

Edited by
Nicole Grmelová
Anna Kretková

Prospects *of* Law *in* Business



ADJURIS 
International Academic Publisher

Prospects of Law in Business

Editors:

Nicole Grmelová

Activity

Nicole Grmelová is Full Professor and Head of the Department of Business and European Law, Faculty of International Relations, Prague University of Economics and Business, Czech Republic. She graduated from Charles University Law School, Prague, Czech Republic, and from the Sevilla University Law School in Spain. She holds a Ph.D. degree in Business Law from the Prague University of Economics and Business. Between 2004 and 2008 she worked as an in-house lawyer-linguist for the European Parliament in Brussels. She also cooperated with the Court of Justice of the European Union as a lawyer-linguist under a framework agreement. Nicole Grmelová is the Czech Republic's Country Correspondent to the European Food and Feed Law Review, and a member of the editorial board of the World Economy and Policy Journal. She publishes widely in international peer-reviewed journals.

Publications

Nicole Grmelová published a monograph on the Precautionary principle in International Trade Law (*Zásada předběžné opatrnosti v právu mezinárodního obchodu*), Prague: C.H. Beck, 2022. In 2023 Nicole Grmelová co-authored a paper on Different regulatory approaches to enhanced water protection in selected European jurisdictions (*Water International*, vol. 48 (2), pp. 188–201.) In 2024 she was one of the authors of a study on the “Rights of the child as imperatives for transforming food systems“ in *Ecology and society*, vol. 29, No. 3, Art. 29. Also, Nicole Grmelová served as an editor of conference proceedings that were indexed in the Web of Science database.

Study visits

During her academic career Nicole Grmelová participated in a number of teachers' mobility exchanges under the Erasmus+ teacher mobility scheme, including the Turība University in Riga (Latvia), University of Turku (Finland), ISCTE University Institute of Lisbon (Portugal), and the University of Economics in Bratislava (Slovakia). She also took part in a Summer School organized by the University of Urbino (Italy), Center for European Legal Studies: “Seminar of Comparative and European Law/Séminaire de droit comparé et européen” in 2018. Nicole Grmelová established a teacher exchange cooperation between the Prague University of Economics and Business and the University of Santiago de Compostela (Spain) where she also engaged as an external expert of a research grant on consumer rights under EU Law funded by the Spanish Ministry of Science and Innovation.

Anna Kretková

Activity

Anna Kretková is a Ph.D. Candidate at the Department of Business and European Law, Faculty of International Relations, Prague University of Economics and Business (VŠE), Czech Republic. She obtained her master's degree from the Faculty of Law at Masaryk University in Brno, Czech Republic. In addition to her academic pursuits, she has gained experience in both the private and public legal sectors. She began her career as a trainee lawyer at KPMG Legal, and later moved to the judiciary, working in the criminal division of the Municipal Court in Prague. She currently serves in the civil division of the Regional Court in Prague.

Publications

Anna Kretková's research is centred on international commercial law, with a particular focus on the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the contemporary challenges it faces in the globalised and digitalised world. She is the author of the publication "*The Scope of the United Nations Convention on Contracts for the International Sale of Goods in the Face of Technological Inventions.*" Furthermore, her article, which bears the title "*Trading Food under the UN Convention on Contracts for the International Sale of Goods (CISG)*", has been accepted for publication, thus contributing to the scholarly discourse on the Convention's application in specific sectors. Her current research examines the impact of technological advancement, digital trade, and evolving commercial practices on the interpretation and application of the CISG, seeking to assess its continued relevance and adaptability in modern international commerce.

Study visits

During her undergraduate studies, Anna Kretkova spent one semester at the University of Helsinki (Finland). Following her graduation, she participated in the European Judicial Training Network (EJTN) Exchange Programme in Lithuania and Finland.

Nicole Grmelová (ed.)
Anna Kretková (ed.)

Prospects of Law in Business

Conference proceedings
*16th International Scientific Conference "Law in Business of
Selected Member States of the European Union"*
October 17, 2025, Prague, Czech Republic

ADJURIS 
International Academic Publisher

Bucharest, Paris, Calgary 2025

ADJURIS – International Academic Publisher

This is a Publishing House specializing in the publication of academic books, founded by the *Society of Juridical and Administrative Sciences (Societatea de Stiinte Juridice si Administrative)*, Bucharest.

We publish in English or French treaties, monographs, courses, theses, papers submitted to international conferences and essays. They are chosen according to the contribution which they can bring to the European and international doctrinal debate concerning the questions of Social Sciences.

ADJURIS – International Academic Publisher is included among publishers recognized by **Clarivate Analytics (Thomson Reuters)**.

ISBN 978-630-6743-04-9 (E-Book)

© ADJURIS – International Academic Publisher

Editing format .pdf Acrobat Reader

Bucharest, Paris, Calgary 2025

All rights reserved.

www.adjuris.ro

office@adjuris.ro

All parts of this publication are protected by copyright. Any utilization outside the strict limits of the copyright law, without the permission of the publisher, is forbidden and liable to prosecution. This applies in particular to reproductions, translations, microfilming, storage and processing in electronic retrieval systems.

Foreword

These conference proceedings constitute a selection of the best papers submitted to the 16th International Scientific Conference "Law in Business of Selected Member States of the European Union" which was organized by the Department of Business and European Law, Faculty of International Relations, Prague University of Economics and Business, Czech Republic. The conference was held in the University's premises on 17 October 2025 and welcomed speakers and participants from abroad (Latvia, Lithuania, the Netherlands, Poland, Bulgaria, Hungary, the United Kingdom, Germany, Slovakia) and the Czech Republic. The conference was held in a hybrid format. Although the on-site participation was encouraged, the conference was streamed online for those who could not join the conference venue in person and to reach a wider audience. The selection of the papers for the conference volume was very rigorous with an acceptance rate of 36 per cent. The papers were submitted and presented in English. All the papers included in this volume passed a rigorous double-blind peer review successfully and were checked for their originality using the iThenticate software kindly provided by the University.

The participants' papers were presented in two specialized sections which correspond to the subheadings of the present volume:

Section 1: European and International Aspects of Doing Business; and

Section 2: Business and Corporate Law.

The conference has been supported by the Internal Grant Agency Project No. IG 37/2025 "Law in Business of Selected Member States of the European Union (16th biannual conference)" of the Prague University of Economics and Business.

All published papers successfully passed the double-blind peer-review process by two independent reviewers - experts with a Ph.D. in the relevant field.

The conference organizers will be happy to welcome the readers at the conference to be held in 2027. The date of the conference is to be announced in due course.

For more information on the call for papers for the upcoming conference please check the conference webpage at <https://lawinbusiness.vse.cz/>.

Wishing you a nice read.

Nicole Grmelová
Chair of the Scientific Committee

Anna Kretková
Chair of the Organisational Committee

Table of Contents

SECTION I. EUROPEAN AND INTERNATIONAL ASPECTS OF DOING BUSINESS9

Tamara BENÁKOVÁ

European Investor-State Dispute Settlement in the Post-Achmea Era 10

Martin BOHÁČEK

Protection of Designations of Origin and Geographical Indications of Craft and Industrial Products in the EU and the Czech Republic in the New Legal Guise - Success or Further Question Marks?21

Daniel KRTIČKA

The Directing of Commercial Activities to the Member State of the Consumer's Domicile Pursuant to Article 17(1)(C) of the Brussels I Bis Regulation39

Paweł MAZUR

Equal Treatment of Shareholders Following the Audiolux Case.....54

Anastasiia PALIENKO

Regulatory Challenges in Cross-Border Gas Trading Between the EU and Ukraine: Reporting Burden and Compliance Risks65

Martin WINKLER, Katarína BROCKOVÁ

Does the Free Movement of Services in the EU Apply to One-off Services Provided Without a Business License?.....78

SECTION II. BUSINESS AND CORPORATE LAW93

Stelios ANDREADAKIS, Dimitrios KAFTERANIS

Commodifying Disclosure? The Debate on Financial Incentives for Whistleblowers94

Lucie ANDREISOVA, Nicole GRMELOVA

Creating a Culture of Integrity and Compliance: The Power of Ethics Programs in a Modern Workplace103

Annija KĀRKLĪŅA, Reinis IVANOVŠ

Liquidated Damages as a Legal Remedy for Merchants in Latvia 115

Tomáš MORAVEC

Applicable Law for Liability Claims in Insolvency Proceedings:

Directors' Duties of Care and Pre-Insolvency Obligations..... 125

Andrej ORIŇAK

Legal Accountability and Liability for AI Decisions in Business 134

Milan VRBA

Dishonesty in Discharge of Debts: A Law and Economics Perspective

on Czech Insolvency Law 147

Daniel ZIGO

Identity Under Copyright: Legal Response to the Deepfake Era 162

SECTION I
EUROPEAN AND INTERNATIONAL ASPECTS
OF DOING BUSINESS

European Investor-State Dispute Settlement in the Post-Achmea Era

Ing. Mgr. Tamara BENÁKOVÁ

bent13@vse.cz

ORCID: 0009-0008-1532-0978

Department of Business and European Law
Faculty of International Relations
Prague University of Economics and Business
Prague, Czech Republic

Abstract: *The Court of Justice of the European Union (“Court”) issued a landmark decision dated 6 March 2018 in a matter between the Slovak Republic and a Dutch company Achmea B.V. (Case C-284/16), in which it ruled that arbitration agreements concluded in bilateral investment treaties between two EU member states are incompatible with the EU law. In doing so, the Court set afoot a chain of intra-EU Bilateral Investment Treaty (BIT) denunciations, leaving investors from EU countries without the possibility to settle their disputes with EU host states through a well-established dispute settlement mechanism. The present paper explores potential ways of dispute settlement between investors and states from the EU following the Achmea decision.*

Keywords: *Achmea decision, intra-EU BITs, investment law, investor-state dispute settlement, ISDS reform.*

JEL Classification: K33, K41

DOI: <https://doi.org/10.62768/ADJURIS/2025/5/01>

Please cite this article as:

Benáková, Tamara, „European Investor-State Dispute Settlement in the Post-Achmea Era”, in Grmelová, Nicole & Anna Kretková (eds.), *Prospects of Law in Business*, ADJURIS – International Academic Publisher, Bucharest, Paris, Calgary, 2025, p. 10-20, <https://doi.org/10.62768/ADJURIS/2025/5/01>

1. INTRODUCTION

The investor-state dispute settlement (ISDS) mechanism is undergoing a major reform worldwide.¹ One of the key catalysts for change was the decision of the Court of Justice of the European Union (“CJEU”) in case *Slovak Republic*

¹ BALTAG, Crina. Reforming the ISDS System: In search of a balanced approach? *Contemporary Asian Arbitration Journal* [online]. 2019, 12(2), 279–312 [viewed 24 September 2025]. Available from: <https://ssrn.com/abstract=3498239>; POPA TACHE, Cristina Elena, and Cătălin-Silviu SĂRARU. Lawfare, Between its (Un)Limits and Transdisciplinarity. *Precedente Revista Juridica*, 2023, 23, 37-66. Doi: 10.18046/prec.v23.5889. hal-04460761f.

v. Achmea B.V., which ultimately led to the termination of bilateral investment treaties (“BITs”) concluded between EU Member States. The present paper explores the remedies available to EU investors seeking to invest in another EU Member State.

2. THE *ACHMEA* OBJECTION TO INTRA-EU BITS

2.1. CJEU’s decision in the matter *Slovak Republic v. Achmea B.V.*

CJEU’s ruling in the matter between the Slovak Republic and the Dutch company Achmea B.V. (“Achmea Judgment”) sparked an extensive debate among scholars and practitioners in the field of international investment law.² To understand its implications for the protection of investors’ rights in the European Union, it is essential to understand the background and the reasoning behind the CJEU’s judgment.

The original dispute between the Slovak Republic and the Dutch Company Achmea B.V. (“Achmea”) concerned Achmea’s rights to freely dispose with its assets in the territory of the Slovak Republic. Achmea initiated arbitration proceeding against the Slovak Republic pursuant to Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of Netherlands and the Czech and Slovak Republic (“BIT”). Article 8 of the BIT stipulated that both contracting States consented to resolution of disputes with investors through arbitration under UNCITRAL Arbitration Rules. In accordance with Article 8(6) of the BIT, the tribunal was instructed to decide the matter in accordance with the law of the respective contracting party to the BIT.³

At the outset of the arbitration, Slovakia raised jurisdictional objections based on the membership of the Slovak Republic in the European Union.⁴ When deciding on these jurisdictional objections, the arbitral tribunal emphasized its conclusions on the jurisdiction are limited only to that particular case.⁵ In other words, the arbitral tribunal indicated that it in no way wishes to establish a precedent for resolution of the intra-EU jurisdictional objection. The arbitral tribunal dismissed Slovakia’s jurisdictional objections and awarded the investor damages of EUR 22.1 million plus interest and costs of the arbitration.⁶

The Slovak Republic decided to challenge the award and filed for a set-

² BIONDI, Andrea, and Giorgia SNAGIUOLO. *The EU and the Rule of Law in International Economic Relations. An Agenda for an Enhanced Dialogue*. Edward Elgar Publishing Limited, 2021, p. 14.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Achmea B.V. v. The Slovak Republic*, PCA Case No. 2008-13, Award dated 7 December 2012, para. 352 [online]. Available from: <https://italaw.com/sites/default/files/case-documents/italaw3206.pdf> [accessed on 2025.09/06].

aside proceeding before the Higher Regional Court in Frankfurt am Main, Germany.⁷ The Higher Regional Court dismissed Slovakia's application and Slovakia appealed while arguing that the Article 8 of the BIT (cited above) is incompatible with Articles 18, 267 and 344 of the Treaty on Functioning of the European Union ("TFEU").⁸ It was the German Supreme Court that raised the preliminary question with the CJEU, stating that it in fact does not consider Article 8 of the BIT incompatible with the provisions of the TFEU.⁹

The CJEU's judgment on the preliminary questions is based on the following considerations:

- The CJEU previously ruled that no international agreement can affect the allocation of powers among the Member States fixed by the EU treaties;¹⁰
- The EU law has primacy over national laws of the Members States and it is autonomous with respect to the international law;¹¹
- In order to ensure the primacy of the EU law and its uniform application, Article 267 of the TFEU provides for the preliminary ruling procedure in which the CJEU provides authoritative rulings on the application of the EU law.¹²

In the eyes of the CJEU, the arbitral tribunal established in accordance with the Article 8 of the BIT is called on to interpret the German law, part of which is the EU law. As such, the arbitral tribunal would interpret the provisions concerning EU's fundamental freedoms, while not being able to recourse to the CJEU for the preliminary ruling procedure.¹³ The CJEU also noted that a provision allowing two Member States to submit disputes to an adjudicative body that is not part of the judicial system of the EU calls into question the principle of mutual trust between the Members States and the preservation of the particular nature of the law established by the Treaties.¹⁴

Notably, in determining whether Article 8 of the BIT is incompatible with the EU law, the CJEU did not consider customary international law and the law of treaties to resolve the conflict between two international treaties.

2.2. The "Achmea objection" in the ISDS case law and the denunciation of the intra-EU BITs

The *Achmea* Judgment set afoot a chain reaction of respondent states

⁷ Judgment of the Court of Justice of 6 March 2018. *The Slovak Republic v. Achmea B.V.*, Case C-284/16, para. 12. ECLI:EU:C:2018:158.

⁸ *Ibid.*, para. 14.

⁹ *Ibid.*

¹⁰ *Ibid.*, para. 32.

¹¹ *Ibid.*

¹² *Ibid.*, para. 37.

¹³ *Ibid.*, para. 42, and 52.

¹⁴ *Ibid.*, para. 58.

raising the “*Achmea* objection” in their respective investment arbitrations.¹⁵

That being said, arbitral tribunals were not ready to accept the *Achmea* Judgment and oftentimes rejected intra-EU jurisdictional objections, albeit for various reasons. For example, the arbitral tribunal in *A.M.F. Aircraftleasing v. Czech Republic* held that it is not called on to decide the dispute by applying the EU law, thus referring to the *Achmea* Judgment’s notion that EU law is applicable whenever the national law of a member state applies. The BIT in that particular case did not include a provision which would specify what law is applicable to the dispute as such and the tribunal ruled that in that case, the provisions of the BIT as well as customary international law is applicable, excluding any possibility to interpret and apply the EU law.¹⁶

The tribunal in *CEF Energia v. Italian Republic*, a case based on the Energy Charter Treaty, went a little further with its analysis of the *Achmea* Judgment and concluded that the judgment was issued in a specific circumstances of the case, the CJEU did not opine on the compatibility of the ISDS system as such, and the tribunal was not called on to decide on matters of EU law (unlike the tribunal in the *Achmea* case).¹⁷

It was not long after the *Achmea* Judgment was issued that the EU Member States signed a plurilateral agreement on termination of the intra-EU BITs (“Termination Agreement”).¹⁸ EU Member States agreed to terminate the BITs as well as strip all sunset clauses of their effects. The basic principles of the Termination Agreement were as follows: (i) no new arbitration proceedings were to commence,¹⁹ (ii) concluded arbitration proceedings were to remain intact,²⁰ and (iii) pending arbitration proceedings could be settled in a special structured dialogue or before national courts under specific circumstances.²¹

After the Termination Agreement entered into force, no other instrument of international law replaced the terminated intra-EU BITs.

3. PROTECTION OF INVESTORS’ RIGHTS AFTER THE DENUNCIATION OF THE INTRA-EU BITS

Whether the CJEU’s stance on the compatibility of the intra-EU was

¹⁵ E.G. *CEF Energia B.V. v. Italian Republic*, SCC Case No. 2015/158; *Mercuria Energy Group Limited v. Republic of Poland* (III), SCC Case No. V 2019/126; *WCV Capital Ventures Cyprus Limited and Channel Crossings Limited v. the Czech Republic*, PCA Case No. 2016-12; *A.M.F. Aircraftleasing Meier & Fisher GmbH & Co. KG v. Czech Republic*, PCA Case No. 2017-15.

¹⁶ *A.M.F. Aircraftleasing Meier & Fisher GmbH & Co. KG v. Czech Republic*, PCA Case No. 2017-15, para. 372-374.

¹⁷ *CEF Energia B.V. v. Italian Republic*, SCC Case No. 2015/158, para 96.

¹⁸ Agreement for the termination of the Bilateral Investment Treaties concluded between the Member States of the European Union dated 29 May 2020.

¹⁹ *Ibid*, Article 5.

²⁰ *Ibid*, Article 6.

²¹ *Ibid*, Articles 9-10.

justified or well-argued is at this point irrelevant. Foreign investors within the EU have to face the new reality of the EU without the rules for State's conduct toward foreign investors from other Member States. While most legal scholarship focused on the CJEU's reasoning in the *Achmea* Judgment and what it means for the BITs in force, the crucial question for European business remains: what recourse do I have against the host state that is interfering with my investment?

The answer can be three-fold. The investor could utilize the "last resort remedy" of customary international law, i.e. the diplomatic protection. Another remedy is national judiciary under national laws. Lastly, certain investors could rely on a specific procedure of structured dialogue under the Termination Agreement.

3.1. Diplomatic protection under customary international law

The current investor-state dispute settlement has evolved from hundreds of years of states attempting to protect citizens on foreign territory.²² The cornerstone of the protection of aliens is the so-called diplomatic protection.²³ This is a concept of dispute settlement established through the customary international law that allowed states of investors to elevate the claims of individuals to the level of public international law and pursue their claims against host states on a state-to-state basis.²⁴

Historically, aliens—in other words outsiders—received different treatment in different jurisdictions.²⁵ Certain countries even refused to acknowledge legal capacity of aliens and denied them access to justice.²⁶ Accordingly, the concept of diplomatic protection evolved at times when only states were subject to international law and aliens had severely limited options to protect their rights abroad.²⁷

A landmark decision in the area of diplomatic protection of foreign investors is the case *Mavrommatis Palestine Concessions* before the Permanent

²² NEWCOMBE Andrew and Lluís PARADELL. *Law and Practice of Investment Treaties: Standards of Treatment*. Kluwer Law International, 2009, p. 3.

²³ ZHOU Jingtong. Evolving Paradigms of Investor Safeguards: An Analytical Review of Diplomatic Protection in the Era of Contemporary International Investment Agreements. *Information Systems and Economics* [online]. 2024, 5(4) [viewed 23 September 2025]. Available from: doi:10.23977/infse.2024.050421.

²⁴ TEJERA PEREZ, V. J. Diplomatic Protection Revival for Failure to Comply with Investment Arbitration Awards. *Journal of International Dispute Settlement* [online]. 2012, 3(2), 445–475 [viewed 23 September 2025]. ISSN 2040-3593. Available from: doi:10.1093/jnlids/ids002.

²⁵ NEWCOMBE, *op.cit.*

²⁶ *Ibid.*

²⁷ DUGARD John 'Diplomatic Protection' In CRAWFORD James, Alain PELLET, and Simon OLLESON (eds.), *Oxford Commentaries on International Law: The Law of International Responsibility*. Oxford: Oxford University Press, 2010, p. 1051.

Court of International Justice (“PCIJ”).²⁸ The case was commenced pursuant to Article 26 of the Mandate for Palestine, which provided for PCIJ’s jurisdiction concerning disputes between the Mandatory and another Member of the League of Nations.²⁹ Greece brought a claim on behalf of its citizen Mr. M. Mavrommatis, who alleged that British government (having its mandate over Palestine) failed to recognize his concession rights to construct and operate electric tramway system as well as supply electric power and drinking water in Jerusalem and the same concession rights in the city of Jaffa.³⁰

Britain objected to the PCIJ’s jurisdiction stating that the dispute was not between the Mandatory and a Member State of the League of Nations. Rather, the dispute was between a private individual and another state.³¹ PCIJ decided—by majority—that it had jurisdiction over the dispute concerning Mr. Mavrommatis’s concessions pertaining to Jerusalem.³² While doing so, PCIJ noted that “*the State is entitled to protect its subjects*” and by elevating the claims of its nationals to the inter-state level, the state is merely asserting its own rights to “*ensure, in the person of its subjects, respect for the rules of international law.*”³³ With respect to the merits of the case, PCIJ held in short that Mr. Mavrommatis’s rights were expropriated but refused to award compensation. Rather, the PCIJ held that Mr. Mavrommatis was entitled to re-adapt his concession in the light of the economic situation at that time.³⁴

While foreign investors might benefit from the diplomatic protection as much as they benefit from investor-state dispute settlement mechanisms established through BITs, the core issue with this method of dispute settlement is the investor’s dependence on the State’s willingness to assert the investor’s rights.³⁵ Translated to the realm of today’s European Union, it is difficult to imagine that—for example—the Czech Republic would pursue a dispute with another EU Member State claiming that Czech national’s rights under international law were infringed. Even if the investor’s claims fit the requirements for diplomatic protection, the investor has rather limited control over the proceeding.³⁶

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ BJORGE, Eirik, and Cameron MILES. *Landmark cases in public international law*. Bloomsbury Publishing Plc, 2017.

³² Judgment of the Permanent Court of Justice dated 30 August 1924. The Mavrommatis Palestine Concessions Case, PCIJ Series A. No. 2.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ JURATOWITCH, Ben. The relationship between diplomatic protection and investment treaties. *ICSID Review* [online]. 2008, 23(1), 10–35 [viewed 26 September 2025]. Available from: doi:10.1093/icsidreview/23.1.10.

³⁶ ZHANG, Rui. Beyond Diplomatic Protection: The Evolution of Investor Rights in International Law. *Journal of Research in Social Science and Humanities* [online]. 2024, 3(9), 82–85 [viewed 25 October 2025]. Available from: doi:10.56397/jrssh.2024.09.10, pp. 83–84.

3.2. Recourse to national judiciary

One of the often-raised arguments against the intra-EU BITs is that judiciary of the EU Member States is sufficiently reliable and independent so that a foreign investor should not have difficulties defending their claims against the host state before the host state's courts. However, recourse to national judiciary may have a number of downsides for foreign investors.

It should be noted that the key drivers for the investor-state dispute settlement mechanism established by the BITs were the foreign investor's protection in countries with underdeveloped legal system and judiciary.³⁷ Despite the fact that likely the majority of EU Member States would have adopted constitutional safeguards to protect fundamental rights of aliens and nationals,³⁸ the concerns about the independence and impartiality of the host state's judiciary may remain.³⁹

Additionally, in a vast majority of European jurisdictions, national judiciary operates in the official language of each particular country.⁴⁰ This alone makes it significantly more difficult for foreign investors to lead effective litigation against the host state.

Enforceability of investors' claims through national judiciary might be hindered by the nature of the claims themselves. The nature of the claims brought by investors under the BITs often prevents such disputes from being dealt with before the national courts. By way of an example, should a foreign investor bring a claim against a Member of the European Union for a denial of justice, such a claim would already involve the national judiciary's failure to accord justice.⁴¹ A claim for denial of justice encompasses denial of access to courts, excessive length of proceedings, serious procedural defects in proceedings or irrational outcome going beyond the misapplication of law and can be brought against the host state only once the investor has exhausted the local remedies.⁴²

Lastly, certain claims of foreign investors that can be raised against the

³⁷ HASTINGS WENDT, Michael. The evolution of investor-state disputes settlements in a global economy. *South Carolina Journal of International Law and Business* [online]. 2022, 19(1) [viewed 15 September 2025]. Available from: <https://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=1257&context=scjilb>.

³⁸ BENÁK, Jaroslav. Historický vývoj ústavního soudnictví a přístupu jednotlivce k ústavnímu soudu. *Časopis pro právní vědu a praxi* [online]. 2018, 26(3), 397 [viewed 25 September 2025]. Available from: doi:10.5817/cvpv2018-3-2.

³⁹ KEITA, Kain, et al. Sovereignty issues and legal framework challenges for foreign direct investment in developing countries. *International Journal of Law and Society (IJLS)* [online]. 2023, 2(2), 142–154 [viewed 26 September 2025]. Available from: doi:10.59683/ijls.v2i2.41.

⁴⁰ KERN, Christoph A. English as a Court Language in Continental Courts. *Erasmus Law Review* [online]. 2012, 5(3), 187–209 [viewed 24 October 2025]. Available from: doi: 10.5553/elr22 1026712012005003005.

⁴¹ PAULSSON, Jan. *Denial of justice in international law*. Cambridge: Cambridge University Press, 2011.

⁴² *Ibid.*

host states pursuant to BITs, could not be brought before the national courts. Whether a certain claim can be litigated before national courts is a question of national law—namely remedies that are available under that national law. However, when the national law itself regulates certain aspects of the foreign direct investment in a manner that discriminates against the foreign investor or otherwise infringes the investor’s rights or if the issue is discontinuance of State aid originally provided to investors, it would be particularly difficult for the foreign investor to raise a claim before national courts against the host state for adopting certain legislation or for changing the state’s subsidies policy.⁴³ This is simply because national judiciary is bound by the national law and is obliged to apply it. A change in a state’s legislation normally does not give rise to claims against that state. However, when certain conditions are fulfilled, change in a state’s legislation might give rise to claims under international investment law. In fact, claims based on adoption of certain laws or the provision of subsidies have been fairly frequent in the intra-EU disputes.⁴⁴

In sum, national judiciary cannot serve as a full replacement of the investor-state dispute settlement mechanism. Apart from the procedural considerations such as independence and impartiality of the judiciary or purely practical issues like language of the proceedings, the nature of investors’ claims normally brought under the BITs often prevents such claims from being litigated before national courts.

3.3. Structured dialogue under the Termination Agreement

When the EU Member States decided to terminate all intra-EU BITs, the Termination Agreement provided for a specific dispute resolution process called “structured dialogue” that is available to investors, who are parties to pending arbitration proceedings and (i) the proceedings have been suspended pursuant to the request of the investor, and (ii) the investor has undertaken not to enforce, recognize or execute an award, if it was already issued.⁴⁵

The structured dialogue is essentially a form of mediation, in which the investor and the host state are to reach a settlement. However, the procedure may only commence if a violation of EU law is at stake.⁴⁶ Should parties to the pro-

⁴³ A typical example of breaches of rights of foreign investors is the frustration of their legitimate expectations through a change in the legal framework. See e.g. *Antaris Solar GmbH and Dr. Michael Göde v. The Czech Republic*, PCA Case No. 2014-01, Award, 2 May 2018. Available from: <https://www.italaw.com/cases/2080>.

⁴⁴ DEL GUAYO, Iñigo. International Arbitration in the Renewable Field: Recent Developments in Spain. In: *The Global Energy Transition* [online]. Hart Publishing, 2020 [viewed 25 October 2025]. Available from: doi:10.5040/9781509932511.ch-012.

⁴⁵ Termination Agreement, Article 9(1).

⁴⁶ Termination Agreement, Article 9(3),(4),(6).

ceeding fail to reach a settlement, the mediator is tasked to propose a final resolution of the matter. The parties to the proceeding are then free to accept or decline the final resolution.⁴⁷

By virtue of the Termination Agreement itself, this dispute resolution procedure is available to only a very limited number of investors. Even though it is a form of dispute settlement mechanism, it is not—by design—a final form of dispute settlement as the “mediator” according to Article 9 of the Termination Agreement does not have authoritative power to render a decision that would finally resolve the dispute between the investor and a Member State.

The structured dialogue is more of an escape route for the investor, who commenced arbitral proceeding against the host state at a time the host state had obligations towards to the investor under a particular BIT, but was not able to finish the arbitral proceeding before the Termination Agreement and would end up with an unenforceable arbitral award. It does not provide for any substantive standards of treatment or elaborated dispute resolution mechanism. As such, the structured dialogue cannot be considered as replacement of the ISDS mechanism.

4. CONCLUSION

The CJEU’s decision in the *Achmea* case has significantly influenced the reform of the investor-state dispute settlement mechanism within the EU to the point where EU Member States have decided to terminate all existing BITs. The termination of all intra-EU BITs has left foreign investors with limited options to protect their rights. They can resort to diplomatic protection provided that their “home state” is willing to pursue the investor’s case. Another option is to assert investor’s claims before the national courts of the host state. By doing so, the investor would be deprived of the possibility to have an international adjudicating body without any connection to either the state of the investor, or the state of the investment. Lastly, investors who have pending cases at the time the Termination Agreement was adopted are entitled to try the so-called structured dialogue. This specific procedure resembles mediation, and its sole purpose is to find amicable solution to the dispute. Neither of these three options is capable to fully replace the investor-state arbitration because the scope of rights protected under the BITs is broader than national legislation.

Neither of these options provide a comparable means of dispute resolution to investor-state arbitration. Investors domiciled within the European Union, thus, lack the same level of protection as investors domiciled outside the European Union. This discrepancy, however, might not be the final state of affairs. The European Union has been promoting the establishment of a multilateral investment court, a permanent adjudicative body to decide on investment disputes.

⁴⁷ Termination Agreement, Articles 11-14.

This system of dispute resolution would address all the concerns that CJEU had with the bilateral investment dispute resolution mechanism.⁴⁸ That being said, this project is still at its very beginning, and it is not entirely clear when European investors would benefit from this new institution.

REFERENCES

1. BALTAG, Crina. Reforming the ISDS System: In search of a balanced approach? *Contemporary Asian Arbitration Journal* [online]. 2019, 12(2), 279–312 [viewed 24 September 2025]. Available from: <https://ssrn.com/abstract=3498239>.
2. BENÁK, Jaroslav. Historický vývoj ústavního soudnictví a přístupu jednotlivce k ústavnímu soudu. *Časopis pro právní vědu a praxi* [online]. 2018, 26(3), [viewed 25 September 2025]. Available from: doi:10.5817/cvpv2018-3-2.
3. BIONDI, Andrea, and Giorgia SNAGIUOLO. *The EU and the Rule of Law in International Economic Relations. An Agenda for an Enhanced Dialogue*. Edward Elgar Publishing Limited, 2021.
4. BJORGE, Eirik, and Cameron MILES. *Landmark cases in public international law*. Bloomsbury Publishing Plc, 2017.
5. DEL GUAYO, Iñigo. International Arbitration in the Renewable Field: Recent Developments in Spain. In: *The Global Energy Transition* [online]. Hart Publishing, 2020 [viewed 25 October 2025]. Available from: doi: 10.5040/9781509932511.ch-012.
6. DUGARD John ‘Diplomatic Protection’ In CRAWFORD James, Alain PELLET, and Simon OLLESON (eds.), *Oxford Commentaries on International Law: The Law of International Responsibility*. Oxford: Oxford University Press, 2010.
7. HASTINGS WENDT, Michael. The evolution of investor-state disputes settlements in a global economy. *South Carolina Journal of International Law and Business* [online]. 2022, 19(1) [viewed 15 September 2025]. Available from: <https://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=1257&context=scjilb>.
8. JURATOWITCH, Ben. The relationship between diplomatic protection and investment treaties. *ICSID Review* [online]. 2008, 23(1), 10–35 [viewed 26 September 2025]. Available from: doi:10.1093/icsidreview/23.1.10.
9. KEITA, Kain, *et al.* Sovereignty issues and legal framework challenges for foreign direct investment in developing countries. *International Journal of Law and Society (IJLS)* [online]. 2023, 2(2), 142–154 [viewed 26 September 2025]. Available from: doi:10.59683/ijls.v2i2.41.
10. KERN, Christoph A. English as a Court Language in Continental Courts. *Erasmus Law Review* [online]. 2012, 5(3), 187–209 [viewed 24 October 2025]. Available from: doi:10.5553/elr221026712012005003005.
11. NEWCOMBE Andrew and Lluís PARADELL. *Law and Practice of Investment*

⁴⁸ European Commission Fact Sheet, Multilateral Investment Court, available at: https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project_en [accessed on 24 October 2025].

- Treaties: Standards of Treatment. Kluwer Law International, 2009.
12. PAULSSON, Jan. *Denial of justice in international law*. Cambridge: Cambridge University Press, 2011.
 13. POPA TACHE, Cristina Elena, and Cătălin-Silviu SĂRARU. Lawfare, Between its (Un)Limits and Transdisciplinarity. *Precedente Revista Juridica*, 2023, 23, 37-66. Doi: 10.18046/prec.v23.5889. hal-04460761f.
 14. TEJERA PEREZ, V. J. Diplomatic Protection Revival for Failure to Comply with Investment Arbitration Awards. *Journal of International Dispute Settlement* [online]. 2012, 3(2), 445–475 [viewed 23 September 2025]. ISSN 2040-3593. Available from: doi:10.1093/jnlids/ids002.
 15. ZHANG, Rui. Beyond Diplomatic Protection: The Evolution of Investor Rights in International Law. *Journal of Research in Social Science and Humanities* [online]. 2024, 3(9), 82–85 [viewed 25 October 2025]. Available from: doi:10.56397/jrssh.2024.09.10, pp. 83-84.
 16. ZHOU Jingtong. Evolving Paradigms of Investor Safeguards: An Analytical Review of Diplomatic Protection in the Era of Contemporary International Investment Agreements. *Information Systems and Economics* [online]. 2024, 5(4) [viewed 23 September 2025]. Available from: doi: 10.23977/infse.2024.0504 21.

Protection of Designations of Origin and Geographical Indications of Craft and Industrial Products in the EU and the Czech Republic in the New Legal Guise - Success or Further Question Marks?

Prof. JUDr. Martin BOHÁČEK, CSc.

bohacek@vse.cz

ORCID 0000-0002-6381-0313

Department of Business and European Law
Faculty of International Relations, Prague University of Economics and
Business
Prague, Czech Republic

Abstract: *The protection of geographical indications and designations of origin is of great importance for the preservation of traditional products in the regions, as well as the expectations for consumers. Also, it can be the next instrument under the EU Green Deal program. Protection of designation of origin has already been introduced in some countries (including the Czech Republic) in form of national registration and international registration under the Lisbon Agreement. The registration for geographical indications was introduced in the European Economic Community (EEC) by a Council Regulation in 1992, but initially only for agricultural products registered by the Commission. After an Amendment to the Lisbon Agreement, the so-called The Geneva Act 2015, the EU adopted a regulation of the European Parliament and Council (EU) in 2023 on the protection of geographical indications of craft and industrial products with a similarly complicated process of change from national registrations to only EU registration. While the finally resulting convergence of the protection of designation of the two product types at EU level is a success, it raises a number of questions, which the paper will discuss. Why has the EU protected only the appellations of agricultural products and for a long time not the non-agricultural ones? Why is there currently only a convergence, but not a unification of the two types of products? Why will the registration authorities for the two acts be different? Will the interpretative principles developed with respect to agricultural products also be applicable to the non-agricultural ones?*

Keywords: *agricultural products, craft and industrial products, Geneva Act to the Lisbon Agreement, protected designation of origin, protected geographic indication.*

JEL Classification: K22, K33

DOI: <https://doi.org/10.62768/ADJURIS/2025/5/02>

Please cite this article as:

Boháček, Martin, „Protection of Designations of Origin and Geographical Indications of Craft and Industrial Products in the EU and the Czech Republic in the New Legal Guise - Success or Further Question Marks?“, in Grmelová, Nicole & Anna Kretková (eds.), *Prospects of Law in Business*, ADJURIS – International Academic Publisher, Bucharest, Paris, Calgary, 2025, p. 21-38, <https://doi.org/10.62768/ADJURIS/2025/5/02>.

1. INTRODUCTION

The protection of geographical indications and designations of origin is of great importance for the preservation and development of traditional products in the regions, their producers and processors, the preservation of quality, specificity and innovation, and the expectations of consumers who use these appellations as a basis for their consumption decisions. Protected designations of origin and geographical indications also represent an important cultural phenomenon of regions in EU policies and are important for the protection of cultural traditions and the EU's regional heritage.¹

The protection of designation of origin was already established by the Paris Convention for the Protection of Industrial Property of 1883² and was accordingly introduced in some countries (including the Czech Republic). The form of protection consists in a registration with the national office (in the Czech Republic the Industrial Property Office in Prague – hereinafter referred to as IPO) and on the basis of this international registration proceeds under the Lisbon Agreement of 1958, of which the Czech Republic became a state party.³ In between national and international protection, the European Economic Community inserted a third level - EU-level protection - for geographical indications by Council Regulation 2081/92 as amended, but initially only for agricultural products and foodstuffs registered with the Commission under Commission Regulation 2400/96.⁴ This reflected the tradition of certain foods, particularly wines, cheeses and beer in Europe. However, the Lisbon Agreement and the national registration systems of its State Parties, include protection of designations for both agricultural and non-agricultural products (AGRI and NON AGRI). The European Commission itself has been designated as the EU registration authority for these designations. This development has led to the fact that geographical indications of AGRI could thus be protected at that time by registration at three levels - national, EU, and international, whereas for NON AGRI products only at

¹ See Article 13 Treaty on the Functioning of the EU (TFEU).

² See the designation of origin (goods) in the list of objects of industrial property protection in Article 1(2) of the Paris Convention for the Protection of Industrial Property of 1883 (in Czechoslovakia as the predecessor of the Czech Republic - hereinafter referred to as the Czech Republic - promulgated in Decree of the Minister of Foreign Affairs No 64/1975 Coll. In Czech the corresponding decree reads “Vyhlaška ministra zahraničních věcí č. 64/1975 Sb.”) - hereinafter referred to as the Paris Convention.

³ See the Lisbon Agreement on the Protection of Appellations of Origin and their International Registration of 1958 (in Czechoslovakia promulgated by Decree of the Minister of Foreign Affairs No 67/1075 Coll. In Czech the corresponding Decree reads “Vyhlaška ministra zahraničních věcí č. 67/1075 Sb.”) - hereinafter referred to as the Lisbon Agreement.

⁴ See Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, as amended; Commission Regulation (EC) No 2400/96 of 17 December 1996 on the registration of certain names in the Register of protected designations of origin and protected geographical indications provided for in Council Regulation (EEC) No 2081/92 (OJ L 327, 18.12.1996).

two levels - national and international.

Another turbulent development has brought an even more unequal status for both types of geographical indications (GIs): the amendment of the Lisbon Agreement, known as the Geneva Act, allowed an international organisation - the EU - to become a party in 2015, but instead of the EU member states that were previously parties to the Lisbon Agreement. These EU member states can no longer be parties to the Lisbon Agreement at the same time as the EU and continue to conduct separate protection at their national level. Only the EU can do that for them. However, this has widened the gap between the two types of appellations, because while designations of origin and geographical indications for non-agricultural products were previously protected by national and derived international registrations (not EU registrations), indications for agricultural products and foodstuffs have since been protected only at EU and derived international level, but no longer at national level. The legal regime for the owners of protected appellations in EU countries, where they had until then protected these appellations by national (or even international) registration, became more complicated as they had to re-register their appellations at EU level if they wanted to continue to protect them - the national registrations ceased to exist. The protection of designations of origin and geographical indications is also associated with the GREEN DEAL programme in the EU as its next instrument, initially only for agricultural products, now also for non-agricultural products in general.⁵

The differences in the legal treatment of the two types of these protected designations have finally been brought together at EU level with the adoption of Regulation (EU) 2411/2023 of the European Parliament and of the Council on the protection of geographical indications for craft and industrial products, with a similarly complicated extinction of their national registrations and associated international registrations as was previously the case for agricultural products. However, the possibility of filing their EU applications in the meantime, as well as derivative new international applications under the Geneva Act, was retained, not with the European Commission in Brussels, but with the EU Intellectual Property Office (EUIPO) in Alicante. As in the case of agricultural products, this change has been reflected in national regulations for designations of origin and geographical indications for non-agricultural products, in the Czech Republic by amendments to the Czech Act on the Protection of Designations of Origin and Geographical Indications.

The resulting convergence of the protection of designations for both types of products at EU level is a success, but it also raises a number of question

⁵ ZAPPALAGLIO, Andrea. The law of geographical indications at the centre of the European green deal. *Journal of Intellectual Property Law & Practice*, 2023(18), No. 8, pp. 557-558. DOI: 10.1093/jiplp/jpad043. This is a legal reflection on the role of designations of origin and geographical indications in EU policy (Green Deal) and the implications for extending protection - it is also relevant for the legal context of the new protection of designations of origin for craft and industrial products.

marks. The aim of this article is to briefly summarise the complex legal developments mentioned above, identify these issues and to discuss them. First of all, the question - why has the EU for a long time only protected AGRI product and food designations? Why has there been only convergence, but not unification, of the protection of designations for both types of products at EU level, when the registration authorities for the two groups will be different and some divergence in interpretation and the procedure for granting protection can be expected? Will the interpretative principles developed for the protection of AGRI product appellations by the Commission be applicable to the protection of NON AGRI product appellations by another EU body, the EUIPO? Will the existing decision-making practice in the EU in disputes concerning the protection of NON AGRI products before national authorities, courts and the international office under the Lisbon Convention be applied? Will NON AGRI product indications depend not only on verbal expression but also on visual or figurative expression, virtual or motion - and how will the possible relationship with trademarks and designs be resolved? The practical dimension of the paper and its analyses will also be considered in the light of the case law of the Court of Justice of the EU (CJEU) in its interpretation of some disputes concerning the legal protection of designations of origin and geographical indications.

2. MILESTONES IN THE TURBULENT DEVELOPMENT OF LEGAL PROTECTION AT EU, INTERNATIONAL AND NATIONAL LEVELS

Designations of origin for certain products were originally created without public registration, through long use and tradition, so that they have caught on among consumers, who associate with them certain perceptions of quality and qualities characteristic of a particular locality. In European countries, protection against misuse, imitation to designate goods from other places, was initially provided only by private law.⁶ This protection was enshrined by means of a list of industrial property objects of the Paris Convention. As indicated, the instrument was mainly the law against unfair competition. The Paris Convention expressly prescribed an obligation to protect the designation of origin by sanctioning of false statements of the origin in Articles 10 and 10ter. Later on, public law protection was also introduced by means of registration in a public register, both in the national legislation of some countries (with the concept of designation of origin itself varying considerably between them) and internationally in the Lisbon Agreement.

In the Czech Republic, this obligation was fulfilled by the adoption of Act No 159/1973 Coll. on the Protection of Designations of Origin of Products

⁶ HORÁČEK, Roman, ČADA, Karel, HAJN, Petr. *Práva k průmyslovému vlastnictví*. 2. vydání. Praha: C.H.BECK, 2011, p. 434 (Industrial property rights. 2nd ed. Prague).

(zákon 159/1073 Sb., o ochraně označení původu výrobků), with the incorporation of the criminal penalty for its deliberate violation in Section 268 of the Criminal Code. In addition, the protection of certain designations of origin of products, provenance data and other designations of agricultural and industrial products referring to origin was also provided for in bilateral conventions concluded by Czechoslovakia with Switzerland in 1973, Austria in 1976 and subsequently with Portugal in 1986 - protection of designations of origin from one country in each other's relations - listed in their annexes, by which the Czech Republic is still bound.⁷ This law has been replaced in the Czech Republic by Act No 452/2001 Coll., as amended (zákon o ochraně označení původu a zeměpisných označení ve znění změn a doplňků), following the development of the protection of these designations in the EU.⁸

The above mentioned Council Regulation (EEC) 2081/92 introduced a new legal protection for the geographical indication but only for agricultural products and foodstuffs. In addition, a number of specific regulations have been issued in the EU to protect specific aspects and types of these agricultural product designations.⁹ Following the introduction of GI protection for agricultural product and food designations, legal protection was initially provided by registration at three levels - national registration in the individual country (including the Czech Republic), EU registration with the European Commission for the territory of all EU countries and, where appropriate, in seven EU countries (Bulgaria, Czech Republic, France, Italy, Hungary, Portugal and Slovakia) and international registration with the WIPO International Intellectual Property Office in Geneva under the Lisbon Agreement. However, this did not apply to EU Member States that were not parties to the Lisbon Agreement. In a number of EU countries, these designations were not protected at national level.

The legal regime for these protected designations was therefore inconsistent across the EU, and in some countries it was completely absent at national

⁷ In the Czech Republic, Decree of the Minister of Foreign Affairs No. 13/1978 Coll., (vyhláška Ministra zahraničních věcí č. 13/1978 Sb.), Decree of the Minister of Foreign Affairs No. 19/1981 Coll. (vyhláška MZV č. 19/1981 Sb.) and Decree of the Minister of Foreign Affairs No. 63/1987 Coll. (vyhláška MZV č. 63/1987 Sb.)

⁸ This is mainly the latest amendment by Act No 277/2025 Coll. (zákon č. 277/2025 Sb.), which came into force on 25 August 2025.

⁹ In particular, Regulation (EU) 1151/2012 of the European Parliament and of the Council on agricultural product and food quality schemes, as amended; Regulation (EU) 1308/2013 of the European Parliament and of the Council establishing a common organisation of the markets in agricultural products and repealing certain earlier EEC and EC Regulations, as amended; Regulation (EU) 251/2014 on the definition, description, presentation and labelling and the protection of geographical indications of aromatised wine products and repealing certain EEC Regulations, as amended; Regulation (EU) 787/2019 of the European Parliament and of the Council on the definition, description, presentation and labelling of spirit drinks, the use of their names and in the labelling of other foodstuffs, the protection of geographical indications of spirit drinks, the use of alcohol and spirits of agricultural origin in the production of alcoholic beverages and the repeal of certain EC Regulations, as amended; and other regulations.

level, and the EU took the decision to unify this at EU level. An opportune moment was the negotiation of an amendment to the Lisbon Agreement, the so-called 'Geneva Act', which was to expand the number of state parties, still relatively small, to modernise the concept and system of these protected designations, especially in the context of the development of digital technologies, and also to allow membership not only to individual states but also to international organisations, which the EU also took advantage of.¹⁰ During its negotiation, the European Commission therefore adopted a recommendation for a decision of the EU Council to open negotiations to participate in the revision of the Lisbon Agreement. The EU Council then adopted a decision on this participation.¹¹

Even the EU's acceptance as a party to the Lisbon Agreement was not free of complications - internal, of course, to the EU. Indeed, initially, the EU became party to the Lisbon Agreement in the context of its revision, alongside the seven existing Lisbon Convention state parties that were also members of the EU (and, of course, other non-EU Lisbon Agreement state parties) - following the EU Council decision on shared competence between the EU and its Member States.¹² It is therefore clear that the Council did not originally intend to establish exclusive centralisation of protection of these signs at EU level only, thus allowing the existing seven members to continue their participation in the Lisbon Agreement and national protection in their territories, as is also common for trademarks. It thus could take advantage of the experience, contacts and registration practice of the seven Lisbon Agreement state parties and empowered them to negotiate the Geneva Act alongside it.

However, the European Commission challenged this by bringing an action before the CJEU and proposed the annulment of the Council (EU) decision.¹³ The CJEU then ruled in 2017 that this was not a shared competence but an exclusive competence of the EU, annulled the Council (EU) decision and ordered it to issue a new decision under Articles 207(1) and 218 TFEU.¹⁴ On that basis, the

¹⁰ The Geneva Act was adopted at the Diplomatic Conference on the Revision - Modernisation of the Lisbon Agreement on 20 May 2015.

¹¹ Council Decision (EU) 8512/15 of 7 May 2015 authorising the opening of negotiations on the revision of the Lisbon Agreement on designations of origin and geographical indications as regards matters falling within the competence of the European Union.

¹² See Articles 114 and 218(3) and (4) TFEU.

¹³ ZAPPALAGLIO, Andrea. The Debate Between the European Parliament and the Commission on the Definition of Protected Designation of Origin: Why the Parliament Is Right. IIC - International Review of Intellectual Property and Competition Law, Vol. 50 (2019), pp. 595-610. DOI: 10.1007/s40319-019-00797-x.

¹⁴ See the CJEU (Grand Chamber) decision of 25 October 2017 in Case C-389/15 European Commission v. Council of the EU. In its reasoning, the Court stated that the negotiation of the revision of the Lisbon Agreement is within the exclusive powers of the EU because international commitments negotiated by the EU in the field of intellectual property fall within the scope of the common commercial policy. It is also necessary because the purpose of the Geneva Act is to strengthen the international protection of designations of origin and geographical indications and, from the EU's point of view, to facilitate trade with third countries.

Council (EU) issued a new decision in 2019 and the EU acceded to the Geneva Act in 2020 in relation to its Member States as an exclusive party to the Lisbon Agreement.¹⁵ Also, the existing 7 EU Member States, which were original parties of the Lisbon Agreement, acceded to the Geneva Act in 2022 and thus, due to the EU's exclusive competence and its new exclusive accession to the Lisbon Agreement, their national registrations of designations of origin and geographical indications of agricultural products and foodstuffs were terminated. As a result, also their international registrations deriving from the national ones were terminated.¹⁶

If the application for registration in the EU was filed late and the appellation was later registered in the EU, there was no continuity of the original registration (with effect from the original national or international registration - *ex tunc*), but a new registration with effect *ex nunc* was made.

This shift in the protection of designations was also reflected in the national laws of the EU Member States - in the Czech Republic by the issue of Act No. 215/2022 Coll. - Amendment to Act No. 452/2001 Coll. However, the amendment to the Czech law did not affect the existing protection of designations of origin of agricultural and non-agricultural products from third countries protected in the Czech Republic on the basis of international registration.¹⁷

However, the above procedure concerned only indications of AGRI products. (the Czech Republic currently has 17 designations of origin registered in the EU for agricultural products and foodstuffs, and 26 geographical indications - e.g. Czech beer (České pivo).

The next milestone in the development of these protected designations therefore brought about a similar arrangement, based on centralised protection at EU level only, for designations of NON AGRI products. On 27 October 2023, the European Parliament and the Council (EU) adopted Regulation No 2411/2023 on the protection of geographical indications for craft and industrial products (NON AGRI). It also established protection for them in the EU only at the cen-

¹⁵ See Council Decision (EU) 1754/2019 of 7 October 2019 on the accession of the European Union to the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications and Regulation (EU) No 1753/2019 of the European Parliament and of the Council of 23 October 2019 on the measures to be taken by the Union following its accession to the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications. See also Ibid MIRI-BUNG, Georg. Changes Happen Slowly - Some Comments on Geographical Indications Between the Geneva Act and Regulation 1753/2019. European Food and Feed Law Review (EFFL), Vol. 15, No. 1 (2020), pp. 25-34. The article compares the Geneva Act and EU Regulation 1753/2019.

¹⁶ The Czech Republic acceded to the Geneva Act on 2 June 2022 and the stated effects of accession occurred in the Czech Republic three months after the deposit of the instrument of accession with WIPO, i.e. on 2 September 2022, Communication of the Minister of Foreign Affairs No. 30/2023 Coll. (sdělení ministra zahraničních věcí č. 30/2023 Sb.)

¹⁷ ŠPRUNGLOVÁ, Andrea. Úprava ochrany označení původu a zeměpisných označení po novele zákona č. 452/2001 Sb. Duševní vlastnictví. (Regulation of the protection of appellations of origin and geographical indications after the amendment of Act No. 452/2001 Coll. Intellectual property). Prague: Industrial Property Office, 2023, No. 1, pp. 15-20.

tralised EU registration level with the abolition of national registrations and international registrations deriving from national registrations. Here too, continuity of protection is allowed starting already from the national registration and similarly for international registration. The condition for continued protection is that the holders of the existing national registrations apply for both the EU registration and continuity of protection by 2 December 2026 through the national offices (in the Czech Republic, the IPO). Similarly, they can also apply for continuity of existing international registrations. This applies also to Czech designations of origin, e.g. Bohemian glass (České sklo). If they do not apply by that date, their national and related international protection would expire and if they then apply for EU registration after that date and the designation is registered, it would only be with effect from the new registration - *ex nunc*, without continuity.

However, there has also been a shift in the labelling of AGRI products - mineral waters and mineral salts are now considered an AGRI product (previously they were understood as NON-AGRI), which is why a new revised Regulation of the European Parliament and of the Council (EU) on geographical indications in the sector of AGRI products has been adopted (in the Czech Republic, e.g. the designation Carlsbad salt (Karlovarská sůl). Their holders had to apply for their EU registration, ensuring continuity of registration until 14 May 2025.¹⁸

This development was also reflected in national regulations, in the Czech Republic in another amendment to Act No. 452/2001 Coll. - by adopting Act No. 277/2025 Coll. The amendments also introduced stricter requirements for checking quality and requirements of the so-called specification. In the Czech Republic, Česká obchodní inspekce (the Czech Trade Inspection Authority) has been designated as the control body for assessing the compliance with the specification, or with the manufacturer's own declaration that the product meets its requirements - its supervision derives directly from the Consumer Protection Act. This protection is advantageous for manufacturers of NON AGRI products - they do not pay any fees for EU registration.¹⁹ In the Czech Republic, for AGRI products, the State Agricultural and Food Inspection Authority), Veterinární správa (the Veterinary Administration) and Ústřední kontrolní a zkušební ústav zemědělský (the Central Institute for Agricultural Inspection and Testing) have been designated as inspection bodies with similar powers.²⁰ The economic advantages of these protective labels for trade in the labelled products have been

¹⁸ VINOPALOVÁ, Žaneta. Dynamický vývoj v oblasti označení původu a zeměpisných označení v EU. Duševní vlastnictví. Praha: Úřad průmyslového vlastnictví (Dynamic developments in the field of designations of origin and geographical indications in the EU. Intellectual Property. Prague: Industrial Property Office), 2024, No. 2, pp. 12-13.

¹⁹ KOUTNÁ, Iva. Jednotná a výlučná ochrana zeměpisných označení v EU je za dveřmi. Duševní vlastnictví, Praha: Úřad průmyslového vlastnictví (Uniform and exclusive protection of geographical indications in the EU is at the door. Intellectual Property, Prague: Industrial Property Office), 2025 (3), pp. 13-16.

²⁰ KOUTNÁ, Iva. Ochrana zeměpisných označení pro řemeslné a průmyslové výrobky v EU. Duševní vlastnictví, Praha: Úřad průmyslového vlastnictví (Protection of geographical indications

thoroughly investigated and confirmed by scholarly literature.²¹

3. DESIGNATION OF ORIGIN AND GEOGRAPHICAL INDICATION - CONCEPTUAL DEFINITIONS

The term 'Protected Designation of Origin' (PDO) was defined in the Lisbon Agreement, Article 2 as 'the geographical name of a country, region or place used to designate the origin of a product whose quality or characteristics are due exclusively or essentially to the geographical environment, including natural and human factors'. The country of origin is "the country whose name or the name of its country or place constitutes the designation of origin which has given the product its general reputation." Thus, according to the Lisbon Agreement, the PDO must fulfil three conceptual features: geographical indication, specific characteristics given by the geographical environment and notoriety. This distinguishes it from a mere indication of origin (provenance), where the labelled product does not have special characteristics due to the environment of origin, but comes from a particular country or place.

The term "geographical indication" (GI) has a more recent birth, namely in the EU Regulation 2081/92 (for AGRI). Regulation 2411/2023 (for NON AGRI) enshrines the most recent definition in EU law: 'In order to qualify for protection as a geographical indication, the name of an artisanal or industrial product must meet the following requirements: (a) it comes from a specific place, region or country; (b) its particular quality, reputation or other characteristic is attributable primarily to its geographical origin; and (c) at least one of the steps in its production takes place in a defined geographical area. Products contrary to public policy shall be excluded from the protection of a geographical indication'.²²

It is clear from a comparison of the two concepts that a GI must fulfil the same three conceptual characteristics as those of a PDO, but unlike a PDO, it is also linked to a given geographical area, but more loosely - it is sufficient to attribute its specific characteristics only 'primarily' to its geographical origin, whereas in the case of a PDO they are 'exclusively or predominantly due to' it. In the case of a GI, it is sufficient that 'at least one of the production steps' (i.e. production, processing or preparation) takes place in the area, whereas in the case of a PDO, it must be all three. Recital 17 to the Regulation for NON AGRI states

for craft and industrial products in the EU. Intellectual Property), 2024, 1, pp. 21-25.

²¹ DE FILLIPIS, Fabricio, et al. The international trade impacts of Geographical Indications: Hype or hope? Food Policy, 2022 (112), DOI 10.1016/j.foodpol.2022.102371. This paper provides a quantitative overview of the trade impacts of NON AGRI GI claims providing an economic context for arguments about their benefits.

²² See Article 6 of Regulation (EU) 2411/2023 of the European Parliament and of the Council of 18 October 2023 on the protection of geographical indications of craft and industrial products and amending Regulations (EU) 2017/1001 and (EU) 2019/1753. OJ L, 2023/2411, 27.10.2023.

that even if it is only one of these three steps, e.g. only the preparation, it must have a substantial effect on the characteristics of the product and it is not a GI where the production is from another geographical area and the goods are merely transported to the designated area to be packed - i.e. only the preparation takes place there - which does not add a specific different characteristic to the product and would not be substantially different from if the preparation were carried out by a completely different person in a different place.

The specific characteristics are defined in the so-called specification, which describes the method of production, processing and preparation. The designated public authorities then check the compliance of the specific product with the specification. The protection of GIs at the exclusive EU level for NON AGRI is new and the question is whether it is the same or will differ in practice from that for AGRI, which is also discussed in scholarly literature.²³

The EU Regulation for NON AGRI mentioned above states that neither a geographical appellation which is a general sign of a type of product (e.g. Viennese coffee) nor so-called homonyms exploiting the identity of a name for a completely different geographical location (e.g. a village in the Czech Republic called Paris) can obtain protection.

The new definition of GIs and the methods of their protection in the aforementioned Regulation (EU) No 2023/2411 for NON AGRI also focuses on new technologies. In its Article 4(1), artisanal and industrial products are also understood to include "products made either entirely by hand, or with hand or digital tools, or by mechanical means, whenever the contribution of manual labour is an important component of the finished product, or made in a standardised manner, including mass production and using machines." Its Recital 37 also mentions the misuse of protected designations in domain names on the Internet in the context of protection against counterfeits and imitations.

Recital 64 of the above cited Regulation for NON AGRI, also mentions protection in the offline and online environment, in particular where platform service intermediaries operate for the dissemination of designated products. In this respect, information related to the advertising, promotion and sale of goods that infringe the protection of GI under this Regulation for NON AGRI should be considered as illegal content within the meaning of Art. 3(h) of Regulation 2022/2065 of the European Parliament and of the Council, the so-called Digital Services Act - DSA, and should be subject to the obligations and measures under that Regulation, in particular in the case of the so-called Dark Patterns.²⁴

²³ BUDILEANU, Cristiana. EU Geographical Indications for craft and industrial products - a comparative view of geographical indications for other types of products. *Challenges of the Knowledge Society*, 2024(17), No. 1, pp. 481-493. It is a comparative study focusing on the recently approved EU Regulation on labelling for craft and industrial products (Regulation (EU) 2411/2023) - a practice-oriented article available via open-access.

²⁴ Regulation (EU) 2065/2022 of the European Parliament and of the Council of 19 October 2022

4. DISCUSSION OF CERTAIN ISSUES

The question of whether it was necessary to abolish national protection for PDO and GI in EU countries and transfer them to the exclusive competence of the EU has already been raised in the Part 2 of this paper. The reason of the exclusive EU competence and benefits of this approach are already clear from the objectives of the new regulation as set out in the above Regulation for NON AGRI 2411/2023 - promoting the recovery and resilience of the EU (Recital 3), benefits for consumers by increasing awareness of the authenticity of the origin of products and their expected quality and specificity, increasing the competitiveness of micro and small and medium sized (SME) enterprises, increasing employment and developing tourism in rural and less developed regions, a certain prevention of their depopulation and facilitating the access of these products to markets in third countries through their trade agreements with the Union (Recital 5),²⁵ wider availability of protected products (Recital 6), and fair competition (Recital 76).²⁶

All this is undoubtedly true, and it is a great achievement that protection for these GI has been introduced at EU level for NON AGRI products as well, but the question is whether the same positive effect would not have occurred if protection for PDO and GI for all types of products (AGRI and NON-AGRI) had remained at national level in addition to EU level. In such case, applicants themselves would be able to determine the scope of protection and a narrower or wider association of the territory of PDO and GI protection with their traditional relatively narrow territory of signed products and their production. The retention of protection would be effective and work well at all three levels - national, EU and international. It can be seen from the experience of the other types of intellectual property - trademarks, industrial designs and, to some extent, patents. Protection of producers and their products' competition is more strongly provided by private law in unfair competition litigation.

While the centralisation of protection of these designations at EU level alone has brought some uniformity, clarity and wider territorial protection of the designations across the EU, it is questionable whether this was necessary and whether non suppressing of national competence and activity at national level

on the single market for digital services and amending Directive 2000/31/EC (Digital Services Regulation). OJ L 277, 27.10.2022, p. 1.

²⁵ HUYSMANNNS, Martijn. Exporting protection: EU trade agreements, geographical indications, and gastronomic nationalism. *Review of International Political Economy*, 2022 (29), No. 3, pp. 979-1005. DOI: 10.1080/09692290.2020.1844272. This empirical and theoretical study on how the EU enforces the protection of designations of origin and geographical indications in trade agreements provides a broader trade policy context to the EU's decision to accede to the Geneva Act in November 2019.

²⁶ CRESCENZI, Riccardo *et al.* From local to global, and return: Geographical indications and FDI in Europe. *Papers in Regional Science*. 2023. DOI: 10.1111/pirs.12758. A study on how GIs affect the attraction of foreign investment to regions.

might instead have brought greater development to these traditional regional designations. They are always linked to the place or country where the products with a regional specific quality and their traditional designation originated, rather than to the broad territory of the whole EU. The fact that the abolition of national protection is not necessary and that, on the contrary, the combination of national, European and international protection is workable and allows the individual owners of these signs to decide freely at what level to secure it, is evident from the trademark system, as pointed out above.

Both, the previous EU Regulations on GI for AGRI products already cited, and the CJEU's interpretative practice on them, was of fundamental importance for the construction of the new Regulation for NON AGRI 2411/2023. It is worth mentioning the notion of "evocation" developed by the CJEU in *Gorgonzola v. Cambozola* but also other jurisprudential results that have been reflected in the text of the new EU Regulation for NON AGRI 2411/2023.²⁷ It was also important to extend the concept of GI for AGRI in the CJEU case law not only to products but also to services, which was also reflected in the text of the new Regulation for NON AGRI products.²⁸

According to another thesis of the new centralised GI and PDO law in the EU, Recital 6 of the EU NON AGRI Regulation stated that the previous system of PDO and GI protection on all 3 levels might increase costs and discourage traditional crafts in Europe. This proclamation can be argued with: Under the previous law, producers of AGRI products could decide whether to register the designation for their products only in the given state where registration protection was originated and traditionally provided, especially if the scope of their activities was locally linked to this territory, or to protect them in the broader context of the entire EU, or internationally in Geneva. It was therefore sufficient for the creators of protection policy in the EU to leave national registration in countries that already had this system (and where producers and consumers were used to it, and had positive experiences with it). Or they could even introduce the national protection in the other EU member states (or adjust the conditions for national regulation by a harmonization directive). Also, to keep previous possibility of protection at EU level that had been used for AGRI and simply expand it for NON AGRI registration at the EU. And enable to producers to register their PDO and GI according to their strategy, costs and decisions at all 3 levels - national, EU,

²⁷ In the case of *Gorgonzola v. Cambozola* (C-87/97), the CJEU ruled that the name "Cambozola", marketed by a German producer, was phonetically and visually reminiscent of the Italian protected designation of origin "Gorgonzola" and thus evokes the protected Italian designation of origin "Gorgonzola". The Court determined that this "evocation" might mislead consumers and is prohibited under EU law - it is sufficient that the consumer associates the product with the protected designation of origin, even if there is no confusion. However, it was up to the national court to decide if the continued use of the "Cambozola" trademark was permissible, considering it was registered in good faith before the protection of "Gorgonzola" was established.

²⁸ In *Champanillo* (C-783/19, 2021) a chain of tapas bars used the sign "Champanillo", so the CJEU ruled in this landmark case that protection was also possible for services.

and international. On the contrary, it seems that introducing a forced protection option for producers only at EU (and not national) level will lead for some producers to higher costs.

Rather, consumer confidence, which is supposed to be enhanced by protection exclusively at EU level according to Recital 76 of the NON AGRI Regulation, will be more enhanced by rigorous controls and penalties against infringements, which are primarily handled by national authorities. On the other hand, Recital 6 is perhaps right that centralised EU-only regulation will better prevent disputes, infringements and protection of consumers against deceive designation of products. Registration at EU level also means broader protection at EU level, easier to fight piracy (Recital 8).²⁹ However, the central problem of the new system of GI at EU level can be in registration competence of two EU registration authorities - Commission in Brussels for AGRI products according to the above EU AGRI Regulation, and the EU Intellectual Property Office (EUIPO) in Alicante, Spain for NON AGRI products, according to the cited EU NON AGRI Regulation. Whilst the European Commission has had experience with registration powers for many years, the EUIPO has never dealt with this part of IP - it is the EU registration authority for EU trademarks and Community Designs (now renamed as EU Industrial Designs)³⁰ and also maintains a database of orphan works and is the parent body of the European Observatory on Infringements of Intellectual Property Rights. A comparison of the two types of GI protection in the above EU Regulations is also addressed in scholarly literature.³¹

Since both types of GIs - AGRI and NON AGRI have so far always been administered by one registration office (in the Czech Republic by the IPO, internationally by the International Intellectual Property Office in Geneva), both nationally and internationally, in the same way, the question is whether the EUIPO as the new EU registration office for NON AGRI products will differ from the European Commission's current practice as a registration office for AGRI products. The question arises as to why the new competence for NON AGRIs has not also been conferred on the European Commission. The explanation is perhaps a little mischievous - that there was a need to find another object of activity and source of revenue in fees for the EUIPO³². Although the arrangements in the two EU Regulations mentioned - for AGRI and NON AGRI - are very similar, in

²⁹ TÖRÖK, Áron et al. Understanding the Real-World Impact of Geographical Indications: A Critical Review of the Empirical Economic Literature. *Sustainability* 2000(12): 9434. DOI: 10.3390/su12229434. A study on the economic impact of GI protection at EU level.

³⁰ See Article 1(1) of Regulation (EU) 2822/2024 of the European Parliament and of the Council (EU) of 23 October 2024 amending Council Regulation (EC) No 6/2002 on Community designs and repealing Commission Regulation (EC) No 2246/2002. OJ L, 2024/2822, 18.11.2024.

³¹ MOERLAND, Anke. Geographical indications upgraded: an overview of the recent changes in EU legislation on GI protection. Maastricht University Press. Maastricht LAW Research Paper Series. 2025(1), pp. 1-26. <https://doi.org/10.26481/mup.law.rps.2501>.

³² EUIPO is one of the two self-financed decentralized agencies of the EU. Therefore, it does not rely on the EU budget for its operation.

practice there may be fragmentation in the way they are registered and thus, again, inconsistency in the system across the EU. Of course, the divergent approach may arise from the different nature of craft and food products, particularly in relation to industrial designs and digital new forms of products and technologies.

However, the text of the cited NON AGRI Regulation offers a certain fall back solution should the EUIPO deviate too much from the registration trajectory outlined and advocated by the European Commission, but also in another situation - according to its Article 30, the European Commission may at any time, at the request of a Member State authority, the EUIPO but also by its own decision *ex officio*, take over from the EUIPO the power to decide on an application if the registration of a GI might be contrary to public policy or jeopardize EU commercial interests and decide by issuing implementing acts (individual regulations). The EUIPO will then register the GI in the EU register accordingly. This gives the Commission decisive crisis power to ensure uniform practice and guarantees the continuation of existing practice. This also applies to the first - national - stage of the newly regulated registration application procedure, which is filed with the designated national office (in the Czech Republic, the IPO), which forwards its decision based on its investigation at this stage to the EU Registration Office (the European Commission or the EUIPO) to carry out the EU procedure and investigation and decide on registration. According to Recital 31 of EU NON AGRI Regulation, the Commission may also take over *ex officio* the proceedings from the national office at this stage. It is therefore unlikely that the entire agenda for the protection of GIs in the EU will be transferred from the Commission to the EUIPO in the future, unless this emergency power remains with the European Commission.

The EU Regulation cited in Recital 6 justifies the delegation of registration power exclusively to the EU level by reducing costs for national offices, but on the other hand leaves the first stage of the application procedure, namely the investigation, and the handling of comments and objections to the national offices of EU Member States, i.e. these costs and activity still remain with them, even if they no longer register anything. Only for those countries that have not yet protected GI for NON AGRI products at national level and do not have a competent registration authority established, the Commission may, at the request of such a country, grant an exemption from the obligation to carry out the first stage of the investigation of the application (Article 19 of the NON AGRI Regulation cited above) and the application for registration is then filed directly with the EUIPO (for the so-called direct registration), where the investigation then takes place only at EU level before the EUIPO. Thus, although the state, its authority and expenses will be saved, it is only such state, that is not yet aware of the national registration and only temporarily.

The cited EU Regulation for NON AGRI addresses the potential conflict between a trademark and a PDO or GI (Article 44), and the interpretation of the designation of AGRI products in the *Budějovické pivo* (Budweiser Beer) case

was decisive for this construction of this problem in the Regulation.³³ However, the new EU NON AGRI Regulation cited above does not address the possible conflict of GIs and PDO with industrial design protection, namely EU designs but a starting point for solving this problem can be the Scotch Whisky / Glen Buchenbach case, which is crucial for the possibility of graphic or spatial expression of GIs and the way how to solve the potential conflict.³⁴ This NON AGRI Regulation does not solve a conflict of GIs with the names of new plant varieties or with the protection of companies own names or trade names or business addresses either. The Morbier judgment was a landmark here, extending protection beyond words and it can show the way of solving the questions raised.³⁵

The question is how extensively a craft or industrial product itself, or its geographic indication, will be able to incorporate digital elements in future practice. Under Article 4(4) of the NON AGRI Regulation the 'manufacturing step' is defined as 'any stage of production, including making, processing, extracting, cutting or preparing, up to the point at which the product reaches a form in which it can be placed on the market. The question then is whether this can include extraction from the database or internet or other digital source or be created by artificial intelligence as well as digital processing? Recital 9 of NON AGRI Regulation envisages the dissemination of these artisanal and industrial products or their labelling also in the form of e-commerce - how far could this also be the labelling of intangible products?³⁶ However, Recital 5 of the EU NON AGRI Regulation lists only "natural stones, wood products, jewellery, textiles, lace, cutlery, glass, porcelain, leather and skins" as existing types of craft and industrial products.

The question is whether the move towards digital forms of the products in question or their labelling is just a natural, necessary modern step or whether, even in the context of only broad territorial protection throughout the whole EU

³³ The dispute over the protected geographical indication '*Budějovické pivo*' (C-478/07, C-96/09 P) concerned its conflict with the trademark 'Bud' of the Anheuser-Busch brewery. The CJEU ruled that the registration of the geographical indication was valid even "without prejudice to the earlier trademarks".

³⁴ In *Scotch Whisky v Glen Buchenbach* (C-44/17, 2018), the CJEU ruled a German spirit labelled "Glen Buchenbach" evoked Scotch whisky and that the evocation was not limited to visual or phonetic similarity; the overall impression was decisive. According to the CJEU, evocation also includes cultural and linguistic connotations.

³⁵ In the *Morbier* case (C-490/19, 2022), it was a black line cheese produced by a competitor, which, according to the CJEU decision, evoked the protected designation of origin "Morbier" even without using its name. The protection of a geographical indication can therefore also apply to the visual characteristics of a product and not only to the verbal imitation.

³⁶ ZAPPALAGLIO, Andrea. The Debate Between the European Parliament and the Commission on the Definition of Protected Designation of Origin: Why the Parliament Is Right. IIC - International Review of Intellectual Property and Competition Law, 2019(50), pp. 602-610. DOI: 10.1007/s40319-019-00797-x. The article also examines the controversial definitions of designations of origin and geographical indications in the context of the major debates before or after the EU's accession to the Geneva Act in 2019.

territory, it will completely change the nature of these products, which have so far often been associated with handmade material production and traditional local know-how, and thus change the nature of their labelling. In view of the establishment of an EU Register in the form of an electronic database for the registration of these signs of GI at the EUIPO in Alicante in a machine-readable format and the anticipated ease of searching therein (Article 37 and Recital 33 of EU NON AGRI Regulation), digital expression is envisaged for all these signs.³⁷

New types of these signs of GI and their expressions, which have so far been used in word form, may also be considered. As we know these new types from the trademark field after the 2016 amendment to EU trademark Regulation (and the national laws formed according to the EU trademark Directive) in EU law and subsequent in national amendments. The question is whether the expressions of these GI and PDO and their signs could be pictorial without words (e.g. a picture of a traditional place well known to the public associated with the origin of the product), picture combined with verbal, sound, motion, expressed by a hologram etc. This expression can again be derived from the case law of the CJEU, but with the function of an indication of origin or geographical indications and cultural expression, not with the function of a trademark.³⁸

The direction or limits of the digitisation of such traditional products and their GI, PDO and their signs are left to further development. Of great importance here will be the practice of judicial review of decisions of the EU registration authorities (both European Commission and EUIPO). Also, the opinions of the Advisory Committee will be essential, as its recommendations, although not binding, will be necessary in technical matters of expertise for the decisions of the EU registration authorities (its members include a representative of the European Commission, EUIPO and, furthermore, each EU Member State appoints one member to it. The Advisory Committee may also invite experts in the field to consult – them (see Article 35 and Recitals 20 and 37 of the NON AGRI Regulation)). The results of mediation will be another key source of interpretation. The use of mediation is encouraged in the NON AGRI Regulation and by the two EU registration authorities in case of disagreement between the disputing parties (Article 22 of NON AGRI Regulation).

³⁷ STRANIERI, Stefanelle, *et al.* Geographical Indications and Innovation: Evidence from EU regions. *Food Policy*, 2023(116), Article 102425. DOI: 10.1016/j.foodpol.2023.102425. This is an empirical study investigating the impact of the extension of geographical indications on innovation activities in EU regions, in particular in terms of the economic effects of extending these indications to NON AGRI.

³⁸ The 2019 CJEU's decision in the *Queso Manchego* case (C-614/17), where a producer used a label with characters from Don Quixote to evoke the protected geographical indication "Queso Manchego", is crucial. According to the CJEU, evocation of GI can also be based on pictorial elements, and the protection of a geographical indication can also extend to symbolic and cultural expressions.

5. CONCLUSIONS

The extension of GI protection at exclusive EU level to craft and industrial products represents a major change and is undoubtedly a huge achievement, particularly as regards the extension of the territories in which protection is granted. This is in response to the Geneva Act, which has considerably expanded the hitherto relatively small number of parties to the Lisbon Agreement or territories covered by its protection. On the other hand, some other questions have been raised, in particular whether the existing holders of registered designations of origin and geographical indications at national level will apply for an EU registration of NON AGRI products with continuity of protection, as well as for their new international registration deriving from the EU registration. The CJEU is likely to build its NON AGRI future decisions on its existing case law from AGRI disputes. It will probably apply the 'evocation' and 'use of reputation' tests outside the food sector, with greater importance given to mediation and expert opinions in the Advisory Committee. Disputes can be expected in particular in the glass, porcelain and textile sectors, where the issue of imitation of appearance will be key, but also in the application of digital technologies and, where appropriate, new forms of such labels. There is also the possibility that the two EU registration authorities - the European Commission and the EUIPO - will take different approaches. However, it is unlikely that the entire GI registration agenda in the EU will be transferred completely to the EUIPO. Protection of designation of origin and geographic indication also open up a new instrument in the EU to implement the Green Deal program in the EU not only in AGRI but also to NON AGRI products.

REFERENCES

1. BUDILEANU, Cristiana. EU Geographical Indications for craft and industrial products - a comparative view of geographical indications for other types of products. *Challenges of the Knowledge Society*, 2024(17), No. 1, pp. 481-493.
2. CRESCENZI, Riccardo *et al.* From local to global, and return: Geographical indications and FDI in Europe. *Papers in Regional Science*. 2023. DOI: 10.1111/pirs.12758.
3. DE FILLIPIS, Fabricio, *et al.* The international trade impacts of Geographical Indications: Hype or hope? *Food Policy*, 2022 (112), DOI 10.1016/j.foodpol.2022.102371.
4. HORÁČEK, Roman, ČADA, Karel, HAJN, Petr. Práva k průmyslovému vlastnictví. 2. vydání. Praha: C.H. BECK, 2011, (Industrial property rights. 2nd ed. Prague).
5. HUYSMANN, Martijn. Exporting protection: EU trade agreements, geographical indications, and gastronationalism. *Review of International Political Economy*, 2022 (29), No. 3, pp. 979-1005. DOI: 10.1080/09692290.2020.1844272.
6. KOUTNÁ, Iva. Jednotná a výlučná ochrana zeměpisných označení v EU je za

- dveřmi. Duševní vlastnictví, Praha: Úřad průmyslového vlastnictví (Uniform and exclusive protection of geographical indications in the EU is at the door. Intellectual Property, Prague: Industrial Property Office), 2025 (3), pp. 13-16.
7. KOUTNÁ, Iva. Ochrana zeměpisných označení pro řemeslné a průmyslové výrobky v EU. Duševní vlastnictví, Praha: Úřad průmyslového vlastnictví (Protection of geographical indications for craft and industrial products in the EU. Intellectual Property), 2024, 1, pp. 21-25.
 8. MOERLAND, Anke. Geographical indications upgraded: an overview of the recent changes in EU legislation on GI protection. Maastricht University Press. *Maastricht LAW Research Paper Series*. 2025(1), pp. 1-26. <https://doi.org/10.26481/mup.law.rps.2501>.
 9. ŠPRUNGLOVÁ, Andrea. Úprava ochrany označení původu a zeměpisných označení po novele zákona č. 452/2001 Sb. Duševní vlastnictví. (Regulation of the protection of appellations of origin and geographical indications after the amendment of Act No. 452/2001 Coll. Intellectual property). Prague: Industrial Property Office, 2023, No. 1, pp. 15-20.
 10. STRANIERI, Stefanelle, *et al.* Geographical Indications and Innovation: Evidence from EU regions. *Food Policy*, 2023(116), Article 102425. DOI: 10.1016/j.foodpol.2023.102425.
 11. TÖRÖK, Áron *et al.* Understanding the Real-World Impact of Geographical Indications: A Critical Review of the Empirical Economic Literature. *Sustainability* 2000(12): 9434. DOI: 10.3390/su12229434.
 12. VÍNOPALOVÁ, Žaneta. Dynamický vývoj v oblasti označení původu a zeměpisných označení v EU. Duševní vlastnictví. Praha: Úřad průmyslového vlastnictví (Dynamic developments in the field of designations of origin and geographical indications in the EU. Intellectual Property. Prague: Industrial Property Office), 2024, No. 2, pp. 12-13.
 13. ZAPPALAGLIO, Andrea. The Debate Between the European Parliament and the Commission on the Definition of Protected Designation of Origin: Why the Parliament Is Right. *IIC - International Review of Intellectual Property and Competition Law*, Vol. 50 (2019), pp. 595-610. DOI: 10.1007/s40319-019-00797-x.
 14. ZAPPALAGLIO, Andrea. The law of geographical indications at the centre of the European green deal. *Journal of Intellectual Property Law & Practice*, 2023(18), No. 8, pp. 557-558. DOI: 10.1093/jiplp/jpad043.

The Directing of Commercial Activities to the Member State of the Consumer's Domicile Pursuant to Article 17(1)(C) of the Brussels I Bis Regulation

JUDr. Ing. Daniel KRTIČKA

daniel.krticka@vse.cz

ORCID: 0009-0002-0674-277X

Ph.D. student

Department of Business and European Law

Faculty of International Relations, Prague University of Economics and

Business

Prague, Czech Republic

Abstract: *The paper deals with the interpretation of the condition of "directing the activities" under Article 17(1)(c) of the Brussels I bis Regulation, the fulfillment of which will probably be the most common reason for the applicability of the consumer provisions of Section IV of that Regulation in practice. The article presents the relevant case law of the Court of Justice of the European Union, supplemented by expert opinions on the issue. It also includes an application case, which explores the research question of whether accommodation contracts concluded with Czech consumers through the platform operated by Booking.com can be considered contracts concluded under Article 17(1)(c) of the aforementioned Regulation. The analysis presents two possible solutions to the outlined question. In addition to the analytical method, synthesis and comparison are also used.*

Keywords: *accommodation contract, consumer protection, directing the trader's activities.*

JEL Classification: K22, K33

DOI: <https://doi.org/10.62768/ADJURIS/2025/5/03>

Please cite this article as:

Krtička, Daniel, „The Directing of Commercial Activities to the Member State of the Consumer's Domicile Pursuant to Article 17(1)(C) of the Brussels I Bis Regulation”, in Grmelová, Nicole & Anna Kretková (eds.), *Prospects of Law in Business*, ADJURIS – International Academic Publisher, Bucharest, Paris, Calgary, 2025, p. 39-53, <https://doi.org/10.62768/ADJURIS/2025/5/03>.

1. INTRODUCTION

It is no exaggeration to say that the Brussels I¹ bis Regulation is the most

¹ 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

important European regulation in the field of international procedural law. It distinguishes between several "types" of jurisdiction, namely general jurisdiction, alternative jurisdiction, special jurisdiction, exclusive jurisdiction, and agreed jurisdiction.² The provisions on special jurisdiction, set out in Articles 10 to 23, also cover consumer contracts³, which will be the subject of the analysis presented in this paper.

Jurisdiction over consumer contracts is governed by Section IV, Articles 17 to 19.⁴ The conditions for the applicability of these provisions are set out in Article 17. According to Article 17, it must first be ensured that the contract in question is concluded by a consumer⁵ for a purpose which is not related to their professional or commercial activities. This condition must be accompanied by at least one of the conditions set out in points (a) to (c) of the same article. Condition (c) refers to a case where the contract was concluded with a person who pursues professional or commercial activities in the Member State (hereinafter referred to as "MS", in the singular or plural as appropriate) of the consumer's domicile⁶, or where such activities are, by any means, directed to that MS or to several MS, including that MS, and (at the same time) the contract falls within the scope of these activities. The subject of this article will be the interpretation of the alternative condition set out in point (c), namely in its second part – i.e. the question of under what circumstances the condition that the trader's activities are directed at the MS of the consumer's domicile will be met.

This question is of exceptional importance, as its fulfillment, or lack thereof, will determine the applicability of the provisions of Section IV.⁷ This is not merely a theoretical question, but a highly practical one, as can be demonstrated by the applicability of Article 18 of the Regulation. If the condition of "directing

matters (recast). OJ L 351, 20.12.2012, pp. 1–32.

² See KYSELOVSKÁ, Tereza, Naděžda ROZEHNALOVÁ *et al.* *Rozhodování Soudního dvora EU ve věcech příslušnosti: analýza rozhodnutí dle nařízení Brusel I bis*. Brno: Masarykova univerzita, Právnická fakulta, 2014.

³ See KYSELOVSKA, Tereza. Online cross-border (consumer) contracts from the point of view of the case-law of the Court of Justice of the EU. In: *Cofola International 2017: Resolution of International Disputes* [online]. Brno: Masarykova univerzita, 2017, pp. 78–91 [viewed 13 September 2025]. Available from: https://www.law.muni.cz/sborniky/cofola-international/cofo_la2017.pdf.

⁴ See BOSNER, Barbara. Cross-border trade and consumer protection. In: *Economic and Social Development (ESD)* [online]. Varazdin: Varazdin Development & Entrepreneurship Agency, 2017, pp. 419–426 [viewed 13 September 2025]. Available from: https://www.esd-conference.com/upload/book_of_abstracts/esd_Book_of_Abstacts_Split_2017_Online.pdf.

⁵ See HAVELKA, Libor. Migrující spotřebitelé a určení mezinárodní příslušnosti v kontextu nařízení Brusel I bis. *Právní rozhledy*. 2016(24)18, pp. 625–631.

⁶ See KORYNTOVÁ, Tereza, Jiří ŠRÁMEK, and Pavel PRAŽÁK. Mezinárodní pravomoc soudů ve sporech proti spotřebiteli. *Právní rozhledy*. 2016, 8, pp. 283–289. See also UHLÍŘOVÁ, Pavlína. *Procesní postavení osoby neznámého pobytu – ve světle Nařízení Brusel I bis*. Praha: Wolters Kluwer, 2019.

⁷ See TRÁVNÍČKOVÁ, Simona. Ochrana spotřebitele v závazkových právních vztazích s mezinárodním prvkem uzavíraných přes internet. *Časopis pro právní vědu a praxi*. 2011, 19(2), pp. 256–163.

the activities" is met, the consumer enjoys a more advantageous position in terms of both active and passive standing.

From the perspective of active standing, the consumer's more advantageous position can be seen in the possibility of bringing proceedings against the contractual partner in the court of the place where the consumer is domiciled. To give an example, consider a situation where a Czech consumer orders accommodation in an Italian hotel via a website which clearly directs at the consumer's MS of domicile. If it were not possible to apply the special provisions of consumer contracts, the consumer could bring proceedings against the Italian hotel either in the courts of the MS where the Italian hotel is based⁸ [Article 4(1)] or in the courts of the MS where the services under the contract were provided [Article 7(1)(a) and (b)]. Given that the services (accommodation and others) were also provided by the hotel in Italy, it would only be possible to establish the jurisdiction of the Italian courts. There are several reasons why it is less advantageous for consumers to bring proceedings before a foreign court (in this case, an Italian court). Proceedings conducted abroad would require the appointment of a foreign attorney. This involves considerably higher costs, both because the services provided by foreign attorneys are generally more expensive and because additional related expenses (for example, the costs of translating documents) would be incurred.

As regards passive standing, Article 18(2) guarantees consumers that if their contractual partner decides to bring proceedings against them, they must do so exclusively in the courts of the MS of the consumer's domicile. The consumer's domicile is understood to be their last known domicile on the date on which the proceedings are brought.⁹ Applied to the example above, this means that any claims by the Italian hotel against the consumer (e.g., for liability for damage caused) would have to be brought before a Czech court. Proceedings could not be initiated in an Italian court, as would be permitted under the rules on alternative jurisdiction¹⁰ if the contract in question did not fall within the scope of "privileged" consumer contracts under Article 17.

The aim of the article is to identify, based on an analysis of the case law of the Court of Justice of the European Union (hereinafter referred to as "CJEU") and academic literature, the conditions which must be met in order to conclude that a trader's activities are directed to the MS of the consumer's domicile pursuant to Article 17(1)(c) of the Brussels I bis Regulation. The research question addressed by the author is whether accommodation contracts concluded by Czech customers through the platform operated by Booking.com could fall within the scope of Article 17(1)(c) of the Brussels I bis Regulation.

⁸ See Article 63(1) of the Brussels I bis Regulation.

⁹ Order of the Court of Justice of 3 September 2020. *mBank S.A. v. PA*. Case C-98/20. OJ C 414, 30.11.2020, p. 19. See also Judgment of the Court of Justice of 17 November 2011. *Hypoteční banka a.s. v. Udo Mike Lindner*. Case C-327/10. OJ C 25, 28.1.2012, pp. 12–13.

¹⁰ Article 7(1)(a) and (b) of the Brussels I bis Regulation.

2. CASE LAW OF THE CJEU

As the Brussels I bis Regulation does not itself specify when the condition of “directing of activities” is met, the case law of the CJEU¹¹, which has repeatedly addressed this issue in preliminary ruling proceedings¹², is of exceptional importance. In addition to the decisions of the CJEU, the decisions of the Supreme Court of the Czech Republic¹³ are also relevant in the Czech legal system. Below, two decisions of the CJEU¹⁴ will be introduced which are related to the interpretation of the condition of “directing the activities”¹⁵ and which are at the same time essential for the solution of the application case. While the case law cited here relates to the interpretation of Article 15(1)(c) and Article 16(1) of the previously applicable Brussels I Regulation, it is also fully applicable to the interpretation of Article 17(1)(c) and Article 18(1) of the Brussels I bis Regulation, given the equivalence of the content of these provisions.¹⁶

2.1. Pammer v Reederei Karl Schlüter GmbH & Co KG and Hotel Alpenhof GesmbH v Oliver Heller

The most significant decision of the CJEU regarding the interpretation of the condition of “directing the activity” can be considered to be the judgment known under the abbreviation *Pammer*¹⁷. Peter Pammer¹⁸, domiciled in Austria,

¹¹ See KYSELOVSKA, Tereza. A Critical Perspective on the Development of Internet Related Case Law for Online Consumer Contracts in the EU. In: *Proceedings of the 4th International Conference on European Integration 2018 (ICEI 2018), PTS 1-3* [online]. Ostrava: VSB – Technická univerzita Ostrava, 2018, pp. 893–900 [viewed 13 September 2025]. Available from: https://www.ekf.vsb.cz/share/static/ekf/www.ekf.vsb.cz/export/sites/ekf/icei/.content/galerie-souboru/ICEI-2018_Proceedings.pdf.

¹² Article 267 of the Consolidated version of the Treaty on the Functioning of the European Union. OJ C 326, 26.10.2012, pp. 47–390.

¹³ See Decision of the Supreme Court, Czech Republic of 29 March 2016. No. 30 Cdo 2823/2015 [online]. In *Salvia Kraken*. [accessed on 2025-08-25]. Available from: <https://kraken.slv.cz/30Cdo2823/2015>.

¹⁴ See also Judgment of the Court of Justice of 6 September 2012. Daniela Mühlleitner v. Ahmad Yusufi and Wadat Yusufi. Case C-190/11. OJ C 355, 17.11.2012, p. 6. See also Judgment of the Court of Justice of 17 October 2013. Lokman Emrek v. Vlado Sabranovic. Case C-218/12. OJ C 367, 14.12.2013, p. 14. See also Judgment of the Court of Justice of 23 December 2015. Rüdiger Hobohm v. Benedikt Kampik Ltd & Co. KG, Benedikt Aloysius Kampik and Mar Mediterraneo Werbe – und Vertriebsgesellschaft für Immobilien SL. Case C-297/14. OJ C 68, 22.2.2016, p. 9.

¹⁵ See KYSELOVSKA, Tereza. Příslušnost soudů ve sporech vyplývajících ze spotřebitelských smluv. *Revue pro právo a technologie*. 2013, 4(8), pp. 46-48.

¹⁶ See recital 34 of the Brussels I bis Regulation and Judgment of the Court of Justice of 14 March 2013. Česká spořitelna, a. s. v. Gerald Feichter. Case C-419/11. OJ C 141, 18.5.2013, p. 6.

¹⁷ Judgment of the Court of Justice of 7 December 2010. Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v. Oliver Heller. Joined cases C-585/08 and C-144/09. J C 55, 19.2.2011, pp. 4–5.

¹⁸ CJEU. Case C-585/08.

who booked a cruise through a German intermediary, brought proceedings against the German company that organized the cruise. During the proceedings, the Austrian Supreme Court asked the CJEU, among other questions, whether it is sufficient for the condition of "directing the activities" under Article 15(1)(c) of the Brussels I Regulation that the intermediary's website can be consulted on the internet.

The second case¹⁹ concerned a dispute between a company operating a hotel in Austria and O. Heller, domiciled in Germany, who had booked accommodation at that hotel after viewing their website. In the proceedings, the Austrian Supreme Court raised a question referred for a preliminary ruling which was similar to the question in the *Pammer* case, but in this case it concerned the consumer's direct contractual partner.

In her Opinion²⁰, the Advocate General (hereinafter referred to as "AG") used a terminological, teleological, historical, and systematic interpretation of the term "directing activities". She concluded that, based on all the interpretations outlined here, the mere availability of a website in the consumer's MS of domicile is insufficient to satisfy the condition of "directing activities". At the same time, she noted that, beyond the historical interpretation, the question of "directing activities" does not depend on whether the website is interactive²¹ or passive. Furthermore, she provided a list of items of evidence indicating "directing activities". It corresponds closely to that provided by the CJEU in their judgment (see below). However, certain items of evidence referred to by the AG were omitted.

In response to the question referred for a preliminary ruling, the CJEU first stated that, since the concept of "activity directed at the MS of the consumer's domicile" is not defined, it must be interpreted autonomously, taking into account the Regulation's scheme and objectives to ensure its full effectiveness. The Court further stated that, although consumers are generally considered the weaker party to a contract, the protection provided by specific provisions cannot be considered absolute. In line with the AG's opinion, the Court also held that the term "activity directed" cannot be interpreted to mean that the mere availability of a trader's or intermediary's website in a MS other than that in which the trader is established is sufficient. Considering the points outlined, it must be concluded that, for the purpose of applying of Article 15(1)(c) of the Brussels I Regulation, the trader must demonstrate an intention to establish commercial relations with consumers from one or more MS, including the consumer's MS of domicile. It is therefore necessary to assess whether, prior to the potential conclusion of a contract with a consumer, there were items of evidence (arising from the website as well as from the trader's overall activities) which would show that the trader was

¹⁹ CJEU. Case C-144/09.

²⁰ Opinion of Advocate General delivered on 18 May 2010 in joined cases C-585/08 and C-144/09. Available from: eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62008CC0585&qid=1757766605433.

²¹ Such a website allows for immediate conclusion of a contract.

considering trading with consumers domiciled in other MS including the consumer's MS of domicile, in the sense that the trader was willing to conclude a contract with such consumers.

Such evidence definitely does not include the provision of the trader's electronic or geographical address, the provision of a telephone number without an international dialing code, or the possibility of using a language or currency commonly used in the trader's MS of domicile. On the contrary, items of evidence indicating that the "directing of activity" is towards the MS of the consumer's domicile include all explicit expressions of the trader's intention to direct activity towards customers there. It is not necessary for the trader to "direct the activity in a substantial manner".

According to the CJEU, such evidence may include the fact that the trader offers their services or goods in one or more specific MS; the expenditure of costs on sponsored links with an internet search engine operator; the international nature of the trader's activities (e.g., certain tourism activities); the provision of a telephone number with an international dialing code; the use of a top-level domain other than that of the trader's MS of domicile, or the use of neutral top-level domain names (e.g., ".com" or ".eu"); description of the journey to the place of service provision starting in one or more MS; indication of an international customer base consisting of customers domiciled in other MS (especially if these customers have given any valuation); the possibility of using a language other than that of the trader's MS or of making and confirming a reservation in that other language; the possibility of using a currency other than that of the trader's MS.

In this important judgment, the CJEU specifically identified the items of evidence that national courts should use as guidance when determining whether the trader, *in concreto*, is directing their activities to the MS of the consumer's domicile. However, the individual items of evidence must be assessed in their mutual context²²The existence of a single "weak" evidence will not be sufficient.²³ Furthermore, the list of these items of evidence is illustrative, so it cannot be excluded that there may be other items of evidence in a specific case. In the author's opinion, such other items of evidence could include the offer of delivery of goods to other MS, where, for example, an e-shop expressly states that they deliver goods to the Czech Republic, Germany, Austria, etc. Another evidence could be the existence of customer support in the language of the MS of the consumer's domicile (e.g., a hotline in Czech, German, etc.). References from customers from other MS, which the trader accepts and displays on their website, could

²² CALVO CARAVACA, Alfonso-Luis, et al. *Brussels Ibis Regulation - Commentary* [online]. Edited by Ulrich MAGNUS and Peter MANKOWSKI. Verlag Dr. Otto Schmidt, 2016 [viewed 26 August 2025]. Available from: doi:10.9785/9783504384807.

²³ MANKOWSKI, Peter, et al. *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR, Band I: Brüssel Ia-VO*. Schmidt KG, Verlag, Otto, 2015.

also be considered further evidence. According to the Magnus/Mankowski Commentary, the size and characteristics of the company, reference to the rules of a particular country, targeting of advertisements on the trader's website, inclusion of email addresses with a country-specific domain, establishing contact at a distance, concluding a contract at a distance, or a causal link between the trader's activities and the conclusion of the contract may be considered as further items of evidence.²⁴

2.2. Maletic v. lastminute.com GmbH and TUI Österreich GmbH

In another judgment presented²⁵, the subject of the proceedings was a dispute between Mr. and Mrs. Maletic, domiciled in Austria, and the intermediary – lastminute.com, domiciled in Germany, through which they booked their trip, and the tour operator – TUI, domiciled in Austria. In the proceedings before the Austrian court, in which Mr. and Mrs. Maletic brought a joint proceedings against the tour operator and the intermediary, the appellate court raised a question referred for a preliminary ruling to the CJEU. The preliminary question concerned whether Article 16(1) of the Brussels I Regulation, which establishes the jurisdiction of the court of the consumer's domicile, should be interpreted to mean that, if the other party to the contract (a foreign travel intermediary) involves a contractual partner (a domestic tour operator), the said article also applies to the contractual partner based in the domestic country in the case of proceedings against these two entities.

In response to the question referred for a preliminary ruling, the CJEU stated that even if we were to accept that the Maletic couple's booking and payment for a vacation package on the lastminute.com website constituted two separate contractual relationships – one with lastminute.com and the other with TUI, the tour operator – the second contractual relationship cannot be classified as purely domestic. This is because the second contractual relationship is inseparably linked to the first contractual relationship, as it is carried out through a travel agency domiciled in another MS. The Court also pointed out the need to prevent the possibility of conflicting decisions being issued in two MS. The CJEU thus favored an extensive interpretation of the term "contractual partner" under Article 16(1) of the Brussels I Regulation, which must be understood to mean, apart from the intermediary company through which the consumer booked the tour, also an entity with which the consumer concluded the contract itself. This applies even if that entity is established in the consumer's MS of domicile.

²⁴ CALVO CARAVACA, *op. cit.*

²⁵ Judgment of the Court of Justice of 14 November 2013. Armin Maletic and Marianne Maletic v. lastminute.com GmbH and TUI Österreich GmbH. Case C-478/12. OJ C 9, 11.1.2014, p. 14.

3. "BOOKING.COM" CASE STUDY

The final chapter of the article aims to answer the question of whether accommodation contracts concluded by Czech consumers through the platform operated by Booking.com could meet the condition of "directing the activity" as referred to in Article 17(1)(c) of the Brussels I bis Regulation.

Firstly, it should be noted that Booking.com B.V., based in the Netherlands, does not act as a contracting party to customers when accommodation is booked on their platform. Accommodation contracts are concluded directly between the customer and the accommodation provider.²⁶ However, Booking.com has a contractual relationship with individual accommodation providers²⁷. In some cases, this company acts directly on behalf of the accommodation provider, for example, when they may charge the customer for damages with the customer's consent.²⁸ From the above, it is clear that Booking.com acts as a mere intermediary towards customers.

When assessing whether contracts concluded by Czech consumers on the Booking.com platform can be considered contracts falling under Article 17(1)(c) of the Brussels I bis Regulation, it is first necessary to address the question of whether a trader can direct their activities to the MS of the consumer's domicile through an intermediary.

The answer to this question was provided by the CJEU in the aforementioned *Pammer* judgment²⁹. In this judgment, the Court stated that the fact that the website belongs to an intermediary (and not directly to the trader) does not prevent the trader's activity from being considered as directed to other MS, including the consumer's MS of domicile, if the intermediary acts on behalf of and for the account of the trader. The national court must verify whether the trader was aware or should have been aware of the international dimension of the intermediary's activities and their interconnection. In the case of Booking.com, there is no dispute about the international dimension of their activities, as the company offers accommodation across all EU countries, but also, for example, in the US and Asia. Booking.com itself also acknowledges the international dimension of their activities, stating on their website that they are one of the world's largest travel platforms, enabling accommodation providers from around the world to reach a global audience.³⁰ At the same time, there is no doubt that the trader must at least be aware of the international dimension of this company's activities, as it must be clear to them that by placing their accommodation offer on this company's platform, they are also making this offer available to customers from other

²⁶ See the General Terms and Conditions of Booking.com. Available from <https://www.booking.com/>.

²⁷ *Ibidem*.

²⁸ *Ibidem*.

²⁹ CJEU. Joined Cases C-585/08 and C-144/09.

³⁰ See the presentation of the activities of Booking.com. Available from <https://www.booking.com/>.

countries, in particular those whose language versions are available on this company's website. Given that the above condition is met by Booking.com, it is now necessary to assess whether this company fulfills the condition of "directing activities" under Article 17(1)(c).

Considering the individual items of evidence presented by the CJEU in the *Pammer* judgment³¹, it can be stated that the evidence consisting of the possibility to view the Booking.com website in the Czech language is fulfilled. The Booking.com website offers a total of 43 language versions³², including Czech. It is also possible to make a reservation directly in Czech. As for the possibility of making a payment in the currency of the consumer's place of domicile, it is possible to make a payment in Czech crowns. It is also possible to select the Czech crown as the currency in which accommodation prices are to be displayed. The fact that Booking.com offers their services in one or more specific countries is evident from the company's home page, which displays accommodation offers from various countries (e.g., the Czech Republic, Austria, Hungary, Poland, Italy, etc.). Furthermore, Booking.com incurs costs for sponsored links with internet browser operators. As part of the test, the phrases "accommodation Austria" and "accommodation Czech Republic" were entered into the Microsoft Edge internet browser. In both cases, the first option displayed was an accommodation offer on the Booking.com platform, which was also marked as a "sponsored link". As regards providing a telephone number with an international dialing code, Booking.com also complies with this requirement. The company provides a telephone number with an international dialing code on their website, namely +44, the dialing code for the United Kingdom. A note accompanying this number also states that customer service is provided in English. In the mobile app, customers who have an account on the platform and have reached a certain level in the loyalty program also have access to a telephone hotline with a Czech-speaking operator. The Booking.com platform also uses the neutral top-level domain name ".com", which is another positive evidence of their "directing of activity" on the MS of the Czech consumer. The evidence consisting of the mention of an international customer base including customers domiciled in other other MS is also fulfilled. The offers of individual accommodation providers include guests from various countries around the world. The name of the guest, the country of origin, the type of accommodation and the length of stay are always indicated, as well as a rating and a verbal review of the accommodation.

In view of the above, it can be concluded that Booking.com as such definitely meets the condition of "directing the activities" to the Czech consumer's MS. If Booking.com were a trader directly concluding contracts with consumers

³¹ CJEU. Joined Cases C-585/08 and C-144/09.

³² See the presentation of the activities of Booking.com. Available from <https://www.booking.com/>.

from the Czech Republic, it would certainly be possible to conclude that the consumer provisions of Section IV of the Brussels I bis Regulation would apply. However, Booking.com is not a trader that contracts directly with individual consumers, but merely provides a platform on which individual accommodation providers can offer their accommodation. In the case of contracts concluded via the Booking.com platform between accommodation providers and Czech consumers, in the author's opinion, there are two possible answers to the question of whether the "directing of activities" condition is met.

The first possible solution to this question is that the condition of "directing the activity" would be fulfilled without any additional requirements, as this condition is already fulfilled by Booking.com as an intermediary. The possibility of applying consumer provisions would thus be created merely by a trader placing their accommodation on this company's platform, making their accommodation offer "international". As the Booking.com platform meets the "directing of activity" condition, the provisions of Section IV can also be applied to contracts concluded with individual accommodation providers.

In favour of this solution, reference can again be made to the *Pammer* judgment³³, in which the CJEU practically equates the activities of a trader with those of an intermediary by placing the trader's website and that of their intermediary on the same level. The view that the activities of an intermediary should be regarded as if they were carried out by the trader himself is also shared by the authors of the significant Commentary by Magnus/Mankowski³⁴. In support of this solution, we can also cite the *Maletic* case³⁵, in which the CJEU dealt with the issue of the connection between the consumer's contractual partner and their intermediary. In this case, it concerned the Spanish company lastminute.com, which acted as a travel agent, and TUI, which was the consumer's contractual partner and also the entity responsible for organizing the tour. Both the national court (Austrian) and the CJEU concluded that, as regards lastminute.com, the condition of "directing the activity" under Article 15(1)(c) of the Brussels I Regulation was met. The CJEU held that, in the case of lastminute.com, which was the tour intermediary, the court with jurisdiction was the court of the consumer's place of domicile. The Court went even further, stating that both the intermediary company (i.e., lastminute.com) and the company with which the consumer concluded the contract (i.e., TUI) must be considered the consumer's contractual partner within the meaning of Article 16(1) of the Brussels I Regulation. This is even the case where the company with which the consumer has concluded the contract is established in the same country as the country of consumer's domicile.

The *Maletic* case is mentioned here because it bears certain similarities to the Booking.com case we are assessing. When accommodation is booked

³³ CJEU. Joined Cases C-585/08 and C-144/09.

³⁴ CALVO CARAVACA, *op. cit.*

³⁵ CJEU. Case C-478/12.

through the lastminute.com portal, lastminute.com acts as an intermediary. In this case, the accommodation provider is always the contracting party to the accommodation contract.³⁶ Significant similarities can also be found in the design and functionality of the websites. Similar to Booking.com, users of lastminute.com have access to a Czech language version of the website, the option to display offers in Czech currency, and references from guests from various countries around the world.

In the *Maletic* case, the CJEU also stated that even if we were to divide the actions that led to the booking of accommodation into two separate contractual relationships (i.e., one with the intermediary and one with the tour operator), it cannot be overlooked that the two contractual relationships are inseparably linked, as the contractual relationship with the tour operator is implemented through the intermediary company³⁷.

As the CJEU did not examine in the cited judgment whether the consumer's contractual partner (i.e., TUI) fulfilled the condition of "directing the activity" by the positive items of evidence, whereas the Court based the fulfillment of this condition on the consideration of the inseparability of the contractual relationship with the "main" contractual partner and the contractual relationship with the intermediary, it would be possible to conclude in our case that if the intermediary (i.e., Booking.com) fulfills the condition of "directing the activity", the consumer's contractual partner (i.e., the relevant accommodation provider) will also fulfill the condition of "directing the activity". As a result, this would mean that a Czech consumer could bring proceedings in their place of domicile against both the intermediary and their contractual partner. According to the *Maletic* judgment³⁸, it would not change anything if the consumer's contractual partner (e.g., a Czech hotel) was from the same country as the consumer (in our case, the Czech Republic). In the cited judgment, the court concluded that by booking accommodation through a foreign intermediary (focusing their activities on the consumer's country of domicile), the contractual relationship was in fact internationalized, making it possible for the consumer to bring proceedings against both their contractual partner and the intermediary in their place of domicile. The international element was "added" by the fact that the consumer booked their accommodation through an intermediary based abroad.

As a last argument in favor of the solution discussed here, it can be said that consumers are considered by both the CJEU³⁹ and Czech courts⁴⁰ to be the

³⁶ See the General Terms and Conditions of lastminute.com. Available from <https://cz.lastminute.com/info/general-conditions>.

³⁷ CJEU. Case C-478/12.

³⁸ *Ibidem*.

³⁹ See Judgment of the Court of Justice of 20 January 2005. *Johann Gruber v. BayWa AG*. Case C-464/01. OJ C 57, 5.3.2005, pp. 1–2.

⁴⁰ See Decision of the Constitutional Court, Czech Republic of 27 November 2017. No. I.ÚS

weaker party to a contract, i.e., the party that is economically weaker and less legally experienced than their (business) contractual partner.

The second solution is based on the consideration that placing an offer of accommodation on the Booking.com platform by the accommodation provider does not automatically fulfill the condition of "directing the activity", and that such placement of accommodation can only be considered one of the positive items of indicating the trader's intention to direct their activities to the MS of consumer's domicile (in the case under consideration, the Czech Republic).

As the CJEU held in *Pammer*⁴¹, a national court must always verify whether, before concluding a contract with a consumer, it was apparent from the website (of the trader or intermediary) and from the trader's overall activity that the trader intended to trade with consumers from other MS, including the consumer's MS of domicile, in the sense of a willingness to conclude a contract with them. The above implies, that in order to assess the condition of "directing the activity", in addition to the website (in our case) of the intermediary, the "overall activity of the trader" must also be taken into account. This means how the trader generally approaches international clients and the possibility of concluding a contract with customers from other countries.

The situation will certainly be different for a trader who operates an international hotel chain in several countries and has websites in several languages than for a trader who runs a small Alpine guesthouse without their own website and uses the Booking.com platform to reach a wider range of customers. In the case of the latter trader, it cannot be concluded that their overall activity indicates an intention to reach consumers from all countries whose language versions are available on the Booking.com website. The opposite reasoning would lead, *ad absurdum*, to the conclusion that the condition of "directing the activity" would also be met in the case of the aforementioned Alpine guesthouse, whose offer (placed on the Booking.com platform) attracted a customer domiciled in the Canary Islands. This would result in a consumer domiciled in the Canary Islands being able to bring proceedings against the operator of the Alpine guesthouse in the place of their domicile, i.e. in the Canary Islands. However, this was certainly not the intention of the European legislator. Moreover, the CJEU has repeatedly emphasized that although consumers are generally considered to be the weaker party in a relationship with a trader, consumer protection cannot be regarded as absolute.⁴²

In view of the above, according to this solution, the fact that the trader places an accommodation offer on the Booking.com platform would have to be accompanied by other positive items of evidence arising from the trader's overall

1844/17 [online]. In *Nalus*. [accessed on 2025-09-04]. Available from: <https://nalus.usoud.cz/Search/ResultDetail.aspx?id=99914&pos=1&cnt=1&typ=result>.

⁴¹ CJEU. Joined Cases C-585/08 and C-144/09.

⁴² See Judgment of the Court of Justice of 15 April 2010. *E. Friz GmbH v. Carsten von der Heyden*. Case C-215/08. OJ C 148, 5.6.2010, pp. 5–6.

activity. Only on the basis of such evidence would it then be possible to conclude that the condition of "directing activity" has been met. Such evidence could include well-known items of evidence, namely those defined in the *Pammer*⁴³ judgment.

4. CONCLUSION

Given that the overall number of contracts concluded online⁴⁴, including on foreign websites, is growing, an increase in disputes arising from such contracts can also be expected. Typically, these will involve the exercise of rights arising from defective performance and withdrawal from the contract. Along with this, there will be a growing need to answer the question of which country's courts will have jurisdiction to hear and decide the case if one of the parties decides to bring proceedings. From the consumer's point of view, it is essential to be able to infer that the activity is directed to the MS of the consumer's domicile. If this condition is met, the provisions of Section IV of the Brussels I bis Regulation will apply to the contract concluded between the consumer and the trader.

When assessing whether the condition of "directing the activity" has been met, the judgment in the *Pammer* case is of fundamental importance, as the CJEU explained both the positive and negative items of evidence indicating the "directing of activity". This judgment has become a precedential guideline for the decision-making practice of both Czech courts and the CJEU.

As regards the case of Booking.com, a platform through which many Czech consumers regularly book accommodation not only abroad, the article presented two possible solutions to the question of whether contracts concluded with Czech consumers through this platform fall within the scope of Article 17(1)(c) of the Brussels I bis Regulation. The first solution presented was the opinion that the mere fact of an accommodation provider placing an offer of accommodation on the Booking.com platform would, without further requirements, fulfill the condition of "directing the activity". In this case, it would be sufficient for the positive evidence to be met by Booking.com (which can certainly be considered to be the case), and it would not be necessary to further examine whether there is any other positive evidence from the accommodation provider. The second solution was based on the consideration that the activity of Booking.com, which undoubtedly fulfills the condition of "directing the activity", is considered only one of the positive items of evidence. Therefore, in order for Article 17(1)(c) to be applied to the contractual relationship in question, there would have to be additional items of evidence arising from the trader's overall activity, as the passive

⁴³ CJEU. Joined Cases C-585/08 and C-144/09.

⁴⁴ MEER, M. A. The Rise of E-Commerce and Its Impact on Retail. Medium [online]. 28 May 2024 [viewed 7 September 2025]. Available from: <https://medium.com/@MAMeer841/the-rise-of-e-commerce-and-its-impact-on-retail-ae1c9260d431>.

existence of an accommodation provider's offer on the Booking.com platform would not be sufficient *per se*.

Of the solutions offered, the author agrees most with the latter. In his view, it is not possible for an accommodation provider to fulfill the condition of "directing the activity" merely by placing an offer for accommodation on the Booking.com platform, without other circumstances also indicating their willingness to trade with consumers from certain MS. Furthermore, it cannot be ignored that the condition of "directing the activity" should be examined individually in each specific case by the national court that will decide on the matter. However, any general solution would deprive the national court of such powers. Apart from the above, it cannot be excluded that, in view of the principle of consumer protection as the weaker contracting party and the consumer-oriented decision-making practice of the CJEU⁴⁵, either the Czech courts or the CJEU could lean towards the first solution offered, i.e., an extensive interpretation of the condition of "directing the activity".

REFERENCES

1. BOSNER, Barbara. Cross-border trade and consumer protection. In: *Economic and Social Development (ESD)* [online]. Varazdin: Varazdin Development & Entrepreneurship Agency, 2017, pp. 419–426 [viewed 13 September 2025]. Available from: https://www.esd-conference.com/upload/book_of_abstracts/esd_Book_of_Abstracts_Split_2017_Online.pdf.
2. CALVO CARAVACA, Alfonso-Luis, et al. in *Brussels Ibis Regulation - Commentary* [online]. Edited by Ulrich MAGNUS and Peter MANKOWSKI. Verlag Dr. Otto Schmidt, 2016 [viewed 26 August 2025]. Available from: doi: 10.9785/9783504384807.
3. HAVELKA, Libor. Migrující spotřebitelé a určení mezinárodní příslušnosti v kontextu nařízení Brusel I bis. *Právní rozhledy*. 2016(24)18, pp. 625-631.
4. KORYNTOVÁ, Tereza, Jiří ŠRÁMEK, and Pavel PRAŽÁK. Mezinárodní pravomoc soudů ve sporech proti spotřebiteli. *Právní rozhledy*. 2016, 8, pp. 283-289.
5. KYSELOVSKÁ, Tereza, Naděžda ROZEHNALOVÁ et al. *Rozhodování Soudního dvora EU ve věcech příslušnosti: analýza rozhodnutí dle nařízení Brusel Ibis*. Brno: Masarykova univerzita, Právnická fakulta, 2014.
6. KYSELOVSKA, Tereza. A Critical Perspective on the Development of Internet Related Case Law for Online Consumer Contracts in the EU. In: *Proceedings of the 4th International Conference on European Integration 2018 (ICEI 2018), PTS 1-3* [online]. Ostrava: VSB – Technická univerzita Ostrava, 2018, pp. 893–900 [viewed 13 September 2025]. Available from: https://www.ekf.vsb.cz/share/static/ekf/www.ekf.vsb.cz/export/sites/ekf/icei/.content/galerie-souboru/ICEI-2018_Proceedings.pdf.
7. KYSELOVSKA, Tereza. Online cross-border (consumer) contracts from the

⁴⁵ See CJEU. Case C-190/11, case C-218/12, and case C-297/14.

- point of view of the case-law of the Court of Justice of the EU. In: *Cofola International 2017: Resolution of International Disputes* [online]. Brno: Masarykova univerzita, 2017, pp. 78–91 [viewed 13 September 2025]. Available from: [https://www.law.muni.cz/sborniky/cofola-international/cofola 2017.pdf](https://www.law.muni.cz/sborniky/cofola-international/cofola%202017.pdf).
8. KYSELOVSKÁ, Tereza. Příslušnost soudů ve sporech vyplývajících ze spotřebitelských smluv. *Revue pro právo a technologie*. 2013, 4(8), pp. 46-48.
 9. MANKOWSKI, Peter, et al. *Europäisches Zivilprozess - und Kollisionsrecht EuZPR/EuIPR, Band I: Brüssel Ia-VO*. Schmidt KG, Verlag, Otto, 2015.
 10. MEER, M. A. The Rise of E-Commerce and Its Impact on Retail. Medium [online]. 28 May 2024 [viewed 7 September 2025]. Available from: <https://medium.com/@MAMeer841/the-rise-of-e-commerce-and-its-impact-on-retail-ae1c9260d431>.
 11. TRÁVNÍČKOVÁ, Simona. Ochrana spotřebitele v závazkových právních vztazích s mezinárodním prvkem uzavíraných přes internet. *Časopis pro právní vědu a praxi*. 2011, 19(2), pp. 256-163.
 12. UHLÍŘOVÁ, Pavlína. *Procesní postavení osoby neznámého pobytu – ve světle Nařízení Brusel I bis*. Praha: Wolters Kluwer, 2019.

Equal Treatment of Shareholders Following the Audiolux Case

Paweł MAZUR

pawel.a.mazur@gmail.com

ORCID: 0000-0002-0398-3941

Postdoctoral Researcher

Law School, Mykolas Romeris University

Vilnius, Lithuania

Abstract: *This paper analyses the development of equal treatment of shareholders in EU law and argues that the Audiolux case does not end the discussion whether equal treatment of shareholders is a general principle of corporate law. EU secondary law and national statutes regulate aspects of equal treatment of shareholders. However, it is not always required to treat shareholders in the same way. They may be treated unequally, if necessary, as long as such treatment is proportionate, and justified by legitimate corporate purposes. In addition, decisions formally applied to all shareholders may be inadmissible if they unfairly discriminate while preserving the appearance of equality. Corporate law thus emphasizes fair treatment over strict equality, a position also supported by economic reasoning.*

Keywords: *corporate law, equality, equal treatment of shareholders, EU law, fairness, fair treatment, good faith, principles of law.*

JEL Classification: K22, K33

DOI: <https://doi.org/10.62768/ADJURIS/2025/5/04>

Please cite this article as:

Mazur, Paweł, „Equal Treatment of Shareholders Following the Audiolux Case”, in Grmelová, Nicole & Anna Kretková (eds.), *Prospects of Law in Business*, ADJURIS – International Academic Publisher, Bucharest, Paris, Calgary, 2025, p. 54-64, <https://doi.org/10.62768/ADJURIS/2025/5/04>.

1. INTRODUCTION

In the landmark decision in the *Audiolux*¹ case the Court of Justice of the EU (CJEU) did not refute the thesis that equal treatment of shareholders is a general principle of law. The secondary EU law governs various aspects of equal treatment of shareholders in both private and public companies. Thus, equal treatment of shareholders is an important part of the corporate law in the EU. It is also

¹ Judgment of the Court (Fourth Chamber) of 15 October 2009. *Audiolux SA e.a v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others*, ECLI:EU:C:2009:626.

confirmed by statutes in several EU member states².

However, in typical cases, EU law and the law of the EU member states does not require that all shareholders be treated identically; rather, it prohibits unfair discrimination among them³. This means that, in certain situations, a company may grant specific rights or benefits to selected shareholders while denying them to others.

Thus, this paper argues that EU law and law of the EU member states emphasizes the duty to act in good faith in corporate relations rather than strict equality of treatment of shareholders⁴. A prohibition of unfair discrimination of shareholders by the company and by controlling shareholders is part of the corporate duty of loyalty. The latter is derived from the general obligation to act in good faith⁵. In this vein, this paper aims to demonstrate that company law in Europe is based on the principle of “fair treatment of shareholders” rather than strict equality of treatment.

This paper focuses on corporate law issues connected with an obligation to treat shareholders equally. Certain aspects of equal treatment investors were also codified in the EU-securities law⁶. This paper does not analyse them, and in particular equal access to inside information based on the Market Abuse Regulation⁷. It does not discuss equal treatment in the case of a change of control under

² E.g. Article 53a of the German Joint Stock Companies Act, Article 47a of the Austrian Joint Stock Companies Act and Article 20 of the Polish Commercial Companies Code.

³ See MAZUR, Paweł. Equal Treatment of Shareholders and General Principles of Law. In: Book of Proceedings of the 2nd International Doctoral and Postdoctoral Conference in the Law and Law Related Fields – SPLITLAW 2025. Split: Faculty of Law, University of Split, 2025, p. 11. See also MERKT, Hanno. Der Gleichbehandlungsgrundsatz im Gesellschaftsrecht – Generalbericht. In: JUNG, Peter (Hrsg.). Der Gleichbehandlungsgrundsatz im Gesellschaftsrecht: Verhandlungen der Fachgruppe für vergleichendes Handels- und Wirtschaftsrecht anlässlich der 37. Tagung für Rechtsvergleichung, 19.–21. September 2019, Greifswald. Tübingen: Mohr Siebeck, 2021, p. 113 and the comparative review of the principle of equal treatment of shareholders in several civil law and common law countries.

⁴ MAZUR, *op.cit.*

⁵ In Germany it is argued that the obligation to treat shareholders equally is linked to the duty of loyalty in corporate relations (*Treuepflicht*). The latter is derived from the general duty to act in good faith (*Treu und Glauben*) – see VERSE, Dirk A. Der Gleichbehandlungsgrundsatz im Recht der Kapitalgesellschaften [online]. Mohr Siebeck, 2019 [viewed 24 September 2025]. Available from: doi:10.1628/978-3-16-157963-9, p. 87. Similar approach has been adopted in Austria (see DORALT, Peter, and Martin WINNER. *Aktiengesetz. Kommentar*. 3rd ed. Peter DORALT, Christian NOWOTNY, and Susanne KALSS (eds). Wien: Linde Verlag Ges.m.b.H., 2021. p. 593) and in Poland (see OPALSKI, Adam. *Zasada jednakowego traktowania wspólników i akcjonariuszy, Przegląd Prawa Handlowego*, 2012, no. 6, p. 5).

⁶ See MATTIG, Daniel. *Gleichbehandlung im europäischen Kapitalmarktrecht*. Tübingen: Mohr Siebeck, 2019, p. 19 and a comprehensive analysis of equal treatment of shareholders in the capital market law.

⁷ Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, OJ L 173, 12.6.2014, pp. 1–61 – the ‘Market Abuse Regulation’.

the EU Takeover Directive either⁸.

This paper is divided into seven parts. Part two clarifies what is understood by ‘equal treatment of shareholders’. In the paper this notion will be referred to a standard of verification of corporate decisions during the company’s operation and not to the requirement that all shareholders are granted the same rights. Part 3 discusses the statutory basis of the equal treatment of shareholders in the secondary law of the EU. Part 4 argues that even though in *Audiolux* the CJEU refused to recognize the principle of equal treatment of shareholders as a general principle of EU law, it does not provide arguments in favour of the thesis that equal treatment of shareholders is not a general principle of corporate law. This is because the decision of the ECJEU was based on constitutional arguments and balance of powers between institutions of the EU and not the negation of the role of equal treatment of shareholders. Part 5 considers whether equal treatment may be viewed as a general principle of corporate law and argues that such an approach would not be correct because shareholders may be treated differently if the decision to differentiate them is based on clear and verifiable criteria. At the same time, some decisions that apply to all shareholders in the same manner are not admissible. Thus, one could argue that shareholders should be treated fairly rather than equally. Part 6 makes the point that the obligation to treat shareholders fairly (and not necessarily equally) is economically justified. Part 7 offers a conclusion.

2. EQUALITY VS EQUAL TREATMENT OF SHAREHOLDERS

At the outset, it is necessary to explain the meaning of ‘equal treatment’. The concept can refer either to the allocation of rights and obligations among shareholders or to procedural fairness, which requires that corporate decisions be applied consistently to all shareholders⁹.

Referring to the notion of ‘equal treatment’ in the context of the allocation of rights and obligations among shareholders implies that any deviations from the proportional relationship between the number of shares held and the corresponding corporate powers should be regarded as exceptions to the principle of equal treatment of shareholders¹⁰. The practical utility of such principle would be limited as it would be subject to many exceptions. The implementation of Directive 2024/2810¹¹ confirms that pursuing complete equality among shareholders may be futile.

⁸ Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, OJ L 142, 30.4.2004, pp. 12–23 – the ‘Takeover Directive’.

⁹ HUECK, Götz. *Der Grundsatz der gleichmäßigen Behandlung im Privatrecht*. München: Beck, 1958, p. 278.

¹⁰ Such an approach is frequent in Poland – see for instance 15. POPIOŁEK, Wojciech. *Akcja – prawo podmiotowe*. Warszawa: C. H. Beck, 2010, p. 51.

¹¹ Directive (EU) 2024/2810 of the European Parliament and of the Council of 23 October 2024 on

In contrast, understanding equal treatment as a procedural norm — requiring that corporate decisions be applied consistently to all shareholders — does not imply that all shareholders must have identical rights. Accordingly, the shareholders may structure corporate governance as they see fit in the original articles of association¹². Equal treatment of shareholders serves primarily as a standard for assessing corporate decisions made during the company's existence. Such decisions should be applied uniformly to all shareholders unless a justified exception to the obligation of equal treatment exists.

This distinction is not always clear, and some jurisdictions apply both approaches interchangeably. In Poland, case law frequently links the principle of equal treatment of shareholders to the proportionality relation between shareholder's holdings and the scope of their corporate rights¹³. Swiss scholars adopt a similar approach, emphasizing that equal treatment is relative (relative *Gleichbehandlung*) and proportional to shareholding (*Proportionalitätsprinzip*)¹⁴.

By contrast, in Germany¹⁵ and Austria¹⁶, equal treatment is applied only to corporate decisions during the company's operation, not to the initial allocation of rights in the articles of association. Italian literature draws a comparable distinction between equal rights (*parità di diritti*) and equal treatment (*parità di trattamento*)¹⁷.

This paper will focus exclusively on the latter approach and will not address recent legislative changes concerning deviations from the one-share, one-vote principle.

3. MANIFESTATION OF EQUAL TREATMENT OF SHAREHOLDERS IN THE SECONDARY EU LAW

The principle of equal treatment in the corporate context has not been included in the primary law of the EU. Whereas the EU's Charter of Fundamental

multiple-vote share structures in companies that seek admission to trading of their shares on a multilateral trading facility, OJ L, 2024/2810, 14.11.2024 – 'Directive 2024/2810'.

¹² OPALSKI, Adam. In: OPALSKI, Adam (ed.). *Kodeks spółek handlowych. Tom IA. Spółki o-sobowe. Komentarz. Art. 1–36*. Warszawa: C. H. Beck, 2024, commentary to Article 20, marginal number 16.

¹³ See: Judgement of the Appellate Court in Katowice of 3 September 2021, V Aga 266/21, Legalis nr 2887446; judgment of the Polish Supreme Court of 30 September 2004, IV CK 713/03, OSNC 2005/9/160.

¹⁴ KUNZ, Peter; JUNG, Peter. Der Gleichbehandlungsgrundsatz im schweizerischen Gesellschaftsrecht. In: JUNG, Peter. *Der Gleichbehandlungsgrundsatz im Gesellschaftsrecht*. Tübingen: Mohr Siebeck, 2021, p. 84.

¹⁵ VERSE, *op. cit.*, p. 5.

¹⁶ GEIST, Reinhard. In: JABORNEGG, Peter.; STRASSER, Rudolf. *Kommentar zum Aktiengesetz*. Wien: LexisNexis, 2011, p. 597.

¹⁷ PASETTI, Giulio. *Parità di trattamento e autonomia privata*. Padova: Cedam, 1970, p. 70.

Rights invokes a requirement of equal treatment in several fields, it is only addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law (Article 51). It therefore has no direct impact consequences for the relations between individuals.

Moreover, EU law does not impose a general obligation to treat shareholders equally like Article 53a of the German Joint Stock Companies Act, Article 47a of the Austrian Joint Stock Companies Act or Article 20 of the Polish Commercial Companies Code. Interestingly, all those provisions were enacted to implement Article 42 of the Directive 77/91/EEC¹⁸, that requires that Member States ensure equal treatment of all shareholders who are in the same position in connection with the matters governed by the directive, i.e. amendments of the share capital. National legislators went beyond the scope of application of the directive by extending the duty to treat shareholders equally to all actions of the company, and not just to those falling within the scope of the said directive.

The obligation to treat shareholders equally laid down in Article 42 of the Directive 77/91/EEC was extended to share buybacks by the Directive 2006/68/EC¹⁹. Currently those issues are addressed by Directive 2017/1132²⁰ but the scope of application of the requirement to treat shareholders equally did not change and it continues to be limited to amendments of the share capital (Article 85) and to the share buyback (Article 60).

Secondary law of the EU regulates also certain aspects of equal access of shareholders of listed companies to corporate information. In this context one could invoke Article 17(1) of the Transparency Directive²¹ which imposes an obligation on issuers to make available certain information and documents relevant

¹⁸ Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent. OJ L 026, 31.01.1977, pp. 1-13 (Directive 77/91/EEC of 13 December 1976).

¹⁹ Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006 amending Council Directive 77/91/EEC as regards the formation of public limited liability companies and the maintenance and alteration of their capital. OJ L 264, 25.9.2006, pp. 32–36.

²⁰ Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law. OJ L 169, 30.6.2017, pp. 46–127. Also, see POPA TACHE, Cristina Elena & Elise Nicoleta VĂLCU. Artificial Intelligence and Corporate Liability. Towards a New Legal-Ethical Contract in the Dynamics of Emerging Global Human Rights Convergences. *Juridical Tribune – Review of Comparative and International Law*, 2025/2, pp. 281–305, p. 281.

²¹ Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC. OJ L 390, 31.12.2004, pp. 38–57 (“Transparency Directive”). See some details in HOHMANN, Balázs, Adrián FÁBIÁN & Gergely László SZŐKE. The Shades of the Concept of Transparency on the Horizon of European Technology Law and Platform Regulation. *Juridical Tribune – Review of Comparative and International Law*, 2025/1, pp. 44–62, p. 44.

to general meetings to all shareholders. The obligation to treat all shareholders who are in the same position about participation and the exercise of voting rights at the general meeting has been strengthened by the Shareholder Rights Directive (SDR)²². It proclaimed the principle of equal treatment for all shareholders who are in the same position with regard to the participation and the exercise of voting rights in the general meeting (Article 4 of the SRD).

4. THE AUDIOLUX CASE

In the absence of an express basis in secondary law, the CJEU, in its landmark decision in the *Audiolux* case, denied the existence of a general principle of equal treatment of shareholders in EU law. In her opinion preceding the judgement of the CJEU, the Advocate General Trstenjak emphasized that such a general principle cannot be derived directly from primary law in the absence of explicit provisions in the founding treaties²³. Moreover, given the limited scope of the duty of equal treatment of shareholders under Article 42 of Directive 77/91/EEC, the principle could not be inferred from that directive or from any other act of secondary EU law. Consequently, the Advocate General concluded that recognizing a general principle of equal treatment of shareholders would risk upsetting the institutional balance and encroaching upon the legislator's competences. The CJEU shared this view, holding that EU law does not recognize such a general principle.

The *Audiolux* judgment should not be read as diminishing the importance of equal treatment of shareholders in Europe. What the CJEU clarified was narrower: equal treatment is not a general principle of EU law that, on its own, could create an obligation to share a control premium equally among all shareholders in a change-of-control transaction. For such an obligation to exist, a specific legal basis is required²⁴. This basis was later introduced by the Takeover Directive, which, however, did not yet apply to the transaction at issue in *Audiolux*.

The CJEU's reasoning in *Audiolux* was primarily concerned with the division of powers between the EU and its Member States. Because EU competences in company law are not exclusive, any areas not harmonised at EU level remain within the jurisdiction of national legislatures. The CJEU therefore refused to construct unwritten principles of EU corporate law that might limit national autonomy, and it avoided stepping into the role of the legislator itself.

²² Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies. OJ L 184, 14.7.2007, pp. 17–24 (“SRD” or “Shareholders Rights Directive”).

²³ Opinion of the Advocate General Trestenjak delivered on 30 June 2009, Case C-101/08 *Audiolux and Others*, ECLI:EU:C:2009:410, para 75.

²⁴ See: MUCCIARELLI, Francesco. Equal treatment of shareholders and European Union law. Case note on the Decision “*Audiolux*” of the European Court of Justice. *European Company and Financial Law Review*, 2010/1, pp. 158-167. Available from: doi:10.1515/ecfr.2010.158, p. 166.

Accordingly, the fact that the CJEU rejected equal treatment of shareholders as a general EU law principle does not mean that the concept lacks importance within European company law more broadly. To assess whether equal treatment functions as a foundational principle, one must instead look to the laws of individual Member States, which continue to hold primary authority in this field.

5. FAIR TREATMENT VS EQUAL TREATMENT

The frequent invocation of the obligation to treat shareholders equally in secondary EU law and in national legal orders, along with the inconclusive character of the *Audiolux* case, allows one to consider whether the equal treatment of shareholders may be regarded as a general principle of corporate law.

While the principle of equal treatment of shareholders is frequently invoked in the secondary EU law (with a narrow scope of application) and in national legal orders, case law from multiple jurisdictions demonstrates that strict equal treatment is neither absolute nor always required, and that unequal treatment may be legally permissible when it serves legitimate corporate objectives.

The Directive 2017/1132 limits the scope of application of the principle of equal treatment of shareholders with reference to amendments of the share capital share buybacks to shareholders ‘who are in the same position’ (Article 60 and Article 85). It means that some shareholders may be treated preferentially, if one could demonstrate that their position differs from the one applying to other shareholders. Some jurisdictions further elaborate this principle through doctrines of objective justification and proportionality. Germany requires that unequal treatment have a ‘substantive reason’ (*Sachlicher Grund*) and satisfy suitability, necessity, and proportionality tests²⁵, while Austria permits unequal treatment if it serves a ‘legitimate purpose’ (*Schutzwürdiges Interesse*) and is proportionate. Similar approach has been developed in the Netherlands, where it is argued that unequal treatment of shareholders is permissible if it is intended to achieve a legitimate purpose and is proportionate to the means used to do so²⁶.

²⁵ The doctrine of substantive reason was shaped by the Kali und Salz judgment (i.e. judgment of the German Federal Court of Justice of 21 March 1978, BGHZ 71, 40). It allows unequal treatment of shareholders if such diversified approach to holders of shares serves a purpose justified by the company’s legitimate interest, is necessary to achieve that purpose, and is not disproportionate to the interests of the shareholders treated unequally. The application of such proportionality test leads to the conclusion that the mere fact that differentiated treatment of shareholders situated in comparable circumstances serves the interests of the company does not, in itself, justify a departure from the principle of equal treatment of shareholders. Such differentiation would result in the subordination of the individual shareholder’s interest to that of the company - see also VERSE, *op.cit.*, pp. 287-295.

²⁶ See DE KLUIVER, Harm-Jan, and Joti ROEST. Deviations from the ‘one share, one vote’ principle in the Netherlands. Legal and empirical considerations. *European Company Law* [online]. 2025, 22(3), pp. 94–100 [viewed 12 October 2025]. Available from: doi:10.54648/eucl2025018, p.

Thus, jurisdictions in which the doctrine of equal treatment of shareholders is well developed (such as Germany, Austria and the Netherlands²⁷) agree that a divergent approach to different groups of shareholders is admissible, provided that it satisfies the proportionality test. The practical application of this approach is the cross-border merger case involving Mediaset - an international media group²⁸. In course of the cross-border merger with its subsidiaries Mediaset adopted a loyalty voting scheme. The court found that granting loyalty shares to selected shareholders may be tolerated if intended to promote long-term shareholder engagement. However, in the Mediaset case the court struck down the scheme because it was neither necessary nor proportionate, finding that its primary purpose was to consolidate absolute control of the shareholder who benefited from the scheme (Berlusconi family) and marginalize the second-largest shareholder (Vivendi S.A. controlled by the Bolloré family)²⁹. In conclusion, equal treatment is context-dependent: while formal equality is a guiding principle, unequal treatment may be admissible when objectively justified, proportionate, and aligned with legitimate corporate purposes.

As already mentioned, equal treatment is not always required. In addition, it is not a safe harbour for corporate decisions. A decision that ostensibly applies equally to all shareholders but in practice grants disproportionate benefits to one shareholder or is intended to discriminate against a group of shareholders, may be deemed inadmissible. German law distinguishes between open discrimination, where a given decision applies differently to various groups of shareholders (*formale Ungleichbehandlung*), and substantive discrimination (*materielle Ungleichbehandlung*), that is, an action which ostensibly applies to all shareholders but, in practice, discriminates against some of them³⁰. A practical example of the latter is a rights issue, structured specifically to dilute that shareholder's stake (where it is known that a particular shareholder lacked the funds to participate in a rights issue)³¹. Similarly, repeated decisions not to distribute dividends (i.e., decisions that ostensibly apply equally to all shareholders) may be deemed inadmissible if, at the same time, the company grants abnormally high bonuses to managers who are also controlling shareholders³². These examples illustrate that

97.

²⁷ Similar approach is advocated by some Polish scholars – see OPALSKI, Adam. In: OPALSKI, Adam (ed.). *Kodeks spółek handlowych. Tom IA. Spółki osobowe. Komentarz. Art. 1–36*. Warszawa: C. H. Beck, 2024, commentary to Article 20, marginal number 8.

²⁸ DE KLUIVER, *op. cit.*

²⁹ Judgment of the Court of Appeal in Amsterdam of 1 September 2020, ECLI:NL:GHAMS:2020:2379, JOR 2020/279.

³⁰ VERSE, *op. cit.*, p. 93.

³¹ See the judgement of the Polish Supreme Court of 15 March 2002, case no. II CKN 677/00, Legalis; *Re a Company* (No 007623 of 1984), [1986] BCL 362.

³² See the judgement of the Polish Supreme Court of 30 April 2021, case no. V CSK 25/21, V CSK 25/21, Legalis nr 2577480; judgment of the French Court of Cassation of 30 August 2023, n° 22-13.851 (n° 722 F-B); judgment of the High Court of England and Wales of 2019, [2019] 1 BCLC

the principle of equal treatment is context-dependent, and that the mere fact a corporate decision applies uniformly to all shareholders does not suffice to shield it from judicial scrutiny.

Thus, the obligation to treat shareholders equally is neither absolute nor is it a safe harbour for corporate decisions. Its role is to protect shareholders from arbitrary discrimination contrary to the requirements of good faith. Thus, the notion ‘equal treatment of shareholders’ could be well substituted with ‘fair treatment of shareholders’³³.

6. LAW AND ECONOMICS OF EQUAL TREATMENT OF SHAREHOLDERS

Protecting shareholders against arbitrary discrimination by imposing an obligation of fair treatment of shareholders is economically justified as it reduces cost of capital. If majority shareholders were able to make arbitrary decisions, uncertainty about potential returns — and thus investment risk borne by shareholders — would be substantially higher. Investors would consequently demand a higher risk premium, reducing the value of their contributions to subscribe for company shares and increasing the cost of equity financing³⁴.

At the same time the requirement of absolute equal treatment would not be economically efficient. From an economic perspective, departures from equality may be justified when granting disproportionate benefits to a particular shareholder enhances the company’s overall performance or optimizes asset utilization, rather than merely reflecting the controlling shareholder’s ability to impose their will on minority investors³⁵. Such situations may occur, for instance, when additional benefits are necessary to secure a shareholder’s talent and commitment. In each case, it is essential to assess whether the resulting advantages outweigh associated costs, including higher financing costs for other shareholders due to a discount arising from the reduction of rights attached to their shares.

Therefore, from the economic point of view equal treatment of shareholders is not a moral imperative, but rather an instrument enabling the achievement of economically rational outcomes. Unequal treatment of shareholders may be fair if it is motivated by the goal of maximizing value, rather than by the particular interests of managers or majority shareholders³⁶. Economically optimal

171 (Re Edwardian Group Ltd, Estera Trust Ltd v Singh).

³³ Interestingly, in the recitals of Directive 2024/2810, the EU legislator explains that it intends to provide fair treatment of shareholders (see recitals 11 and 14 of Directive 2024/2810).

³⁴ BRUDNEY, Victor. Equal treatment of shareholders in corporate distributions and reorganizations. *California Law Review* [online]. 1983, 71(4), 1072 [viewed 12 October 2025]. Available from: doi:10.2307/3480195, p. 1078.

³⁵ See EASTERBROOK, Frank, FISCHER, Daniel. *The Economic Structure of Corporate Law*. Cambridge: Harvard University Press, 1991, p. 110.

³⁶ *Ibid.*

results, depending on the circumstances, may be achieved either through uniform or differentiated treatment of shareholders. Equality, therefore, is not an autonomous value in corporate law. What matters is fair conduct aimed at maximizing the value generated by the corporation, rather than at fulfilling the demands of particular interest groups.

7. CONCLUSIONS

In *Audiolux*, the CJEU did not reject the thesis that equal treatment of shareholders is a general principle of law. This principle is also frequently invoked in EU secondary law and in the legal orders of the EU member states. However, equal treatment of shareholders is not always required. Shareholders may be treated unequally if it is necessary and proportionate to achieve a legitimate purpose and justified by the interests of the company. At the same time, in some cases, a decision applied in the same manner to all shareholders may be deemed inadmissible if it, in practice, unfairly discriminates against certain shareholders while merely preserving the façade of equal treatment. Thus, one could argue that company law is based on the principle of “fair treatment of shareholders” rather than strict equality of treatment. Such an approach is also supported from an economic standpoint.

REFERENCES

1. BRUDNEY, Victor. Equal treatment of shareholders in corporate distributions and reorganizations. *California Law Review* [online]. 1983, 71(4), 1072 [viewed 12 October 2025]. Available from: doi:10.2307/3480195.
2. DE KLUIVER, Harm-Jan, and Joti ROEST. Deviations from the ‘one share, one vote’ principle in the Netherlands. Legal and empirical considerations. *European Company Law* [online]. 2025, 22(3), pp. 94–100 [viewed 12 October 2025]. Available from: doi:10.54648/eucl2025018.
3. DORALT, Peter, and Martin WINNER. in *Aktiengesetz. Kommentar*. 3rd ed. Peter DORALT, Christian NOWOTNY, and Susanne KALSS (eds). Wien: Linde Verlag Ges.m.b.H., 2021.
4. EASTERBROOK, Frank, FISCHER, Daniel. *The Economic Structure of Corporate Law*. Cambridge: Harvard University Press, 1991.
5. GEIST, Reinhard. In: JABORNEGG, Peter.; STRASSER, Rudolf. *Kommentar zum Aktiengesetz*. Wien: LexisNexis, 2011.
6. HOHMANN, Balázs, Adrián FÁBIÁN & Gergely László SZŐKE. The Shades of the Concept of Transparency on the Horizon of European Technology Law and Platform Regulation. *Juridical Tribune – Review of Comparative and International Law*, 2025/1, pp. 44–62.
7. HUECK, Götz. *Der Grundsatz der gleichmäßigen Behandlung im Privatrecht*. München: Beck, 1958.
8. KUNZ, Peter; JUNG, Peter. Der Gleichbehandlungsgrundsatz im schweizerischen Gesellschaftsrecht. In: JUNG, Peter. *Der Gleichbehandlungsgrundsatz im*

- Gesellschaftsrecht*. Tübingen: Mohr Siebeck, 2021.
9. MATTIG, Daniel. *Gleichbehandlung im europäischen Kapitalmarktrecht*. Tübingen: Mohr Siebeck, 2019.
 10. MAZUR, Paweł. Equal Treatment of Shareholders and General Principles of Law. In: *Book of Proceedings of the 2nd International Doctoral and Postdoctoral Conference in the Law and Law Related Fields – SPLITLAW 2025*. Split: Faculty of Law, University of Split, 2025.
 11. MERKT, Hanno. Der Gleichbehandlungsgrundsatz im Gesellschaftsrecht – Generalbericht. In: JUNG, Peter (Hrsg.). *Der Gleichbehandlungsgrundsatz im Gesellschaftsrecht: Verhandlungen der Fachgruppe für vergleichendes Handels- und Wirtschaftsrecht anlässlich der 37. Tagung für Rechtsvergleichung, 19.–21. September 2019*, Greifswald. Tübingen: Mohr Siebeck, 2021.
 12. MUCCIARELLI, Francesco. Equal treatment of shareholders and European Union law. Case note on the Decision “Audiolux” of the European Court of Justice. *European Company and Financial Law Review*, 2010/1, pp. 158-167. Available from: doi:10.1515/ecfr.2010.158, p. 166.
 13. OPALSKI, Adam. In: OPALSKI, Adam (ed.). *Kodeks spółek handlowych. Tom IA. Spółki osobowe. Komentarz. Art. 1–36*. Warszawa: C. H. Beck, 2024.
 14. OPALSKI, Adam. Zasada jednakowego traktowania wspólników i akcjonariuszy, *Przegląd Prawa Handlowego*, 2012, no. 6.
 15. PASETTI, Giulio. *Parità di trattamento e autonomia privata*. Padova: Cedam, 1970.
 16. POPIOŁEK, Wojciech. *Akcja – prawo podmiotowe*. Warszawa: C. H. Beck, 2010.
 17. POPA TACHE, Cristina Elena & Elise Nicoleta VÂLCU. Artificial Intelligence and Corporate Liability. Towards a New Legal-Ethical Contract in the Dynamics of Emerging Global Human Rights Convergences. *Juridical Tribune – Review of Comparative and International Law*, 2025/2, pp. 281–305.
 18. VERSE, Dirk A. *Der Gleichbehandlungsgrundsatz im Recht der Kapitalgesellschaften* [online]. Mohr Siebeck, 2019 [viewed 24 September 2025]. Available from: doi:10.1628/978-3-16-157963-9.

Regulatory Challenges in Cross-Border Gas Trading Between the EU and Ukraine: Reporting Burden and Compliance Risks

Bc. Anastasiia PALIENKO

anastasiia.paliienko@cevro.cz

Master's student, Department of Private Law

CEVRO University

Prague, Czech Republic

Abstract: *Cross-border natural gas trading between the EU and Ukraine is shaped by differing regulatory regimes, particularly regarding the Regulation on Wholesale Energy Market Integrity and Transparency (REMIT) reporting obligations. While the EU operates under a comprehensive framework of transaction reporting, transparency and enforcement under the supervision of the Agency for the Cooperation of Energy Regulators (ACER) and national regulators, Ukraine is still in the process of implementing comparable rules through gradual alignment with the Energy Community acquis. Applying comparative analysis of EU and Ukrainian frameworks, drawing on regulatory documents and policy reports, the paper shows how this asymmetry is recognised as a source of compliance risks for market participants, including duplicative requirements and legal uncertainty in cross-border transactions. The paper analyses how these challenges are reflected in practice, considers the perspectives of regulatory authorities at both EU and Ukrainian level, and discusses future steps that have been promised or recommended in the context of market integration, highlighting their relevance for easing reporting burdens, strengthening regulatory cooperation and ensuring that cross-border gas trade remains efficient and attractive for market participants.*

Keywords: *ACER; compliance burden; cross-border gas trading; Energy Community; European Union; NEURC; REMIT Ukraine.*

JEL Classification: K23, K33

DOI: <https://doi.org/10.62768/ADJURIS/2025/5/05>

Please cite this article as:

Paliienko, Anastasiia, „Regulatory Challenges in Cross-Border Gas Trading Between the EU and Ukraine: Reporting Burden and Compliance Risks”, in Grmelová, Nicole & Anna Kretková (eds.), *Prospects of Law in Business*, ADJURIS – International Academic Publisher, Bucharest, Paris, Calgary, 2025, p. 65-77, <https://doi.org/10.62768/ADJURIS/2025/5/05>.

1. INTRODUCTION

The liberalisation of the European gas market and the gradual integration of Ukraine into the EU energy framework have created both opportunities and

new regulatory challenges. Ukraine's underground gas storage (UGS) capacities are increasingly central for European traders seeking flexibility in supply, especially under the pressures of geopolitical risk and seasonal volatility.¹ At the same time, the EU has entered a phase of stricter regulatory enforcement: 2024 has already been described as a record year for fines under the Regulation (EU) No 1227/2011 on Wholesale Energy Market Integrity and Transparency (REMIT), with penalties exceeding EUR 120 million across the Union.² Ukraine, meanwhile, has adopted Law No. 3141-IX approximating the REMIT framework (entered into force in July 2023)³, together with secondary regulations issued by the National Energy and Utilities Regulatory Commission (NEURC) to operationalise reporting and disclosure obligations in line with the EU *acquis*.⁴ This combination of stricter enforcement in the EU and an emerging but incomplete framework in Ukraine creates practical frictions for traders operating across both jurisdictions.⁵

In this context, the paper examines the ways in which asymmetries between EU and Ukrainian REMIT-equivalent frameworks affect traders in practice — most visibly through extra reporting duties and compliance risks in cross-border gas transactions.

Existing literature and monitoring reports provide important insights into how REMIT has evolved in the EU. Academic analyses emphasise the regulatory role of the Agency for the Cooperation of Energy Regulators (ACER) and the operational significance of the Transaction Reporting User Manual (TRUM), while recent studies underline how enforcement actions contribute to deterrence in wholesale energy markets.⁶ At the same time, ACER's latest monitoring reports show that reporting obligations continue to expand, which raises concerns

¹ BRUEGEL. *How Ukrainian gas storage can contribute to Europe's security of supply* [online]. Brussels: Bruegel, 2023. Available at: <https://www.bruegel.org/analysis/how-ukrainian-gas-storage-can-contribute-europes-security-supply>.

² ACER. *REMIT Quarterly Report Q3 2024* [online]. Ljubljana: Agency for the Cooperation of Energy Regulators, 2024. Available at: <https://remitcloud.de/en/acer-remit-quarterly-report-2024-q3/>; CUBELOGIC. 2024: *A Record Year for REMIT Enforcement* [online]. 21 January 2025 [accessed 2025-09-24]. Available at: <https://cubelogic.com/2025/01/21/2024-a-record-year-for-remit-enforcement/>.

³ UKRAINE. Law of Ukraine No. 3141 of 10 June 2023 on Making Changes to Some Laws of Ukraine Regarding the Prevention of Abuse in Wholesale Energy Markets. Official Gazette of the Verkhovna Rada of Ukraine. 2023. Available at: <https://zakon.rada.gov.ua/laws/show/3141-20#Text>.

⁴ LEXOLOGY. *Ukraine: Implementation of REMIT and NEURC Resolutions* [online]. 2024. Available at: <https://www.lexology.com/library/detail.aspx?g=7813c39a-57be-4c3e-b331-ecf45a3af566>.

⁵ ENERGY COMMUNITY SECRETARIAT. *Implementation Report 2024* [online]. Vienna: Energy Community Secretariat, 2024. Available at: <https://www.energy-community.org/implementation/Ukraine.html>.

⁶ GODIN, Jean-Théodore, POLET, Manon, and JAMAR DE BOLSÉE, Arthur. "Implementing REMIT: What a Legal Analysis Tells about the (Regulatory) Role of ACER." *European Journal of Risk Regulation*. 2018, 9(2), pp. 192-207. DOI: 10.1017/err.2018.17; BERCEANU, Ionut Bogdan.

among market participants about the balance between transparency and administrative burden.⁷ However, scholarly work analysing the compliance cost burden for firms under REMIT remains relatively sparse, especially in the context of cross-border trade. On the Ukrainian side, the Energy Community Secretariat's assessment of the 2023 Law shows that while there is clear progress in aligning with EU obligations, significant gaps remain in enforcement coordination, data exchange, and clarity of secondary regulation.⁸

This paper adopts a descriptive and comparative law-and-economics approach. It draws on secondary sources — ACER guidance, TRUM, REMIT monitoring reports, EU Commission assessments, Energy Community and NEURC documentation — and compares the EU and Ukrainian frameworks to highlight structural asymmetries. Both EU and Ukrainian sources, including legislation and regulatory acts, are examined to provide a balanced view of the reporting and compliance landscape. The analysis applies a qualitative comparative method combining legal interpretation, document analysis, and institutional comparison to identify key differences affecting market participants.

The focus of this paper is practical: it identifies how regulatory asymmetries translate into additional reporting burdens, higher compliance costs, and potential legal risks for market participants. Rather than proposing large-scale reforms, it highlights short-term steps that companies can take to organise compliance more efficiently, and points to areas where closer coordination between EU and Ukrainian regulators could reduce friction. By concentrating on the business dimension of compliance, the paper seeks to make cross-border gas trade more predictable and manageable under evolving REMIT frameworks.

2. REGULATORY FRAMEWORKS: EU VS UKRAINE

This section outlines the regulatory frameworks as they operate in practice — that is, the combination of legal rules, supervisory institutions, and reporting infrastructures relevant to market participants. The focus is not only on the formal legislation but also on how these systems function day-to-day, since for cross-border traders the practical burdens and risks often arise at the operational rather than purely legal level.

Doctrinal Analysis of REMIT II's Sanctioning Framework. Laws [online]. 2025, 14(5), 61. Available at: <https://doi.org/10.3390/laws14050061>.

⁷ ACER. *REMIT Quarterly Report Q3 2024* [online]. Ljubljana: Agency for the Cooperation of Energy Regulators, 2024. Available at: <https://remitcloud.de/en/acer-remit-quartely-report-2024-q3/>.

⁸ ENERGY COMMUNITY SECRETARIAT. *Assessment of the Law of Ukraine "On Amendments to Some Laws of Ukraine regarding the prevention of abuse in the wholesale energy markets"* [online]. Vienna: Energy Community Secretariat, 2023. Available at: https://www.energy-community.org/dam/jcr%3A02c32f91-2f3a-4eef-8f93-5f12fdb465a1/20072023_UEMO_REMIT_Law_final_clean.pdf.

2.1. The EU Framework

The European Union operates a comprehensive regime for monitoring wholesale energy markets under the Regulation on Wholesale Energy Market Integrity and Transparency (REMIT). Market participants must report transactions in wholesale energy products — including standard and non-standard contracts, orders, and fundamental data — to the Agency for the Cooperation of Energy Regulators (ACER) through Registered Reporting Mechanisms (RRMs). Organised Market Places (OMPs) and Persons Professionally Arranging Transactions (PPATs) also hold delegated reporting obligations. Inside information is disclosed through authorised Inside Information Platforms (IIPs)⁹, which since 2024 under Regulation (EU) 2024/1106 amending Regulation (EU) No 1227/2011 on wholesale energy market integrity and transparency (REMIT II)¹⁰ have replaced company websites as the official channel for transparency requirements.

Regulation (EU) 2024/1106 amending Regulation (EU) No 1227/2011 on wholesale energy market integrity and transparency (REMIT II) also broadened the scope of reportable products (notably LNG and balancing contracts), tightening data-validation requirements, and strengthening ACER's supervisory tools.¹¹ These changes are reflected in ACER's Transaction Reporting User Manual (TRUM v.7.0)¹², which revises contract categories and reporting fields.

The REMIT framework forms part of the EU's broader gas-market architecture, which was recently updated by the Hydrogen and Decarbonised Gas Market Package (2024), consisting of Directive (EU) 2024/1788¹³ and Regulation (EU) 2024/1789¹⁴. This package extends the same principles of transparency, integrity, and regulatory cooperation to renewable and low-carbon gases, including hydrogen. It also promotes closer cooperation with the Energy Community, which directly links to Ukraine's integration path—showing where the EU energy market is heading and why regulatory alignment matters long-term.

⁹ Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (REMIT) *OJ L* 326, 8.12.2011, p. 1.

¹⁰ Regulation (EU) 2024/1106 of the European Parliament and of the Council of 11 April 2024 amending Regulation (EU) No 1227/2011 on wholesale energy market integrity and transparency (REMIT II). *OJ L*, 2024/1106, 17.4.2024.

¹¹ *Ibid.*

¹² ACER. Transaction Reporting User Manual (TRUM), Version 7.0 [online]. Ljubljana: Agency for the Cooperation of Energy Regulators, December 2024. Available at: <https://acer.europa.eu/remit-documents>.

¹³ Directive (EU) 2024/1788 of the European Parliament and of the Council of 13 June 2024 on common rules for the internal markets for renewable gas, natural gas and hydrogen, amending Directive (EU) 2023/1791 and repealing Directive 2009/73/EC. *OJ L*, 2024/1788, 15.7.2024.

¹⁴ Regulation (EU) 2024/1789 of the European Parliament and of the Council of 13 June 2024 on the internal markets for renewable gas, natural gas and hydrogen, amending Regulations (EU) No 1227/2011, (EU) 2017/1938, (EU) 2019/942 and (EU) 2022/869 and Decision (EU) 2017/684 and repealing Regulation (EC) No 715/2009. *OJ L*, 2024/1789, 15.7.2024.

2.2. The Ukrainian Framework

The adoption of Law No. 3141-IX in 2023 introduced rules on wholesale energy market transparency and integrity, modelled after REMIT.¹⁵ The framework is implemented through secondary legislation adopted by the National Energy and Utilities Regulatory Commission (NEURC) in 2024, in particular Resolution No. 137/2024 on inside-information platforms¹⁶, Resolution No. 614/2024 on integrity and transparency requirements¹⁷ and Resolution No. 618/2024 on transaction reporting.¹⁸

The technical infrastructure is still developing. The LLC Gas TSO of Ukraine (GTSOU) operates the Transparency Platform that publishes data on physical flows, entry/exit capacities, nominations, allocations and outages, and also serves as a designated Data-Transmission Administrator under Resolution No. 618/2024, providing the channel for reporting bilateral contracts such as cross-border deliveries and storage by non-residents. The Ukrainian Energy Exchange (UEEX) publishes auction results and reports standardised exchange trades. Inside information is disclosed through licensed IIPs, currently NEURC has included NEC Ukrenergo, JSC Market Operator and LLC Gas TSO of Ukraine in the official IIP Register.

2.3. Comparative Observations

The two regimes diverge in ways that directly shape cross-border activity. REMIT as amended now covers a broader spectrum of gas products —including LNG and balancing — while Ukraine’s regime, though modelled on REMIT, remains narrower and not yet fully aligned.¹⁹

¹⁵ UKRAINE. Law of Ukraine No. 3141 of 10 June 2023 on Making Changes to Some Laws of Ukraine Regarding the Prevention of Abuse in Wholesale Energy Markets. Official Gazette of the Verkhovna Rada of Ukraine. 2023. Available at: <https://zakon.rada.gov.ua/laws/show/3141-20#Text>.

¹⁶ NEURC. Resolution No. 137 of 16 January 2024 on the Approval of the Procedure for the Functioning of Insider Information Platforms [online]. Available at: <https://www.nerc.gov.ua/acts/prozatverdzhennya-poryadku-funkcionuvannya-platform-insajderskoyi-informaciyi>.

¹⁷ NEURC. Resolution No. 614 of 27 March 2024 on Approval of Requirements for Ensuring Integrity and Transparency in the Wholesale Energy Market [online]. Available at: <https://www.nerc.gov.ua/acts/pro-zatverdzhennya-vimog-shchodo-zabezpechennya-dobrochesnosti-ta-prozorsti-na-optovomu-energetichnomu-rinku>.

¹⁸ NEURC. Resolution No. 618 of 27 March 2024 on the Approval of the Procedure for Submitting Information on Completed Economic and Trade Operations Related to Wholesale Energy Products [online]. Available at: <https://www.nerc.gov.ua/acts/pro-zatverdzhennya-poryadku-podannya-informaciyi-pro-zdijsneni-gospodarsko-torgovelni-operaciyi-povyazani-z-optovimi-energetichnimi-produktami>.

¹⁹ ENERGY COMMUNITY SECRETARIAT. Annual Implementation Report 2024: Ukraine [online]. Ljubljana: Agency for the Cooperation of Energy Regulators, 2024. Available at: <https://www.energy-community.org/>

Product definitions remain inconsistent, particularly balancing and intra-group contracts. Under REMIT, intra-group transactions are generally exempt from publication if they have no potential impact on market prices. Ukraine's law doesn't provide clarity in this regard yet, which creates an extra reporting burden. Under NEURC's Resolution 618, intragroup contracts are no longer considered standard contracts, which means they don't need to be reported via the exchange. However, the law doesn't clearly say whether this exemption also applies to non-standard bilateral contracts, so for now, companies tend to treat those on a case-by-case basis — in practice, that's one of the reporting grey areas still awaiting clarification.

Certain storage and capacity operations conducted under the customs-warehouse regime also fall outside both frameworks. Because these transactions take place between non-resident entities outside the customs territory of Ukraine, they are not reportable to ACER (delivery occurs beyond EU jurisdiction) and not captured by NEURC's reporting channels, which cover only trades within the national market.

Disclosure practice also differs. In the EU, inside information must be published in a timely and public manner via IIPs, with postponement permitted only under narrowly defined conditions subject to review. In Ukraine, according to Resolution No. 614/2024, NEURC formally retains the discretion to accept or question the reason, but the regulation does not establish clear criteria or guidelines as to which justifications are sufficient. As a result, public disclosure is automatically deferred until the end of martial law, with *ex post* publication required, while firms face uncertainty about the regulator's expectations. This ensures supervisory oversight but creates prolonged information asymmetry for market participants. The combined effect has been described in policy monitoring as "compliance without transparency", which raises uncertainty and weakens the commercial case for engagement when other war-related constraints already exist.²⁰

The differences are particularly visible in reporting practice, which technical and administrative infrastructures further amplify. EU reporting is automated and interoperable, with delegation to RRM — including OMP platforms (such as ICE Endex and EEX) and service providers such as Equias/ EFETnet and Trayport. Market participants submit automated XML-based transaction reports through RRM to ACER within one working day after execution ("T+1").

In Ukraine, bilateral trades must be reported via designated administrators, UEEX handles standard trades, and IIPs (Ukrenergo, Market Operator, GTSOU) publish inside information. Standard contracts are reported via the

²⁰ ENERGY COMMUNITY SECRETARIAT. Ukraine Energy Market Observatory Assessment 2/25: On the termination of the data publication in the electricity market [online]. Vienna: Energy Community, 2025. Available at: <https://www.energy-community.org/>.

UEEX exchange within the same time frame (“T+1”), while non-standard contracts are uploaded manually in CSV format within 30 calendar days (“T+30”) via GTSOU’s Transparency Platform.

These channels remain fragmented and non-interoperable with EU systems, limiting firms’ ability to reuse compliance pipelines. Within the EU, both sides of a trade report to ACER, yet the system automatically matches their submissions through a Unique Transaction Identifier (UTI) and shared XML schema. By contrast, ACER’s and NEURC’s repositories have no interoperability, leading to separate datasets with different formats, validation rules, and timelines. Fragmented reporting standards and inconsistent validation rules across jurisdictions increase compliance costs and reduce data reliability in regulatory monitoring systems.²¹

The trigger for reporting obligations must also be considered. Under REMIT, reporting depends on the delivery point: if delivery takes place within the EU, the transaction must be reported to ACER; if it occurs on the Ukrainian side, it is reported to NEURC. In cross-border trade, each counterparty reports its own side of the same physical flow to its respective regulator, which as a result generates two distinct reports.

Additionally, some EU companies that hold or trade Ukrainian storage or balancing capacity under the customs-warehouse regime qualify as market participants in Ukraine. For such activities, they must report to NEURC — typically via the GTSOU Transparency Platform for non-standard or bilateral contracts — often in parallel with their REMIT reporting to ACER.

Enforcement and monitoring also diverge. Whereas ACER has adopted a more assertive posture, supported by updated TRUM validation rules and a sharp increase in suspicious transaction reports (STRs) and fines²², and a broader shift toward proactive market oversight.²³ Ukraine’s enforcement remains more cautious. Implementation has been supported by the Energy Community Secretariat and donor programmes such as USAID’s Energy Security Project, but institutional capacity within NEURC is constrained, particularly under wartime

²¹ HIEMSTRA, Liebrich M. Energy trading and the exchange of information between supervisors : effectiveness of fragmented supervision and information sharing in view of reporting obligations for energy trading. *Journal of Energy & Natural Resources Law*. 2021, 39(2), 159–182. DOI: 10.1080/02646811.2020.1841400.

²² ACER. Transaction Reporting User Manual (TRUM), Version 7.0, December 2024 [online]. Ljubljana: Agency for the Cooperation of Energy Regulators, 2024. Available at: <https://acer-remit-publications.europa.eu/>.

²³ BERCEANU, Iomut-Bogdan, CĂRĂUȘAN, Mihaela Victorita and ZORZOANĂ, Alina, The Regulation of Market Manipulation in the EU Energy Sector: doctrinal analysis of REMIT II’s sanctioning framework, *Laws*, 14(5) (2025), 61. DOI: 10.3390/laws14050061; KLOPČIČ, Alenka Lena *et al.* The key player or just a paper tiger? The effectiveness of the Agency for the Cooperation of Energy Regulators (ACER) in the creation and functioning of the EU’s internal energy market. *The Electricity Journal*. 2022, 35(9), 107207. DOI: 10.1016/j.tej.2022.107207.

conditions.²⁴

Registration and market access also contrast. In the EU, a one-time registration (LEI + ACER code) enables trading across Member States, reducing administrative friction. In Ukraine, by contrast, entry to the internal market typically requires a licence and a local entity; consequently, most EU firms rely instead on border deliveries or customs-warehouse storage transactions.

Finally, the compliance cost profile diverges. The EU regime is costly but predictable, underpinned by strong regulatory capacity and clearer supervisory expectations. The EU reporting regime, while well-established, has long been associated with substantial administrative and IT costs for market participants.²⁵ Ukraine's system involves costs combined with uncertainty: reports highlight unclear rules, weak IT, and a persistent gap between law and practice; one industry interview suggested that “about 90% of regulation remains on paper rather than in practice,” underscoring the risks perceived by traders.²⁶

3. CROSS-BORDER PAIN POINTS

The differences between EU and Ukrainian frameworks translate into specific burdens and risks whenever traders engage in cross-border activity. In practice, most EU companies avoid the Ukrainian wholesale market, which requires a local entity, and instead operate through customs-warehouse storage, bilateral deliveries at border points, or short-haul balancing products.

EU traders typically interact with Ukraine through three main channels. The first is the customs-warehouse storage (CWS) regime, which allows non-residents to inject gas into Ukraine's underground storage system. Ukraine hosts the largest UGS capacity in Europe, around 30 bcm, which on paper offers an attractive buffer for European markets.²⁷ In practice, however, foreign use has lowered. Analysts point to the weak summer–winter price spread and the high security risk of Russian attacks on infrastructure as decisive deterrents.²⁸ In September 2025 Ukraine itself was forced to import around USD 1 billion of gas after storage and transport facilities were damaged, further underlining the fragility of

²⁴ ENERGY COMMUNITY SECRETARIAT. Ukraine Energy Market Observatory Assessment 2/25. *op. cit.*

²⁵ HIEMSTRA, Liebrich M., REMIT: ten years and counting – An exploration of the regulatory paradigm for commodity derivative trading in the energy sector, *Law and Financial Markets Review*, 14(4) (2020), 237–248. DOI: 10.1080/17521440.2020.1805870.

²⁶ EnergySecurityUA. REMIT introduces a paradigm shift in energy markets. Interview with Alexander Golas [online]. Kyiv: Energy Security Project, 2024. Available from: <https://energysecurityua.org/news/remit-introduces-a-paradigm-shift-in-energy-markets/>.

²⁷ BRUEGEL. How Ukrainian gas storage can contribute to Europe's security of supply [online]. Brussels: Bruegel, 2023. Available at: <https://www.bruegel.org/analysis/how-ukrainian-gas-storage-can-contribute-europes-security-supply>.

²⁸ S&P GLOBAL. Ukraine storage injections fall on weak spreads, war risk [online]. London: S&P Global Commodity Insights, 2024. Available at: <https://www.spglobal.com/commodityinsights/>.

this option.²⁹

The second channel is bilateral physical delivery at border points. The main flows occur through Budince on the Slovak border, Beregovo on the Hungarian border, Drozdovichi on the Polish border, and Tekovo and Isaccea-Orlivka on the Romanian side.³⁰ Traders generally prefer this option to direct entry into the Ukrainian wholesale market, which would require licensing and a local entity. Even though infrastructure has been reinforced - for example, the capacity of the Poland-Ukraine interconnection at Hermanowice-Drozdovichi was scheduled to double as of 1 July 2025, following a joint agreement between GAZ-SYSTEM and GTSOU,³¹ and the Trans-Balkan corridor was reopened³² - foreign participation has remained cautious. Industry observers also note that the Baltic link via Poland has expanded, yet interest remains low because of political risks and administrative hurdles.³³

The third channel is short-haul and balancing flows, especially between Slovakia, Hungary and Ukraine. These products have been promoted since 2020 as a tool of market integration and are well defined in EU rules.³⁴ In Ukraine, however, their reporting treatment remains ambiguous, and reliance on manual platforms raises the cost of compliance.³⁵

Although these channels should offer flexibility and resilience, in practice they are constrained by recurring problems. Reporting is duplicative: the same transaction must be notified to ACER under REMIT and again to NEURC under Resolutions No. 618/2024 and No. 614/2024, often with different formats and deadlines.³⁶ Legal definitions are not fully harmonised, creating uncertainty

²⁹ REUTERS. Ukraine will need to buy \$1 billion of gas to hit winter storage target after Russian attacks [online]. 18 September 2025. Available at: <https://www.reuters.com/business/energy/ukraine-will-need-buy-1-billion-gas-hit-winter-storage-target-after-russian-2025-09-17>.

³⁰ ENTSOG. Transmission Capacity Maps 2024. Brussels, 2024. Available at: <https://entsog.eu/maps>.

³¹ GTSOU. GAZ-SYSTEM and GTSOU agreed to double firm capacity in the direction Poland-Ukraine from 1 July 2025 [online]. 18 June 2025. In GTSOU News. Available at: <https://tsoua.com/en/news/gaz-system-and-gtsou-agreed-to-double-firm-capacity-in-direction-poland-ukraine-from-1-july-2025/>; Reuters. Ukraine, Poland boost capacity of gas interconnector to 124 million cubic metres [online]. 13 June 2025. Available at: <https://www.reuters.com/business/energy/ukraine-poland-boost-capacity-gas-interconnector-124-million-ubic-metres-2025-06-13/>.

³² ENERGY COMMUNITY. South Corridor / Trans-Balkan gas flow reopening [online]. Vienna: Energy Community Secretariat, 2025. Available at: <https://www.energy-community.org/>.

³³ FINANCIAL TIMES. Baltic-Ukraine gas transit: politics deters traders despite new capacity [online]. London: Financial Times, 2024. Available at: <https://www.ft.com/>.

³⁴ OXFORD INSTITUTE FOR ENERGY STUDIES. Integration of Ukraine into European gas balancing zones. Oxford, 2021. Available at: <https://www.oxfordenergy.org/>.

³⁵ DIXI GROUP. Quarterly Monitoring Report Q4 2024 [online]. Kyiv: DiXi Group, 2025. Available at: <https://dixigroup.org/en/analytic/monitoring-of-ukraines-national-energy-and-climate-plane-necp-q4-2024/>.

³⁶ NEURC. Resolution No. 618 of 27 March 2024 on the Approval of the Procedure for Submitting Information on Completed Economic and Trade Operations Related to Wholesale Energy Products

over the treatment of products such as balancing contracts. Transparency is weakened by the martial-law rules on postponed disclosure, which have been described in policy assessments as “compliance without transparency.” Administrative and licensing hurdles remain, particularly on the Polish route, and external security risks add another layer of uncertainty: in August 2025 the Orlivka interconnector was briefly shut after a missile strike.³⁷

Taken together, these scenarios confirm the same pattern. Ukraine’s infrastructure is substantial, and in theory attractive, but regulatory duplication, legal ambiguity, weak transparency and security risks undermine its use. As a result, the country’s large storage system and expanded border capacities remain underutilised, while EU traders prefer the predictability of established hubs inside the Union.

4. PERSPECTIVES OF REGULATORS AND RECOMMENDATIONS

Regulators face different priorities. At EU level, ACER prioritises data quality and deterrence,³⁸ reflected in high rejection rates of reports and record fines exceeding EUR 120 million in 2024.³⁹ This strict posture reassures markets of regulatory integrity and has increased the number of suspicious transaction reports (STRs)⁴⁰, but it also drives up compliance costs for firms that must invest heavily in IT systems, validation, and audits. ACER’s coordination with national regulators ensures consistency across the Union, reinforcing predictability for cross-border trade.

Ukraine’s regulator NEURC, by contrast, faces wartime constraints. The

[online]. Available at: <https://www.nerc.gov.ua/acts/pro-zatverdzhennya-poryadku-podannya-informaciyi-pro-zdijsneni-gospodarsko-torgovelni-operaciyi-povyazani-z-optovimi-energetichnimi-produktami>; NEURC. Resolution No. 614 of 27 March 2024 on Approval of Requirements for Ensuring Integrity and Transparency in the Wholesale Energy Market [online]. Available at: <https://www.nerc.gov.ua/acts/pro-zatverdzhennya-vimog-shchodo-zabezpechennya-dobrochesnosti-ta-prozorosti-na-optovomu-energetichnomu-rinku>.

³⁷ INTERFAX UKRAINE. Orlivka gas interconnector resumes flows after attack [online]. Kyiv: Interfax-Ukraine, August 2025. Available at: <https://interfax.com.ua/>; REUTERS. Ukraine gas interconnector still working after Russian attack [online]. 7 August 2025. Available at: <https://www.reuters.com/business/energy/ukraine-gas-interconnector-still-working-after-russian-attack-operator-says-2025-08-07/>.

³⁸ ACER. REMIT Quarterly Report Q3 2024 [online]. Ljubljana: Agency for the Cooperation of Energy Regulators, 2024. Available at: <https://remitcloud.de/en/acer-remit-quartely-report-2024-q3/>.

³⁹ CUBELOGIC. 2024: A Record Year for REMIT Enforcement [online]. 21 January 2025. Available at: <https://cubelogic.com/2025/01/21/2024-a-record-year-for-remit-enforcement/>.

⁴⁰ ACER. Consolidated Annual Activity Report 2024 [online]. Ljubljana: Agency for the Cooperation of Energy Regulators, 2025. Available at: <https://www.europarl.europa.eu/cmsdata/296687/ACER%20CAAR%202024.pdf>; GLOBAL RELAY. ACER shows suspicious transaction reports are rising across EU energy markets under new REMIT [online]. 2024. Available at: <https://www.globalrelay.com/resources/thought-leadership/acer-shows-suspicious-transaction-reports-are-rising-across-eu-energy-markets-under-new-remit/>

Energy Community confirms progress on legal approximation but points to weak enforcement and infrastructural risks. This divergence explains the security-versus-transparency trade-off. By allowing postponed disclosure, NEURC protects critical infrastructure but reduces market transparency. EU regulators, in contrast, treat delayed disclosure as a rare and reviewable exception.

While Ukraine has legislated REMIT-like obligations and begun aligning with the Energy Community *acquis*, there is reason to question whether the existing level of regulatory complexity truly supports increased participation of EU traders. Several constraints—such as risks to infrastructure from conflict, unfavourable price spreads, and high logistical costs—already limit the attractiveness of using Ukrainian gas storage or entering into bilateral physical delivery contracts. Under these conditions, maintaining demanding reporting and registration requirements may inadvertently deter foreign participants rather than strengthen market integrity. Introducing a streamlined or mutually recognisable reporting mechanism could reduce redundant compliance costs and enhance Ukraine’s ability to achieve its strategic energy storage and security goals without undermining regulatory oversight.

Independent policy analysis confirms these challenges. DiXi Group’s 2023 Annual Report highlights that while businesses welcome transparency objectives, they face regulatory uncertainty, weak data quality, and high administrative costs, which undermine the credibility of reforms.⁴¹ Energy Community assessments likewise observe that reporting and disclosure channels, though formally established, remain fragmented and only partially operational.⁴² In some cases, such as the electricity market, data publication was suspended altogether during wartime, highlighting the fragility of transparency under crisis conditions.⁴³

From these perspectives, several practical steps emerge. In the short term, firms should map gaps between EU and Ukrainian reporting rules, create internal workflows for disclosure, and maintain detailed compliance records. Regulators could support this process by issuing clearer guidance on postponed disclosure and registration.

In the medium term, duplication could be reduced through mutual recognition of reports, or at least harmonisation of data fields. Shared IIP platforms or interoperability solutions, developed under Energy Community coordination, would lower costs. Donor programmes could be channelled into strengthening

⁴¹ DIXI GROUP. Annual Report 2023: Energy Reforms in Ukraine [online]. Kyiv: DiXi Group, 2024. Available at: https://dixigroup.org/wp-content/uploads/2024/04/zvit-2023_eng-1.pdf.

⁴² ENERGY COMMUNITY SECRETARIAT. Annual Implementation Report 2024 – Ukraine [online]. Vienna: Energy Community Secretariat, 2024. Available at: <https://www.energy-community.org/implementation/Ukraine.html>.

⁴³ ENERGY COMMUNITY SECRETARIAT. On the Termination of the Data Publication in the Electricity Market of Ukraine – Assessment 2/25 [online]. Vienna: Energy Community Secretariat, 2025. Available at: <https://www.energy-community.org/monitoring/assessments.html>.

NEURC's IT capacity and supervisory resources.⁴⁴

In the long term, Ukraine should acknowledge that traders already face significant commercial barriers such as war risks and unfavourable spreads. Simplifying reporting and clarifying disclosure rules would improve market attractiveness without weakening oversight.

5. CONCLUSION

Asymmetry between EU and Ukrainian REMIT frameworks is not an abstract legal issue but a set of practical burdens that shape trader behaviour and market outcomes. For EU traders, this translates into additional costs and reduced legal certainty, as they must adapt to parallel reporting systems with inconsistent rules. For Ukraine, the paradox is evident: although it offers the largest storage capacity in Europe and expanded interconnection routes, participation remains limited because regulatory complexity and postponed disclosure continue to weaken market confidence.

Short-term alignment measures, such as clearer disclosure guidance and streamlined reporting workflows, could already reduce costs. Harmonising data fields or recognising reports across ACER and NEURC would help further. Longer-term reforms such as simplifying licensing, strengthening IT capacity, and developing interoperable platforms are essential if Ukraine is to translate its infrastructure potential into real cross-border participation.

Future research should not only quantify the compliance costs of duplication but also test the feasibility of recognition mechanisms, explore how EU and Ukrainian frameworks interact in practice, and examine potential solutions for regulatory cooperation to support market integration. Donor support and external assistance should also be assessed in terms of their ability to strengthen supervisory capacity in third countries.

Ultimately, addressing these frictions is not only a matter of technical fixes but a prerequisite for Ukraine's deeper integration with the EU energy market. For firms, the key is to prepare structured compliance strategies; for regulators, the challenge is to reduce duplication while safeguarding oversight. Tackling these issues will make cross-border trade more resilient, efficient, and attractive under evolving REMIT frameworks.

REFERENCES

1. ACER. *REMIT Quarterly Report Q3 2024* [online]. Ljubljana: Agency for the Cooperation of Energy Regulators, 2024. Available at: <https://remitcloud.de/en/acer-remit-quarterly-report-2024-q3/>;

⁴⁴ ENERGY COMMUNITY SECRETARIAT. Annual Implementation Report 2024 – Ukraine [online]. Vienna: Energy Community Secretariat, 2024. Available at: <https://www.energy-community.org/implementation/Ukraine.html>.

2. BERCEANU, Ionut Bogdan. Doctrinal Analysis of REMIT II's Sanctioning Framework. *Laws* [online]. 2025, 14(5), 61. Available at: <https://doi.org/10.3390/laws14050061>.
3. BERCEANU, Ionut-Bogdan, CĂRĂUȘAN, Mihaela Victorita and ZORZOANĂ, Alina, The Regulation of Market Manipulation in the EU Energy Sector: doctrinal analysis of REMIT II's sanctioning framework, *Laws*, 14(5) (2025), 61. DOI: 10.3390/laws14050061.
4. BRUEGEL. *How Ukrainian gas storage can contribute to Europe's security of supply* [online]. Brussels: Bruegel, 2023. Available at: <https://www.bruegel.org/analysis/how-ukrainian-gas-storage-can-contribute-europes-security-supply>.
5. CUBOLOGIC. 2024: *A Record Year for REMIT Enforcement* [online]. 21 January 2025 [accessed 2025-09-24]. Available at: <https://cubelogic.com/2025/01/21/2024-a-record-year-for-remit-enforcement/>.
6. GODIN, Jean-Théodore, POLET, Manon, and JAMAR DE BOLSÉE, Arthur. "Implementing REMIT: What a Legal Analysis Tells about the (Regulatory) Role of ACER." *European Journal of Risk Regulation*. 2018, 9(2), pp. 192-207. DOI: 10.1017/err.2018.17.
7. HIEMSTRA, Liebrich M. Energy trading and the exchange of information between supervisors : effectiveness of fragmented supervision and information sharing in view of reporting obligations for energy trading. *Journal of Energy & Natural Resources Law*. 2021, 39(2), 159–182. DOI: 10.1080/02646811.2020.1841400.
8. HIEMSTRA, Liebrich M., REMIT: ten years and counting – An exploration of the regulatory paradigm for commodity derivative trading in the energy sector, *Law and Financial Markets Review*, 14(4) (2020), 237–248. DOI: 10.1080/17521440.2020.1805870.
9. KLOPČIČ, Alenka Lena *et al.* The key player or just a paper tiger? The effectiveness of the Agency for the Cooperation of Energy Regulators (ACER) in the creation and functioning of the EU's internal energy market. *The Electricity Journal*. 2022, 35(9), 107207. DOI: 10.1016/j.tej.2022.107207.

Does the Free Movement of Services in the EU Apply to One-off Services Provided Without a Business License?

JUDr. Ing. Martin WINKLER, PhD.

martin.winkler@euba.sk

ORCID 0009-0009-0450-3266

Assistant Professor, Department of International Law
Faculty of International Relations, Bratislava University of Economics and
Business
Bratislava, Slovakia

Dr. habil. JUDr. Ing. Katarína BROCKOVÁ, PhD., LL.M.

katarina.brockova@euba.sk

ORCID 0000-0002-4681-2018

Associate Professor, Department of International Law
Faculty of International Relations, Bratislava University of Economics and
Business
Bratislava, Slovakia

Abstract: *In the European Union, the Treaty on the Functioning of the EU (TFEU) prohibits restrictions on the freedom to provide services in the EU in relation to nationals of Member States who are established in a Member State other than that of the recipient of the services. Services are considered to be activities provided by entrepreneurs for remuneration, unless they are covered by the provisions on the free movement of goods, capital, and persons. At the same time, the Directive of the European Parliament and of the Council of 12 December 2006 on services in the internal market applies. This Directive lays down general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high level of quality of services. However, does the free movement of services also apply to one-off services (activities) provided by an entrepreneur from one Member State outside the scope of their business license in another Member State? If so, can the host Member State impose any restrictions on them? The purpose of this paper is to answer the above question.*

Keywords: *Directive on services in the internal market, free movement of services, Treaty on the Functioning of the EU (TFEU).*

JEL Classification: K22, K33

DOI: <https://doi.org/10.62768/ADJURIS/2025/5/06>

Please cite this article as:

Winkler, Martin & Katarína Brocková, „Does the Free Movement of Services in the EU Apply to One-off Services Provided Without a Business License?“, in Grmelová, Nicole & Anna Kretková (eds.), *Prospects of Law in Business*, ADJURIS – International Academic Publisher, Bucharest, Paris, Calgary, 2025, p. 78-92, <https://doi.org/10.62768/ADJURIS/2025/5/06>.

1. INTRODUCTION

The internal market of the European Union (EU) constitutes an area without internal frontiers, within which the free movement of goods, persons, services, and capital is ensured (Article 26(2) TFEU). The free movement of services thus represents one of the fundamental freedoms within the EU. However, the nature of services is complementary to the other three components of the internal market: a service is an economic category that is neither a good, nor business or employment activity by a specific person, nor capital—although it is, to a greater or lesser extent, related to all three of these economic phenomena. Nevertheless, it possesses an autonomous character.

The legal framework governing the free movement of services within the EU is enshrined in the Treaty on the Functioning of the European Union (TFEU), the Services Directive adopted on its basis¹, as well as in a range of other specific legislative acts (most commonly directives) regulating certain particular categories of services. This legal framework is further developed through the case law of the Court of Justice of the European Union (CJEU). In this paper, we analyse this complex network of sources of EU primary and secondary law, together with the CJEU's jurisprudence and, to some extent, the national legislation of the Czech Republic, Slovakia, Germany, and Austria, with the aim of addressing a fundamental question: Do one-off remunerated services—which may be provided in the home Member State even without a business authorisation (for instance, a one-time granting of a loan or credit, the brokerage of the purchase or sale of a specific property, the provision of financial leasing to a subsidiary established in another Member State, or, for example, the occasional or one-time guiding of a tourist group in a neighbouring Member State)—also benefit from the free movement of services? And if so, may the host Member State impose restrictions on such a service, or refuse to recognise its legal effects?

We approached this question systematically. First, we examined the concept of a “service” in EU law and attempted to define it. Subsequently, we analysed the sources of EU law and the case law of the CJEU to determine whether the relevant issue had ever been the subject of legislative action or of the CJEU's interpretative or application-related decisions, thereby establishing an informational basis for addressing the first question. We then analysed the applicable legal framework in terms of restrictions and obstacles to the free movement of services, so as to provide an answer to the second question posed.

This paper adopts a doctrinal and analytical legal research methodology based on the systematic interpretation of primary and secondary sources of EU law. The investigation is based *ex ante* on the relevant provisions of the TFEU and the Services Directive, supplemented *mutatis mutandis* by the interpretative

¹ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market. OJ L 376, 27.12.2006.

practice of the CJEU. This framework allows the authors to assess the legal nature and scope of the free movement of services, particularly with regard to one-off cross-border activities carried out outside the provider's business license.

The methodological structure unfolds in three successive stages. First, the concept of a “service” in EU law is delineated within its systematic relationship to the other fundamental freedoms of the internal market, highlighting its autonomous economic and remunerative character. Second, the corpus of relevant CJEU case law is examined to ascertain whether one-off or non-continuous services have been subjected to judicial interpretation and, if so, how they are situated within the existing legal taxonomy of EU freedoms. Third, the study analyses the limits of Member States’ regulatory competence, focusing on restrictions permissible under the principles of non-discrimination, necessity, and proportionality as enshrined in Article 16 of the Services Directive.

The doctrinal analysis is further enriched by comparative elements, particularly through reference to Slovak, Czech, Austrian, and German legislation to illustrate the interplay between national and EU law in defining and regulating one-off services. The comparative method is complemented by analytical synthesis (identifying commonalities and divergences), inductive reasoning (drawing general lessons from the national specificities) and deductive application (mapping the models against the EU legal framework for “services” and “entrepreneurial activity”).

This integrated doctrinal–comparative approach forms the epistemic basis for the conclusions reached concerning the applicability of the freedom to provide services to singular, non-continuous economic activities within the European Union’s internal market.

2. DEFINITION OF THE TERM “SERVICE” IN EU LAW

2.1. The Delimitation of the Free Movement of Services in Relation to Other Fundamental Freedoms within the Internal Market

According to Article 57 TFEU, *for the purposes of the Treaties, services are considered to be performances normally provided for remuneration, unless they are governed by the provisions on the free movement of goods, capital, or persons*. Services, as an object of free movement within the EU internal market, therefore function as a kind of “catch-all category,” into which certain activities or performances are included only if they cannot be classified under the free movement of goods, persons (whether self-employed or employed), or capital.

The freedom to provide services is closely related to the freedom of establishment, which forms part of the free movement of persons; however, the distinction lies in the temporal dimension. While the provision of services is characterized by transience or temporariness, the freedom of establishment is marked

by a certain permanence.² This was clearly articulated by the CJEU in the *Gebhard* judgment³. Thus, 'the freedom to provide services' is characterised by the absence of a stable and continuous participation in the economic life of the host Member State, being of a more temporary nature.⁴ Furthermore, the CJEU has clarified the differences between them, based on the assumption that if a service provider is legally established in one Member State, they should be able to provide services in another Member State, without facing subject to the same controls twice.⁵ According to the last sentence of Article 57 TFEU it applies that *without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by the state on its own nationals.*

The freedom to provide services is also closely related to the free movement of workers. The CJEU clarified the distinction between the two in the *Rush Portuguesa*⁶ judgement, according to which, in the case of the temporary movement of workers sent to another Member State to perform work as part of the provision of services by their employer, these workers return to their country of origin upon completion of the work, without ever gaining access to the labour market of the host Member State. Therefore, the posting of employees to another Member State constitutes the free movement of services, not the free movement of workers. Nevertheless, through its interpretative activity, the CJEU has made it clear that the posting of workers is not limited to cross-border provision of services but is closely linked to the corresponding freedom of movement of persons.⁷

In explaining the distinction between the free movement of goods and the free movement of services in the EU, the substantive difference between a good and a service comes to the forefront. Typically, a service is an intangible performance, although it does not need to be completely separate from a tangible sub-

² TICHÝ, Luboš, ARNOLD, Rainer, ZEMÁNEK, Jiří., KRÁL, Richard, DUMBROVSKÝ, Tomáš. *Evropské právo*. 5. vyd. Praha: C. H. Beck, 2014, p. 382.

³ Judgement of the Court of Justice 30 November 1995, Case C-55/94 *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, para. 25. and 27.

⁴ O'LEARY, Siofra, SÁNCHEZ, Sara Iglesias. Free Movement of Persons and Services. In: CRAIG, Paul, DE BÚRCA, Gráinne (eds.). *The Evolution of EU Law*. Oxford: Oxford University Press, 2021, p. 534.

⁵ KAINER, Friedemann. *Free Movement of Services and Freedom of Establishment*. Luxembourg: European Union, 2019. p. 11 [online]. Available from: [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/638394/IPOL_STU\(2019\)638394_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/638394/IPOL_STU(2019)638394_EN.pdf) [accessed on 2025-09-21].

⁶ Judgment of the Court of 27 March 1990 in case C-113/89, *Rush Portuguesa Lda v. Office national d'immigration*, para. 15.

⁷ SPISAROVA, Simona. Aktuální otázky přeshraničního zaměstnávání v Německu. In: ŠVARC, Z. (ed.) *Právo v podnikání vybraných členských států Evropské Unie – sborník příspěvků k VIII. ročníku mezinárodní vědecké konference*, 1st ed. Praha: TROAS, 2016, p. 120.

strate. For example, the CJEU considered the distribution of lottery tickets to constitute a service in *Schindler*⁸, the distribution and dubbing of films in *Fedicine*⁹, retail sale of products in *X and Visser*¹⁰, short-term rental of real estate to occasional clients in the joined cases *Cali Apartments and HX*¹¹, and prostitution in *Jany*¹². By contrast, the Court regarded waste as a good in *Commission v. Belgium*¹³ and printed matter in *Commission v. France*¹⁴, both of which fall within the scope of the free movement of goods.

Finally, it is necessary to distinguish between the free movement of services and the free movement of capital. Here, the interpretation is guided by the text of the TFEU itself. According to Article 58(2) TFEU, *the liberalization of banking and insurance services in connection with the free movement of capital is to be carried out in accordance with the liberalization of capital movements*. Beyond banking and insurance services, this category also includes other financial services provided by regulated entities, such as investment services, payment services, financial intermediation, pension savings, and more recently, the management and acquisition of credit claims, as well as services related to crypto-assets. Looking ahead, the EU aims to establish a digital European Capital Markets Union.¹⁵ These services operate on a cross-border basis under the so-called *single licence*¹⁶, whereby the intention to provide financial services in a host Member State is first notified to the home supervisory authority, which then communicates this information to the supervisory authority in the host Member State.

⁸ Judgement of the Court of 24 March 1994 in case C-275/92, *Her Majesty's Customs and Excise v. Gerhart Schindler, Jörg Schindler*, para.37.

⁹ Judgement of the Court of 4 May 1993 in case C-17/92, *Federación de Distribuidores Cinematográficos (Fedicine) v. The Spanish State*, para. 11.

¹⁰ Judgment of the Court of 30 January 2018 in the joined cases C-360/15 and C-31/16: *College van Burgemeester en Wethouders van de gemeente Amersfoort v. X BV (C-360/15) and Visser Vastgoed Beleggingen BV v. Raad van de gemeente Appingedam (C-31/16)*, para. 90.

¹¹ Judgement of the Court of 22 September 2020 in joined Cases C-724/18 and C-727/18, *Cali Apartments SCI (C-724/18), HX (C-727/18) v. Procureur général près la cour d'appel de Paris, Ville de Paris*, para. 45.

¹² Judgment of the Court of 20 November 2001 in case C-268/99 *Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie*, para. 34.

¹³ Judgement of the Court of 9 July 1992 in case C-2/90, *Commission of the European Communities v. Kingdom of Belgium*, para. 28.

¹⁴ Judgement of the Court of 7 May 1985 in case 18/84 *Commission of the European Communities v. French Republic*, para. 12.

¹⁵ BUSCH, Danny. The future of EU financial law. In. *Capital Markets Law Journal*, 2022, vol. 17, No. 1, p. 70 *et seq.*

¹⁶ In financial services, the so-called single license principle applies. For further details, see, for example, SLEZÁKOVÁ, Andrea; ŠIMONOVÁ, Jana; JEDINÁK, Peter. *Zákon o finančnom sprostredkovaní a finančnom poradenstve – komentár*. 1st ed. Bratislava: Wolters Kluwer SR, 2020, p. 90.

2.2. Defining Characteristics of a Service in EU Law

According to Article 57 TFEU *services shall be considered ‘services’ within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to the freedom of movement for goods, capital and persons.* ‘Services’ shall in particular include activities of industrial and commercial character, activities of craftsman and of the professions.¹⁷

According to the Services Directive for the internal market, a service is defined as *any independent economic activity normally provided for remuneration, within the meaning of Article 50 of the Treaty* (now Article 57 TFEU). A distinct category of services is represented by services in the shared (collaborative) economy, which are also subject to the regime of free movement of services.¹⁸

A service is normally provided for remuneration. The CJEU has ruled that the freedom of free movement of services does not extend to the gratuitous provision of information without an economic motive (case *Unborn Children*¹⁹) or to educational courses financed from public funds (cases *Wirth*²⁰, or *Humbel and Edel*²¹). Remuneration does not need to be monetary (e.g. *Steymann*²²) and does not need to be paid by the recipient of the service; it may also be provided by a third party (e.g. *Bond van Averteerders*²³).

The Services Directive for the internal market, in its preamble, sets out interpretative rules for certain key concepts. The services covered by this Directive include services for businesses (e.g., business or human resources consulting, certification and testing, facility management, advertising, or services of commercial agents), services for both businesses and consumers (e.g., legal and tax advice, real estate services, construction-related services, architectural services, distribution services, vehicle rental, or travel agency services), as well as services provided exclusively to consumers (e.g., tourism services including

¹⁷ See also BACHŇÁKOVÁ RÓZENFELDOVÁ, Laura. *Právne vzťahy v kolaboratívnom hospodárstve*. 1st ed. Bratislava: C. H. Beck, 2022, pp. 14–16.

¹⁸ For details see: HATZOPOULOS, Vassilis, ROMA, Sofia. Caring for sharing? The collaborative economy under EU law. In. *Common Market Law Review*, 2017, 54, No. 1, pp. 81 et seq.

¹⁹ Judgement of the Court of 4 October 1991 in case C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd and Stephen Grogan and others*, para. 26.

²⁰ Judgment of the Court of 7 December 1993 in case C-109/92 *Stephan Max Wirth v. Landeshauptstadt Hannover*, para. 19.

²¹ Judgment of the Court of 27 September 1988 in case C-263/86, *Belgian State v. René Humbel and Marie-Thérèse Edel*, paras. 17-20.

²² Judgment of the Court of 5 October 1988 in case C-196/87 *Udo Steymann v. Staatssecretaris van Justitie*, para. 12.

²³ Judgment of the Court of 26 April 1988 in case C-352/85 *Bond van Averteerders and others v. The Netherlands State*, para 16.

guiding, leisure services, domestic assistance, etc.), and encompass services provided both in person and at a distance (recital 33 of the Directive). However, the Directive excludes activities performed gratuitously by the state or on behalf of the state in connection with its obligations in the social, cultural, educational, and judicial spheres, as these do not constitute economic activity; payment of a fee by the recipient, such as tuition or enrolment fees by students to contribute in some way to operational costs, does not in itself constitute remuneration (recital 34 of the Directive). Non-profit amateur sports activities aimed at fulfilling social and recreational objectives are also not considered services, as they do not constitute economic activity (recital 35 of the Directive).

Article 2(2) of the Directive defines its negative scope. Hence, the Directive does not apply e.g. to non-economic services of general interest and to services covered by their own specific legal regimes. Examples include financial services, healthcare services or social services.²⁴

2.3. One-Off Services

As explained further above, in the context of EU law, the freedom of establishment differs from the freedom to provide services in that the former is characterized by a permanent presence in the host Member State, whereas the latter is marked by temporariness. But how does this apply to one-off services, which are moreover not provided on the basis of an entrepreneurial authorization in the service provider's home Member State?

For example, in the Slovak Republic, entrepreneurship is defined as *a continuous activity carried out independently by an entrepreneur in their own name and at their own risk, with the aim of generating profit or achieving a measurable positive social impact, in the case of economic activity conducted by a registered social enterprise under a specific regulation* (Article 2(1) of the Commercial Code). Continuity is understood as long-term, repeated, or permanent activity and does not include one-off actions. The criterion of continuity is also fulfilled by planned seasonal activity, which the entrepreneur temporarily suspends and subsequently resumes. It is essential that the entrepreneur's intention is to perform the activity repeatedly. The requirement of continuity excludes from entrepreneurship any activity that is performed randomly, exceptionally, or occasionally.²⁵ One-off activities carried out for remuneration, since they do not meet the continuity requirement, cannot be regarded as entrepreneurship and therefore

²⁴ For the case law of the CJEU concerning issues related to the Services Directive for the internal market, see, for example, GRMELOVÁ, Nicole. Implementace evropské směrnice o službách na vnitřním trhu v České republice. In: ŠVARC, Zdeněk (ed.) *Aktuální problémy práva v podnikatelském prostředí ČR a EU – sborník příspěvků z mezinárodní vědecké konference – 2. díl*. 1st ed. Prague: TROAS, 2014, pp. 121–123.

²⁵ OVEČKOVA, Oľga, CSACH, Kristián. *Obchodné právo I. Všeobecná časť a súťažné právo*. Bratislava: Wolters Kluwer SR, 2019, p. 112.

do not require an entrepreneurial authorization. At the same time, such activities are not prohibited by law, meaning they may be performed on a one-off basis. This is in accordance with Article 2(3) of the Constitution of the Slovak Republic, which provides that *everyone may do what is not prohibited by law, and no one may be compelled to do what the law does not require*, reflecting one of the fundamental principles of a substantive rule-of-law state.²⁶ Of course, this does not affect the obligation to tax even one-off income as so-called other income (Article 8(1) of Act No. 595/2003 Coll. on Income Tax, as amended).

A very similar concept of entrepreneurship applies in the Czech Republic. According to Article 420(1) of the new Civil Code (Act No. 89/2012 Coll., Civil Code), *anyone who independently carries out a gainful activity on their own account and responsibility, in a trade or similar manner, with the intention of doing so continuously for the purpose of generating profit, is considered an entrepreneur with respect to that activity*. Thus, the activity must be of a permanent or repeated nature, not a one-off act²⁷; however, this character does not need to be fully realized—what suffices is the existence of a demonstrable intention to carry out the activity over the long term. Compared to Slovak law, the Czech definition is more subjective in nature.

In Austrian law, entrepreneurial activity (*unternehmerische Tätigkeit*) is defined primarily through its continuity and regularity. According to Article 1(2) of the Austrian Commercial Code (*Unternehmensgesetzbuch – UGB*), an enterprise (*Unternehmen*) is *any organisation of independent economic activity that is conducted on a continuing basis, even if not directed at profit*. The permanent and systematic nature of the activity, rather than its size or profitability, constitutes the essential criterion of entrepreneurship. The Trade, Commerce and Industry Regulation Act (*Gewerbeordnung, GewO 1994*) reinforces this by defining a trade (*Gewerbe*) as an activity carried out independently, regularly, and with the intention of achieving an economic benefit [Art. 1(2) GewO]. Sporadic or purely occasional actions therefore do not meet the threshold of entrepreneurial activity. Austrian jurisprudence has consistently upheld this interpretation: the Supreme Court stated that “for the definition of an entrepreneur under the Consumer Protection Act (*Konsumentenschutzgesetz – KSchG*), no minimum degree of commercial activity is required, but rather the regularity and methodical character of the activity exercised (*Regelmäßigkeit und Methodik der ausgeübten Tätigkeit*) are decisive.”²⁸ Likewise, the Court confirmed that the existence of a „durable organisation of independent economic activity” (*auf Dauer angelegte Organisation selbstständiger wirtschaftlicher Tätigkeit*) can be inferred even

²⁶ DRGONEC, Ján. *Ústava Slovenskej republiky. Komentár*. 3rd ed. Šamorín: Heuréka, 2012, p. 212.

²⁷ For example, Judgment of the Supreme Administrative Court of the Czech Republic of 8 June 2017, Case No. 1 As 50/2017-32.

²⁸ Oberster Gerichtshof (Austria), Judgment of 21 October 2010, 5 Ob 155/10w, published in *RIS-Justiz*, Document No. JJT_20101021_OGH0002_0050OB00155_10W0000_000.

from the establishment of a dedicated company vehicle created to perform that activity.²⁹ Austrian legal scholarship reflects this jurisprudence – the authors Schopper and Strasser emphasise that entrepreneurship in Austrian law presupposes a continuing, self-reliant market activity rather than an isolated transaction.³⁰

In German law, the concept of entrepreneurial activity (*unternehmerisches Handeln*) is defined by its durable and systematic character rather than by any minimum scale or profit threshold. Under Article 14(1) of the German Civil Code (*Bürgerliches Gesetzbuch* – BGB), an entrepreneur (*Unternehmer*) is a natural or legal person or partnership having legal capacity who, when entering into a legal transaction, acts in the exercise of his or her commercial or independent professional activity. German jurisprudence interprets this provision functionally: entrepreneurial activity presupposes “a planned, lasting and market-oriented engagement in economic life” (*dauerhafte, planmäßige und am Markt ausgerichtete Tätigkeit*). The German Federal Court of Justice (*Bundesgerichtshof* – BGH) has repeatedly emphasised that permanence and regularity are decisive. It held that a person acts entrepreneurially “when the transaction forms part of a planned and continuous business activity” (*wenn das Geschäft Teil einer planmäßigen und auf Dauer angelegten unternehmerischen Tätigkeit ist*).³¹ Similarly, in a different decision, BGH reaffirmed that even preparatory or ancillary transactions qualify as entrepreneurial if they are integrated into a continuing commercial plan.³² German doctrine aligns closely with this jurisprudence – the authors Palandt and Grüneberg explain that entrepreneurial activity requires a certain *duration, organisation and external market orientation*³³, while other commentators of BGB stress that the regular, not merely occasional, pursuit of economic activity distinguishes entrepreneurship from private conduct.³⁴

Comparatively, both Austrian and German law make the permanent or regular character of the activity the decisive element of entrepreneurship. Austria codifies this explicitly in Art. 1 UGB and Art 1 GewO 1994, while Germany derives it interpretatively from Art. 14 BGB and consistent BGH jurisprudence.

²⁹ Oberster Gerichtshof (Austria), Judgment of 16 February 2012, 6 Ob 203/11p, published in *Sammlung Zivilrechtlicher Entscheidungen* (SZ) 2012/17.

³⁰ SCHOPPER, Andreas, STRASSER, Bernhard. *Unternehmensrecht I: Grundlagen, Unternehmens- und Firmenrecht, Unternehmensübergang, Unternehmenspublizität, Unternehmensvertreter, Unternehmensrechtliche Sondervorschriften des ABGB*, 4. vollständig überarbeitete Auflage, Wien: MANZ Verlag, 2022, p. 41 *et seq.*

³¹ Bundesgerichtshof, Judgment of 29 March 2006 – VIII ZR 173/05, In: *Neue Juristische Wochenschrift* (NJW) 2006 (1), 2250–2251.

³² Bundesgerichtshof, Judgment of 7 April 2016 – VIII ZR 32/16, *NJW* 2016, 2257–2258.

³³ PALANDT, Otto, GRÜNEBERG, Christian (eds.) *Bürgerliches Gesetzbuch: BGB*. 83rd ed. München: C. H. Beck, 2024, p. 215.

³⁴ SCHULZE, Reiner, SÄCKER, Franz Jürgen, RIXECKER, Roland, OETKER, Hartmut. (eds.) *Münchener Kommentar zum BGB*, 9th ed., München: C. H. Beck, 2022, p. 236.

In both systems, isolated or one-off remunerated acts, however economically relevant, lack the permanence required to constitute entrepreneurial activity in the legal sense.

The CJEU has addressed the question of whether a one-off service falls within the scope of the free movement of services only once in its history. Specifically, this arose in Case *X*³⁵, which primarily concerned tax issues. The Court proceeded from the assumption that even the playing of a football match by a club for remuneration on only two occasions (with a two-year interval) in another Member State must be understood as a service subject to the freedom to provide services. The Court concluded that the obligation of the recipient of such a service, established in one Member State, to withhold tax on the remuneration paid to the service provider established in another Member State constitutes a restriction on the freedom to provide services (unless the same requirement applies to a service recipient established in the same Member State as the service provider).

Since neither the TFEU, nor the Services Directive for the internal market, nor the CJEU case law contains any specific regulation excluding one-off services from the general regime applicable to services, it is not possible to reach any other legal conclusion than that services provided on a one-off basis and without an entrepreneurial authorization, provided they meet the general defining characteristics of services (i.e., economic nature, remuneration, and not falling under the regime of the freedom of establishment, the free movement of persons, or the free movement of goods), must, for the purposes of EU law, be considered services.

3. FREE MOVEMENT OF SERVICES IN THE EU

3.1. Characteristics of the Free Movement of Services in the EU

According to Article 56 of the TFEU, restrictions on the freedom to provide services within the Union are prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. From this provision it follows implicitly that the freedom to provide services encompasses two aspects:

- prohibition of restrictions on the part of the service provider, and
- prohibition of restrictions on the part of the recipient of the service.

The first case is referred to as active free movement of services, and the second as passive free movement of services. Active free movement of services means that a provider established in one Member State may offer their service in

³⁵ Judgment of the Court of Justice of 18 October 2012 in Case C-498/10 *X NV v. Staatssecretaris van Financiën*, para. 20 and 34.

any other Member State; however, establishment in an EU Member State is required.³⁶ In the *Soysal*³⁷ case, the CJEU, based on the Association Agreement between the European Economic Community (EEC) and Turkey, extended this right by granting Turkish nationals the right to enter the territory of a Member State visa-free, where their employer was to provide services through them. However, in the *SN* case³⁸, concerning the so-called derived right of residence for Ukrainian nationals working for a Slovak employer in the Netherlands, the Court did not see a reason to grant this right automatically. Similarly, applying the same association agreement with Turkey, the CJEU denied passive free movement of services in favour of a Turkish national in the *Demirkan* case³⁹. Thus, regarding active free movement of services, the situation remains unclear⁴⁰ whereas passive free movement of services is dependent on establishment in a Member State.

However, through its interpretative authority, the CJEU has extended the freedom to provide services beyond active and passive free movement of services also to include:

- related activities, and
- equivalent (or comparable) activities.⁴¹

Related (ancillary) activities are those services where only the service itself, and not the persons involved, crosses national borders. The CJEU defined such activities in the *Sacchi*⁴² judgement, where it recognised the transmission of television signals as a service. Equivalent (or comparable) activities refer to situations in which both the provider and the recipient of the service are nationals of the same Member State, while only the service itself crosses borders. In *Commission v. France*⁴³ tourist guide services were considered such an example.

However, certain areas remain outside the full scope of the freedom to provide services or are only partially covered by it — for instance, mediation

³⁶ TICHÝ, Luboš, ARNOLD, Rainer, ZEMÁNEK, Jiří., KRÁL, Richard, DUMBROVSKÝ, Tomáš. *Evropské právo*. 5. vyd. Praha: C. H. Beck, 2014, p. 385.

³⁷ Judgment of the Court of Justice of 19 February 2009 in Case C-228/06, *Mehmet Soysal and Ibrahim Savatli v. Federal Republic of Germany*, with the participation of the Bundesagentur für Arbeit.

³⁸ Judgment of the Court of Justice of 20 June 2024 in Case C-540/22, *SN et al. v. Staatssecretaris van Justitie en Veiligheid*, para. 55.

³⁹ Judgment of the Court of Justice of 24 September 2013 in Case C-221/11, *Leyla Ecem Demirkan v. Federal Republic of Germany*.

⁴⁰ See also: PEERS, Steve. Free Movement of Services and Non-EU Citizen Staff – a U-turn from the CJEU? Comments on Case C-540/22, SN, ECLI:EU:C:2024:530. In. *European Journal of Migration and Law*, 2024, 26, No. 4, pp. 535–538.

⁴¹ TICHÝ, Luboš, ARNOLD, Rainer, ZEMÁNEK, Jiří., KRÁL, Richard, DUMBROVSKÝ, Tomáš. *Evropské právo*. 5. vyd. Praha: C. H. Beck, 2014, p. 383.

⁴² Judgment of the Court of 30 April 1974 in case C-155/73 *Giuseppe Sacchi*, operative part, at point 1.

⁴³ Judgment of the Court of 26 February 1991 in case C-154/89 *Commission of the European Communities v French Republic*.

services⁴⁴ or the dissemination of digital content⁴⁵.

3.2. Restrictions on the Freedom to Provide Services

According to Article 56 TFEU, *restrictions on the freedom to provide services within the Union are prohibited in respect of nationals of Member States who are established in a Member State other than that of the recipient of the services.*

The prohibited restrictions are specified in Article 16(2) (concerning service providers) and Article 19 (concerning service recipients) of the Services Directive. For instance, no Member State may impose on a provider established in another Member State an obligation to have an establishment or permanent presence within its territory or an obligation to obtain a licence, register in a register, or enrol with a professional body or association within its territory (except in specific cases).

Similarly, no Member State may impose on service recipients requirements that restrict the use of a service supplied by a provider established in another Member State, in particular:

- a) an obligation to obtain authorisation from the competent authority or to make a declaration to the competent authorities,
- b) discriminatory restrictions on the granting of financial assistance.

Prohibited restrictions are forbidden under any circumstances. However, there are other restrictions that may be permissible under certain conditions. Member States may impose such restrictions on the provision of services only if they comply with the conditions of non-discrimination, necessity, and proportionality (Article 16(1) of the Directive).

The non-discrimination condition means that a requirement imposed by a Member State must not be directly or indirectly discriminatory on the basis of nationality or the Member State of establishment. The necessity condition requires that the measure be justified by reasons of public policy, public security, public health, or the protection of the environment. Finally, the proportionality condition means that the requirement must be appropriate for achieving the intended objectives and must not exceed what is necessary to attain those objectives.

Certain services constitute an exception to the general rule of free movement of services and are subject to a specific regime, allowing for additional deviations. These services are exhaustively defined in Article 17 of the Services

⁴⁴ RADANOVA, Yuliya, TVARONAVIČIENĖ, Agne. Free movement of mediators across the European Union: a new frontier yet to be accomplished? In. *Access to Justice in Eastern Europe*, 2024, No. 1, pp. 83-106.

⁴⁵ MYLLY, Ulla-Maija, HERRERO, Mónica. Free Movement of Audiovisual Content for Benefit of European Consumers of Culture. In. *International Review of Intellectual Property and Competition Law*, 2022, 53, No. 7, pp. 1038 – 1070.

Directive for the internal market.

There is extensive CJEU case law on the practical application of prohibited restrictions and other conditions, to which reference is made here.⁴⁶ A detailed discussion of this case law will not be undertaken, as the analysis of the free movement of services is not the primary objective of this article.

Regarding the future development of the free movement of services, reference is also made to the most recent opinions on this issue.⁴⁷

4. CONCLUSION

Even a one-off activity carried out on a cross-border basis between entities from different EU Member States, provided it is performed for remuneration, meets the defining characteristics of a service under Article 57 TFEU and Article 4(1) of the Services Directive for the internal market. The provision of a service is a very broad category, essentially encompassing any phenomenon in the market as part of economic life. Therefore, a one-off service falls within the regime of free movement of services under Article 56 TFEU and the Services Directive.

It is not within the competence of the authorities of the host Member State to assess whether an entity from the home Member State of the EU is authorized to provide a one-off service from that Member State in accordance with its entrepreneurial authorization, or to make the permissibility of providing that service in its territory conditional upon such authorization or its acquisition. Doing so could be considered a prohibited restriction under Article 16(2)(b) of the Services Directive.

Accordingly:

1. The provision of such a one-off service in the territory of the host Member State cannot be prevented.
2. The provision of such a one-off service in the territory of the host Member State cannot be denied legal effect.

Of course, depending on the character and nature of the one-off service, the host Member State may apply certain so-called additional restrictions to it or its provider, but only in compliance with the conditions of non-discrimination, necessity, and proportionality.

⁴⁶ For details see e. g. TICHÝ, Luboš, ARNOLD, Rainer, ZEMÁNEK, Jiří., KRÁL, Richard, DUMBROVSKÝ, Tomáš. *Evropské právo. 5. vyd.* Praha: C. H. Beck, 2014, pp. 387-389, O'LEARY, Síofra, SÁNCHEZ, Sara Iglesias. Free Movement of Persons and Services. In: CRAIG, Paul, DE BÚRCA, Gráinne (eds.). *The Evolution of EU Law*. Oxford: Oxford University Press, 2021, pp. 535-538.

⁴⁷ VAN LEEUWEN, Barend. Repositioning Free Movement of Services: A Substantive Perspective on the Structure and Dynamics of the Internal Market. In: *Common Market Law Review*, 2025, 62, No. 3, pp. 705-746.

REFERENCES

1. BACHŇÁKOVÁ RÓZENFELDOVÁ, Laura. *Právne vzťahy v kolaboratívnom hospodárstve*. 1st ed. Bratislava: C. H. Beck, 2022.
2. BUSCH, Danny. The future of EU financial law. In. *Capital Markets Law Journal*, 2022, vol. 17, No. 1.
3. DRGONEC, Ján. *Ústava Slovenskej republiky. Komentár*. 3rd ed. Šamorín: Heuréka, 2012.
4. GRMELOVÁ, Nicole. Implementace evropské směrnice o službách na vnitřním trhu v České republice. In: ŠVARC, Zdeněk (ed.) *Aktuální problémy práva v podnikatelském prostředí ČR a EU – sborník příspěvků z mezinárodní vědecké konference – 2. díl*. 1st ed. Prague: TROAS, 2014.
5. HATZOPOULOS, Vassilis, ROMA, Sofia. Caring for sharing? The collaborative economy under EU law. In. *Common Market Law Review*, 2017, 54, No. 1.
6. KAINER, Friedemann. *Free Movement of Services and Freedom of Establishment*. Luxembourg: European Union, 2019. [online]. Available from: [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/638394/IPOL_STU\(2019\)638394_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/638394/IPOL_STU(2019)638394_EN.pdf) [accessed on 2025-09-21].
7. MYLLY, Ulla-Maija, HERRERO, Mónica. Free Movement of Audiovisual Content for Benefit of European Consumers of Culture. In. *International Review of Intellectual Property and Competition Law*, 2022, 53, No. 7, pp. 1038 – 1070.
8. O'LEARY, Síofra, SÁNCHEZ, Sara Iglesias. Free Movement of Persons and Services. In. CRAIG, Paul, DE BÚRCA, Gráinne (eds.). *The Evolution of EU Law*. Oxford: Oxford University Press, 2021, pp. 535-538.
9. OVEČKOVÁ, Oľga, CSACH, Kristián. *Obchodné právo I. Všeobecná časť a súťažné právo*. Bratislava: Wolters Kluwer SR, 2019.
10. PALANDT, Otto, GRÜNEBERG, Christian (eds.) *Bürgerliches Gesetzbuch: BGB*. 83rd ed. München: C. H. Beck, 2024.
11. PEERS, Steve. Free Movement of Services and Non-EU Citizen Staff – a U-turn from the CJEU? Comments on Case C-540/22, SN, ECLI:EU:C:2024:530. In. *European Journal of Migration and Law*, 2024, 26, No. 4, pp. 535–538.
12. RADANOVA, Yuliya, TVARONAVIČIENÉ, Agne. Free movement of mediators across the European Union: a new frontier yet to be accomplished? In. *Access to Justice in Eastern Europe*, 2024, No. 1, pp. 83-106.
13. SCHOPPER, Andreas, STRASSER, Bernhard. *Unternehmensrecht I: Grundlagen, Unternehmens- und Firmenrecht, Unternehmensübergang, Unternehmenspublizität, Unternehmensvertreter, Unternehmensrechtliche Sondervorschriften des ABGB*, 4. vollständig überarbeitete Auflage, Wien: MANZ Verlag, 2022.
14. SCHULZE, Reiner, SÄCKER, Franz Jürgen, RIXECKER, Roland, OETKER, Hartmut. (eds.) *Münchener Kommentar zum BGB*, 9th ed., München: C. H. Beck, 2022.
15. SLEZÁKOVÁ, Andrea; ŠIMONOVÁ, Jana; JEDINÁK, Peter. *Zákon o finančnom sprostredkovaní a finančnom poradenstve – komentár*. 1st ed. Bratislava: Wolters Kluwer SR, 2020.
16. SPISAROVÁ, Simona. Aktuální otázky přeshraničního zaměstnávání v Německu. In. ŠVARC, Z. (ed.) *Právo v podnikání vybraných členských států*

Evropské Unie – sborník příspěvků k VIII. ročníku mezinárodní vědecké konference, 1st ed. Praha: TROAS, 2016.

17. TICHÝ, Luboš, ARNOLD, Rainer, ZEMÁNEK, Jiří., KRÁL, Richard, DUMBROVSKÝ, Tomáš. *Evropské právo*. 5. vyd. Praha: C. H. Beck, 2014.
18. VAN LEEUWEN, Barend. Repositioning Free Movement of Services: A Substantive Perspective on the Structure and Dynamics of the Internal Market. In. *Common Market Law Review*, 2025, 62, No. 3, pp. 705-746.

SECTION II
BUSINESS AND CORPORATE LAW

Commodifying Disclosure? The Debate on Financial Incentives for Whistleblowers

Dr. Stelios ANDREADAKIS

stelios.andreadakis@brunel.ac.uk

ORCID: 0000-0002-3836-8033

College of Arts, Law and Social Sciences

Brunel University of London

United Kingdom

Prof. Dr. Dimitrios KAFTERANIS

dimitrios.kafteranis@coventry.ac.uk

ORCID: 0000-0001-9895-6112

Centre for Financial and Corporate Integrity

Coventry University

United Kingdom

Abstract: *This paper examines the ongoing debate over whether whistleblowers should receive financial rewards, with a focus on the financial sector. It compares the U.S. model, where schemes, such as the Dodd-Frank Act, have created strong incentives yielding significant enforcement results, with the European Union's preference for protection without remuneration, as reflected in the Whistleblowing Directive. The analysis highlights the effectiveness of rewards in generating high-quality disclosures while acknowledging concerns over motivation, compliance culture, and risks of opportunism. It argues that Europe's cultural, legal, and institutional context precludes direct transplantation of the U.S. system but suggests that hybrid or pilot reward schemes could provide a pragmatic middle ground. The paper concludes that a balanced model, which combines protection, recognition, and, where appropriate, modest compensation, could offer the most viable path to strengthening accountability and integrity in whistleblower regimes.*

Keywords: *financial rewards, incentives, speak up, whistleblower protection, whistleblowing.*

JEL Classification: K22, K33

DOI: <https://doi.org/10.62768/ADJURIS/2025/5/07>

Please cite this article as:

Andreadakis, Stelios & Dimitrios Kafteranis, „Commodifying Disclosure? The Debate on Financial Incentives for Whistleblowers”, in Grmelová, Nicole & Anna Kretková (eds.), *Prospects of Law in Business*, ADJURIS – International Academic Publisher, Bucharest, Paris, Calgary, 2025, p. 94-102, <https://doi.org/10.62768/ADJURIS/2025/5/07>.

1. INTRODUCTION

The question of whether whistleblowers should be financially rewarded has long been controversial. At stake is the delicate balance between recognising whistleblowing as an act of civic responsibility and acknowledging the personal risks and costs borne by those who disclose misconduct. Nowhere is this debate more pronounced than in the financial sector, where the complexity of transactions and the opacity of institutional practices make insider information particularly valuable to regulators. The contrast between the United States and Europe is especially striking. In the U.S., reward-based schemes, such as those introduced under the False Claims Act and later expanded through the Dodd-Frank Act¹, have created powerful incentives for individuals to come forward, yielding billions of dollars in recovered funds. In Europe, however, the 2019 Whistleblowing Directive² deliberately refrains from addressing financial incentives, reflecting cultural and institutional reservations about “commodifying” whistleblowing.

This article seeks to contribute to this debate by offering a comparative analysis of the U.S. reward-based approach and the European preference for protection without remuneration. It evaluates the effectiveness, risks, and normative implications of financial rewards for whistleblowers, with a particular focus on the financial services sector. In doing so, it also explores potential pathways for reform in the EU and UK, considering whether pilot reward schemes or hybrid models might offer a pragmatic middle ground.

2. THE DEBATE ON FINANCIAL INCENTIVES FOR WHISTLEBLOWERS

2.1. Financial Incentives and Enforcement in the United States

In the United States, whistleblower protection and rewards have developed through a succession of legislative acts, beginning with the False Claims Act (FCA) of 1863. Enacted during the Civil War to combat fraud against the government, the FCA introduced the concept of *qui tam* lawsuits, enabling private citizens to sue on behalf of the government and earn between 15% and 30% of the recovered damages. This set a precedent for involving ordinary individuals in public enforcement.

Subsequent legal developments reinforced and expanded this framework. The Internal Revenue Code allows the Inland Revenue Service (IRS) to compensate informants with up to 30% of proceeds in tax-related enforcement cases. The

¹ UNITED STATES OF AMERICA, Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, §§748, 922, 124 Stat. 1380, 1381 (2010) (codified in 15 U.S.C. § 78n (2012)).

² Directive (EU) No 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law. OJ L 305, 26.11.2019, p. 17.

Sarbanes-Oxley Act of 2002³, though it lacks provisions for financial rewards, strengthened anti-retaliation protections for corporate whistleblowers. A major milestone came with the 2010 Dodd-Frank Act, which created the Securities and Exchange Commission (SEC) Whistleblower Program. Under this programme, whistleblowers are eligible for rewards ranging from 10% to 30% of monetary sanctions exceeding \$1 million. The act also extended protections, including confidentiality and anonymity, which further encouraged whistleblowing.

The results of these measures have been significant. Since its establishment, the SEC programme has received over 80,000 tips, with a record of 24,980 whistleblower tips during 2024. In 2023 alone, it awarded more than \$501 million to whistleblowers. That same year, the Department of Justice recovered nearly \$2 billion under the FCA, with whistleblowers responsible for the majority of these recoveries.⁴ These statistics underscore the effectiveness of financial incentives in generating high-quality, actionable information. Moreover, the presence of reward mechanisms has fostered the emergence of legal professionals and firms that support whistleblowers on a contingency basis, thereby enhancing the quality of cases submitted and reducing the burden on regulatory bodies.

However, it needs to be mentioned that this system is not without its critics. Critics argue that generous rewards might encourage external disclosures at the expense of internal reporting channels.⁵ In a notable 2018 decision, *Digital Realty Trust v. Somers*⁶, the U.S. Supreme Court held that Dodd-Frank's anti-retaliation provisions apply only to individuals who report directly to the SEC, thereby potentially discouraging internal whistleblowing and weakening internal compliance mechanisms.⁷

2.2. Whistleblower Rewards in the EU: Between Resistance and Reform

In contrast, the European Union has historically been more cautious in its approach towards financial rewards.⁸ Whistleblowing often carries negative associations in many EU Member States, especially those with authoritarian

³ UNITED STATES OF AMERICA, Sarbanes-Oxley Act of 2002, 18 U.S.C. (2002).

⁴ Annual Report to Congress for Fiscal Year 2024. Securities and Exchange Commission Office of the Whistleblower, November 2024.

⁵ MIN, Geeyoung. The Employees' Dilemma: Balancing Internal Reporting, Whistleblowing, and Insider Trading Risks. *SSRN Electronic Journal* [online]. 2025 [viewed 27 September 2025]. Available from: doi:10.2139/ssrn.5094669.

⁶ Digital Realty Trust, Inc v Somers, 21 February 2018, n° 16-1276.

⁷ ANDREADAKIS, Stelios, and Dimitrios KAFTERANIS. Internal Whistleblowing in the US after Digital Realty Trust v Somers: Any Lessons to be Learnt from Europe? *Industrial Law Journal* [online]. 2025 [viewed 27 September 2025]. Available from: doi:10.1093/indlaw/dwaf008.

⁸ KAFTERANIS, Dimitrios. Rethinking Financial Rewards for Whistle-Blowers Under the Proposal for a Directive on the Protection of Whistle-blowers Reporting Breaches of EU Law. *Nordic Journal of European Law* [online]. 2019, 2(1), 38–49 [viewed 27 September 2025]. Available from: doi:10.36969/njel.v2i1.19787.

pasts. Although the Whistleblowing Directive introduced stronger protections and put forward common minimum standards for all Member States, it did not touch the issue of financial rewards. Only a few EU legal instruments allow for such incentives, and, even then, only under limited and largely unimplemented conditions. The Market Abuse Regulation⁹ and the Prospectus Regulation¹⁰ theoretically permit rewards under specific circumstances, such as when the information provided is novel and leads to sanctions. However, their vagueness and procedural complexity have rendered them largely ineffective in practice.

Cultural and historical factors further hinder the adoption of financial incentives in Europe. In Germany, for example, the use of informants under the Nazi and East German regimes has left a legacy of deep mistrust. Similar reservations exist across Eastern and Central Europe. These societies often view whistleblowing through an ethical lens that values loyalty and professional integrity over monetary gain.¹¹ This skepticism is reflected in the way that several national legislations have been constructed. In France, the 2022 Law Wasserman¹² explicitly prohibits financial rewards for whistleblowers, reinforcing the notion that such actions should be altruistically motivated. In the UK, although the Public Interest Disclosure Act (PIDA) provides a relatively robust framework for protection, the government has been reluctant to adopt a formal rewards system. Institutions, such as the Financial Conduct Authority and the Prudential Regulation Authority, have expressed concerns in the past that financial incentives might corrupt motivations and disrupt internal compliance.¹³ Nevertheless, some UK bodies, such as the HM Revenue & Customs and the Competition and Markets Authority, have offered limited rewards in specific enforcement contexts.¹⁴

⁹ Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC. OJ L 173, 12.6.2014, p. 1.

¹⁰ Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC. OJ L 168, 30.6.2017, p. 12.

¹¹ HÜTTL, Tivadar, and Sándor LÉDERER. Whistleblowing in Central Europe. *Public Integrity* [online]. 2013, 15(3), 283–306 [viewed 27 September 2025]. Available from: doi:10.2753/pin1099-9922150304.

¹² FRANCE, Law No. 2022-401 on improving protections for whistleblowers [LOI n° 2022-401 du 21 mars 2022 visant à améliorer la protection des lanceurs d'alerte].

¹³ TEICHMANN, Fabian Maximilian Johannes, and Chiara WITTMANN. Compliance cultures and the role of financial incentives. *Journal of Financial Crime* [online]. 2022 [viewed 27 September 2025]. Available from: doi:10.1108/jfc-06-2022-0135.

¹⁴ LOCKHART, Eliza. The Inside Track The Role of Financial Rewards for Whistleblowers in the Fight Against Economic Crime. Royal United Services Institute, Serious Organised Crime & Anti-Corruption Evidence [online]. December 2024 [viewed 27 September 2025]. Available from: https://static1.squarespace.com/static/63e4aef3ae07ad445eed03b5/t/6756cfd024f33859fb718888/1733742545613/SOC-ACE-RP31_Whistleblowing-Dec+24.pdf.

The European Commission has also warned that introducing financial incentives might commercialise the act of whistleblowing, thereby undermining its legitimacy and detracting from its ethical foundation.¹⁵ Moreover, the EU lacks a centralised enforcement agency with the necessary powers and financial autonomy to manage a reward programme. Suggestions to assign this role to the European Securities and Markets Authority or the European Public Prosecutor's Office face legal and logistical obstacles, including constrained competences, fragmented legal systems, and funding limitations.¹⁶ In contrast to the U.S., where enforcement agencies can retain proceeds from penalties to fund operations and rewards, EU enforcement proceeds generally revert to national treasuries.

Despite these challenges, the potential benefits of financial incentives are difficult to ignore. Empirical studies and data from the U.S. reveal that rewards significantly increase both the quantity and quality of whistleblower disclosures.¹⁷ They also reduce enforcement costs, as private actors assume part of the investigative burden. The mere presence of reward mechanisms enhances corporate compliance, driven by the possibility that insiders may disclose misconducts externally, while high rewards can mitigate the so-called "crowding-out" effect, whereby extrinsic incentives dampen intrinsic motivations.¹⁸

Potential downsides include the filing of false or opportunistic claims, deterioration of workplace trust, regulatory overload, and the emergence of a "bounty hunter" mentality. However, such risks can be addressed through careful regulatory design. Mechanisms, such as tip thresholds, penalties for fraudulent claims, and robust vetting processes can screen out frivolous cases. Furthermore, it has been reported that many whistleblowers initially report internally before turning to external channels, challenging the notion that rewards inherently erode corporate compliance.¹⁹

¹⁵ Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law. EUR-Lex [online]. 2018. Available from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018SC0116>.

¹⁶ MITSILEGAS, Valsamis. European prosecution between cooperation and integration: The European Public Prosecutor's Office and the rule of law. *Maastricht Journal of European and Comparative Law* [online]. 2021, 28(2), 245–264 [viewed 27 September 2025]. Available from: doi:10.1177/1023263x2111005933.

¹⁷ NYRERÖD, Theo, and Giancarlo SPAGNOLO. Myths and numbers on whistleblower rewards. *Regulation & Governance* [online]. 2019, 15(1), 82–97 [viewed 27 September 2025]. Available from: doi:10.1111/rego.12267.

¹⁸ MALESKY, Edmund, and Markus TAUSSIG. The Danger of Not Listening to Firms: Government Responsiveness and the Goal of Regulatory Compliance. *Academy of Management Journal* [online]. 2017, 60(5), 1741–1770 [viewed 27 September 2025]. Available from: doi: 10.5465/amj.2015.0722.

¹⁹ KAFTERANIS, Dimitrios, and Stelios ANDREADAKIS. Internal vs. External Whistleblowing: Doing the Right Thing ... in the Right Way. In: *Whistleblowing Policy and Practice, Volume II* [online]. Cham: Springer Nature Switzerland, 2025, pp. 79–95 [viewed 27 September 2025]. Available from: doi:10.1007/978-3-031-93170-3_6.

2.3. Beyond Rewards: Pragmatic Options for Europe

For jurisdictions unwilling to implement financial rewards, there are alternatives. These include honorary recognition programmes, robust and confidential internal reporting systems, access to legal and psychological support, awareness campaigns to combat stigma, and strong managerial endorsement of whistleblower protections. While these measures may lack the tangible impact of financial rewards, they help foster a culture in which whistleblowing is seen as legitimate and respected.²⁰

Financial rewards, while not universally applicable, have proven effective in the U.S., particularly in the financial sector. The EU and UK could consider pilot programmes in specific high-risk areas, such as tax enforcement or securities fraud. Policymakers should avoid rigid ideological positions and instead adopt a pragmatic, evidence-based approach. Member States might introduce tiered reward systems based on the significance of the information, the risk taken, and the public benefit achieved. Compensation could also be conditioned on measurable outcomes, such as fines, prosecutions, or recovered funds.²¹ In other words, a hybrid model that combines modest financial compensation with symbolic recognition may offer a culturally sensitive compromise, blending ethical and incentive-based approaches.

Beyond legal and institutional arguments, it is important to highlight the moral dimension of whistleblower rewards. Whistleblowers frequently endure profound personal and professional consequences, including job loss, reputational damage, and emotional distress.²² In this context, financial rewards function not merely as incentives but as a form of restitution. They help offset the real-world costs of doing the right thing. Thus, a more balanced view that recognises both altruism and pragmatism as valid motivators is the preferred avenue.

2.4. Towards a Balanced Model of Whistleblower Protection

The comparative analysis underscores that the success of the U.S. model is deeply linked to its institutional structure. Agencies, such as the SEC and IRS, not only have enforcement power but also financial autonomy, allowing them to

²⁰ ANDREADAKIS, Stelios. Enhancing Whistleblower Protection: It's all about the Culture. *European Business Law Review* [online]. 2019, 30(6), 859–880 [viewed 27 September 2025]. Available from: doi:10.54648/eulr2019037.

²¹ HOGIC, Nedim. Financial Incentives for Whistleblowing. *European Journal of Comparative Law and Governance* [online]. 2023, 10(2), 176–205 [viewed 27 September 2025]. Available from: doi: 10.1163/22134514-bja10050.

²² BUTLER, Jeffrey V., Danila SERRA, and Giancarlo SPAGNOLO. Motivating Whistleblowers. *SSRN Electronic Journal* [online]. 2017 [viewed 27 September 2025]. Available from: doi: 10.2139/ssrn.3086671.

offer rewards without undermining their capacity. In contrast, EU agencies operate under tight mandates and limited budgets. The U.S. legal culture also supports private involvement in public enforcement, embracing mechanisms like *qui tam* actions and class suits.²³ By contrast, Europe generally adheres to a tradition of state-led enforcement grounded in public service ethics.

These philosophical and institutional differences suggest that the U.S. model cannot simply be transplanted into the European context. In our view, a more tailored approach should be considered instead. Pilot reward schemes could be launched in sectors known for opacity and systemic risk. Rewards might be scaled according to the public value of the disclosure. A centralised European fund could help circumvent national funding challenges, while symbolic and institutional recognition could reinforce legitimacy.²⁴

To strengthen whistleblower protections overall, the need for complementary legal and organisational reforms should be emphasised. We argue that legal safeguards must be supported by workplace cultures that genuinely welcome disclosures. Too often, formal protections are undercut by subtle retaliation, such as exclusion or career stagnation.²⁵ Whistleblower laws must also be harmonised with labour law, clearly superseding contractual obligations when disclosures serve the public interest. The burden of proof in retaliation claims should lie with the employer, and interim relief should be available during proceedings.

The stakes are particularly high in the financial sector, where misconduct is often concealed and difficult to detect. Whistleblowers within financial institutions are uniquely placed to expose practices, such as insider trading, market manipulation, and money laundering, as evidenced by the Wirecard and Danske Bank scandals.²⁶ A reward-based system could incentivise earlier disclosures, improve detection, and deter misconduct. An effective whistleblower programme can serve as an early warning system, helping companies address compliance failures before they escalate.²⁷ While companies may fear reputational damage, the long-term costs of cover-ups are invariably higher. Achieving the right balance between internal and external mechanisms will be key to the overall success of whistleblower protection regimes.

²³ EVANS, Justin W., et al. Reforming Dodd-Frank from the Whistleblower's Vantage. *American Business Law Journal* [online]. 2021, 58(3), 453–523 [viewed 27 September 2025]. Available from: doi:10.1111/ablj.12191.

²⁴ LOYENS, Kim, and Wim VANDEKERCKHOVE. Whistleblowing from an International Perspective: A Comparative Analysis of Institutional Arrangements. *Administrative Sciences* [online]. 2018, 8(3), 30 [viewed 27 September 2025]. Available from: doi:10.3390/admsci8030 030.

²⁵ ANDREADAKIS, Stelios. Enhancing Whistleblower Protection: It's all about the Culture. *European Business Law Review*. 2019, 30(6), 859-880.

²⁶ NYREROD, Theo, and Giancarlo SPAGNOLO. Surprised by Wirecard? Enablers of Corporate Wrongdoing in Europe. *SSRN Electronic Journal* [online] 2021. [viewed 27 September 2025]. Available from: <http://dx.doi.org/10.2139/ssrn.3823030>.

²⁷ VANDEKERCKHOVE, Wim, Kate KENNY, and Marianna FOTAKI. Whistleblowing Guide: Speak-Up Arrangements, Challenges and Best Practices. Wiley & Sons, Limited, John, 2019.

3. CONCLUSION

The debate over financial rewards for whistleblowers cannot be reduced to a choice between altruism and material gain. The U.S. experience demonstrates that reward schemes can generate invaluable information, reduce enforcement costs, and promote a compliance culture, especially in sectors where misconduct is hard to detect. Europe, however, faces cultural, legal, and institutional constraints that make the wholesale adoption of the U.S. model impractical. These differences do not mean that financial incentives should be dismissed altogether. Rather, they invite consideration of hybrid approaches, where modest compensation is combined with symbolic recognition, strong protection against retaliation, and support services for those who come forward. Such an approach would preserve the ethical dimension of whistleblowing while acknowledging the heavy personal and professional costs it entails. Ultimately, effective whistleblower regimes must integrate protection, recognition, and, where appropriate, financial restitution. By striking this balance, policymakers can propose systems that not only protect those who speak up but also strengthen accountability, trust, and integrity.

REFERENCES

1. ANDREADAKIS, Stelios, and Dimitrios KAFTERANIS. Internal Whistleblowing in the US after Digital Realty Trust v Somers: Any Lessons to be Learnt from Europe? *Industrial Law Journal* [online]. 2025 [viewed 27 September 2025]. Available from: doi:10.1093/indlaw/dwaf008.
2. ANDREADAKIS, Stelios. Enhancing Whistleblower Protection: It's all about the Culture. *European Business Law Review* [online]. 2019, 30(6), 859–880 [viewed 27 September 2025]. Available from: doi: 10.54648/eulr2019037.
3. BUTLER, Jeffrey V., Danila SERRA, and Giancarlo SPAGNOLO. Motivating Whistleblowers. *SSRN Electronic Journal* [online]. 2017 [viewed 27 September 2025]. Available from: doi: 10. 2139/ssrn.3086671.
4. EVANS, Justin W., et al. Reforming Dodd-Frank from the Whistleblower's Vantage. *American Business Law Journal* [online]. 2021, 58(3), 453–523 [viewed 27 September 2025]. Available from: doi:10.1111/ablj.12191.
5. HOGIC, Nedim. Financial Incentives for Whistleblowing. *European Journal of Comparative Law and Governance* [online]. 2023, 10(2), 176–205 [viewed 27 September 2025]. Available from: doi: 10.1163/22134514-bja10050.
6. HÜTTL, Tivadar, and Sándor LÉDERER. Whistleblowing in Central Europe. *Public Integrity* [online]. 2013, 15(3), 283–306 [viewed 27 September 2025]. Available from: doi:10.2753/pin 1099-9922150304.
7. KAFTERANIS, Dimitrios, and Stelios ANDREADAKIS. Internal vs. External Whistleblowing: Doing the Right Thing ... in the Right Way. In: *Whistleblowing Policy and Practice*, Volume II [online]. Cham: Springer Nature Switzerland, 2025, pp. 79–95 [viewed 27 September 2025]. Available from: doi: 10.1007/978-3-031-93170-3_6.
8. KAFTERANIS, Dimitrios. Rethinking Financial Rewards for Whistle-Blowers

- Under the Proposal for a Directive on the Protection of Whistle-blowers Reporting Breaches of EU Law. *Nordic Journal of European Law* [online]. 2019, 2(1), 38–49 [viewed 27 September 2025]. Available from: doi: 10.36969/njel.v2 i1. 19787.
9. LOCKHART, Eliza. The Inside Track the Role of Financial Rewards for Whistleblowers in the Fight Against Economic Crime. Royal United Services Institute, Serious Organised Crime & Anti-Corruption Evidence [online]. December 2024 [viewed 27 September 2025]. Available from: https://static1.squarespace.com/static/63e4aef3ae07ad445eed03b5/t/6756cfd024f33859fb718888/1733742545613/SOC-ACE-RP31_Whistleblowing-Dec+24.pdf.
 10. LOYENS, Kim, and Wim VANDEKERCKHOVE. Whistleblowing from an International Perspective: A Comparative Analysis of Institutional Arrangements. *Administrative Sciences* [online]. 2018, 8(3), 30 [viewed 27 September 2025]. Available from: doi:10.3390/admsci8030 030.
 11. MALESKY, Edmund, and Markus TAUSSIG. The Danger of Not Listening to Firms: Government Responsiveness and the Goal of Regulatory Compliance. *Academy of Management Journal* [online]. 2017, 60(5), 1741–1770 [viewed 27 September 2025]. Available from: doi: 10. 5465/amj.2015.0722.
 12. MIN, Geeyoung. The Employees' Dilemma: Balancing Internal Reporting, Whistleblowing, and Insider Trading Risks. *SSRN Electronic Journal* [online]. 2025 [viewed 27 September 2025]. Available from: doi:10.2139/ssrn.5094669.
 13. MITSILEGAS, Valsamis. European prosecution between cooperation and integration: The European Public Prosecutor's Office and the rule of law. *Maastricht Journal of European and Comparative Law* [online]. 2021, 28(2), 245–264 [viewed 27 September 2025]. Available from: doi: 10.1177/1023263x211005933.
 14. NYRERÖD, Theo, and Giancarlo SPAGNOLO. Myths and numbers on whistleblower rewards. *Regulation & Governance* [online]. 2019, 15(1), 82–97 [viewed 27 September 2025]. Available from: doi:10.1111/rege.12267.
 15. NYREROD, Theo, and Giancarlo SPAGNOLO. Suprised by Wirecard? Enablers of Corporate Wrongdoing in Europe. *SSRN Electronic Journal* [online]. 2021. [viewed 27 September 2025]. Available from: <http://dx.doi.org/10.2139/ssrn.3823030>.
 16. TEICHMANN, Fabian Maximilian Johannes, and Chiara WITTMANN. Compliance cultures and the role of financial incentives. *Journal of Financial Crime* [online]. 2022 [viewed 27 September 2025]. Available from: doi: 10.11 08/jfc-06-2022-0135.
 17. VANDEKERCKHOVE, Wim, Kate KENNY, and Marianna FOTAKI. Whistleblowing Guide: Speak-Up Arrangements, Challenges and Best Practices. Wiley & Sons, Limited, John, 2019.

Creating a Culture of Integrity and Compliance: The Power of Ethics Programs in a Modern Workplace

Ing. Lucie ANDREISOVA, Ph.D.

lucie.andreisoava@vse.cz

ORCID: 0000-0002-2107-3757

Department of Business and European Law, Faculty of International Relations,
Prague University of Economics and Business
Prague, Czech Republic

Prof. JUDr. Nicole GRMELOVA, Ph.D.

nicole.grmelova@vse.cz

ORCID: 0000-0002-2995-4794

Department of Business and European Law, Faculty of International Relations,
Prague University of Economics and Business
Prague, Czech Republic

Abstract: *This paper investigates the correlation between comprehensive ethics programs and ethical behaviour in the workplace. Drawing on data from the Institute of Business Ethics' (IBE) "Ethics at Work 2024" survey, which assessed over 12,000 employees across 16 countries, alongside findings from other notable workplace ethics surveys, this paper explores the impact of structured ethics and compliance frameworks on honesty, reporting of misconduct, management support, and corporate social responsibility. The paper sets out to establish the effectiveness of comprehensive ethics programs in fostering an ethical and compliant workplace culture, meeting workforce expectations, and supporting adherence to regulatory standards. Findings underscore the importance of integrating compliance within ethics programs, offering practical recommendations for building ethical resilience through compliance alignment.*

Keywords: *business ethics, compliance ethics at work, comprehensive ethics programs, corporate responsibility, organizational behaviour.*

JEL Classification: K23, K31

DOI: <https://doi.org/10.62768/ADJURIS/2025/5/08>

Please cite this article as:

Andreisova, Lucie & Nicole Grmelova, „Creating a Culture of Integrity and Compliance: The Power of Ethics Programs in a Modern Workplace”, in Grmelová, Nicole & Anna Kretková (eds.), *Prospects of Law in Business*, ADJURIS – International Academic Publisher, Bucharest, Paris, Calgary, 2025, p. 103-114, <https://doi.org/10.62768/ADJURIS/2025/5/08>.

1. INTRODUCTION

In contemporary business settings, cultivating a culture of integrity and compliance is essential for meeting regulatory obligations, ensuring ethical practices, and building trust with stakeholders.¹ Increasingly, regulatory bodies require organizations to implement effective compliance programs that prevent misconduct and encourage reporting of unethical behaviour.² Comprehensive ethics programs support compliance by promoting adherence to standards of behaviour that meet both ethical and legal expectations, providing a dual function of encouraging integrity and minimizing compliance risk(s).³

This paper leverages insights from the Institute of Business Ethics (IBE)⁴ "Ethics at Work 2024" survey⁵, complemented by findings from Deloitte⁶, the Ethics & Compliance Initiative (ECI)⁷, PwC⁸, Gallup⁹, Strategic Human Resource Management (SHRM)¹⁰, and KPMG¹¹, and evaluates the role of ethics

¹ ANDREISOVÁ, Lucie. How Can a Corporate (Compliance) Culture Be Described and Effectively Measured? *Business and Management Studies*, 2018(4)3, pp. 52-57.

² ANDREISOVÁ, Lucie. The role and importance of effective compliance management systems in criminal law practice, *Horizons of Law in Business and Finance*, Bucarest, Paris, Calgary: ADJURIS, 2018, pp. 11-26.

³ ANDREISOVÁ, Lucie. Building and Maintaining an Effective Compliance Program, *International Journal of Organizational Leadership*, 2016(5)1, pp. 24-39.

⁴ The Institute of Business Ethics (IBE) was established in 1986 to champion high standards of ethical behaviour in the business environment. Working with a broad range of British and international businesses, the IBE provides support to organizations aiming to preserve their long-term reputation through integrity and responsible practices. It acts as a "critical friend" to advise senior leaders and those responsible for corporate ethics, offering guidance through networking events, research, publications, and training. The IBE also educates future business leaders and supports a network that shares best practices in business ethics. As a registered charity, IBE is committed to independent and practical advice, driven by research and engagement with its supporters to anticipate and address emerging ethical challenges in business. For more details, please see: <<https://www.ibe.org.uk/>>.

⁵ Institute of Business Ethics (IBE), *Ethics at Work 2024 Survey*, 2024. Available at: <<https://www.ibe.org.uk/ethicsatwork2024.html>>.

⁶ Deloitte, *Global Millennial and Gen Z Survey*, 2023. Available at: <<https://www2.deloitte.com/content/dam/Deloitte/global/Documents/deloitte-2023-genz-millennial-survey.pdf>>.

⁷ Ethics & Compliance Initiative (ECI), *Global Business Ethics Survey*, 2023. Available at: <<https://www.ethics.org/global-business-ethics-survey/>>.

⁸ PwC, *Global Economic Crime and Fraud Survey*, 2022. Available at: <<https://www.pwc.com/gx/en/services/forensics/economic-crime-survey/2022.html>>.

⁹ Gallup, *State of the Global Workplace Report*, 2023. Available at: <<https://www.gallup.com/workplace/349484/state-of-the-global-workplace.aspx>>.

¹⁰ Strategic Human Resource Management (SHRM), *Workplace Ethics Survey (2023 State of the Workplace Survey)*, 2023. Available at: <<https://www.shrm.org/mena/topics-tools/research/2023-2024-shrm-state-workplace>>.

¹¹ KPMG, *Corporate Responsibility Reporting Survey*, 2023. Available at: <<https://assets.kpmg.com/content/dam/kpmg/no/pdf/2024/06/sustainability-report-2023.pdf>>.

programs in supporting compliance frameworks within organizations. In addition, the paper considers how alignment with ISO 37301's¹² principles can help organizations foster an ethical culture and achieve regulatory compliance. By integrating ethical standards and compliance requirements, organizations can create cohesive programs that both foster ethical culture and ensure regulatory alignment.

With respect to the research objective, this paper aims to evaluate the role of comprehensive ethics and compliance programs in promoting ethical and compliant behaviour within organizations. Specifically, it seeks to assess how such programs influence employee honesty, willingness to report misconduct, perceptions of management, and commitment to corporate responsibility, providing actionable insights for organizations seeking to integrate compliance into their ethics frameworks. By integrating the principles of above cited ISO 37301, the research aims to highlight practical approaches for building robust ethics programs that align with global recommendations and standards.

The research builds on established theories of ethical culture and corporate governance, particularly drawing from organizational culture theory¹³, social learning theory¹⁴, and psychological safety theory¹⁵. Additionally, this paper incorporates recent theoretical advancements, including ethical climate theory¹⁶, moral identity theory¹⁷, psychological ownership theory¹⁸, and ethical infrastructure theory¹⁹. These frameworks suggest that ethical behaviour in organizations is shaped by cultural norms, leadership models, supportive systems, and personal moral identity, offering valuable insights into the effectiveness of ethics programs. These theoretical perspectives are complemented by ISO 37301's emphasis on structured compliance practices, which reinforce the need for a systematic approach to ethics and compliance.

¹² International Organization for Standardization, *ISO 37301:2021 Compliance Management Systems – Requirements with guidance for use*, 2021.

¹³ SCHEIN, Edgar H. *Organizational Culture and Leadership*, San Francisco: Jossey Bass, 1985.

¹⁴ BANDURA, Albert. *Social learning theory*, Englewood Cliffs, NJ: Prentice Hall, 1977.

¹⁵ EDMONDSON, Amy. Psychological Safety and Learning Behavior in Work Teams, *Administrative Science Quarterly*, 1999(44)2, pp. 350-383.

¹⁶ VICTOR Bart & John B. CULLEN. A Theory and Measure of Ethical Climate in Organizations, *Research in Corporate Social Performance and Policy*, 1988(9), pp. 51-71; and MARTIN Kelly D. & CULLEN John B., Continuities and Extensions of Ethical Climate Theory: A Meta-Analytic Review, *Journal of Business Ethics*, 2006(69), pp. 175-194.

¹⁷ AQUINO Karl & Americus REED, The Self-Importance of Moral Identity, *Journal of Personality & Social Psychology*, 2002(83)6, pp. 1423-1440; and SHAO Ruodan, *et al.*, Beyond moral reasoning: A review of moral identity research and its implications for business ethics, *Business Ethics Quarterly*, 2008(18)4, pp. 513-540.

¹⁸ PIERCE Jon L. *et al.*, Toward a Theory of Psychological Ownership in Organizations, *The Academy of Management Review*, 2001(26)2, pp. 298-310.

¹⁹ TENBRUNSEL Ann E. *et al.*, Building houses on rocks: The role of the ethical infrastructure in organizations, *Social Justice Research*, 2003(16)3, pp. 285-307.

Authors have engaged in desktop research relying primarily on data originating from the IBE's "Ethics at Work 2024" survey²⁰, which collected responses from over 12,000 employees across 16 countries. Complementary data from other surveys, including the above cited ECI's *Global Business Ethics Survey*, Deloitte's *Global Millennial and Gen Z Survey*, PwC's *Global Economic Crime and Fraud Survey*, Gallup's *State of the Global Workplace Report*, SHRM's *Workplace Ethics Survey*, and KPMG's *Corporate Responsibility Reporting Survey*, were utilized to provide a robust comparative perspective. This multi-source approach aligns with ISO 37301's emphasis on thorough data gathering and analysis to inform compliance management systems.

Each of these surveys is conducted by reputable organizations/institutions using validated methodologies, ensuring the reliability and representativeness of the findings. By triangulating data from multiple sources, this paper mitigates potential biases and provides a comprehensive view of workplace ethics across various industries and demographics. This triangulation not only enhances data validity but also aligns with ISO 37301's guidelines on using systematic data analysis to support informed decision-making within compliance programs.

The data used in this paper has been interpreted in line with ethical guidelines and methodological best practices. While each survey has its specific focus, the core elements of ethics programs – such as honesty, reporting mechanisms, and management support – are consistent across sources, allowing for accurate and trustworthy comparisons. In integrating ISO 37301's principles, this paper follows a structured, standards-based approach to understanding ethics and compliance, ensuring that the analysis reflects international best practices in compliance management.

2. GROWING AWARENESS OF ETHICS PROGRAMS

The above stated 2024 IBE survey reveals a steady increase in employee awareness of ethics programs, with 71 % of employees in targeted organizations with comprehensive programs reporting familiarity with written standards of conduct, compared to 67 % in 2021.²¹ The Ethics & Compliance Initiative (ECI)²² reported similar findings, showing that awareness of ethics frameworks correlates with lower misconduct rates and higher reporting frequency. This aligns with organizational culture theory²³, which posits that shared norms and values foster a collective commitment to ethical standards.

Deloitte's *Global Millennial and Gen Z Survey*²⁴ further emphasizes the

²⁰ Institute of Business Ethics (IBE), *op. cit.*

²¹ Institute of Business Ethics (IBE), *op. cit.*

²² Ethics & Compliance Initiative (ECI), *op. cit.*

²³ SCHEIN, *op. cit.*

²⁴ Deloitte, *op. cit.*

importance of these elements, especially among younger workers who increasingly seek employers with strong ethical frameworks that align with their values. The increased awareness of ethics programs reflects not only organizational efforts but also employees' growing expectations for integrity in the workplace. SHRM's *Workplace Ethics Survey*²⁵ supports this finding, highlighting how accessible ethics training can significantly increase employees' likelihood to report unethical practices and understand organizational expectations around ethical conduct.

3. WILLINGNESS TO REPORT MISCONDUCT AND PSYCHOLOGICAL SAFETY

The willingness to report misconduct is a key indicator of psychological safety in the workplace. In organizations with comprehensive ethics programs, 64 % of employees expressed readiness to report misconduct, up from 57 % in 2021.²⁶ Psychological safety theory²⁷ suggests that employees who feel safe are more likely to speak up about issues without fear of retribution. However, the IBE survey indicates that barriers persist; 34 % of employees who refrained from reporting cited concerns over job security and inaction.²⁸ This finding aligns with Deloitte's insights, highlighting the importance of creating safe environments that encourage ethical behaviour.²⁹

Gallup's research further reinforces the significance of psychological safety in ethical reporting. According to Gallup, employees who trust their leadership and experience psychological safety report higher satisfaction with ethical outcomes.³⁰ These insights underscore the value of trust-building initiatives within ethics programs.

4. IMPACT ON HONESTY AND INTEGRITY

Honesty is fundamental to ethical behaviour in the workplace. In organizations with comprehensive ethics programs, 90 % of employees report that honesty is frequently or always practiced, compared to 75 % in organizations without such programs.³¹ PwC's survey supports these findings, noting a reduction in internal fraud within organizations that implement strong ethics programs.³²

²⁵ Strategic Human Resource Management (SHRM), *op. cit.*

²⁶ Institute of Business Ethics (IBE), *op. cit.*

²⁷ EDMONDSON, *op. cit.*, pp. 350-383.

²⁸ Institute of Business Ethics (IBE), *op. cit.*

²⁹ Deloitte, *op. cit.*

³⁰ Gallup, *op. cit.*

³¹ Institute of Business Ethics (IBE), *op. cit.*

³² PwC, *op. cit.*

Social learning theory³³ provides a theoretical basis for understanding how ethical behaviour can be reinforced through role modelling and positive reinforcement. When employees observe honesty modelled by managers and colleagues, they are more likely to adopt similar behaviours. This theory is evident in the above cited IBE survey, where organizations with ethics programs report higher levels of honesty and employee satisfaction with ethical standards.

5. THE ROLE OF MANAGEMENT IN PROMOTING ETHICS

The role of senior management is crucial to the success of ethics programs. According to the IBE survey, 89 % of employees in organizations with ethics programs believe that senior management takes ethics seriously.³⁴ This is consistent with Gallup's research, which shows that ethical leadership fosters employee engagement and trust.³⁵

Deloitte's findings underscore that younger employees, in particular, value ethical leadership and are more likely to remain with organizations where management exemplifies strong ethical values.³⁶ Line managers are critical to this process, as they directly influence employees' daily experiences and perceptions of ethical standards. Organizations that prioritize ethics at all management levels cultivate a culture of integrity that reinforces employee commitment.

6. PRACTICAL RECOMMENDATIONS FOR ENHANCING ETHICS AND COMPLIANCE PROGRAMS

In addition to fostering ethical culture, ethics programs can also serve as a foundation for robust compliance.³⁷ Based on findings from the IBE survey and other research sources (see above), accompanied with authors' professional experience in the field, the following recommendations are provided to enhance both ethics and compliance within organizations:

- Strengthen Reporting Mechanisms and Protections: Implement confidential and accessible reporting channels that encourage employees to report unethical or non-compliant behaviour without fear of retaliation. Compliance can be further supported by maintaining robust but sensible processes for documenting and addressing reported issues to meet regulatory requirements. Organizations should regularly communicate the availability and protections of these mechanisms to reinforce trust and encourage reporting, crucial elements for both ethics and compliance success. It is also recommended to communicate past and

³³ BANDURA, *op. cit.*

³⁴ Institute of Business Ethics (IBE), *op. cit.*

³⁵ Gallup, *op. cit.*

³⁶ Deloitte, *op. cit.*

³⁷ WALKER Rebecca, International Corporate Compliance Programs, *International Journal of Disclosure and Governance*, 2006(3), pp. 70-81.

anonymised stories (e.g. internal best practice).

- **Embed Compliance into Ethics Training:** Ethics training should incorporate compliance components to clarify regulatory requirements, industry standards, and legal obligations. Employees need to understand that ethical and compliant behaviour not only aligns with organizational values but is also essential for legal compliance. By training employees on ethical conduct and compliance simultaneously, organizations can build a stronger foundation for both.³⁸

- **Establish a Compliance-Based Ethical Culture with Psychological Safety:** Organizations should establish a culture where employees feel safe to raise concerns without fear of retribution, a concept supported by psychological safety theory.³⁹ A compliance-based ethical culture ensures that employees feel empowered to speak up, knowing they are protected and that their concerns will be addressed. Leadership should emphasize the role and importance of non-retaliation policies, which are crucial for compliance with whistleblower protection regulations.⁴⁰

- **Engage Leadership to Model Ethical and Compliant Behaviour:** Senior leaders and line managers play a key role in promoting a culture of both ethics and compliance. Managers should model ethical and compliant behaviour, reinforcing these standards within their teams. Training for leaders can incorporate both ethics and compliance elements, emphasizing that ethical leadership supports adherence to legal and regulatory obligations. Regular workshops can reinforce this dual commitment to ethical and compliant behaviour.

- **Measure, Report, and Enhance Program Effectiveness for Compliance:** Compliance-oriented metrics (the so called “key compliance indicators”), such as frequency and resolution rates of reported incidents, should be integrated into ethics program assessments. Regularly measuring and transparently reporting on the effectiveness of ethics and compliance programs can build trust with employees, stakeholders, and regulatory bodies. Analysing program metrics helps identify compliance risks and room for improvement, ensuring that both ethical and legal standards are continuously upheld.

- **Address Emerging Ethical and Compliance Challenges Together:** As ethical and regulatory challenges evolve, ethics programs should adapt to include components that address emerging compliance issues, such as responsible AI, data privacy, and environmental sustainability. Integrating compliance and ethics considerations into decision-making on these issues helps organizations proactively manage risk and meet regulatory standards, while also maintaining their commitment to ethical practices.

³⁸ ADAM Avshalom M.& Dalia Rachman-Moore, The Methods Used to Implement an Ethical Code of Conduct and Employee Attitudes, *Journal of Business Ethics*, 2004(54), pp. 225–244.

³⁹ EDMONDSON, *op. cit.*, pp. 350–383.

⁴⁰ In the EU, for example: Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (the “*EU Whistleblowing Directive*”). OJ L 305, 26.11.2019, p. 17.

A final and essential consideration is that none of the above recommendations would be achievable without sufficient resource allocation by the organization. As Weber and Wasieleski⁴¹ discuss, resource investment is foundational to creating and sustaining ethical infrastructure within organizations. Their research highlights that for ethics and compliance initiatives to be effective, organizations must allocate financial, human, and technological resources towards areas like ethics training, reporting mechanisms, monitoring systems, and dedicated compliance staff. According to these authors, the absence of adequate resources can undermine an organization's ethical framework, as it limits the ability to enforce policies, conduct thorough training, and follow up on reported issues. They emphasize that resource constraints often lead to superficial ethics programs, where policies exist in name only ("on paper") but lack real enforcement or impact. This insight underscores the importance of organizational commitment not only in policy development but also in practical, sustained investment to support and enhance ethical practices over time. Without such investment, organizations risk fostering a compliance culture that fails to meet its intended objectives, as employees may perceive ethics initiatives as symbolic rather than actionable.⁴²

To sum up – while comprehensive ethics and compliance programs are widely regarded as effective instruments for fostering integrity, their success depends on genuine implementation and consistent leadership commitment. If applied merely symbolically – without adequate resources, authentic leadership engagement, or integration into daily decision-making – such programs risk becoming formalistic or "on paper only".⁴³ Superficial or decoupled ethics initiatives may even produce unintended effects, such as employee cynicism, reduced trust in leadership, or a false sense of ethical security.⁴⁴ These risks highlight that compliance frameworks must be more than procedural artefacts – they require continuous reinforcement, transparent accountability, and alignment between declared values and actual practices. Only when supported by authentic leadership and embedded in organizational culture can ethics programs achieve their intended preventive and developmental function.⁴⁵

7. INTEGRATING ISO 37301 STANDARDS INTO ETHICS AND COMPLIANCE PROGRAMS

ISO 37301⁴⁶, the relatively new and widely recognised international

⁴¹ WEBER James & David M. WASIELESKI, Corporate Ethics and Compliance Programs: A Report, Analysis and Critique, *Journal of Business Ethics*, 2013(112), pp. 609-626.

⁴² WEBER, *op. cit.*

⁴³ ANDREISOVÁ, 2016, *op. cit.*

⁴⁴ WEBER, *op. cit.*

⁴⁵ ANDREISOVÁ, 2016, *op. cit.*

⁴⁶ As a recently introduced and widely recognized standard, ISO 37301 reflects evolving global expectations for compliance management, emphasizing a proactive, well-resourced, and leadership-

standard for compliance management systems, provides organizations with a structured framework for establishing and maintaining effective compliance programs. By aligning the findings of this paper with the principles of ISO 37301, organizations can enhance the integrity of their compliance frameworks, ensuring they foster ethical behavior while meeting regulatory requirements. Below, we explore key areas where the recommendations from this paper are closely aligned with the ISO's principles.

Leadership and Commitment: ISO 37301 emphasizes that senior leadership must actively promote and demonstrate commitment to compliance.⁴⁷ This paper's findings underscore the importance of ethical leadership in building a trustworthy culture. The alignment highlights that visible commitment from leaders can reinforce ethical standards and compliance across the organizations.

Risk-Based Approach and Continuous Improvement: A risk-based approach is central to ISO 37301, which recommends identifying, assessing, and prioritizing compliance risks.⁴⁸ This aligns with the paper's recommendation for regular assessment and monitoring to proactively address potential compliance risks. Additionally, both ISO 37301 and this paper advocate for continuous improvement, ensuring compliance frameworks evolve with emerging ethical challenges, such as data privacy and environmental sustainability.

Effective Reporting and Whistleblower Protection: ISO 37301 advises organizations to establish effective and confidential reporting mechanisms, fostering a culture where employees feel safe to raise concerns without fear of retaliation.⁴⁹ This recommendation is echoed in the findings, where a well-functioning reporting system was identified as essential for both ethics and compliance success. The paper's emphasis on psychological safety in encouraging whistleblowing supports ISO 37301's recommendation for implementing effective non-retaliation policies.

Training and Competence: ISO 37301 underscores the importance of compliance training to ensure that employees are aware of their obligations.⁵⁰ This paper's recommendation to integrate compliance training into ethics programs aligns with this requirement, suggesting that combining compliance and ethics trainings can strengthen organizational values and legal adherence. Training equips employees with knowledge to navigate ethical dilemmas, reinforcing their commitment to both ethical principles and compliance standards.

Resource Allocation and Support: Adequate resource allocation is a

driven approach.

⁴⁷ ISO 37301:2021, chapter 5.1.

⁴⁸ ISO 37301:2021, chapter 6.1.

⁴⁹ ISO 37301:2021, chapter 8.3.

⁵⁰ ISO 37301:2021, chapter 7.2.

key requirement in ISO 37301, as it ensures that compliance programs are sustainable and impactful.⁵¹ Organizations that under-resource their ethics and compliance programs risk superficial implementation. Both ISO 37301 and this paper emphasize that financial, human, and technological resources are necessary to support ethical and compliance objectives effectively.

In conclusion, ISO 37301 provides a structured approach to designing and sustaining compliance frameworks. By integrating ISO 37301 principles, organizations can build robust ethics and compliance programs that foster a culture of integrity, address emerging ethical risks, and meet regulatory requirements. This alignment underscores the importance of a comprehensive, well-resourced approach to ethics and compliance in achieving long-term organizational resilience.

8. CONCLUSION

This paper highlights the significant role that comprehensive ethics and compliance programs play in fostering a culture of integrity within organizations. Supported by findings from the IBE "Ethics at Work 2024" survey⁵² and other notable studies⁵³, this paper demonstrates that such programs can promote honesty, improve willingness to report misconduct, and strengthen trust in leadership, while also supporting compliance with (not only) regulatory standards. The alignment with ISO 37301 reinforces that adherence to structured, internationally recognized guidelines can enhance the effectiveness of these programs by providing a consistent framework for ethical behavior and regulatory compliance.

Drawing on theories such as organizational culture theory, social learning theory, psychological safety, ethical climate theory, moral identity theory, psychological ownership, and ethical infrastructure⁵⁴, this paper provides a theoretical foundation for understanding the interconnected roles of ethics and compliance. A list of final practical recommendations is offered to help organizations integrate compliance considerations into their ethics frameworks, ensuring alignment with regulatory requirements, employee expectations, and corporate values.

In line with ISO 37301's principles, the recommendations in this paper encourage organizations to adopt a structured compliance approach, ensuring that ethical behavior and regulatory adherence are integrated into the corporate culture. The addition of ISO 37301 offers organizations a clear pathway to strengthen these programs through leadership commitment, risk assessment, continuous improvement, and resource allocation, all of which are essential to building long-term resilience.

⁵¹ ISO 37301:2021, chapter 7.1.

⁵² Institute of Business Ethics (IBE), *op. cit.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

Future research might further explore the long-term impact of ethics and compliance programs on organizational performance, the challenges of implementing these programs across diverse cultural and regulatory environments, and best practices for integrating ethical and compliant behavior. Additional studies could also investigate how the adoption of ISO 37301 influences ethical outcomes and organizational trust in various industries and regions.

REFERENCES

1. ADAM Avshalom M. & Dalia Rachman-Moore, The Methods Used to Implement an Ethical Code of Conduct and Employee Attitudes, *Journal of Business Ethics*, 2004(54), pp. 225–244.
2. ANDREISOVÁ, Lucie. Building and Maintaining an Effective Compliance Program, *International Journal of Organizational Leadership*, 2016(5)1, pp. 24-39.
3. ANDREISOVÁ, Lucie. How Can a Corporate (Compliance) Culture Be Described and Effectively Measured? *Business and Management Studies*, 2018(4)3, pp. 52-57.
4. ANDREISOVÁ, Lucie. The role and importance of effective compliance management systems in criminal law practice, *Horizons of Law in Business and Finance*, Bucarest, Paris, Calgary: ADJURIS, 2018, pp. 11-26.
5. AQUINO Karl & Americus REED, The Self-Importance of Moral Identity, *Journal of Personality & Social Psychology*, 2002(83)6, pp. 1423-1440.
6. BANDURA, Albert. *Social learning theory*, Englewood Cliffs, NJ: Prentice Hall, 1977.
7. Deloitte, *Global Millennial and Gen Z Survey*, 2023. Available at: <<https://www2.deloitte.com/content/dam/Deloitte/global/Documents/deloitte-2023-gen-z-millennial-survey.pdf>>.
8. EDMONDSON, Amy. Psychological Safety and Learning Behavior in Work Teams, *Administrative Science Quarterly*, 1999(44)2, pp. 350-383.
9. Ethics & Compliance Initiative (ECI), *Global Business Ethics Survey*, 2023. Available at: <<https://www.ethics.org/global-business-ethics-survey/>>.
10. Gallup, *State of the Global Workplace Report*, 2023. Available at: <<https://www.gallup.com/workplace/349484/state-of-the-global-workplace.aspx>>.
11. Institute of Business Ethics (IBE), *Ethics at Work 2024 Survey*, 2024. Available at: <<https://www.ibe.org.uk/ethicsatwork2024.html>>.
12. KPMG, *Corporate Responsibility Reporting Survey*, 2023. Available at: <<https://assets.kpmg.com/content/dam/kpmg/no/pdf/2024/06/sustainability-report-2023.pdf>>.
13. MARTIN Kelly D. & CULLEN John B., Continuities and Extensions of Ethical Climate Theory: A Meta-Analytic Review, *Journal of Business Ethics*, 2006 (69), pp. 175–194.
14. PIERCE Jon L. *et al.*, Toward a Theory of Psychological Ownership in Organizations, *The Academy of Management Review*, 2001(26)2, pp. 298–310.
15. PwC, *Global Economic Crime and Fraud Survey*, 2022. Available at: <<https://www.pwc.com/gx/en/services/forensics/economic-crime-survey/2022.html>>.
16. SCHEIN, Edgar H. *Organizational Culture and Leadership*, San Francisco:

- Jossey Bass, 1985.
17. SHAO Ruodan, *et al.*, Beyond moral reasoning: A review of moral identity research and its implications for business ethics, *Business Ethics Quarterly*, 2008(18)4, pp. 513–540.
 18. Strategic Human Resource Management (SHRM), *Workplace Ethics Survey (2023 State of the Workplace Survey)*, 2023. Available at: <<https://www.shrm.org/mena/topics-tools/research/2023-2024-shrm-state-workplace>>.
 19. TENBRUNSEL Ann E. *et al.*, Building houses on rocks: The role of the ethical infrastructure in organizations, *Social Justice Research*, 2003(16)3, pp. 285-307.
 20. VICTOR Bart & John B. CULLEN. A Theory and Measure of Ethical Climate in Organizations, *Research in Corporate Social Performance and Policy*, 1988(9), pp. 51-71.
 21. WALKER Rebecca, International Corporate Compliance Programs, *International Journal of Disclosure and Governance*, 2006(3), pp. 70-81.
 22. WEBER James & David M. WASIELESKI, Corporate Ethics and Compliance Programs: A Report, Analysis and Critique, *Journal of Business Ethics*, 2013 (112), pp. 609-626.

Liquidated Damages as a Legal Remedy for Merchants in Latvia

Dr. iur. Annija KĀRKLĪŅA

E-mail: annija.karklina@lu.lv

ORCID: 0000-0002-4992-8403

Faculty of Law, University of Latvia

Professor, Head of the Department of Constitutional and Administrative Law,
Riga, Latvia

Mg. iur. Reinis IVANOVS

E-mail: reinis.ivanovs@lu.lv

ORCID : 0009-0002-4806-8998

Faculty of Law, University of Latvia

Lecturer, Ph.D. Student at the Department of Civil Law
Riga, Latvia

Abstract: *Liquidated damages are a widely used legal remedy in several countries. Liquidated damages represent a legal institution that is praised for its practicality, certainty, and economic logic. In practice, this legal institution has also been applied in Latvia. In 2023, the Supreme Court of the Republic of Latvia adopted the most significant judgment in relation to liquidated damages. In this judgment, the court ruled on the prohibition of liquidated damages in Latvia. This judgment has raised a variety of opinions in Latvian legal science as to whether in Latvia there should be an absolute prohibition on liquidated damages. Considering the above, the authors analyse the legal concept of liquidated damages in Latvia and its compatibility with other Latvian civil law concepts. The paper evaluates the reasoning of the Supreme Court of the Republic of Latvia regarding this legal institution and offers the authors' assessment of liquidated damages in Latvia, comparing the practice of Latvia and other countries regarding this legal institution. Lastly, the paper concludes with an assessment of the possible admissibility of liquidated damages in commercial legal relations.*

Keywords: *contractual penalty, legal relations of merchants, liquidated damages, penalty clauses.*

JEL Classification: K22, K23

DOI: <https://doi.org/10.62768/ADJURIS/2025/5/09>

Please cite this article as:

Kārkliņa, Annija & Reinis Ivanovs, „Liquidated Damages as a Legal Remedy for Merchants in Latvia”, in Grmelová, Nicole & Anna Kretková (eds.), *Prospects of Law in Business*, ADJURIS – International Academic Publisher, Bucharest, Paris, Calgary, 2025, p. 115-124, <https://doi.org/10.62768/ADJURIS/2025/5/09>.

1. INTRODUCTION

The paper explains the nature of liquidated damages and their place in the Latvian Civil Law system. In this article, the authors will answer the question of whether merchants could use liquidated damages in their legal transactions. The authors will also answer the question of how the proportionality of liquidated damages in merchants' legal transactions could be assessed in the Latvian civil law system. In order to achieve the objective of answering the questions formulated, the authors will use several methods. A comparative method is used to analyse the similarities and differences between Latvia and other countries in their approach to liquidated damages. The paper also uses an analytical method to draw conclusions about the application of liquidated damages in commercial legal relations. Considering that liquidated damages are a little-discussed topic in the Latvian context, foreign sources have been used in addition to Latvian legal literature and case law.

1.1. General description of the liquidated damages

According to the theory of contracts liquidated damages are one of the civil law remedies, which contractual parties can stipulate. The essence of liquidated damages is a prior, realistic estimate of potential damages in the event of a breach of contract. Moreover, it is not necessary to prove the actual amount of damages to claim liquidated damages.¹ In the case of liquidated damages, it is irrelevant whether any damages have arisen. The rules on liquidated damages apply automatically as soon as a breach of contract has been established.² Consequently, there is only one prerequisite for applying liquidated damages – a breach of contract.

In respect of preconditions of civil liability, liquidated damages fully match the concept of contractual penalties. Therefore, both legal concepts are closely related. It is important to bear in mind that liquidated damages can only be agreed upon for a breach of a contractual provision. If the parties have agreed on the payment of a certain amount in the event of certain circumstances, this does not automatically mean that the contract specifies liquidated damages or contractual penalties.³ Liquidated damages must be agreed upon not for the occurrence of certain circumstances, but specifically for the breach of a specific contractual obligation.

The structure of the agreement on liquidated damages is closely linked to its purpose. The purpose of the liquidated damages clause is to convert uncertain

¹ EGGLESTON, Brian. *Liquidated Damages and Extensions of Time: In Construction Contracts*. Wiley & Sons, Incorporated, John, 2009, p. 76.

² *Ibid.*, p. 78.

³ READ, P. A. *Contract Law (Common Professional Examination)*. HLT Publications, 1996, p. 325.

future damages into a fixed amount and thus “liquidate” the uncertainty about the consequences of a breach of contract.⁴ In addition to the aspect of legal certainty, there are pure commercial and economic reasons why contracting parties are willing to agree on liquidated damages. Liquidated damages allow parties to avoid the expense and disputes associated with proving the amount of damages.⁵ Furthermore, the liquidated damages clause may be expressed in various ways – as a fixed amount, a percentage, or otherwise.⁶

Regardless of the way liquidated damages are expressed, the key factor is the truthfulness of this contractual clause – a realistic estimate of potential damages at the time of concluding the contract. If the parties to the contract “make a mistake” in determining the amount of liquidated damages, different countries have different approaches to this legal institution.

For example, in the United Kingdom (UK) (where this legal institution originates), liquidated damages are an acceptable civil law remedy. However, contractual penalties or disproportionately high liquidated damages are not permitted. Therefore, punitive contractual provisions are not permitted in the UK. The criteria for distinguishing between liquidated damages and contractual penalties in the UK are derived from two landmark judgments: 1) *Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Company Limited* and 2) *Cavendish Square Holding BV v Talal El Makdessi; Parking Eye Limited v Beavis*. In summarising the findings of both judgments, the following criteria may indicate the punitive character of the agreed sum: 1) the sum is excessive in comparison with the greatest damages that could be proven; 2) the sum exceeds the value of the obligation; 3) the sum is payable in equal amounts for different infringements irrespective of severity. However, the proportionality of the agreed amount is demonstrated if the clause has been carefully considered and agreed between the parties.⁷

Additional criteria for identifying a punitive clause are present where its purpose is to impose on the breaching party (i) damages disproportionate to the legitimate interests of the other party, or (ii) in less complex cases, damages that are manifestly excessive and disproportionate.⁸ Regarding this aspect of proportionality, courts in Anglo-Saxon (common law) countries have indicated that, in order for a clause to be deemed invalid, it is not sufficient that the estimate of damages is disproportionate. It is necessary that the damages included in the

⁴ HALSON, Roger. *Liquidated Damages and Penalty Clauses*. Oxford University Press, 2018, p. 116.

⁵ EGGLESTON, Brian. *Liquidated Damages and Extensions of Time: In Construction Contracts*. Wiley & Sons, Incorporated, John, 2009, p.41.

⁶ WHINCUP, Michael H. *Contract law and practice: the English system and continental comparisons*. 2nd ed. Deventer, the Netherlands: Kluwer Law & Taxation Publishers, 1992, p. 259.

⁷ BEALE, Hugh, et al. *Cases, materials and text on contract law*. 2nd ed. Oxford: Oxford: Hart, 2010, p. 1053.

⁸ HALSON, *op. cit.*, pp. 5-6.

clause are “out of all proportion”.⁹

The example of the UK is significant because the UK has the most experience with the liquidated damages. However, the UK follows the common law tradition, the foundations of which differ substantially from those of the Latvian legal system, which is part of continental European law system. Latvia is a Romano-Germanic law country, and because of historical background and traditions Latvian civil law is often compared to the related German civil law. However, unlike in Latvian civil law, in Germany the concept of liquidated damages is recognized alongside the concept of contractual penalties. The distinction is based on the different functions of the two legal concepts. Contractual penalties in Germany have two functions: they encourage the other party to the contract to fulfil their obligations and, in the event of non-fulfilment, cover any damages. Liquidated damages, by contrast, serve only the latter function.¹⁰

In German law, the purpose of liquidated damages is to simplify litigation following a breach of contract, not to impose a penalty on the contracting party. Consequently, when assessing the legality of the liquidated damages, the court must examine whether the amount determined by the parties is a reasonable assessment of the damages. In contrast, the main purpose of a contractual penalty is to encourage the debtor to fulfil their obligations by imposing an additional burden on them in the event of a breach.¹¹

The existence of liquidated damages in the German legal system is derived from the German Civil Code (*Bürgerliches Gesetzbuch*)¹² (BGB) regulations on civil liability. Liquidated damages are governed, by analogy, through the provisions on contractual penalties. For example, BGB Article 343 (1) provides: “*If the contractual penalty to be paid is disproportionately high, it may be reduced to a reasonable amount by court order upon application by the debtor. When assessing proportionality, all the debtor's legitimate interests must be taken into account, not just his financial interests. Once the contractual penalty has been paid, its reduction is excluded.*” According to German case law, this legal provision also applies in cases of liquidated damages.¹³

Thus, unlike UK law, in Germany a court may intervene in a liquidated damages clause by reducing it. In the UK, on the other hand, the court can only declare the liquidated damages clause null and void. In Germany, a claim for liquidated damages is unlawful if one of the following alternative criteria is met: 1)

⁹ Order of the High Court of Australia of 17 November 2005, No. S291/2005, S292/2005 and S293/2005. [online]. [accessed on 2025-09-21]. Available from: <https://jade.io/article/346>.

¹⁰ BEALE, *op. cit.*, p. 1058.

¹¹ RASNAČS, Lauris. Liquidated Damages in Latvian Law. In: The 9th International Scientific Conference of the Faculty of Law of the University of Latvia. [online]. University of Latvia Press, 2024, pp. 286–299 [viewed 23 September 2025]. Available from: doi:10.22364/iscflul.9.1.25

¹² Law of Germany “German Civil Code”, 01.01.1900. [viewed 21.09.2025.]. Available from: https://www.gesetze-im-internet.de/englisch_bgb/.

¹³ BEALE, *op. cit.*, p. 1056.

the amount specified exceeds the damages that would normally be expected under normal circumstances or the normal reduction in value; or 2) the counterparty is not expressly granted the right to prove that either no damages occurred or that the actual loss is significantly lower than the fixed sum.¹⁴ As a final difference from UK law, it should be noted that under German law, a liquidated damages clause does not preclude the enforcement of a “classic” damages claim. In other words, liquidated damages (like contractual penalties) are claimed as the minimum amount that the claimant hopes to obtain, in addition to the claim for full compensation for damages.¹⁵ Thus, to summarise, liquidated damages are a contractual civil liability remedy that is found in both Anglo-Saxon and Romano-Germanic countries. However, both examples illustrate that liquidated damages constitute a legal institution whose regulation must be aligned with the legal system of the respective country.

2. LIQUIDATED DAMAGES IN LATVIA

The first theoretical breakdown, which can be found as a legal source on liquidated damages in Latvia is the judgment of the Supreme Court of the Republic of Latvia of 30 March 2023 in case SKC-3/2023¹⁶ (the Judgment). In the Judgment, the Supreme Court answered the question of whether a claim for liquidated damages is admissible in Latvia. The judgment provides a clear answer that liquidated damages are not admissible in Latvia. In the opinion of the Senate, this legal institute is not permissible because the parties could avoid the need to prove the prerequisites for compensation for damages specified in the Civil Law of the Republic of Latvia (*Latvijas Republikas Civillikums*)¹⁷ (CL).¹⁸

In the authors' view, comparing liquidated damages to a claim for compensation for damages is not the most appropriate method of analysis. As mentioned above, liquidated damages do not have the same prerequisites as a classic claim for damages. Liquidated damages require only a breach of obligation, but a claim for damages also requires the existence of damages and causality. Similarly, the objectives of liquidated damages and claims for damages are completely different. The objective and effectiveness of liquidated damages lies in the fact

¹⁴ DANNEMANN, Gerhard, Reiner SCHULZE, and Jonathon WATSON (eds.) *German Civil Code Volume I* [online]. C.H. BECK, 2020 [viewed 23 September 2025]. ISBN 9783406765773. Available from: doi:10.17104/9783406765773.

¹⁵ BEALE, *op. cit.*, p. 1058.

¹⁶ Decision of Senāta Civillietu departaments, Latvia of 30 March 2023, No. SKC-3/2023 [online]. In Archive Court decisions. Court administration. [accessed on 2025-09-21]. Available from: <https://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/civillietu-departaments/hronologiska-seciba?lawfilter=0&year=2023>.

¹⁷ Law of Republic of Latvia “the Civil Law”, 28.01.1937. [viewed 21.09.2025.]. Available from: <https://likumi.lv/ta/en/en/id/225418-civil-law>.

¹⁸ Decision of Senāta Civillietu departaments, Latvia of 30 March 2023, No. SKC-3/2023 cited above, para. 14.7.

that a specific, previously known amount is claimed. Compensation for damages, by contrast, must restore the injured party to the financial position they would have occupied had the unlawful act not occurred. A similar objective of compensation for damages is also set out in the civil law codifications of Germany and the Czech Republic.¹⁹

To determine whether the concept of liquidated damages is compatible with the Latvian civil law system, it is necessary to examine its compatibility with contractual penalties rather than compensation for damages. The CL sets out the rules for agreeing and applying contractual penalties in relatively great detail. The most significant of these is the mandatory 10% limit on contractual penalties from the amount of non-performed debt for improper performance of obligations (CL Article 1716(3)) and the mandatory order of debt deduction, starting with interest, then principal debt, and only then contractual penalties (CL Article 1843). If, in parallel with contractual penalties, liquidated damages clauses (which are not regulated by the CL²⁰) were also allowed, all restrictions regarding contractual penalties could easily be circumvented, which will lead to the result that the CL Article 1716(3), which limits the contractual penalty to max 10%, would become declarative. In the authors' opinion, this is precisely why liquidated damages are not permissible in the Latvian civil law system.

3. LIQUIDATED DAMAGES AS A LEGAL REMEDY FOR MERCHANTS

Although the Judgment prohibits liquidated damages in any form, it would be reasonable to discuss whether this legal institution could be permitted at least in certain sectors. For example, the opinion has been expressed that liquidated damages should be permissible in competition law. In light of Latvia's current experience with the recovery of damages for competition law violations, it has been concluded that in such a particularly complex sector, parties should be permitted to agree in advance on the amount of damages.²¹ Although there is no court case in Latvia which supports such approach, it should be examined from the point of view of legal theory, whether such potential admissibility of liquidated damages can be allowed – namely, its application in merchant (business) relations.

Latvian commercial law is codified in the Latvian Commercial Law

¹⁹ BRANDEJSKÝ, Tomáš. Selected aspects of Compensation in the Dieselgate case in Germany. in GRMELOVÁ, Nicole (ed.), *Perspectives of Law in Business and Finance*, Bucharest: ADJURIS, 2023, pp. 105-117.

²⁰ See more on institutions of Contractual Law that are not regulated in the CL: KERIKMÄE, Tanel, *et al.*, (eds.) *The Law of the Baltic States* [online]. Cham: Springer International Publishing, 2017 [viewed 25 September 2025], pp. 297-298. Available from: doi:10.1007/978-3-319-54478-6.

²¹ RASNAČS, Lauris, and Beāte PETRONE. Iepriekš novērtēti zaudējumi konkurences tiesību pārkāpuma gadījumā. *Jurista Vārds*. 2023, (43) 1309, pp. 36–42.

(*Komerclikums*)²² (KCL). Since the KCL does not contain specific provisions regarding contractual penalties, the CL also applies to contractual penalties in commercial legal relationships. As mentioned above, according to the CL, liquidated damages are not permitted. Therefore, at least for the time being, liquidated damages are not admissible in commercial legal relations under Latvian law.

However, merchant relations (as in the case of competition law) cannot be regarded in the same manner as ordinary legal relations. The KCL regulations themselves provide for a different approach to merchants. Merchants are one of the few entities whose purpose of existence and functioning is defined by law. KCL Article 1(2) provides that the purpose of a merchant's activity is the pursuit of profit. Therefore, all aspects that promote profit-making – speed, efficiency, predictability, etc. – are essential in merchant relations. This distinction is illustrated by the limitation period: while the general limitation period under Latvian civil law is 10 years (CL Article 1895), in commercial relations it is reduced to 3 years (KCL Article 406). This is one example of how Latvian legislation has been adapted to the economic needs of merchants.

Different legal treatment of merchants is common practice in many countries. When assessing the possibility of introducing liquidated damages in Latvia, we must once again return to the example of Germany. Under German law, a court has the right to reduce the amount of liquidated damages only if the relevant clause is intended to put pressure on a party to fulfil a legal obligation (rather than to agree in advance on the amount of damages), and if that party is not a merchant.²³ Thus, German regulation allow for greater flexibility in the application of liquidated damages between merchants.

In addition to the argument for more liberal regulation for merchants, economic considerations in favour of liquidated damages should also be noted. Legal doctrine indicates that economic principles can be used to analyse the effectiveness of legal regulation. The economic approach offers a rather uniform and objective view of what legal norms are and what they should be to promote economic activity.²⁴ Thus, if there were no Judgment (prohibiting liquidated damages), economic logic would indicate that the legal framework should allow for liquidated damages between merchants.

At the same time, Latvia's experience with the regulation of contractual penalties demonstrates that civil liability remedies cannot be applied without limitation. Even in the absence of specific legal provisions, guidelines for establishing sound practice are necessary at the very least. This is particularly important in the case of contractual remedies,²⁵ as there is information asymmetry in many

²² Law of Republic of Latvia “the Commercial Law”, 13.04.2000. [viewed 21.09.2025.]. Available from: <https://likumi.lv/ta/en/en/id/5490-commercial-law>.

²³ HALSON, *op. cit.*, p. 175.

²⁴ HILLMAN, Robert A. Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages. *Cornell Law Review*. 2000, 85(3), 717–738.

²⁵ More on remedies in CL: TORĢĀNS, Kalvis, et al. *Contract Law in Latvia*. Alphen aan den

contracts, which allows one party to impose its will on the other. Such commercial contracts include, for example, insurance contracts, agency contracts, sub-contractor contracts, etc.²⁶ Therefore, if liquidated damages were permitted in commercial legal relations, a mechanism should be provided for the court to control their proportionality.

Given that Latvia has no specific regulations governing liquidated damages, the court should be guided by the principle of proportionality, which is derived from Article 1 of CL.²⁷ Article 1 of CL requires that rights are exercised, and obligations are performed in good faith. Article 1 of CL demands that parties of civil law relationships respect each other and take into account the legitimate interests of the other party.²⁸ However, the obligation to respect the interests of others should not be interpreted as authorising the court to adapt the outcome of each legal situation to general considerations of fairness, freely modifying the legal consequences arising from the law or a legal transaction.²⁹ Article 1 of CL applies as a rule for interpreting written law, which imposes an obligation on the person applying the law to assess the interests involved in each individual case and, on that basis, to determine the scope and limits of subjective rights.³⁰

This is where the first problem arises – in the absence of any regulation on liquidated damages, the Latvian courts will not be able to use Article 1 of CL as a norm for interpreting written law, as there will be no norm to interpret. However, taking into account legal theory and the findings of the Constitutional Court on the application of the principle of proportionality in the context of contractual penalties³¹ courts could use the principle of proportionality as an independent legal norm for the control of liquidated damages.

This brings us to the next problem – how to apply the principle of proportionality in the context of liquidated damages? In this regard, Australian legal doctrine states that the application of the principle of good faith to liquidated

Rijn: Kluwer Law International, 2020, pp. 151-166.

²⁶ BAG, Sugata. *Economic Analysis of Contract Law: Incomplete Contracts and Asymmetric Information*. Palgrave Macmillan, 2018, p. 60.

²⁷ BALODIS, Kaspars. *Ievads civiltiesībās*. Rīga: Zvaigzne ABC, 2007, p. 146.

²⁸ Decision of Senāta Civillietu departaments, Latvia of 27 March 2024, No. SKC-25/2024, para 16.1. [online]. In Archive Court decisions. Court administration. [accessed on 2025-09-21]. Available from: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/528455.pdf>.

²⁹ Decision of Senāta Civillietu departaments, Latvia of 12 March 2020, No. SKC-189/2020, para 6.3. [online]. In Archive Court decisions. Court administration. [accessed on 2025-09-21]. Available from: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/407611.pdf>.

³⁰ Decision of Senāta Civillietu departaments, Latvia of 16 December 2020, No. SKC-231/2020, para 6.1. [online]. In Archive Court decisions. Court administration. [accessed on 2025-09-21]. Available from: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/433401.pdf>.

³¹ Decision of Constitutional Court (Satversmes tiesa) of 28 September 2020, No. 2019-37-0103, para 29.2. [online]. In Archive Court decisions. Court administration. [accessed on 2025-09-21]. Available from: https://www.satv.tiesas.gov.lv/wp-content/uploads/2019/12/2019-37-0103_Spriedums.pdf.

damages cannot be equated with their “reasonableness”.³² For example, the applicability of the principle of good faith to liquidated damages clauses may be indicated not only by prior discussion of the agreed amount, but also by discussion of the methodology used for its calculation. In Latvia, incorporating discussion of the methodology for calculating liquidated damages could serve as a useful means of assessing their compliance with the principle of good faith. However, this assessment criterion is not universal, as there may be cases where the calculation methodology contains commercial secrets or state secrets, which at the time of concluding the contract cannot be revealed to others for legal reasons.³³ Latvian courts will potentially have to come to their own conclusions and criteria for assessing liquidated damages clauses between merchants. Foreign court practice and doctrine could be a possible source for these criteria.

To summarise, it must be concluded that allowing the liquidated damages, even only in commercial legal relations, would pose a serious challenge to the Latvian civil law system. The application of such a legally complex legal institution could cause difficulties for both the courts and the parties to the agreement. To be able to accurately determine the amount of potential damages at the time of concluding a contract, the parties to the transaction must have in-depth knowledge in the specific field, as well as sufficient financial and time resources to draft the contract. Therefore, in the authors' opinion, merchants are the subjects who could theoretically be allowed to use liquidated damages. Although, according to the practice of the Latvian Supreme Court, liquidated damages are currently not allowed, it is likely that the development of economic relations will force Latvia to allow the existence of such a legal institution. Therefore, it can be expected that in the coming years, liquidated damages or a serious reform of contractual penalties could become topical issues in Latvian civil law.

4. CONCLUSION

Liquidated damages are a civil law remedy commonly used in Anglo-Saxon countries., they are also applied in several countries with a Romano-Germanic legal system. Liquidated damages are a civil remedy that allows the parties to agree in advance on the amount to be paid in the event of a breach of contract. This avoids lengthy and costly litigation to prove the existence and exact amount of the damages. Since only one criterion (breach of contract) needs to be established to recover liquidated damages, this legal institution is similar to a contractual penalty.

The Supreme Court of the Republic of Latvia has adopted a judgment

³² CARTER, JW and Elisabeth PEDENA. A Good Faith Perspective on Liquidated Damages. In: RICKETT, Charles E.F. (ed.) *Justifying Private Law Remedies* [online]. Hart Publishing, 2008, pp. 149-174.

³³ *Ibid.*

prohibiting liquidated damages in Latvia. This judgment has sparked a debate on whether a complete prohibition of liquidated damages is appropriate in today's economic relations. The authors point to commercial legal relations as the most appropriate area in which liquidated damages could theoretically be allowed. However, the use of liquidated damages can pose considerable challenges even among the most economically knowledgeable and capable entities. These challenges are related both to the ability of the parties to the contract to apply this legal institution correctly and to the ability of the courts (currently without specific regulations) to control it.

REFERENCES

1. BAG, Sugata. *Economic Analysis of Contract Law: Incomplete Contracts and Asymmetric Information*. Palgrave Macmillan, 2018.
2. BALODIS, Kaspars. *Ievads civiltiesībās*. Rīga: Zvaigzne ABC, 2007.
3. BEALE, Hugh, et al. *Cases, materials and text on contract law*. 2nd ed. Oxford: Oxford: Hart, 2010.
4. BRANDEJSKÝ, Tomáš. Selected aspects of Compensation in the Dieselgate case in Germany. in GRMELOVÁ, Nicole (ed.), *Perspectives of Law in Business and Finance*, Bucharest: ADJURIS, 2023, pp. 105-117.
5. CARTER, JW and Elisabeth PEDENA. A Good Faith Perspective on Liquidated Damages. In: RICKETT, Charles E.F. (ed.) *Justifying Private Law Remedies* [online]. Hart Publishing, 2008, pp. 149-174.
6. DANNEMANN, Gerhard, Reiner SCHULZE, and Jonathon WATSON (eds.) *German Civil Code Volume I* [online]. C.H. BECK, 2020 [viewed 23 September 2025]. ISBN 9783406765773. Available from: doi: 10.17104/9783406765773.
7. EGGLESTON, Brian. *Liquidated Damages and Extensions of Time: In Construction Contracts*. Wiley & Sons, Incorporated, John, 2009.
8. HALSON, Roger. *Liquidated Damages and Penalty Clauses*. Oxford University Press, 2018.
9. HILLMAN, Robert A. Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages. *Cornell Law Review*. 2000, 85(3), 717–738.
10. RASNAČS, Lauris, and Beāte PETRONE. Iepriekš novērtēti zaudējumi konkurences tiesību pārkāpuma gadījumā. *Jurista Vārds*. 2023, (43) 1309, pp. 36–42.
11. RASNAČS, Lauris. Liquidated Damages in Latvian Law. In: The 9th International Scientific Conference of the Faculty of Law of the University of Latvia. [online]. University of Latvia Press, 2024, pp. 286–299 [viewed 23 September 2025]. Available from: doi:10.22364/iscflul.9.1.25.
12. READ, P. A. *Contract Law (Common Professional Examination)*. HLT Publications, 1996.
13. WHINCUP, Michael H. *Contract law and practice: the English system and continental comparisons*. 2nd ed. Deventer, the Netherlands: Kluwer Law & Taxation Publishers, 1992.

Applicable Law for Liability Claims in Insolvency Proceedings: Directors' Duties of Care and Pre-Insolvency Obligations

doc. JUDr. Ing. Tomáš MORAVEC, Ph.D.

tomas.moravec@vse.cz

ORCID 0000-0003-43595174

Department of Business and European Law
Faculty of International Relations, Prague University of Economics and
Business, Prague, Czech Republic

Abstract: *This paper examines the determination of applicable law for liability claims in pre-insolvency proceedings. It analyses the boundary between the company law statute (lex societatis) and the insolvency statute (lex concursus), with particular emphasis on directors' liability for breach of the duty of care and on pre-insolvency obligations. Building on the case law of the Court of Justice of the European Union, the paper highlights the material approach to conflict-of-law qualification. Further attention is devoted to the duty to file for insolvency, the shift of loyalty from shareholders to creditors, and the risks of forum shopping. A solution may lie in the minimal harmonization of selected rules at the EU level, or alternatively through clearer guidance in national conflict-of-law norms.*

Keywords: *applicable law, directors' liability, duty of care, insolvency law.*

JEL Classification: K22, K23

DOI: <https://doi.org/10.62768/ADJURIS/2025/5/10>

Please cite this article as:

Moravec, Tomáš, „Applicable Law for Liability Claims in Insolvency Proceedings: Directors' Duties of Care and Pre-Insolvency Obligations”, in Grmelová, Nicole & Anna Kretková (eds.), *Prospects of Law in Business*, ADJURIS – International Academic Publisher, Bucharest, Paris, Calgary, 2025, p. 125-133, <https://doi.org/10.62768/ADJURIS/2025/5/10>.

1. INTRODUCTION

International jurisdiction in proceedings related to insolvency is primarily determined in EU law by Article 6 of Regulation (EU) 2015/848¹. This provision, interpreted in the light of Recital 35, embodies the principle of *vis attractiva concursus*, actions which derive directly from insolvency proceedings and are closely connected with them must be heard by the courts of the Member State

¹ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast). OJ L 141, 5.6.2015, pp. 19–72(hereinafter EIR).

where the insolvency proceedings have been opened. The purpose is to concentrate disputes with an insolvency core before one court while simultaneously excluding any gaps between the European Insolvency Regulation (EIR) and the Brussels I bis² Regulation, which otherwise governs jurisdiction in civil and commercial matters.³

The demarcation between the EIR and Brussels I bis regulations is autonomous and functional. The decisive criterion is not the procedural context but the legal basis of the claim.⁴ This approach follows the case law of the Court of Justice of the EU (CJEU)⁵ based on the Gourdain doctrine,⁶ according to which Article 6 EIR applies to claims whose rights and obligations are specifically governed by insolvency law and whose precondition is the existence of insolvency or a direct insolvency context. The claims arising under general civil or commercial law fall under the Brussels I bis regime. The close connection test is reinforced by the aim of avoiding inconsistent judgments in separate proceedings, and is also supported by case law on related actions.

For the assessment of the applicable law, it is therefore essential to determine whether pre-insolvency proceedings fall within the scope of the EIR or not. If they do, the existing case law will apply. If such pre-insolvency proceedings are not listed in Annex A EIR the applicable law will have to be solved separately.

If pre-insolvency proceedings are deemed to fall under the EIR Annex A, the established framework of Article 6 EIR will apply. In this case, many claims are covered by Article 6 EIR, including exclusion actions, avoidance actions, actions for supplementing the estate by directors where insolvency is a prerequisite, actions seeking a declaration that certain assets belong to secondary insolvency proceedings, and sanctions for failure to file for insolvency in due time.⁷ By contrast, contractual performance claims arising from contracts concluded before insolvency, tort claims with a different purpose e.g., unfair competition, actions

² 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, 20.12.2012, pp. 1–32 (hereinafter Brussels I bis).

³ BĚLOHLÁVEK, J. Alexander. *Evropské a mezinárodní insolvenční právo: komentář. Nařízení Evropského parlamentu a Rady 2015/848 o insolvenčním řízení*. 1. vydání. Praha: C. H. Beck, 2020, p. 311. Also, GARCIMARTIN, Francisco. *Insolvency-related judgments and Vis Attractiva Concursum: The EU Approach*. *Insolvency Intelligence*, 2018(1). Available from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3221102.

⁴ BORK Reinhard, VAN ZWIETEN, K. (eds.) Kristin. *Commentary on the European Insolvency Regulation*, Oxford: OUP 2016 p. 204. Also, GARCIMARTIN, *op. cit.*, p. 4.

⁵ Compare the judgments of the CJEU in cases C-649/13 *Comité d'entreprise de Nortel Networks* of 11 June 2015, C-157/13 *Nickel & Goeldner Spedition* of 4 September 2014, and C-386/05 *Color Drack GmbH v Lexx International Vertriebs GmbH* of 3 May 2007.

⁶ See the judgment of the CJEU in case C-133/78 *Gourdain Nadler* of 22 February 1979.

⁷ See the judgment of the CJEU in case C – 47/18 *Skarb Państwa Rzeczypospolitej Polskiej – Generalny Dyrektor Dróg Krajowych i Autostrad* of 18 September 2019. See also the judgment of the CJEU in case C-296/17 *Wiemer & Trachte* of 14 November 2018. and in case C- 157/13, *Nickel & Goeldner Spedition* of 4. September 2014.

brought after the closure of insolvency proceedings, and claims following assignment usually fall under Brussels I bis regulation.⁸ On the other hand, the administrator may bring both claims before the courts of the defendant's domicile under Brussels I bis regulation. This balances the concentration of insolvency matters with the requirements of procedural efficiency and the avoidance of contradictory judgments.⁹

Scholarly writing highlights the cost and predictability implications of applying *lex fori concursus* for the debtor's contractual partners and creditors — shifting jurisdiction to the insolvency court and the application of foreign law may increase transaction costs and undermine contractual autonomy.¹⁰ Critical literature Madaus, Wessels¹¹ stresses the inconsistency in applying Article 6 EIR to borderline cases. The CJEU, however, emphasises that the EIR and Brussels I bis regulations must be interpreted to avoid overlaps and legal vacuums, thereby establishing their mutual exclusivity.

In the case of pre-insolvency proceedings, the question arises whether such proceedings fall within the scope of Annex A of the EIR. In these cases, the absence of inclusion in Annex A raises significant uncertainty and the jurisdiction must then be determined under the Brussels I bis regulation or, in certain instances, through national conflict-of-law rules. This gap creates the risk of inconsistent classifications across Member States and highlights the pressing need for further scholarly analysis and, potentially, targeted harmonisation.

On the basis of above mentioned theory and judicature, the article aims to examine the applicable law to liability claims in pre-insolvency proceedings focusing on directors' Duties of Care.

This article employs an analytical and comparative methodology. The analysis is based primarily on the interpretation of EU secondary law, in particular the Insolvency EIR, Rome II Regulation and the Brussels I bis Regulation, and on the case law of the CJEU.

2. APPLICABLE LAW IN PRE-INSOLVENCY PROCEEDING

The issue of jurisdiction in liability claims against directors in the context of insolvency remains unsettled in EU law. While the insolvency courts of the center of main interest (COMI) state have exclusive jurisdiction under Article 6 EIR for actions directly derived from insolvency proceedings, questions arise as

⁸ See the judgement of the CJEU in case C-296/17 *Wiemer & Trachte* of 14 November 2018 or case C-98/06 *Freepport plc v. Olle Arnoldsson* of 11 October 2007.

⁹ OMAR Paul J. The Insolvency Exception in the Brussels Convention and the definition of „Analogous Proceedings“. *International Company and Commercial Law Review*, 2011(5), p. 175.

¹⁰ GARCIMARTIN, *op. cit.*

¹¹ MADAUS, Stephan, WESSELS, Bob. *Report on identifying annex actions under Article 6(1) of the European Insolvency Regulation*, Conference on European Restructuring and Insolvency Law, 2015, pp. 4-23.

to whether other liability claims should fall within the competence of the courts of the state of incorporation or the COMI courts (*lex concursus*).¹² The CJEU has consistently favoured a material approach, examining the legal basis of the claim which it set in *Kornhaas*¹³ and held that liability for the late filing of an insolvency petition is governed by *lex concursus*, while in *H v. HK*¹⁴ it accepted that a foreign director may be sued before the COMI courts once insolvency has materialised. So the boundaries of the insolvency statute are defined both positively (*lex fori concursus*) and negatively, by the company statute and contractual statute.¹⁵

In practice, this may lead to the parallel application of the Brussels I bis regulation or even the Lugano II Convention, the interpretation of which follows the CJEU's case law on Brussels I bis regulation. Such overlaps allow multiple actions and create scope for forum shopping, as directors may seek jurisdictions with more lenient liability standards, for example longer deadlines to file for insolvency.¹⁶

The diversity of national regimes makes it difficult for directors to identify their obligations, particularly in the pre-insolvency phase and once insolvency has occurred. Duties arise under both company law including duty of care and loyalty and insolvency law including duty to file an insolvency petition, prohibitions on detrimental transactions, and their scope changes over time.

The determination of the applicable law is contingent upon both the legal nature of the pre-insolvency proceeding and the specific question of liability at stake. From the perspective of insolvency law, the *lex fori concursus* requires an assessment of whether the proceeding falls within the scope of Annex A of the EIR. If it does, the applicable law will be governed accordingly under the framework of the EIR. If it does not, further classification will be necessary to establish whether the proceeding is to be regarded as commercial in nature or as a restructuring process. A subsequent consideration concerns the type of liability in question and whether such liability is intrinsically linked to the conduct of insolvency proceedings, for instance the filing of an insolvency petition, or whether it arises

¹² GERNER-BEUERLE, Carsten, SIEMS, Mathias. The Private International Law of Companies in Germany in BEUERLE, G.C., MUCCIARELLI, F., SCHUSTER, E. SIEMS, M.(eds)., The Private International Law of Companies in Europe, Munich and Oxford: C.H. Beck/Nomos/Hart Publishing, 2019, p. 394 Also BĚLOHLÁVEK J. Alexander. Odpovědnost členů statutárních orgánů korporací v případě insolvenčních řízení s mezinárodním prvkem. *Bulletin advokacie* 7-8, 2015, p.17.

¹³ See the judgment of the CJEU in case C-594/14 *Simona Kornhaas v. Thomasu Dithmarovi* of 10 December 2015.

¹⁴ See the judgment of the CJEU in case C-295/13, *H v. H.K* of 4 December 2014.

¹⁵ Compare SCHMIDT, Jessica. Preventive restructuring frameworks: Jurisdiction, recognition and applicable law. *International Insolvency Review*. 2021, p. 5. Available from <https://doi.org/10.1002/iir.1447>.

¹⁶ KOKORIN, Ilya. Contracting Around Insolvency Jurisdiction: Private Ordering in European Insolvency Jurisdiction Rules and Practices In: LAZIĆ, V. – STUIJ, S. (eds.) *Recasting the Insolvency Regulation Improvements and Missed Opportunities*. The Hague: T.M.C. Asser Press, 2020, p. 27.

independently thereof.

3. APPLICABLE LAW FOR LIABILITY CLAIMS IN PRE-INSOLVENCY

Havel¹⁷ points out that in the pre-insolvency phase the liability of the statutory body undergoes a shift, moving increasingly in favour of creditors. This is reflected in the fact that, in addition to the general duty of care of a prudent manager, directors are compelled to safeguard the interests of creditors. The difficulty, however, lies in the absence of sufficient incentives from the shareholders, whose interests may diverge from those of the creditors. The principle of entrepreneurial professionalism is closely linked to the principle of prevention, not merely in the general sense of *neminem laedere*, but as a requirement of active and skilled performance. The duties and liability of directors fall within company law. Directors are expected to engage only in projects with proportionate risks, since otherwise they risk losing both expected returns and invested capital.¹⁸ Under normal circumstances, a prosperous company does not endanger creditors. However, once the company's equity is exhausted, shareholders may push for riskier strategies to salvage their investment, which can conflict with the interests of creditors. In times of financial distress, creditor interests should therefore prevail over shareholder interests, although the choice between high-risk and low-risk strategies remains problematic.¹⁹ Liability for breaches of the duties of care and loyalty likewise falls under *lex societatis*, as do more specific rules of liability, such as those concerning false disclosures upon incorporation.

Moreover, Schmidt²⁰, in the context of pre-restructuring proceedings, argues that preventive restructuring should be characterised as a commercial agreement, thereby falling within the ambit of *lex societatis*. Such an interpretation appears persuasive, insofar as the proceeding is not expressly included in Annex A of the EIR.

The determination of applicable law for liability claims requires distinguishing whether *lex societatis* (the internal corporate regime) or *lex concursus* (the insolvency statute threw the concept of *vis attractiva concursus*) applies.

Pursuant to Article 7 EIR, *lex concursus* governs also preconditions for

¹⁷ HAVEL Bohumil, *Správa korporace při hrozbě úpadku (sanační schémata a posuny standardů péče a loajality) in HAVEL, B. Fiduciární povinnosti orgánů společnosti na pomezí korporálního, insolvenčního a trestního práva*. Praha: Wolters Kluwer 2020, p. 155.

¹⁸ SPINDLER Gerald. Trading in the Vicinity of Insolvency, *European Business Organization Law Review* 2006(7), p. 339. Compare: HERTIG, Gerard, KANDA, Hideki. Creditor Protection, in KRAAKMAN, Reiner et al. *The Anatomy of Corporate Law. A Comparative and Functional Approach*. Oxford: Oxford University Press, 2004, p. 73.

¹⁹ LICHT Amir N. My Creditor's Keeper: Escalation of Commitment and Custodial Fiduciary Duties in the Vicinity of Insolvency *Working Paper Nr. 551/2020*, 2021. Available from http://ssrn.com/abstract_id=3680768.

²⁰ SCHMIDT, *op. cit.*, p. 5.

opening insolvency proceedings and their effects, according to CJEU case law. This situation also arises after the opening of pre-restructuring proceedings, the company's seat is transferred to another Member State. In such a case, the *lex concursus* remains that of the Member State in which the proceedings were originally opened. This principle has been confirmed by the CJEU in *Galapagos*²¹ which held that a subsequent transfer of the debtor's COMI after lodging the request for the opening of proceedings does not affect the jurisdiction already established under the EIR. It is possible to assume, that pre-insolvency proceeding may settle also COMI for insolvency proceedings.

On the other hand, it is important to investigate, whether the breach of directors' duties, and the annulment of resolutions by shareholders are related to the pre-insolvency or insolvency. In this situation a question arises whether this liability falls within the scope of *lex societatis* or *lex concursus*. The interpretation should follow the principle that insolvency law applies if it deviates from the general rules of civil and commercial law and applies only from a specific triggering moment, defined with regard to the financial situation of the company.²²

On the other hand, the fiduciary nature of directors' duties requires distinguishing between ordinary business judgment, protected by the business judgment rule, and reckless decision-making that jeopardises creditors once financial distress becomes apparent. This functional shift from entrepreneurial freedom to stewardship obligations reflects the dual role of directors as agents of shareholders in normal times and as custodians of creditors' interests in crisis situations. Unfortunately, given the fragmentation of national regimes (particularly in the pre-insolvency phase), borderline cases and risks of overlap or gaps arise, which must be addressed through proper conflict-of-law qualification. In practice, the choice is therefore between *lex societatis*, *lex fori concursus*, and, where relevant, *lex loci delicti*, with correct qualification determining the applicable law.

The boundary between *lex societatis* and *lex fori concursus* is set in Annex A of the EIR. In the case that pre-insolvency proceeding is not included, then it should be decided on the nature of restructuring measures and their connection to law.²³

For completeness it is important to examine also *lex loci delicti* and boundaries between *lex societatis* and *lex concursus*. A breach of duty that does not arise from company law, insolvency law, contractual obligations, or fiduciary duties should be characterised as a non-contractual obligation, to which the Rome II Regulation²⁴ would apply.

²¹ See the judgment of the CJEU in case C-723/2020 *Galapagos BidCo. S.a.r.l. v DE and Others* of 24 March 2022.

²² MUCCIARELLI, Federico M., Not Just Efficiency: Insolvency Law in the EU and Its Political Dimension *European Business Organization Law Review*, 2013(14), p. 175.

²³ See the judgment of the CJEU in case C-47/14 *Holterman Ferho Exploitatie BV and Others v. F.L.F. Spiess von Büllesheim* of 10 September 2015.

²⁴ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on

With respect to the injured party, the damage may be suffered either by the company itself or by a third party, which must be clearly defined. *Lex loci delicti* governs harm caused to third parties, whereas *lex societatis* governs reflective loss suffered by the company. The key issue is therefore who qualifies as a third party — this may include shareholders, who can suffer losses in the value of their shares, or creditors standing outside the company.

For classification purposes, reference must be made to the Rome II and Brussels I bis regulations. Article 1(2)(d) of the Rome II regulation excludes from its scope non-contractual obligations arising out of company law, including the personal liability of directors and members for the company's obligations. The Brussels I bis regulation, in Article 7(2), confers jurisdiction on the courts of the place where the harmful event occurred or may occur. The rationale for excluding corporate matters from this regime lies in the inseparability of liability from the corporate forms governed by company law, where responsibility arising from the operation of the company should primarily fall under *lex societatis*.

A particularly contentious issue is the liability of shareholders for damage caused to the company, especially where such liability involves intentional conduct contrary to good morals, for instance when a shareholder gives unlawful instructions to a director or acts as a director themselves.

4. CONCLUSION

From a theoretical perspective, there is a clear and sharp distinction between a corporation as a functioning business and the situation in the vicinity of insolvency.²⁵ In the ordinary course of business, the business judgment rule applies, whereas in the pre-insolvency phase conduct must be shifted in favor of creditors.²⁶ Members of the management body should therefore refrain from overly risky projects, even if such projects might be consistent with the goal of saving the company.²⁷

The pre-insolvency shift of directors' duties towards creditors, with its implications for insolvency creditors, also affects the choice of conflict-of-law rules, as the matter increasingly acquires the character of an insolvency issue. Also, there is a risk that the EU Member State where the debtor's COMI is located may classify a legal concept differently for the purposes of private international law and insolvency law than the state of incorporation. This may lead to negative

the law applicable to non-contractual obligations (Rome II). OJ L 199, 31.7.2007, pp. 40–49.

²⁵ SPINDLER, *op. cit.*, p. 339.

²⁶ EIDENMÜLLER, Horst. Trading in Times of Crisis: Formal Insolvency Proceedings, Workouts and the Incentives for Shareholders/Managers. *European Business Organization Law Review*, 2006(7), pp. 239-258.

²⁷ KOKORIN, Ilya. The future of harmonisation of directors' duties in the European Union: The Preventive Restructuring Directive and Group Insolvencies. *International Insolvency Review*, 2021, 30(3): 361-382.

or positive conflicts in determining jurisdiction, which could either relieve directors of liability or duplicate applicable liability norms. Such problems may persist in borderline cases, even if criteria for distinguishing between *lex societatis* and *lex fori concursus* or *lex loci delicti* are applied. A particularly contentious issue is the liability of shareholders for damage caused to the company, especially where such liability involves intentional conduct contrary to good morals, for instance when a shareholder gives unlawful instructions to a director or acts as a director themselves is based on criterion of *lex loci delicti*.

In other cases, however, it will be necessary to assess whether *lex societatis* or *lex concursus* applies. Where pre-insolvency proceedings fall under the scope of the EIR, or where the matter qualifies as “closely connected” within the meaning of Article 6 EIR, *lex concursus* will govern. If pre-insolvency proceedings do not fall within the EIR, jurisdiction must instead be determined under the Brussels I bis regulation. It must not be overlooked that breaches of the duty of care may still fall within the ambit of corporate law and thus *lex societatis*. In light of the case law mentioned, one decisive factor will be the impact of liability on potential insolvency creditors: where creditors are directly affected, the matter should be regarded as falling within *lex concursus*.

Furthermore, EU Member States may also apply legal norms that differ in their approach to directors’ liability. While conflicts arising in the pre-insolvency stage are often governed by a combination of company law and insolvency law, once formal proceedings are opened, insolvency law instruments tend to prevail. EU Member States may nevertheless place varying emphasis on one or the other approach, leading to further inconsistencies.

Given these uncertainties and divergences among the EU Member States, minimum harmonisation of selected rules — or at least convergence in the scope of conflict-of-law norms — together with a clearer delineation between *lex societatis*, *lex concursus*, and *lex loci delicti* appears to be the most rational way forward in pre-insolvency proceeding.

REFERENCES

1. BĚLOHLÁVEK J. Alexander. Odpovědnost členů statutárních orgánů korporací v případech insolvenčních řízení s mezinárodním prvkem. *Bulletin advokacie* 7-8, 2015, p.17.
2. BĚLOHLÁVEK, J. Alexander. Evropské a mezinárodní insolvenční právo: komentář. Nařízení Evropského parlamentu a Rady 2015/848 o insolvenčním řízení. 1. vydání. Praha: C. H. Beck, 2020.
3. BORK Reinhard, VAN ZWIETEN, K. (eds.) Kristin. *Commentary on the European Insolvency Regulation*, Oxford: OUP 2016.
4. EIDENMÜLLER, Horst. Trading in Times of Crisis: Formal Insolvency Proceedings, Workouts and the Incentives for Shareholders/Managers. *European Business Organization Law Review*, 2006(7), pp. 239-258.
5. GARCIMARTIN, Francisco. Insolvency-related judgments and Vis Attractiva

- Concursus: The EU Approach. *Insolvency Intelligence*, 2018(1). Available from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3221102.
6. GERNER-BEUERLE, Carsten, SIEMS, Mathias. The Private International Law of Companies in Germany in BEUERLE, G.C., MUCCIARELLI, F., SCHUSTER, E. SIEMS, M.(eds.), *The Private International Law of Companies in Europe*, Munich and Oxford: C.H. Beck/Nomos/Hart Publishing, 2019, p. 394.
 7. HAVEL Bohumil, Správa korporace při hrozbě úpadku (sanační schémata a posuny standardů péče a lojality) in HAVEL, B. *Fiduciární povinnosti orgánů společnosti na pomezí korporálního, insolvenčního a trestního práva*. Praha: Wolters Kluwer 2020, p. 155.
 8. HERTIG, Gerard, KANDA, Hideki. Creditor Protection, in KRAAKMAN, Reiner et al. *The Anatomy of Corporate Law. A Comparative and Functional Approach*. Oxford: Oxford University Press, 2004, p. 73.
 9. KOKORIN, Ilya. Contracting Around Insolvency Jurisdiction: Private Ordering in European Insolvency Jurisdiction Rules and Practices In: LAZIĆ, V. – STUIJ, S. (eds.) *Recasting the Insolvency Regulation Improvements and Missed Opportunities*. The Hague: T.M.C. Asser Press, 2020, p. 27.
 10. KOKORIN, Ilya. The future of harmonisation of directors' duties in the European Union: The Preventive Restructuring Directive and Group Insolvencies. *International Insolvency Review*, 2021, 30(3): 361-382.
 11. LICHT Amir N. My Creditor's Keeper: Escalation of Commitment and Custodial Fiduciary Duties in the Vicinity of Insolvency *Working Paper Nr. 551/2020*, 2021. Available from http://ssrn.com/abstract_id=3680768.
 12. MADAUS, Stephan, WESSELS, Bob. *Report on identifying annex actions under Article 6(1) of the European Insolvency Regulation*, Conference on European Restructuring and Insolvency Law, 2015, pp. 4-23.
 13. MUCCIARELLI, Federico M., Not Just Efficiency: Insolvency Law in the EU and Its Political Dimension *European Business Organization Law Review*, 2013(14), p. 175.
 14. OMAR Paul J. The Insolvency Exception in the Brussels Convention and the definition of „Analogous Proceedings“. *International Company and Commercial Law Review*, 2011(5), p. 175.
 15. SCHMIDT, Jessica. Preventive restructuring frameworks: Jurisdiction, recognition and applicable law. *International Insolvency Review*. 2021, p. 5. Available from <https://doi.org/10.1002/iir.1447>.
 16. SPINDLER Gerald. Trading in the Vicinity of Insolvency, *European Business Organization Law Review* 2006(7), p. 339.

Legal Accountability and Liability for AI Decisions in Business

Mgr. Andrej ORIŇAK

andrej.orinak@student.upjs.sk

Ph.D. student, Department of Commercial Law and Business Law

Faculty of Law, Pavol Jozef Šafárik University in Košice

Košice, Slovak Republic

Abstract: *In recent years, we have seen AI technologies become an integral part of business processes, fundamentally changing the way companies achieve efficiency and innovation. AI implementation in business operations creates complex legal and ethical challenges because of its fast integration into organizational processes. AI systems generate multiple legal issues because their autonomous nature and unpredictable behaviour and self-learning abilities create various problems. The identification of AI error responsibility among developers, operators, users and organizations creates complex problems regarding liability and causation particularly when algorithms show bias and stakeholders demand answers. The current legal system requires modifications to negligence and strict liability and vicarious liability frameworks because researchers propose risk-based approaches for AI regulation. The ability to track AI system operations becomes essential for determining liability because it helps identify responsible parties in cases of system failure. The development of new legal frameworks should focus on filling accountability gaps which stem from self-contained liability provisions. The European Union has started working on AI Liability Directive and Product Liability Directive to resolve questions, but multiple essential issues persist regarding these measures. The evaluation of these matters becomes increasingly challenging when studying them within healthcare and financial services and additional high-risk sectors. The development of complete flexible legal frameworks must occur to enable proper AI deployment while supporting its adoption.*

Keywords: *artificial intelligence; legal accountability; liability; negligence.*

JEL Classification: K22, K33

DOI: <https://doi.org/10.62768/ADJURIS/2025/5/11>

Please cite this article as:

Orinák, Andrej, „Legal Accountability and Liability for AI Decisions in Business”, in Grmelová, Nicole & Anna Kretková (eds.), *Prospects of Law in Business*, ADJURIS – International Academic Publisher, Bucharest, Paris, Calgary, 2025, p. 134-146, <https://doi.org/10.62768/ADJURIS/2025/5/11>.

1. INTRODUCTION

The deep integration of AI systems across various industries, including

transport and healthcare, requires a fundamental legal reassessment.¹ The defining characteristics of advanced AI, namely autonomy, unpredictability, and lack of human control, undermine the traditional fault-based liability standards of EU Member States.² When AI causes harm, victims face an overwhelming information gap because they lack the necessary technical evidence to prove a defect, fault, or causal link.³ This doctrinal problem has spurred legislative efforts, particularly within the EU, to construct a cohesive legal framework combining *ex ante* risk regulation (the AI Act) with *ex post* compensatory rules (the Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC (PLD) and Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AILD)).⁴ In this paper we evaluate the effectiveness of the proposed EU liability reforms in resolving the information asymmetry and accountability gap inherent in AI-related claims. For this paper, we have set the following research question: “*How do EU’s proposed liability directives (PLD, AILD) address AI opacity and information gaps for claimants in high-risk sectors?*” To test the research question, we have set the following hypotheses:

H1: “*The AILD and PLD’s rebuttable presumptions of causality and defectiveness shift the burden of proof, reducing information asymmetry and easing claimants’ evidentiary requirements in high-risk AI harm cases.*”

H2: “*The success of AILD and PLD legal presumptions relies on providers and deployers mandatorily implementing and disclosing auditable, legally relevant Explainable AI (XAI) evidence.*”

This research is primarily based on a qualitative legal analysis, specifically employing a doctrinal approach. The study methodology involved a systematic review and interpretation of primary legal proposals (PLD Proposal and AILD Proposal) and specialized secondary sources discussing AI liability and legal accountability. This approach allowed for the systematic review and synthesis of legislative intent, identifying the mechanisms (such as the disclosure

¹ RANE, Nitin Liladhar, Suraj Kumar MALLICK, Ömer KAYA, and Jayesh. RANE. Applications of machine learning in healthcare, finance, agriculture, retail, manufacturing, energy, and transportation: A review. In: *Applied Machine Learning and Deep Learning: Architectures and Techniques* [online]. Deep Science Publishing, 2024, p. 120. Available from: doi:10.70593/978-81-981271-4-3_6.

² SCHERER, Matthew U. Regulating artificial intelligence systems: Risks, challenges, competencies, and strategies. *Harvard Journal of Law & Technology* [online]. 2016, 29(2), p. 356. Available from: <https://jolt.law.harvard.edu/articles/pdf/v29/29HarvJLTech353.pdf>.

³ BOTERO ARCILA, Beatriz. AI liability in Europe: How does it complement risk regulation and deal with the problem of human oversight. *Computer Law and Security Review* [online]. 2024, p. 5. Available from: doi: 10.1016/j.clsr.2024.106012.

⁴ HACKER, Philipp. *The European AI Liability Directives – Critique of a half-hearted approach and lessons for the future.* [online]. Working Paper, 2023. Version: 28 July 2023. p. 30. Available from: <https://arxiv.org/abs/2211.13960v6>.

regime and presumptions) designed to adapt non-contractual civil liability to AI's unique characteristics. The investigation draws heavily on meta-studies conducted between 2019 and 2022, ensuring a solid base in established scholarly debate. This paper and its analysis aim to map AI characteristics (autonomy, unpredictability, and loss of control) to the structural shortcomings of existing national tort laws to evaluate the practical efficacy of the proposed EU harmonization efforts. This paper was prepared as part of the grant tasks of the APVV-21-0336 project "*Analysis of court decisions using artificial intelligence methods*".

2. LITERATURE REVIEW

Scholarly consensus affirms that AI systems introduce problems related to duty of care, causation, and predictability that traditional tort law cannot easily assimilate.⁵ Establishing fault in AI systems is complicated by their complexity and autonomy; for instance, defining the necessary monitoring duties for users is difficult when systems act semi-autonomously.⁶ Moreover, conventional causation tests, such as the but-for test, often fail when multiple simultaneous actions by autonomous systems may have contributed to the harm, forcing courts to resort to special tests, such as the Necessary Element of a Sufficient Set (NESS).⁷ The inherent difficulty in providing evidence of causation in complex cases, such as those involving innovative medical devices or machine learning, often renders effective victim redress impossible under conventional standards. Empirical research indicates that the incorporation of artificial intelligence (AI) systems into vital sectors results in systemic difficulties regarding the distribution of accountability, mainly due to the lack of transparency in black box algorithms and the inadequacy of human oversight.⁸ The incident involving the deadly crash in Tempe (March 2018), where an autonomous test car from Uber Advanced Technologies Group hit and killed a pedestrian, Elaine Herzberg,⁹ illustrates automation complacency, as the vehicle operator was visually distracted and focused on

⁵ BUITEN, Miriam, Alexandre DE STREEL, and Martin PEITZ. The law and economics of AI liability. *Computer Law & Security Review* [online]. 2023, p. 8. Available from: doi: 10.1016/j.clsr.2023.105794.

⁶ *Ibidem*.

⁷ PADOVAN, Paulo Henrique, Clarice Marinho. MARTINS, and Chris REED. Black is the new orange: How to determine AI liability. *Artificial Intelligence and Law* [online]. 2023, 31, p. 137. Available from: doi:10.1007/s10506-022-09308-9.

⁸ STAMP, Helen. Innovative Technologies and the Deepening Regulatory Capture of Law Enforcement Agencies: The Uber Herzberg Case Study. *Notre Dame Journal on Emerging Technologies* [online]. 2023, 5(1), pp. 42 – 44. Available from: https://ndlsjnet.com/wp-content/uploads/2023/12/5-1_Stamp.pdf.

⁹ NATIONAL TRANSPORTATION SAFETY BOARD. Collision Between Vehicle Controlled by Developmental Automated Driving System and Pedestrian, Tempe, Arizona, March 18, 2018. Highway Accident Report NTSB/HAR-19/03 [online]. 2019, pp. 8. Available from: <https://www.ntsb.gov/investigations/AccidentReports/Reports/HAR1903.pdf>.

her personal phone.¹⁰ The accident was additionally influenced by a malfunction in the ADS, which repeatedly misidentified the pedestrian (for instance, as "Other," "Vehicle," or "Bicycle") at -5.2 seconds and subsequently (-4.2 s, -2.6 s).¹¹ The NTSB also criticized the ADS system for using an "action suppression" feature that inhibited emergency braking even when a collision was inevitable, thus heightening the safety risk.¹² Despite numerous discoveries regarding Uber's shortcomings, the criminal liability was ultimately assigned to the operator, Rafael Vasquez,¹³ who accepted a guilty plea in July 2023 to a lesser offense of "endangerment" and received probation.¹⁴ Simultaneously, the Dutch social welfare scandal exposed a significant issue of lack of transparency in the Toeslagen Verstrekkingen System (TVS), which relied on a "black box" risk assessment model and utilized data from the SyRI (System Risk Indication) system to fight fraud.¹⁵ This system mistakenly implicated around 26,000 applicants for childcare benefits¹⁶ and resulted in discrimination due to its reliance on controversial indicators like "Dutch nationality Yes/No," which caused an unequal emphasis on specific ethnic and socioeconomic groups.¹⁷ The District Court of The Hague concluded in 2020 that the SyRI legal framework lacked binding authority as it breached Article 8 of the European Convention on Human Rights owing to the opacity of the "secret" risk model and indicators, hindering verification, thus infringing upon the essential principles of proportionality and subsidiarity.¹⁸

The revised PLD reacts to this matter in Article 10(4): "4. *A national court shall presume the defectiveness of the product or the causal link between its defectiveness and the damage, or both, where, despite the disclosure of evidence in accordance with Article 9 and taking into account all the relevant circumstances of the case:*

(a) the claimant faces excessive difficulties, in particular due to technical or scientific complexity, in proving the defectiveness of the product or the causal link between its defectiveness and the damage, or both; and

¹⁰ *Ibidem*, p. 43.

¹¹ *Ibidem*, p. 15.

¹² STAMP, *op. cit.*, p. 41.

¹³ *Ibidem*, p. 44.

¹⁴ SUPERIOR COURT OF THE STATE OF ARIZONA. State of Arizona vs. Rafael Stuart Vasquez, CR2020-001853-001, Plea Agreement [online]. Maricopa County, July 28, 2023, p. 2. Available from: <https://maricopacountyattorney.org/DocumentCenter/View/2780/Rafaela-Vasquez-Plea-Agreement>.

¹⁵ ALREFAI, Asiea, Concealing algorithms, biased data and unethical risk models – the case of the Dutch Child Welfare Scandal. Bachelor Thesis [online]. Vrije Universiteit Amsterdam, July 28, 2023, pp. 19 – 21. Available from: https://w4ra.org/wp-content/uploads/2023/08/Final_Bachelor_thesis_Asiea_Alrefai.pdf.

¹⁶ *Ibidem*, p. 57.

¹⁷ *Ibidem*, pp. 26 – 27.

¹⁸ RECHTBANK DEN HAAG. Judgment of 5 February 2020, ECLI:NL:RBDHA:2020:1878 (SyRI legislation in breach of European Convention on Human Rights). [online]. 2020, pp. 27 – 32. Available from: <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2020:1878>.

(b) the claimant demonstrates that it is likely that the product is defective or that there is a causal link between the defectiveness of the product and the damage, or both.

5. The defendant shall have the right to rebut any of the presumptions referred to in paragraphs 2, 3 and 4.¹⁹

The need for transparency is recognized as essential to bridge the "information gap" and restore accountability.²⁰ For a legal claim to succeed, plaintiffs must overcome AI opacity by providing explanations that are salient to the legal elements of the cause of action (duty, breach, causation, defect).²¹ Explanations need not only serve the purpose of enhancing public understanding, but must be driven by the legal goal they are intended to support²². Techniques like Local Interpretable Model-agnostic Explanations (LIME) or Shapley Additive explanations (SHAP) are necessary to create accurate explanations for each observation and quantify the contribution of input variables to predictions.²³ This technological requirement directly supports the implementation of any effective legal liability regime.

The EU approach is designed to harmonize liability rules across the EU Member States, which currently possess highly divergent tort law regimes concerning protected interests and the duty of care.²⁴ The revised PLD significantly expands the scope of strict liability by explicitly including software and digital manufacturing files within the definition of a "product".²⁵ The new directive is also designed to address AI products that continue to learn after deployment, making the manufacturer strictly liable for defects arising from such learning.²⁶ For claimants facing highly complex AI claims, the revised PLD establishes a presumption of defectiveness if the defendant violates specific mandatory EU or national safety requirements intended to protect against the specific damage that

¹⁹ Article 10(4) of Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC. OJ L, 2024/2853, 18.11.2024.

²⁰ BOTERO ARCILA, *op. cit.*, p. 5.

²¹ FRASER, Henry, Aaron J. SNOSWELL, and Rhyle SIMCOCK. AI opacity and explainability in tort litigation. In: Proceedings of the 2022 ACM conference on fairness, accountability, and transparency (FAccT '22) [online]. ACM, 2022, p. 5. Available from: doi: 10.1145/3531146.3533084.

²² *Ibidem*.

²³ PADOVAN, *et al.*, *op.cit.*, p. 135.

²⁴ MONTAGNANI, Maria Lilla, Marie-Claire NAJJAR, and Antonio DAVOLA. The EU regulatory approach(es) to AI liability, and its application to the financial services market. *Computer Law & Security Review* [online]. 2024, p. 5. Available from: doi: 10.1016/j.clsr.2024. 105984.

²⁵ Article 4(1) of Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC cited above.

²⁶ *Ibidem*, Article 6.

occurred.²⁷ The AILD focuses on procedural rules to facilitate claims under national fault-based regimes, specifically targeting high-risk AI systems as defined by the AI Act.²⁸ To prevent "fishing expeditions," the AILD allows courts to order the disclosure of evidence relevant to high-risk AI systems, but only if the claimant provides enough facts and evidence to support a plausible case.²⁹ However, this plausibility requirement itself presents a weakness, as gathering evidence for a *prima facie* case often overwhelms potential claimants, mirroring issues observed in non-discrimination law.³⁰

The most important procedural mechanism is the rebuttable presumption of causality set out in Article 4 AILD Proposal: "*1. Subject to the requirements laid down in this Article, national courts shall presume, for the purposes of applying liability rules to a claim for damages, the causal link between the fault of the defendant and the output produced by the AI system or the failure of the AI system to produce an output, where all of the following conditions are met:*

(a) the claimant has demonstrated or the court has presumed pursuant to Article 3(5), the fault of the defendant, or of a person for whose behaviour the defendant is responsible, consisting in the non-compliance with a duty of care laid down in Union or national law directly intended to protect against the damage that occurred;

(b) it can be considered reasonably likely, based on the circumstances of the case, that the fault has influenced the output produced by the AI system or the failure of the AI system to produce an output;

(c) the claimant has demonstrated that the output produced by the AI system or the failure of the AI system to produce an output gave rise to the damage."³¹

This presumption covers the causal link between the defendant's proven fault (non-compliance with a duty of care) and the AI system's output.³² The presumption is only triggered if three conditions are met: the defendant's fault consists of non-compliance with a duty of care, the claimant suffered damage, and the AI output caused the damage.³³ This mechanism aims to lower the probability threshold of evidence needed for a favourable judgment from the regular national

²⁷ HACKER, *op. cit.*, p. 28.

²⁸ Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive) [online]. In EUR-Lex. [accessed on 2025-09-25]. Available from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0496>.

²⁹ BOTERO ARCILA, *op. cit.*, p. 9.

³⁰ HACKER, *op. cit.*, p. 27.

³¹ Article 4(1) of Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive) [online]. In EUR-Lex. [accessed on 2025-09-25]. Available from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0496>.

³² HACKER, *op. cit.*, p. 33.

³³ *Ibidem*.

standard (e.g., beyond reasonable doubt) to mere likeliness.³⁴

Legal responsibility for AI-driven choices within the business landscape is highly intricate, necessitating focused legal examination and oversight tailored to the particulars of various high-risk industries.³⁵ In the healthcare sector, the evolving and educational characteristics of AI generate ambiguity in responsibility allocation, complicating the identification of whether the liability for harm from AI-assisted decisions lies with the physician, healthcare facility, or AI creator.³⁶ The incorporation of AI into clinical practice prompts inquiries regarding how AI suggestions align with the standard of care and the extent of supervision needed from the physician.³⁷ Likewise, in financial sectors, the independent functioning of AI systems creates intricate responsibility networks, complicating the distribution of accountability among developers, operators, and users when regulatory breaches or mistakes occur.³⁸ In the realm of transportation, especially regarding autonomous vehicles, strict liability systems are frequently suggested to guarantee compensation for victims without proving fault. However, this requires clear definitions of "high risk" and strong insurance frameworks.³⁹ Ultimately, in public administration, a major challenge is differentiating AI as a tool from the accountability of its human operators, with transparency and clear accountability systems being vital to preserving public confidence in AI-enhanced processes.⁴⁰

3. EVALUATION: TESTING THE HYPOTHESES

The EU directives establish mechanisms that substantially mitigate the information asymmetry and the evidentiary burden for claimants, particularly in technical and scientific complex cases involving smart products or AI-enabled products.⁴¹ Under the PLD, defectiveness is presumed if the manufacturer fails to

³⁴ BOTERO ARCILA, *op. cit.*, p. 7.

³⁵ BOTTOMLEY, Dane and Donrich THALDAR. Liability for harm caused by AI in healthcare: an overview of the core legal concepts. *Frontiers in Pharmacology* [online]. 2023, pp. 2 – 3. Available from: doi:10.3389/fphar.2023.1297353.

³⁶ CESTONARO, Clara *et al.* Defining medical liability when artificial intelligence is applied on diagnostic algorithms: a systematic review. *Frontiers in Medicine* [online]. 2023, p. 4. Available from: doi:10.3389/fmed.2023.1305756

³⁷ BOTTOMLEY, *op. cit.*, p. 5.

³⁸ MONTAGNANI, *op. cit.*, pp. 4 – 5.

³⁹ BUITEN, *op. cit.*, pp. 9 – 10.

⁴⁰ MOCH, Enrico. Liability Issues in the Context of Artificial Intelligence: Legal Challenges and Solutions for AI-Supported Decisions. *East African Journal of Law and Ethics* [online]. 2024, 7(1), pp. 10 – 11. Available from: doi:10.37284/eajle.7.1.2518.

⁴¹ Article 10(4) of Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC cited above.

disclose evidence or violates mandatory safety requirements.⁴² Crucially, the causality presumption under the AILD allows a claimant to succeed without having to fully prove the intricate workings of the "black box" once fault is established.⁴³ These presumptions provide a necessary solution to the difficulties in establishing causality where the legislator considers it too burdensome for the victim to prove the causal link under strict liability regimes.⁴⁴

While the presumptions formally shift the burden of proof, the practical success of claims hinges on the availability of technical evidence and expertise.⁴⁵ Even to trigger the disclosure mechanism under the AILD, the claimant must provide "sufficient facts and evidence" to support a plausible claim.⁴⁶ Since AI opacity prevents human understanding, technical tools like XAI are essential to satisfy this initial plausibility requirement, especially in high-risk areas like financial services.⁴⁷ XAI techniques provide the forensic toolset necessary for accident analysis (fact gathering, analysis, and conclusion drawing) to reconstruct the incident history and identify contributing factors, which is required to fulfil the legal elements of a claim.⁴⁸ The ability to demonstrate that an AI system performed at an "infrahuman performance" level, for example, should trigger a rebuttable presumption of defectiveness, but determining this level requires auditable XAI metrics.⁴⁹

The interaction between AI and human judgement in healthcare highlights the reliance on XAI. In radiology, AI systems often function as decision support tools.⁵⁰ Laypeople, as potential jurors or patients, may not exhibit strong algorithm aversion when physicians follow AI recommendations, even if the AI is wrong.⁵¹ However, if the AI output is not explainable, the clinician essentially becomes a "liability sink," taking full responsibility for decisions they cannot fully comprehend.⁵² The complexity of AI in healthcare, particularly due to the use of patient data, makes enhanced XAI a core ethical and legal requirement to maintain patient safety and ensure non-discrimination.⁵³ The doctrinal analysis

⁴² *Ibidem*.

⁴³ Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive) cited above.

⁴⁴ BUITEN, *op. cit.*, p. 4.

⁴⁵ MONTAGNANI, *op. cit.*, p. 6.

⁴⁶ BOTERO ARCILA, *op. cit.*, p. 13.

⁴⁷ MONTAGNANI, *op. cit.*, p. 10.

⁴⁸ PADOVAN, *op. cit.*, p. 144.

⁴⁹ HACKER, *op. cit.* p. 135.

⁵⁰ *Ibidem*.

⁵¹ TOBIA, Kevin, Aileen NIELSEN, and Alexander STREMITZER. When does physician use of AI increase liability? *Journal of Nuclear Medicine* [online]. 2021, 62(1), p. 19. Available from: doi: 10.2967/jnumed.120.256032.

⁵² LAWTON, Tom *et al.* Clinicians risk becoming 'liability sinks' for artificial intelligence. *Future Healthcare Journal* [online]. 2024. p. 4. Available from: doi: 10.1016/j.fhj.2024.100007.

⁵³ PHAM, Tuan. Ethical and legal considerations in healthcare AI: innovation and policy for safe and fair use. *Royal Society Open Science* [online]. 2025, p. 5. Available from: doi: 10.1098/rsos.

confirms the pressing need for legal reform given the challenges posed by AI's autonomy and opacity. Robust legal foundations for XAI necessitate new regulations that require mechanisms exceeding mere formal transparency to guarantee reliability and significant auditability. Laws should mandate that companies produce and deliver clear and comprehensible reports on AI decision-making processes to data subjects, regulators, and courts, ensuring transparency is upheld both prior to and following disputed proceedings.⁵⁴ To guarantee that these explanations are substantive rather than superficial, legal standards must mandate or promote the use of standardized, validated XAI techniques (like LIME or SHAP) and set objective criteria for explanation quality, mirroring the criteria applied to machine learning accuracy.⁵⁵ Robustness is improved by the necessity for explanations to be customized for various stakeholders, such as laypeople, experts, and regulators and focusing on human-centered assessment, evaluating their practical effectiveness for end users instead of solely their technical sufficiency.⁵⁶ The idea of "auditable XAI" is enforced through legal frameworks that stipulate validated, auditable methods of explanation⁵⁷ while enabling regulators to audit, compare, and enforce these XAI standards, with this duty to be carried out in consideration of balancing transparency with trade secret protection and security.⁵⁸ The system's auditability is additionally enhanced by the incorporation of tools like algorithmic impact assessments and fairness audits, which promote wider accountability and tackle the shortcomings of existing XAI techniques.⁵⁹

The procedural shifts introduced by the PLD and AILD proposals are highly effective mechanisms designed to address the AI opacity challenge by modifying the burden of proof. By providing mechanisms for disclosure and causality presumptions (AILD) and by expanding strict liability (PLD), the EU aims to harmonize protection and mitigate the victim's information gap, especially for high-risk AI systems.⁶⁰ Based on the results indicated by our research we have evaluated the hypotheses as follows:

H1 Confirmed: Systematic literature review indicates that the disclosure

241873.

⁵⁴ CHAUDHARY, Gyandeep. Explainable Artificial Intelligence (xAI): Reflections on Judicial System. *Kutafin Law Review* [online]. 2023, 10(4), pp. 14 – 15. Available from: doi: 10.17803/2713-0533.2023.4.26.872-889.

⁵⁵ ALI, Sajid T. *et al.* Explainable Artificial Intelligence (XAI): What we know and what is left to attain Trustworthy Artificial Intelligence. *Information Fusion* [online]. 2023, pp. 33 – 34. Available from: <https://doi.org/10.1016/j.inffus.2023.101805>.

⁵⁶ *Ibidem*.

⁵⁷ *Ibidem*, p. 40.

⁵⁸ NANNINI, Luca *et al.* Operationalizing Explainable Artificial Intelligence in the European Union Regulatory Ecosystem. *IEEE Intelligent Systems* [online]. 2024, July/August, pp. 43 – 44. Available from: doi: 10.1109/MIS.2024.3383155.

⁵⁹ LALA, Andi. Regulatory Framework for Artificial Intelligence: Ethical and Legal Issues. *Journal of Law and Regulation Governance* [online]. 2025, 3(4), pp. 5 – 6. Available from: <https://journal.worldofpublication.com/index.php/jlarg/article/view/104>.

⁶⁰ MONTAGNANI, *op. cit.*, p. 14.

mechanism and the rebuttable presumptions successfully lower the evidentiary burden from a high national standard to mere likelihood, providing claimants with viable legal pathways where none previously existed.

H2 Confirmed: Research results indicate that the practical operationalisation and legal defensibility of these presumptions are critically reliant on technologies like XAI. Without technical evidence, victims often cannot meet the initial plausibility threshold required to trigger the disclosure or presumption rules, meaning XAI is a necessary component for effective legal enforcement.

However, while the proposed EU directives mark an important advancement in standardizing liability for harm caused by artificial intelligence, critics highlight ongoing deficiencies in liability, especially concerning black-box algorithms employed in high-risk fields like healthcare and finance.⁶¹ The intricate and unclear nature of these systems indicates that following the application of the PLD/AILD, artificial intelligence systems might still evade accountability. Victims find it very challenging to prevail in lawsuits due to the difficulty of establishing causation, product defect (under PLD), or identifiable error (under AILD) under existing legal standards.⁶² Additionally, the AILD imposes a significant proof obligation on plaintiffs to show damage, connection, and liability,⁶³ while the intricacy of black-box models heightens this evidential challenge. The conversation should also highlight the narrow scope of PLD, which pertains solely to physical injuries or property damage and fails to consider damages prevalent in AI applications, like discrimination or financial loss.⁶⁴ Viewed in this light, the transparency that explainable AI (XAI) might offer, though deemed crucial, is not adequately ensured or mandated by existing legal structures to completely bridge these gaps.⁶⁵

4. CONCLUSION

In conclusion, the EU's approach represents a robust effort to ensure that

⁶¹ DUFFOURC, Mindy Nunez, Sara GERKE. The proposed EU Directives for AI liability leave worrying gaps likely to impact medical AI. *npj Digital Medicine* [online]. 2023, pp. 1 – 2. Available from: <https://doi.org/10.1038/s41746-023-00823-w>.

⁶² SULLIVAN, Hannah R., Scott J. SCHWEIKART. Are Current Tort Liability Doctrines Adequate for Addressing Injury Caused by AI? *AMA Journal of Ethics* [online]. 2019, 21(2), pp. 2 – 4. Available from: [doi:10.1001/amajethics.2019.160](https://doi.org/10.1001/amajethics.2019.160).

⁶³ DE LEMOS CAMPOS, Mariana. Comments on the article titled “The regulation of AI liability in Europe: a critical overview of two recent Directive Proposals – the (new) ALD and the (revised) PLD” by Beatriz Garcia. *e-Publica* [online]. 2024, 11(3), pp. 2 – 4. Available from: <https://e-publica.pt/api/v1/articles/127704-comments-on-the-article-titled-the-regulation-of-ai-liability-in-europe-a-critical-overview-of-two-recent-directive-proposals-the-new-aild-and-pld.pdf>.

⁶⁴ *Ibidem*.

⁶⁵ HASSIJA, Vikas *et al.* Interpreting Black-Box Models: A Review on Explainable Artificial Intelligence. *Cognitive Computation* [online]. 2024, pp. 49 – 53. Available from: <https://doi.org/10.1007/s12559-023-10179-8>.

the rapid advancement of AI remains tethered to core ethical principles of justice, transparency, and accountability. Future policy must continue to focus on clarifying the application of these rules to address remaining ambiguities, such as ensuring full harmonization between the PLD and AILD on concepts like defectiveness and fault and explicitly integrating XAI requirements into the norms that trigger liability presumptions. From the perspective of the Slovak business environment, the implementation of the proposed EU directives will pose a significant challenge, especially for small and medium-sized enterprises, which may not have sufficient technical and legal capacities to ensure the auditability and explainability of AI systems. We therefore consider it essential to prepare methodological guidelines and training programs for lawyers, entrepreneurs, and IT professionals. We view this topic as highly relevant, as the interconnection of law and technology is essential for the safe and ethical use of AI in practice. For the future, we recommend focusing research on the practical aspects of implementing XAI in various sectors and on creating standards that would facilitate evidence in AI-related disputes.

REFERENCES

1. ALI, Sajid T. *et al.* Explainable Artificial Intelligence (XAI): What we know and what is left to attain Trustworthy Artificial Intelligence. *Information Fusion* [online]. 2023, pp. 33 – 34. Available from: <https://doi.org/10.1016/j.inffus.2023.101805>.
2. ALREFAI, Asiea, Concealing algorithms, biased data and unethical risk models – the case of the Dutch Child Welfare Scandal. Bachelor Thesis [online]. Vrije Universiteit Amsterdam, July 28, 2023, pp. 19 – 21. Available from: https://w4ra.org/wp-content/uploads/2023/08/Final_Bachelor_thesis_Asiea_Alrefai.pdf.
3. BOTERO ARCILA, Beatriz. AI liability in Europe: How does it complement risk regulation and deal with the problem of human oversight. *Computer Law and Security Review* [online]. 2024. Available from: doi: 10.1016/j.clsr.2024.106012.
4. BOTTOMLEY, Dane and Donrich THALDAR. Liability for harm caused by AI in healthcare: an overview of the core legal concepts. *Frontiers in Pharmacology* [online]. 2023, pp. 2 – 3. Available from: doi: 10.3389/fphar.2023.1297353.
5. BUITEN, Miriam, Alexandre DE STREEL, and Martin PEITZ. The law and economics of AI liability. *Computer Law & Security Review* [online]. 2023. Available from: doi: 10.1016/j.clsr.2023.105794.
6. CESTONARO, Clara *et al.* Defining medical liability when artificial intelligence is applied on diagnostic algorithms: a systematic review. *Frontiers in Medicine* [online]. 2023. Available from: doi:10.3389/fmed.2023.1305756.
7. CHAUDHARY, Gyandeep. Explainable Artificial Intelligence (xAI): Reflections on Judicial System. *Kutafin Law Review* [online]. 2023, 10(4), pp. 14 – 15. Available from: doi: 10.17803/2713-0533.2023.4.26.872-889.
8. DE LEMOS CAMPOS, Mariana. Comments on the article titled “The regulation of AI liability in Europe: a critical overview of two recent Directive Proposals –

- the (new) ALD and the (revised) PLD” by Beatriz Garcia. *e-Publica* [online]. 2024, 11(3), pp. 2 – 4. Available from: <https://e-publica.pt/api/v1/articles/127704-comments-on-the-article-titled-the-regulation-of-ai-liability-in-europe-a-critical-overview-of-two-recent-directive-proposals-the-new-aild-and.pdf>.
9. DUFFOURC, Mindy Nunez, Sara GERKE. The proposed EU Directives for AI liability leave worrying gaps likely to impact medical AI. *npj Digital Medicine* [online]. 2023, pp. 1 – 2. Available from: <https://doi.org/10.1038/s41746-023-00823-w>.
 10. FRASER, Henry, Aaron J. SNOSWELL, and Rhyle SIMCOCK. AI opacity and explainability in tort litigation. In: Proceedings of the 2022 ACM conference on fairness, accountability, and transparency (FAccT '22) [online]. ACM, 2022. Available from: doi: 10.1145/3531146.3533084.
 11. HACKER, Philipp. *The European AI Liability Directives – Critique of a half-hearted approach and lessons for the future*. [online]. Working Paper, 2023. Version: 28 July 2023. Available from: <https://arxiv.org/abs/2211.13960v6>.
 12. HASSIJA, Vikas *et al.* Interpreting Black-Box Models: A Review on Explainable Artificial Intelligence. *Cognitive Computation* [online]. 2024, pp. 49 – 53. Available from: <https://doi.org/10.1007/s12559-023-10179-8>.
 13. LALA, Andi. Regulatory Framework for Artificial Intelligence: Ethical and Legal Issues. *Journal of Law and Regulation Governance* [online]. 2025, 3(4), pp. 5 – 6. Available from: <https://journal.worldofpublication.com/index.php/jlrag/article/view/104>.
 14. LAWTON, Tom *et al.* Clinicians risk becoming 'liability sinks' for artificial intelligence. *Future Healthcare Journal* [online]. 2024. Available from: doi: 10.1016/j.fhj.2024.100007.
 15. MOCH, Enrico. Liability Issues in the Context of Artificial Intelligence: Legal Challenges and Solutions for AI-Supported Decisions. *East African Journal of Law and Ethics* [online]. 2024, 7(1), pp. 10 – 11. Available from: doi: 10.37284/eajle.7.1.2518.
 16. MONTAGNANI, Maria Lilla, Marie-Claire NAJJAR, and Antonio DAVOLA. The EU regulatory approach(es) to AI liability, and its application to the financial services market. *Computer Law & Security Review* [online]. 2024. Available from: doi: 10.1016/j.clsr.2024.105984.
 17. NANNINI, Luca *et al.* Operationalizing Explainable Artificial Intelligence in the European Union Regulatory Ecosystem. *IEEE Intelligent Systems* [online]. 2024, July/August, pp. 43 – 44. Available from: doi: 10.1109/MIS.2024.3383155.
 18. PADOVAN, Paulo Henrique, Clarice Marinho. MARTINS, and Chris REED. Black is the new orange: How to determine AI liability. *Artificial Intelligence and Law* [online]. 2023, 31. Available from: doi:10.1007/s10506-022-09308-9.
 19. PHAM, Tuan. Ethical and legal considerations in healthcare AI: innovation and policy for safe and fair use. *Royal Society Open Science* [online]. 2025. Available from: doi: 10.1098/rsos.241873.
 20. RANE, Nitin Liladhar, Suraj Kumar MALLICK, Ömer KAYA, and Jayesh. RANE. Applications of machine learning in healthcare, finance, agriculture, retail, manufacturing, energy, and transportation: A review. In: *Applied Machine*

- Learning and Deep Learning: Architectures and Techniques* [online]. Deep Science Publishing, 2024. Available from: doi:10.70593/978-81-981271-4-3_6.
21. SCHERER, Matthew U. Regulating artificial intelligence systems: Risks, challenges, competencies, and strategies. *Harvard Journal of Law & Technology* [online]. 2016, 29(2). Available from: <https://jolt.law.harvard.edu/articles/pdf/v29/29HarvJLTech353.pdf>.
 22. STAMP, Helen. Innovative Technologies and the Deepening Regulatory Capture of Law Enforcement Agencies: The Uber Herzberg Case Study. *Notre Dame Journal on Emerging Technologies* [online]. 2023, 5(1), pp. 42 – 44. Available from: https://ndlsjnet.com/wp-content/uploads/2023/12/5-1_Stamp.pdf.
 23. SULLIVAN, Hannah R., Scott J. SCHWEIKART. Are Current Tort Liability Doctrines Adequate for Addressing Injury Caused by AI? *AMA Journal of Ethics* [online]. 2019, 21(2), pp. 2 – 4. Available from: doi:10.1001/amajethics.2019.160.
 24. TOBIA, Kevin, Aileen NIELSEN, and Alexander STREMITZER. When does physician use of AI increase liability? *Journal of Nuclear Medicine* [online]. 2021, 62(1). Available from: doi:10.2967/jnumed.120.256032.

Dishonesty in Discharge of Debts: A Law and Economics Perspective on Czech Insolvency Law¹

JUDr. Ing. Milan VRBA, Ph.D.

milan.vrba@vse.cz

ORCID 0009-0008-5243-1925

Department of Business and European Law, Faculty of International Relations
Prague University of Economics and Business, Czech Republic

Abstract: *Honesty is deemed a central principle of the procedure leading to discharge of debts. A debtor seeking debt relief is obliged to maximise satisfaction for creditors while refraining from any actions that could harm or favour any of them. In accordance with Becker's classical theory of crime, the paper assumes that the debtor's decision to act (dis)honestly is a matter of rational choice. The debtor chooses between the certainty of honest performance of duties and the risky alternative of dishonesty. The aim of the paper is to provide an analytical framework for understanding this decision-making process and to identify how legal and institutional factors can influence it. To illustrate this, the paper applies a basic state-preference model. The model demonstrates that the debtor's ultimate decision is shaped by three key variables: (1) the potential gain from dishonesty, (2) the severity of sanctions, and (3) the likelihood of detection and punishment of dishonest conduct. Each of these variables is subsequently analysed in the context of Czech insolvency regulation, highlighting how the legal framework can influence the debtor's incentives.*

Keywords: *Discharge of Debts, Dishonest Intent, Economic Analysis of Law, Insolvency Proceedings, Personal Bankruptcy, State-Preference Model.*

JEL Classification: K22

DOI: <https://doi.org/10.62768/ADJURIS/2025/5/12>

Please cite this article as:

Vrba, Milan, „Dishonesty in Discharge of Debts: A Law and Economics Perspective on Czech Insolvency Law”, in Grmelová, Nicole & Anna Kretková (eds.), *Prospects of Law in Business*, ADJURIS – International Academic Publisher, Bucharest, Paris, Calgary, 2025, p. 147-161, <https://doi.org/10.62768/ADJURIS/2025/5/12>.

1. INTRODUCTION

Honesty is deemed a central principle of the procedure leading to dis-

¹ This paper was prepared within the framework of the IGA project of the Prague University of Economics and Business no. IGA 43/2024 “Dishonest intent in rehabilitation methods of prevention and resolution of insolvency.”

charge of debts. Under Czech law, a debtor seeking discharge is obliged to maximise satisfaction for creditors and to refrain from any conduct that could harm or favour any of them.² Other legal systems take a similar approach.³ The EU has reinforced this principle in Directive (EU) 2019/1023, which obliges Member States to make discharge of debts available to entrepreneurs, while at the same time stressing that it should be accessible only to honest debtors.⁴

This paper builds on the economic theory of crime, attributed primarily to Gary S. Becker,⁵ which views criminal behaviour as the product of rational choice.⁶ The same reasoning can be applied to any form of unlawful conduct, including dishonest behaviour in proceedings leading to discharge of debts. Accordingly, the paper treats (dis)honesty as the outcome of a rational decision: the debtor chooses between the certainty of fulfilling obligations honestly and the

² Decision of the Supreme Court of the Czech Republic of 13 August 2024, No. 29 NSČR 77/2024. ECLI:CZ:NS:2024:29.NSCR.77.2024.1. Similarly decision of the Supreme Court of the Czech Republic of 30 May 2022, No. 29 NSČR 44/2020. ECLI:CZ:NS:2022:29.NSCR.44.2020.1. See also MORAVEC, Tomáš and David MACHAČ. Poctivý záměr v oddlužení ve světle novely č. 252/2024. *Studia Iuridica Cassoviensia* [online]. 2025, 13(2), pp. 148–160 [viewed 12 October 2025]. Available from: doi.org/10.33542/SIC2025-2-08

³ See European Commission. Study on a New Approach to Business Failure and Insolvency. Comparative Legal Analysis of the Member States' Relevant Provisions and Practices [online]. 2016, pp. 294–297, 303, 320–323. [viewed 12 October 2025]. Available from: https://commission.europa.eu/document/download/ec2350c9-b7e2-4599-b9a6-ecceae7c2374_en?filename=insolvency_study_2016_final_en.pdf. For Slovak law refer to VETERNÍKOVÁ, Mária and Andrea SLEZÁKOVÁ. Annulment of Debt Relief Due to Dishonest Intention of the Debtor in the Decision-making Practice of Slovak Courts. In GRMELOVÁ, Nicole (ed.) Conference proceedings. 15th International Scientific Conference “Law in Business of Selected Member States of the European Union”. October 25–27, 2023, Prague, Czech Republic. Prague: Oeconomica Publishing House, 2023, pp. 95–106 [viewed 12 October 2025]. Available from: https://lawinbusiness.vse.cz/wp-content/uploads/Law-in-Business_2023.pdf.

⁴ Recitals 78–79, art. 23(1) of Directive (EU) 2019/1023. See RAMMESKOW, Ulrik In BRAEGELMANN, Tom, Christoph G. PAULUS, and Reinhard DAMMANN. European Preventive Restructuring: An Article-By-Article Commentary. Bloomsbury Publishing Plc, 2021, pp. 261–262. See also JOKUBAUSKAS, Remgijus. Discharge of Debts of Insolvent Entrepreneurs Under the Restructuring and Insolvency Directive. *Utrecht Journal of International and European Law* [online]. 2023, 38(1), pp. 64–75 [viewed 12 October 2025]. Available from: doi: 10.5334/ujiel.606. MACHAČ, David. Debt Discharge for Insolvent Czech Entrepreneurs under the EU Directive 2019/1023. In GRMELOVÁ, Nicole, TOMČIAK, Petr (eds.) Horizons of Law in Business and Finance. Conference proceedings. 15th International Scientific Conference “Law in Business of Selected Member States of the European Union”. October 25–27, 2023, Prague, Czech Republic. Bucarest, Paris, Calgary: Adjuris – International Academic Publisher, 2023, p. 64 [viewed 12 October 2025]. Available from: <https://adjuris.ro/books/hlbf/Horizons%20of%20Law%20in%20Business%20and%20Finance.pdf>.

⁵ BECKER, Gary S. Crime and Punishment: An Economic Approach. *Journal of Political Economy* [online]. 1968, 76(2), pp. 169–217 [viewed 12 October 2025]. Available from: doi: 10.1086/259394.

⁶ WINTER, Harold. Economics of Crime. Taylor & Francis Group, 2019, pp. 2–5. WINTER, Harold. Issues in Law and Economics. University of Chicago Press, 2017, pp. 145–147. COOTER, Robert and ULEN, Thomas. Law & Economics. 6th ed. Boston: Prentice Hall, 2012, pp. 463–467.

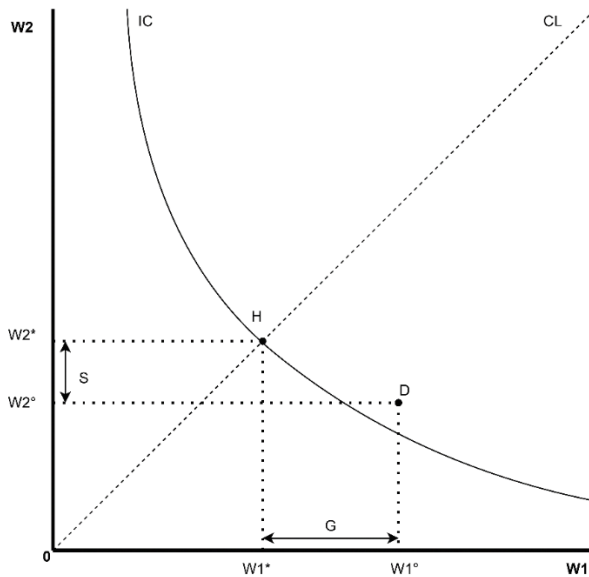
risky alternative of acting dishonestly.

The aim of the paper is to provide an analytical framework for understanding the debtor's (dis)honesty as a rational choice and to show how specific features of insolvency regulation influence their behaviour. To illustrate this decision-making process, the paper applies a state-preference model, which makes it possible to identify key variables that shape the debtor's conduct. It then analyses each of these variables in the context of Czech insolvency regulation, highlighting how legal rules and institutional practice can influence the debtor's incentives and promote honest behaviour.

2. (DIS)HONESTY IN THE STATE-PREFERENCE MODEL

The debtor's dilemma of whether to pursue dishonest intent in the process of discharge of debts can be illustrated using the state-preference model⁷ as follows:

Fig. 1. Debtor's dilemma



W1 represents the debtor's wealth if dishonest conduct remains undetected and unpunished. W2, on the other hand, represents the debtor's wealth if dishonesty is revealed and sanctioned. The diagonal axis of the quadrant is the certainty line (CL): for any point on it, $W1 = W2$, meaning that the debtor's

⁷ For detailed explanation of the state-preference model refer to e.g. GRAVELLE, Hugh, and Ray REES *Microeconomics*. 3rd ed. New York: Pearson Education, 2004, pp. 466 et seq.

wealth is the same regardless of whether dishonesty is revealed.

Each point in the graph corresponds to a unique combination of W_1 and W_2 , to which the debtor assigns a certain level of utility. Points providing the same utility form an indifference curve (IC). ICs can be thought of as contour lines on a map: points on the same curve bring the same “altitude” of utility, points below it (closer to the origin) bring lower utility and points above it bring higher utility. A rational debtor seeks to maximize utility. Therefore, combinations of W_1 and W_2 lying above a given IC are preferred, those on the IC are equally acceptable, and those below the IC are inferior.⁸

Point H represents the debtor’s situation if they act honestly. Since wealth is then certain, H lies on the CL ($W_1^* = W_2^*$). Point D represents the risky alternative of dishonesty. For the purposes of further analysis, we will presume that dishonest conduct takes the form of concealing income⁹ or property¹⁰ since these are arguably the most frequent forms of dishonest conduct in insolvency proceedings.¹¹ If concealment succeeds, the debtor’s wealth rises from W_1^* to W_1° (the difference being the gain from dishonesty – G). If concealment is detected, however, wealth falls from W_2^* to W_2° (the difference being the sanction for dishonesty – S).

The IC passing through point H forms a boundary between the “area of dishonesty” (the area above the IC where all points yield higher utility than H) and the “area of honesty” (the area below the IC where all points yield lower utility than H). If point D lies above this IC, a rational debtor will prefer dishonesty over honesty, and vice versa. The regulatory task is therefore to shift point D below the IC passing through point H, thereby making honest conduct the debtor’s preferred option.

⁸ The indifference curve is always downward sloping because, to maintain the same level of utility, a decrease in W_1 must be offset by an increase in W_2 and vice versa. The IC depicted in the graph is convex, which corresponds to a risk-averse individual. For risk-neutral decision-makers, the IC is a straight line, while the IC of risk-seeking individuals is concave. An individual’s risk attitude affects how they respond to changes in key variables. For example, a risk-averse individual will be more affected by a percentage increase in the magnitude of the sanction than by an equal percentage increase in the probability of its imposition, even though the expected sanction is the same in both cases. See WINTER, 2017, *op. cit.*, p. 114; SHAVELL, Steven. Foundations of Economic Analysis of Law. Belknap Press, 2004, pp. 480–481; BECKER, Gary S. Crime and Punishment: An Economic Approach. *Journal of Political Economy* [online]. 1968, 76(2), p. 178 [viewed 12 October 2025]. Available from: doi:10.1086/259394.

⁹ Decision of the Supreme Court of the Czech Republic of 29 June 2023, No. 29 NSČR 161/2022. ECLI:CZ:NS:2023:29.NSCR.161.2022.1.

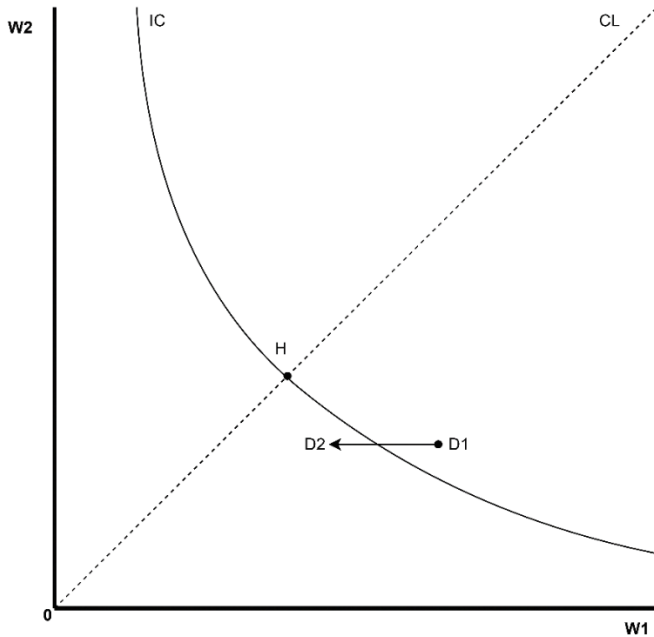
¹⁰ Decision of the Supreme Court of the Czech Republic of 17 June 2015, No. 29 NSČR 47/2013. ECLI:CZ:NS:2015:29.NSCR.47.2013.1.

¹¹ Beyond the mentioned situations, dishonesty typically includes actions aimed at prejudicing creditors even before the opening of insolvency proceedings, concealing liabilities, frustrating the satisfaction of creditors, giving preferential treatment to certain creditors, obstructing creditors or the insolvency practitioner from properly assessing the debtor’s financial situation, or deliberately diminishing the value of the debtor’s estate. See e.g. decision of the Supreme Court of the Czech Republic of 30 May 2022, No. 29 NSČR 44/2020. ECLI:CZ:NS:2022:29.NSCR.44.2020.1.

3. GAIN FROM DISHONEST CONDUCT

The debtor’s incentive to conceal property or income depends largely on the potential gain (G) that such conduct may yield. Legal rules and institutional measures can reduce or even eliminate this gain. This lowers the debtor’s wealth in the case where dishonesty goes undetected and shifts point D leftward in the graph, making dishonest conduct less attractive.

Fig. 2. Effect of reducing gains from dishonest conduct



A key way to reduce G is to make the debtor’s assets and income transparent. This can be achieved in two main ways. First, through public registers: land registers, securities registers, vehicle registers, the commercial register, and similar databases make it difficult for the debtor to conceal ownership. Where an asset is transparently recorded, the prospect of gaining from its concealment effectively disappears. Second, information can be obtained from third parties.¹² Banks, for example, are under a statutory duty to cooperate with the insolvency practitioner: they must disclose whether the debtor holds an account, provide balances, and deliver account statements. This enables the insolvency practitioner to reconstruct past transactions and neutralise attempts to divert or hide funds.

¹² Articles 43 and 44 of the CZECH REPUBLIC Act No. 182/2006 Coll., the Insolvency Act [zákon č. 182/2006 Sb., insolvenční zákon]. Hereinafter referred to as the Czech Insolvency Act or IA.

Obtaining information about debtor's assets can become more complicated if the debtor holds property abroad, most typically foreign bank accounts.¹³ Article 21(1) of Regulation (EU) 2015/848 addresses this by generally allowing the insolvency practitioner appointed by a court with jurisdiction under Article 3(1) to exercise all powers conferred by the law of the State of the opening of proceedings also in other Member States (subject to certain conditions).¹⁴ This enables the insolvency practitioner to formally request cooperation from foreign banks and other third parties just as they would domestically. In practice, however, such cross-border cooperation may be slower and less effective than domestic mechanisms, leaving still significant opportunity for gain from concealment. Moreover, Article 21 facilitates access to information but does not empower the insolvency practitioner to freeze or preserve assets located abroad. To address this limitation, proposals have been made to expressly extend the European Account Preservation Order (EAPO) procedure under Regulation (EU) 655/2014 to insolvency practitioners, who are currently not recognised as potential beneficiaries of this mechanism.¹⁵

A similar logic applies to income. Income paid by a third party (such as an employer, a pension authority, or another payer) is much harder to conceal. The payer reports the income to the insolvency practitioner and performs mandatory deductions directly,¹⁶ meaning that the debtor never gains access to the attachable portion of the income. In this sphere, G is virtually reduced to zero. By contrast, self-employed debtors must report their revenue and expenditure to the insolvency practitioner themselves so that the attachable portion of profit can be

¹³ SARRA, Janis, Stephan MADAUS, and Irit MEVORACH. Chasing Assets Abroad: Ideas for More Effective Asset Tracing and Recovery in Cross-Border Insolvency. *International Insolvency Review* [online]. 2023, 32(2), pp. 253–288 [viewed 12 October 2025]. Available from: doi:10.1002/iir.1499. In the Czech legal practice, see e.g. decision of the Supreme Court of the Czech Republic of 31 January 2024, No. 29 NSČR 58/2023. ECLI:CZ:NS:2024:29.NSCR.58.2023.1.

¹⁴ For more details see THOLE, Christoph. In BRINKMANN, Moritz (ed.). *European Insolvency Regulation: Article-by-Article Commentary*. München: Verlag C.H. Beck, 2019, pp. 211 et seq. For instance, referring to Article 18 of Regulation 1346/2000 (similar to the current Article 21 of the Regulation 2015/848), the English court held that in insolvency proceedings opened in the UK (pre-Brexit) the insolvency practitioner could require a former bookkeeper residing in Ireland to deliver up the company's accounting records. The court confirmed that an insolvency practitioner may exercise powers conferred by the law of the State of the opening of proceedings also in other Member States, provided there is a sufficient connection to the jurisdiction. Decision of the High Court of Justice (Chancery Division), England and Wales of 22 February 2010, No. [2010] EWHC 317 (Ch) [online]. In BAILII Database. British and Irish Legal Information Institute. [accessed on 2025-10-12]. Available from: <https://www.bailii.org/ew/cases/EWHC/Ch/2019/2503.html>.

¹⁵ European Commission. Study on Tracing and Recovery of Debtor's Assets by Insolvency Practitioners [online]. 2022, pp. 69-72. [viewed 12 October 2025]. Available from: https://commission.europa.eu/document/download/abd928b8-4719-4e1e-8495-77d8e9a9140b_en?filename=Final%20Report%20-%20Study%20on%20tracing%20and%20recovery%20of%20debtor%E2%80%99s%20assets%20by%20insolvency%20practitioners%20-%20March%202022.pdf.

¹⁶ Article 406(3) IA.

calculated.¹⁷ Needless to say, the insolvency practitioner's ability to verify the accuracy of such reports is very limited.

Another way of curbing gains from dishonesty is by restricting the debtor's ability to deprive creditors of value through certain legal acts. In debt-discharge proceedings, for example, refusing an inheritance or a gift requires the consent of the insolvency practitioner,¹⁸ preventing the debtor from unilaterally reducing the estate. Fraudulent transfers of property can be challenged through *actio Pauliana*,¹⁹ allowing assets wrongfully diverted from creditors' reach to be restored.

Despite these measures, G can never be completely eliminated. Besides the difficulty of verifying the income of self-employed debtors, assets not recorded in public registers (cash, movables etc.) remain inherently harder to control. The legal framework addresses this at least partially by imposing several duties: the debtor must disclose all assets in the statement of assets,²⁰ they must allow the insolvency practitioner access to all premises where such assets are located,²¹ and any person holding property belonging to the estate is obliged to notify the insolvency practitioner.²² Serious breaches of these duties may constitute a criminal offence,²³ yet in practice full compliance with these obligations cannot be entirely relied upon.

4. SANCTION FOR DISHONEST CONDUCT

The sanction for dishonest conduct in the debt-discharge process takes the form of either prolonging repayment plan,²⁴ terminating the proceedings without granting the debtor a discharge of residual debts,²⁵ or of revoking a discharge that has already been granted.²⁶ In all cases, the debtor remains liable for the outstanding debts and must continue to endure wage deductions or other forms of

¹⁷ Article 398b IA.

¹⁸ Article 412(6) IA.

¹⁹ Article 235 et seq. IA.

²⁰ Article 104(2), Article 211(1) and Article 392(1) IA.

²¹ Article 212(1) IA.

²² Article 213 IA. In this context, it is worth pointing out that the Dutch Supreme Court confirmed that an order issued by an English court (pre-Brexit) requiring a third party in the Netherlands to provide information about a bankrupt's assets falls within the scope of Article 18 of Regulation 1346/2000 (corresponding to the current Article 21 of Regulation 2015/848). Decision of the Supreme Court of the Netherlands of 18 March 2011, No. 10/00502, ECLI:NL:HR:2011:BP1404.

²³ Articles 222 and 225 of the CZECH REPUBLIC Act No. 40/2009 Coll., the Criminal Act [zákon č. 40/2009 Sb., trestní zákoník].

²⁴ Article 412b(6) IA. This sanction was introduced by one of the most recent amendments to the Czech Insolvency Act, effective from 1 October 2024. As of now, there is no relevant practical experience with its application.

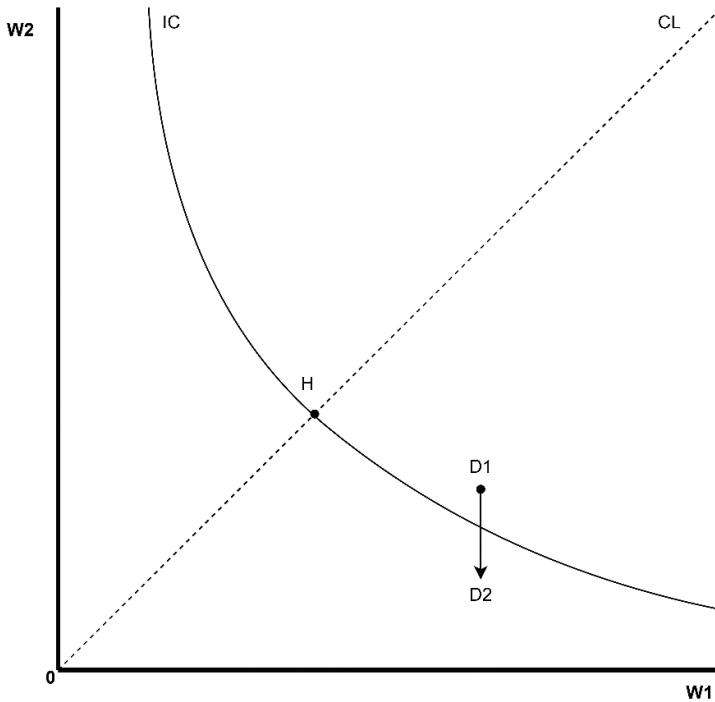
²⁵ Article 395(1), 405(1) and 418(4) IA.

²⁶ Article 417 IA.

enforcement against future income (whether in insolvency or enforcement proceedings).

From an economic perspective, the sanction (S) can be expressed as the present value of all additional deductions that the debtor must endure as a consequence of dishonest conduct. In the model, increasing S shifts point D downward, as it reduces the debtor’s wealth in the case where dishonesty is detected and punished, thereby lowering the overall utility of the dishonest option.

Fig. 3. Effect of stricter sanctions for dishonest conduct



Formally, sanction (S) can be written as:

$$S = \sum_{t=0}^T \frac{CF_t}{(1+i)^t} - \sum_{t=0}^R \frac{CF_t}{(1+i)^t}$$

where CF_t is the deduction in future period t , i is the discount rate, T is the total time until a new discharge can be granted, and R is the remaining time under the original repayment plan (of course, $R < T$). The sanction therefore equals the present value of all future deductions until a new debt relief can be granted, minus the present value of deductions the debtor would have been obliged to pay even without the extension or termination of the first process. In economic terms, S represents the present value of the net additional burden caused by the debtor’s

dishonesty.

As is evident from the above formula, the value of S is determined by four factors: the amount of the deduction in each period, the discount rate reflecting the debtor's time preference, the length of the future period during which deductions must be made, and remaining duration of the original repayment plan.

The amount of deductions (CF) is fixed by statutory rules on the attachable portion of income²⁷ and, absent legislative change, cannot be influenced in an individual case.

The discount rate (i) reflects the debtor's preference for present over future consumption. While its baseline level is influenced by prevailing market interest rates, it ultimately depends on individual time preferences. Empirical studies suggest that individuals with lower education, lower income, and lower socioeconomic status tend to apply a higher discount rate (thus strongly preferring presence).²⁸ Since most debtors in debt-relief proceedings fall into these groups, they are likely to be relatively "short-sighted" when weighing immediate gains from dishonesty against the future costs of continued deductions. Even though this behavioural factor is important for understanding debtor decision-making,²⁹ it is essentially exogenous and cannot be directly influenced by legal regulation.

The key determinant of the sanction's severity is the length of the future period during which deductions continue (T). Czech insolvency law provides two alternative sanctions. In less serious cases, the court may extend the repayment plan by up to 18 months. In more serious cases, the debt-relief procedure is terminated entirely and the debtor is barred from initiating a new procedure for five years. Together with the initial phase of the new procedure (approximately half a year) and the subsequent three-year repayment plan, this means that at least 8.5 years must pass between the termination of the first procedure and the granting of a new discharge. The longer this period, the more severe the sanction.

Lastly, the perceived severity of the sanction is determined by the remaining duration of the original repayment plan (R). The net burden on the debtor depends on how much time was left in the plan at the moment of its extension or termination. The debtor would have been required to undergo deductions during this remaining period anyway, so these "baseline" deductions cannot be regarded as part of the sanction. To determine the true sanction, the present value of these baseline deductions must be subtracted from the total present value of all future

²⁷ Article 276 et seq. of the CZECH REPUBLIC Act No. 99/1963 Coll., the Civil Procedure Act [zákon č. 99/1963 Sb., občanský soudní řád].

²⁸ See e.g. HARRISON, Glenn W., Morten I. LAU, and Melonie B. WILLIAMS. Estimating Individual Discount Rates in Denmark: A Field Experiment. *American Economic Review* [online]. 2002, 92(5), pp. 1606–1617 [viewed 12 October 2025]. Available from: doi: 10.1257/000282802762024674.

²⁹ COOTER, Robert and ULEN, Thomas. Law & Economics. 6th ed. Boston: Prentice Hall, 2012, pp. 470–474. See also POSNER, Richard A. An Economic Theory of the Criminal Law. *Columbia Law Review* [online]. 1985, 85(6), pp. 1213–1214 [viewed 12 October 2025]. Available from: doi: 10.2307/1122392.

deductions. It follows that shortening the standard repayment period autonomously increases the effective severity of the sanction.³⁰

In other words, the shorter the remaining repayment period (R), the more severe the sanction becomes. In all cases of termination, the debtor cannot obtain a discharge for at least 8.5 years. If termination occurs at the very start, however, the debtor would still have been subject to deductions for the full three years of the original plan, so the effective additional burden is roughly 5.5 years of extra deductions. By contrast, if termination occurs near the end of the plan, the debtor loses almost all of the benefit of the payments already made and must wait the entire 8.5 years again. Termination late in the process is thus substantially more painful, because nearly the whole waiting period counts as a “pure” penalty.

In summary, apart from exogenous factors such as the amount of future deductions and the debtor’s discount rate, there are two key determinants of the sanction’s severity: (1) the total time that must elapse before the debtor can again obtain a discharge (T), and (2) the remaining duration of the original repayment plan at the moment of its extension or termination (R). The severity of the sanction increases not only with T, but also (perhaps less intuitively) as R becomes shorter. Together, these two factors determine how far point D is pushed downward in the model and thus how strongly dishonest conduct is disincentivised.

5. PROBABILITY OF IMPOSITION OF SANCTION FOR DISHONEST CONDUCT

Another key variable in the model is the probability of detection and punishment of dishonest conduct (P).³¹ In the state-preference diagram, P is reflected in the slope of the indifference curve: the higher the P, the flatter the IC, and vice versa.³² Put differently, as P increases, the “area of dishonesty” (the area above the IC) becomes smaller, making it more likely that point D will fall below the curve and that the debtor will choose honesty.

The first factor influencing P is the debtor’s own conduct. The debtor may actively attempt to reduce the probability of detection by engaging in concealment efforts such as hiding assets, falsifying records, or transferring property to third parties. These activities, however, are not costless: they require time, resources, and often the assistance of others. In terms of the state-preference model,

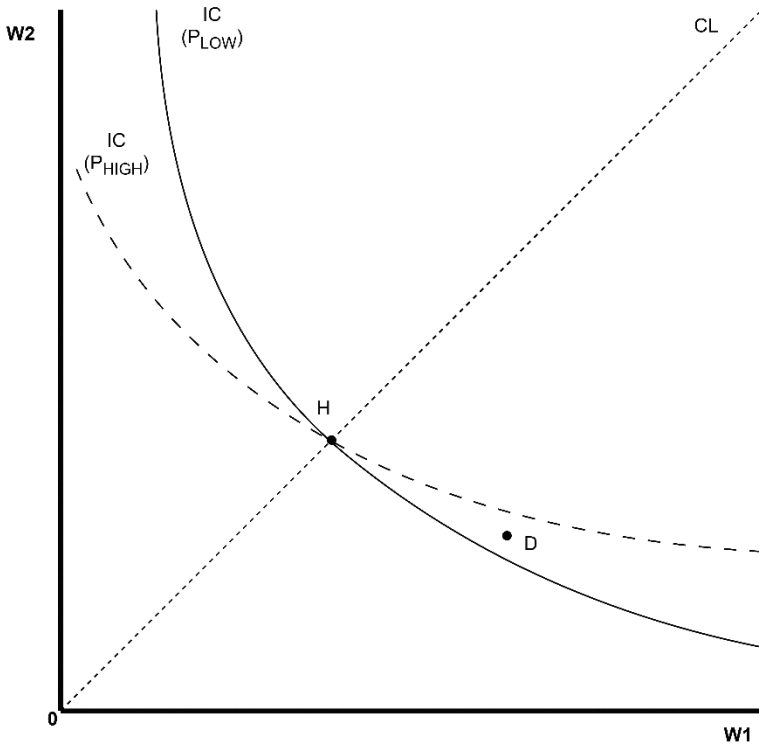
³⁰ The amendment to the Czech Insolvency Act effective as of 1 October 2024 shortened the general duration of the repayment plan from five to three years, reflecting the transposition of Directive (EU) 2019/1023. As a result, the sanction for dishonest conduct has become more stringent.

³¹ More specifically, we consider probability as it is perceived by the debtor (i.e. their subjective probability). SHAVELL, Steven. *Foundations of Economic Analysis of Law*. Belknap Press, 2004, pp. 481, 515–518.

³² The slope of IC is given by $\frac{MU(W1).(1-P)}{MU(W2).P}$ where MU stands for marginal utility of W1 or W2 and P is the probability of imposition of sanction (ranging from 0 to 1). As P approaches 1 (i.e. nears certainty), the slope of the IC approaches zero, causing the IC to become nearly horizontal.

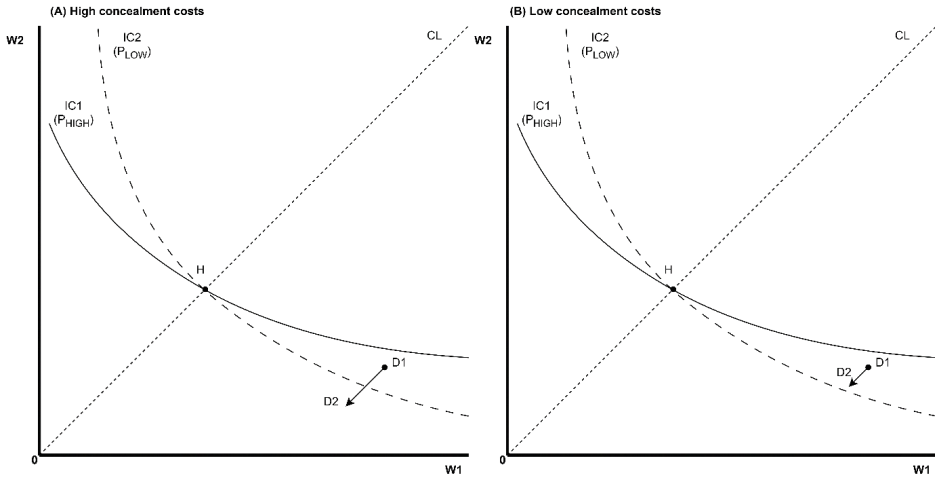
such costs shift point D downward and leftward, parallel to the certainty line, because they reduce the debtor's wealth in both states of the world. The overall effect on the debtor's choice is therefore ambiguous: while a lower P makes the indifference curve steeper and increases the relative attractiveness of dishonesty, the simultaneous reduction in wealth caused by concealment costs makes dishonesty less attractive. Which effect ultimately prevails depends on their relative magnitude.

Fig. 4. Effect of higher probability of imposition of sanction for dishonest conduct



In the following graph, point D1 lies below IC1, meaning the debtor is better off remaining honest. The debtor can, however, exert effort to conceal property or income, thereby lowering the probability of detection. This makes the indifference curve steeper, resulting in a new curve IC2. At the same time, the concealment costs shift the original point D1 to a new position D2. If these costs are sufficiently high, D2 falls below IC2 and honesty remains the preferred choice (A). If the costs are relatively low, D2 lies above IC2 and the debtor will choose dishonesty (B). Regulation should therefore aim to raise concealment costs enough to ensure that the negative wealth effect outweighs any benefit gained from reducing P.

Fig. 5. Effect of debtor’s effort to lower the probability of detection of dishonest conduct



The probability P also depends on the insolvency practitioner’s investigative effort. Effort raises P but is costly (requiring time, enquiries, analysis, coordination with third parties etc.). A key disincentive is the loss of future fees if dishonesty is established and the case is terminated. Since the insolvency practitioner is paid a flat monthly fee, this opportunity cost is the highest at the beginning of the process and declines as it nears its end. From a purely cost–benefit perspective, the insolvency practitioner’s effort (and thus P) can be expected to rise as the remaining duration of the repayment plan becomes shorter.

Regulation can adjust these incentives to raise P throughout the case. One option is to neutralise the fee disincentive by preserving part of the insolvency practitioner’s remuneration upon termination or by granting a detection bonus. Even though the Czech Insolvency Act generally empowers courts to increase the insolvency practitioner’s remuneration where they find it justified,³³ the Czech Supreme Court has held that examining the debtor’s honesty, investigating voidable transactions, and monitoring the debtor’s handling of assets fall within the insolvency practitioner’s ordinary supervisory duties and therefore do not justify any exceptional increase in remuneration.³⁴ Further measures include credible penalties for negligent performance of insolvency practitioner’s duties and lowering the cost of investigation through easier data access, cross-border cooperation, clearer procedural powers (including enforcement of third-party cooperation) etc.

The final factor influencing P is the courts’ approach. If courts adopt an

³³ Article 38(3) IA.

³⁴ Decision of the Supreme Court of the Czech Republic of 28 November 2018, No. 29 NSČR 27/2017. ECLI:CZ:NS:2018:29.NSCR.27.2017.1.

overly lenient stance, dishonesty may go unsanctioned even when detected, rendering the statutory sanction ineffective. Moreover, terminating a case for dishonest actions requires the court to state this ground explicitly and provide detailed reasoning,³⁵ which is procedurally more demanding. In practice, courts are often inclined to terminate proceedings for procedurally simpler reasons (e.g. insufficient payments) that do not require the same detailed justification. Additionally, if the debtor voluntarily moves to have the proceedings discontinued, the court does not examine any other grounds for termination (including dishonesty).³⁶ In such cases, although the process is terminated, the five-year bar on filing a new petition does not apply, allowing the debtor to initiate a new process almost immediately.

To counter this, the law lowers the “administrative cost”³⁷ of using dishonesty as a ground for termination by easing the evidentiary burden on courts: dishonesty need not be fully proven but only established to the level of a “reasonable presumption.”³⁸ This standard is less demanding than the usual civil standard of proof,³⁹ which makes it procedurally easier for courts to apply the dishonesty ground and thus enhances its preventive function.

6. CONCLUSION

A rational debtor chooses between honest fulfilment of duties and dishonest conduct by comparing the utility derived from each option. The state-preference model identifies three key variables influencing this decision: potential gain (G), the severity of the sanction (S), and the probability of its imposition (P).

Higher gains make dishonesty more attractive. Gains can be reduced by measures that prevent concealment or limit its benefits, such as automatic income deductions, public registers, and cooperation duties of banks and other institutions. To further curb gains from dishonesty, the EU legislator could consider expressly extending the European Account Preservation Order (EAPO) mechanism to insolvency practitioners.

Stronger sanction discourages dishonesty. Its severity grows with the time before a new discharge can be granted. The newly introduced sanction allowing courts to extend the repayment plan by up to 18 months should not lead to a generally more lenient approach, whereby courts replace termination of the

³⁵ Decision of the Supreme Court of the Czech Republic of 29 April 2024, No. 29 NSČR 92/2023. ECLI:CZ:NS:2024:29.NSCR.92.2023.1.

³⁶ Decision of the Supreme Court of the Czech Republic of 26 January 2023, No. 29 NSČR 43/2022. ECLI:CZ:NS:2023:29.NSCR.43.2022.1.

³⁷ Administrative costs of civil proceedings are the sum of the costs to everyone involved therein, including costs of taking evidence. COOTER, Robert and ULEN, Thomas. *Law & Economics*. 6th ed. Boston: Prentice Hall, 2012, pp. 384–386.

³⁸ Articles 395(1), 405(1) and 418(4) IA.

³⁹ Decision of the Supreme Court of the Czech Republic of 30 January 2020, No. 29 NSČR 101/2019. ECLI:CZ:NS:2020:29.NSCR.101.2019.1.

case with a mere extension of the repayment plan. Instead, it should be applied to cases of moderate misconduct that previously went unsanctioned because full termination would have been disproportionate. The sanction also becomes progressively more severe as the original plan nears its end. Notably, the recent reduction of the standard repayment period from five to three years has indirectly made sanctions for dishonest conduct stricter.

Finally, a higher probability of sanction encourages honest behaviour. Debtors may resort to various strategies to impede detection of their dishonesty, but regulation should ensure that the costs of such efforts outweigh any benefit from lowering P . The insolvency practitioner's investigative effort also increases P , yet it is constrained by resources and incentives. Besides facilitating access to relevant information (including in cross-border contexts) a key improvement could involve preserving part of the practitioner's remuneration upon termination of the case or introducing performance-based bonuses. Courts likewise influence P through their approach to dishonest debtors. Excessive leniency or reluctance to apply dishonest intent as a ground for termination of the debt-relief procedure considerably weakens deterrence and undermines the preventive function of the law.

Considered jointly, these variables show how legal rules can be designed to shift the debtor's choice in favour of honesty and thus enhance the integrity of the debt-relief process.

REFERENCES

1. BECKER, Gary S. Crime and Punishment: An Economic Approach. *Journal of Political Economy* [online]. 1968, 76(2), pp. 169–217 [viewed 12 October 2025]. Available from: doi: 10.1086/25 9394.
2. COOTER, Robert and ULEN, Thomas. Law & Economics. 6th ed. Boston: Prentice Hall, 2012.
3. GRAVELLE, Hugh, and Ray REES Microeconomics. 3rd ed. New York: Pearson Education, 2004.
4. HARRISON, Glenn W., Morten I. LAU, and Melonie B. WILLIAMS. Estimating Individual Discount Rates in Denmark: A Field Experiment. *American Economic Review* [online]. 2002, 92(5), pp. 1606–1617 [viewed 12 October 2025]. Available from: doi: 10.1257/000282802762024674.
5. JOKUBAUSKAS, Remgijus. Discharge of Debts of Insolvent Entrepreneurs Under the Restructuring and Insolvency Directive. *Utrecht Journal of International and European Law* [online]. 2023, 38(1), pp. 64–75 [viewed 12 October 2025]. Available from: doi: 10.5334/ ujiel.606.
6. MACHAČ, David. Debt Discharge for Insolvent Czech Entrepreneurs under the EU Directive 2019/1023. In GRMELOVÁ, Nicole, TOMČIAK, Petr (eds.) Horizons of Law in Business and Finance. Conference proceedings. 15th International Scientific Conference “Law in Business of Selected Member States of the European Union”. October 25–27, 2023, Prague, Czech Republic. Bucarest, Paris, Calgary: Adjuris – International Academic Publisher, 2023, p. 56–67.

- [viewed 12 October 2025]. Available from: <https://adjuris.ro/books/hlbf/Horizons%20of%20Law%20in%20Business%20and%20Finance.pdf>.
7. MORAVEC, Tomáš and David MACHAČ. Poctivý záměr v oddlužení ve světle novely č. 252/2024. *Studia Iuridica Cassoviensia* [online]. 2025, 13(2), pp. 148–160 [viewed 12 October 2025]. Available from: doi.org/10.33542/SIC2025-2-08
 8. POSNER, Richard A. An Economic Theory of the Criminal Law. *Columbia Law Review* [online]. 1985, 85(6), pp. 1213–1214 [viewed 12 October 2025]. Available from: [doi: 10.2307/1122392](https://doi.org/10.2307/1122392).
 9. RAMMESKOW, Ulrik In BRAEGELMANN, Tom, Christoph G. PAULUS, and Reinhard DAMMANN. European Preventive Restructuring: An Article-By-Article Commentary. Bloomsbury Publishing Plc, 2021, pp. 261–262.
 10. SARRA, Janis, Stephan MADAUS, and Irit MEVORACH. Chasing Assets Abroad: Ideas for More Effective Asset Tracing and Recovery in Cross-Border Insolvency. *International Insolvency Review* [online]. 2023, 32(2), pp. 253–288 [viewed 12 October 2025]. Available from: [doi:10.1002/iir.1499](https://doi.org/10.1002/iir.1499).
 11. SHAVELL, Steven. Foundations of Economic Analysis of Law. Belknap Press, 2004.
 12. THOLE, Christoph. In BRINKMANN, Moritz (ed.). European Insolvency Regulation: Article-by-Article Commentary. München: Verlag C.H. Beck, 2019.
 13. VETERNÍKOVÁ, Mária and Andrea SLEZÁKOVÁ. Annulment of Debt Relief Due to Dishonest Intention of the Debtor in the Decision-making Practice of Slovak Courts. In GRMELOVÁ, Nicole (ed.) Conference proceedings. 15th International Scientific Conference “Law in Business of Selected Member States of the European Union”. October 25–27, 2023, Prague, Czech Republic. Prague: Oeconomica Publishing House, 2023, pp. 95–106 [viewed 12 October 2025]. Available from: https://lawinbusiness.vse.cz/wp-content/uploads/Law-in-Business_2023.pdf.
 14. WINTER, Harold. Economics of Crime. Taylor & Francis Group, 2019, pp. 2–5.
 15. WINTER, Harold. Issues in Law and Economics. University of Chicago Press, 2017.

Identity Under Copyright: Legal Response to the Deepfake Era¹

Mgr. Daniel ZIGO, PhD., LL.M.

daniel.zigo@flaw.uniba.sk

ORCID 0000-0003-2414-3471

Assistant Professor, Institute of Clinical Legal Education

Faculty of Law, Comenius University in Bratislava

Bratislava, Slovakia

Abstract: *The exponential growth of artificial intelligence has created new challenges for personal identity protection, particularly through deepfakes, AI-generated, hyper-realistic imitations of human likenesses and performances. This paper situates the problem within the evolving EU and global regulatory landscape, analysing key instruments such as the EU's AI Act and Digital Services Act (DSA), alongside emerging national approaches. It then focuses on Denmark's innovative legislative proposal amending its Copyright Act to protect both performing artists and individuals from unauthorized digital replicas. By introducing copyright-like rights over personal likeness, the Danish model offers a novel, though unconventional, mechanism that blurs the line between intellectual property and personality rights. The article critically evaluates this approach and considers its implications for future European harmonization and the balance between protection, expression, and enforcement.*

Keywords: *AI, copyright, deepfake, Denmark, DSA, personality protection.*

JEL Classification: K24, K39

DOI: <https://doi.org/10.62768/ADJURIS/2025/5/13>

Please cite this article as:

Zigo, Daniel, „Identity Under Copyright: Legal Response to the Deepfake Era”, in Grmelová, Nicole & Anna Kretková (eds.), *Prospects of Law in Business*, ADJURIS – International Academic Publisher, Bucharest, Paris, Calgary, 2025, p. 162-173, <https://doi.org/10.62768/ADJURIS/2025/5/13>.

1. INTRODUCTION

The rapid development of artificial intelligence (AI) in recent years has been nothing short of extraordinary. AI, long present in academic and technological discourse, has in recent years quickly become an integral part of nearly every sector of human activity. From industrial automation and financial services to healthcare, education, and entertainment, AI systems are now deeply embedded

¹ Funded by the EU NextGenerationEU through the Recovery and Resilience Plan for Slovakia under the project No. 09I05-03-V02-00038.

in processes that save time, reduce costs, and generate entirely new forms of value. They enhance access to knowledge, foster innovation, and stimulate economic growth on a global scale², driven in large part by massive investments from big tech companies³. In this respect, AI represents one of the most powerful drivers of human progress in the 21st century. Yet, the very power that makes AI transformative also makes it disruptive. Throughout history humans have attempted to distort or manipulate reality using various media: altered photographs⁴, falsified documents, edited audio or video recordings. Such practices were once resource-intensive, demanding professional equipment and technical expertise. Today, AI tools have radically changed this landscape: realistic digital imitations can be generated by virtually anyone with an internet connection.

In this context, the phenomenon commonly referred to as deepfake has emerged. According to the EU's Artificial Intelligence Act⁵ ("AI Act") deepfake content encompasses image, audio, or video material that has been generated or manipulated through AI that resembles existing persons, objects, places, entities, or events, and would falsely appear to a person to be authentic or truthful⁶. Deepfakes, therefore, embody the ambivalent nature of AI⁷: on the one hand, they showcase its extraordinary creative potential, on the other, they illustrate its capacity to produce significant social, legal, and political risks. Indeed, recent years have brought a series of alarming cases. Deepfakes have been used to commit fraud, damage reputations, spread non-consensual pornography⁸, and even attempt to manipulate electoral outcomes by circulating fabricated speeches or "secret" political messages.⁹ Real-world cases already demonstrate the disruptive

² ACEMOGLU, Daron. The simple macroeconomics of AI. *Economic Policy*. 2024, 40(121), 13 - 58. [viewed 15 September 2025]. Available from: doi:10.1093/epolic/eiae042.

³ MONTGOMERY, Blake. Big tech has spent \$155bn on AI this year. It's about to spend hundreds of billions more. *The Guardian* [online]. 2025 [viewed 15 September 2025]. Available from: <https://www.theguardian.com/technology/2025/aug/02/big-tech-ai-spending>.

⁴ JOHNSON, Samuel. Victorious Laughter: Satirical Photomontage in Brigade KGK's Photo Series From the 16th to the 17th Congress of the All-Union Communist Party (Bolsheviks). *Getty Research Journal* [online]. 2025, (20) [viewed 15 September 2025]. Available from: doi: 10.594 91/wgvy8306.

⁵ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act). *OJ L*, 2024/1689, 12.7.2024.

⁶ *Ibidem*. Article 3, point 60.

⁷ ŁABUZ, Mateusz. Deep fakes and the Artificial Intelligence Act—An important signal or a missed opportunity? *Policy and Internet* [online]. 2024, 16(4), 783 – 800. [viewed 15 September 2025]. Available from: doi: 10.1002/poi3.406. p. 784.

⁸ KOREC Branislav, HOCHMANN Roland, and ADAMKOVIČ Marek. Deepfake pornografia - nová výzva v oblasti kyberkriminality. *Justičná revue*. 2025, 77(4), 414–422.

⁹ PAINTER, Richard W. Deepfake 2024: Will Citizens United and Artificial Intelligence Together Destroy Representative Democracy? *SSRN Electronic Journal* [online]. 2023, 14(121), 120 - 149. [viewed 15 September 2025]. Available from: doi:10.2139/ssrn.4558216. p. 130.

potential of deepfakes. In 2019 fraudsters used AI-generated voice to impersonate a German CEO and trick a UK subsidiary into wiring €220,000.¹⁰ During the war in Ukraine a fabricated video of President Volodymyr Zelenskyy calling on troops to surrender briefly circulated online before being exposed as fake.¹¹ These developments raise urgent questions about the resilience of democratic processes, the protection of individual rights, and the ability of legal systems to respond effectively.

Unsurprisingly, governments and international organizations have started to search for appropriate regulatory responses. While the European Union has adopted the AI Act as a horizontal framework, several states have pursued more targeted approaches to address deepfake technology. Among them, Denmark has attracted particular attention for its legislative proposal currently under public consultation. The draft amendment to the Copyright Act¹² seeks to extend protection to artistic performances against deepfake misuse and, more innovatively, to recognize every individual's right to their digital likeness.

The purpose of this article is to examine the emerging legal responses to deepfake technology, with particular focus on the Danish legislative proposal amending the Copyright Act. The analysis situates deepfakes within the existing EU regulatory framework and selected international approaches, before turning to Denmark's innovative copyright-based solution. It then offers a critical assessment of this model with particular attention to the conceptual debate on whether copyright law is the appropriate framework for protecting digital identity, as well as the practical challenges related to enforcement and freedom of expression. Methodologically, the article combines doctrinal legal analysis with comparative insights drawing on both EU law and international regulatory developments.

2. DEEPPAKES AND THE EXISTING REGULATORY FRAMEWORK

While the phenomenon of deepfakes has quickly entered public awareness, the legal landscape remains fragmented. This chapter provides an overview of the existing regulatory responses, beginning with instruments at the EU level, followed by national approaches within the EU Member States, and also illustrating a broader global context.

¹⁰ DAMIANI, Jesse. A Voice Deepfake Was Used to Scam a CEO out of \$243,000. *Forbes* [online]. 2019 [viewed 15 September 2025]. Available from: <https://www.forbes.com/sites/jessedamiani/2019/09/03/a-voice-deepfake-was-used-to-scam-a-ceo-out-of-243000/>.

¹¹ WAKEFIELD, Jane. Deepfake presidents used in Russia-Ukraine war. *BBC* [online]. 2022 [viewed 15 September 2025]. Available from: <https://www.bbc.com/news/technology-60780142>.

¹² DENMARK. The Copyright Act No. 1144 of 23 October 2014, as amended [Bekendtgørelse af lov om ophavsret nr. 1144 af 23. oktober 2014 med de ændringer] („Copyright Act“).

2.1. EU-level instruments

At the European Union level there is not a single, comprehensive legal instrument designed specifically to regulate deepfakes. Nonetheless, several existing frameworks partially address the risks. The AI Act which entered into force in August 2024, imposes transparency obligations for AI-generated or manipulated content. Providers of so-called deepfake systems must disclose that the material is artificially created or altered¹³, and manipulative AI content that significantly distorts human behaviour or impairs informed decision-making is expressly prohibited¹⁴. Complementing this, the Digital Services Act¹⁵ (“DSA”) strengthens the responsibilities of online platforms, particularly very large online platforms, requiring them to act against illegal and harmful content¹⁶. The DSA introduces notice and action mechanisms¹⁷, obliges platforms to react promptly to takedown orders¹⁸, and demands systemic risk assessments with respect to disinformation and other harmful practices. In the event of a dispute, Article 21 of the DSA represents a new approach to resolving disputes between users and platforms.¹⁹ Deepfakes are also a problematic aspect of online advertising, which also falls under the scope of the DSA.²⁰ Deepfakes might also fall within the scope of the General Data Protection Regulation²¹ (“GDPR”) when they involve personal data such as biometric identifiers, including faces or voices²². This brings with it rights of access, erasure, and objection for data subjects, alongside compliance obligations for processors.²³ While these acts are partially applicable, their coverage is often insufficient on deepfakes. In particular, the AI Act has been criticised for omitting explicit references to deepfake pornography and for

¹³ AI Act, Art. 50(4).

¹⁴ *Ibid.*, Art. 5(1 a).

¹⁵ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act). *OJ L 277, 27.10.2022, p. 1.*

¹⁶ *Ibid.* Art. 35(1) c.

¹⁷ *Ibid.* Art. 16.

¹⁸ *Ibid.* Art. 9.

¹⁹ ZIGO, Jana. Alternative dispute resolution in the digital environment: challenges and perspectives of the mechanism under the DSA. In: *Mil'niky práva v stredoeurópskom priestore 2025*. Bratislava: Právnická fakulta Univerzity Komenského v Bratislave, 2025, pp. 716–727.

²⁰ SLÁMKOVÁ, Kristína. Regulation of social media advertising in Poland. In: *Mil'niky práva v stredoeurópskom priestore 2025*. Bratislava: Univerzita Komenského v Bratislave. Právnická fakulta UK, 2025, pp. 220–230.

²¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). *OJ L 119, 4.5.2016, p. 1.*

²² Judgment of the Court of Justice of 11 December 2014. František Ryneš v Úřad pro ochranu osobních údajů. Case C-212/13. ECLI:EU:C:2014:2428.

²³ MESARČÍK, Matúš, and Ondrej ZIMEN. Deep fakes a ochrana súkromia. *Acta facultatis iuridicae Universitatis Comenianae*. 2019(2), 227–242, p. 240.

failing to address the broader social consequences of this phenomenon, including the disproportionate victimisation of women.²⁴ These gaps suggest that, rather than introducing an entirely new framework, the EU could strengthen its approach by adopting complementary rules or targeted provisions to ensure more effective protection against the harms of deepfakes.

Within an individual EU Member State, a person affected by a deepfake can rely on existing legal frameworks, including personality rights, data protection rules, platform duties, and criminal prohibitions. Traditionally, Civil law provides protection of personality rights, allowing individuals to challenge unlawful interference with dignity, honour, privacy, name, or likeness.²⁵ Victims of deepfakes can therefore seek injunctions, apologies, or damages.²⁶ Where a deepfake involves personal data, GDPR applies, enabling individuals to demand access, deletion, or restriction, and to lodge complaints before the national Data Protection Authority. The implementation of the DSA also creates practical mechanisms for victims to request the removal of manipulated content hosted on digital platforms. In more serious cases usually criminal law is applicable, for instance, in relation to child pornography, threats, defamation, or fraud.²⁷ Political deepfakes may also interfere with election laws and media regulations, potentially triggering sanctions for misleading voters or engaging in unlawful campaign practices. However, traditional legal instruments encounter challenges with modern technologies like deepfakes, particularly in terms of the practical enforcement aspects like evidence, speed, and cross-border dissemination. Remedies are also fragmented across different legal instruments, enforcement is often slow, and liability is difficult to attribute, given the anonymity and cross-border nature of online dissemination. Importantly, individuals lack a dedicated right to prevent or contest the misuse of their likeness through deepfakes.

2.2. Global approaches

Globally, jurisdictions have begun to experiment with different regulatory models. In the United States, there is no comprehensive federal regime. Regulation has developed primarily at the state level, with some states banning deepfakes in election contexts or criminalizing non-consensual sexual deepfakes. Federal debate is ongoing, complicated by First Amendment constraints, yet in May 2025 the Take It Down Act was signed into law, banning the online publication

²⁴ LABUZ, *op.cit.*, p. 796.

²⁵ For example, in Slovakia, according to Article 11 of the Civil Code (Act No. 40/1964 Coll., the Civil Code [zákon č. 40/1964 Zb., Občiansky zákonník]): „A natural person has the right to the protection of their personality, in particular of life and health, civil honor and human dignity, as well as of privacy, their name, and expressions of a personal nature.“

²⁶ Article 13 of the Slovak Civil Code (SLOVAK REPUBLIC Act No. 40/1964 Coll., the Civil Code [zákon č. 40/1964 Zb., Občiansky zákonník]).

²⁷ KOREC, *op. cit.*, p. 415.

of non-consensual sexually explicit AI generated or real images.²⁸ The United Kingdom represents another hybrid model. Traditional intellectual property laws are ill-suited to handle deepfakes, forcing individuals to rely on contractual protection, defamation law, data protection, or the tort of passing off. Passing off is especially difficult to prove for ordinary individuals, since it requires evidence of goodwill and risk of misrepresentation, effectively limiting the remedy to celebrities.²⁹ More recently, criminal law in the UK has been strengthened by the Online Safety Act 2023 (which, according to some opinions, was not a sufficient mechanism³⁰) criminalized the sharing of intimate deepfakes, and the Data (Use and Access) Act 2025 criminalized even their non-consensual creation, punishable by unlimited fines or up to two years of imprisonment.³¹ China has also adopted a strict regulation through its Deep Synthesis Regulations. These rules impose labelling requirements for AI generated content and make platforms directly liable if they fail to prevent harmful dissemination.³²

3. DENMARK'S LEGISLATIVE INNOVATION

The Danish Ministry of Culture (Kulturministeriet) introduced in June 2025³³ a draft amendment to the Copyright Act³⁴ (“Copyright Act”), under public consultation at the time of writing, that proposes an original and highly innovative approach to regulating deepfake content. The legislative proposal is built on a dual model of protection.

²⁸ GRIMMELMANN, James. Deconstructing the Take It Down Act. *Communications of the ACM* [online]. 2025 [viewed 19 September 2025]. Available from: doi:10.1145/3747203.

²⁹ PEROT, Emma, and Frederick MOSTERT. Fake it till you make it: an examination of the US and English approaches to persona protection as applied to deepfakes on social media. *Journal of Intellectual Property Law & Practice* [online]. 2020, 15(1), 32–39 [viewed 19 September 2025]. Available from: doi:10.1093/jiplp/jpz164.

³⁰ KIRA, Beatriz. When non-consensual intimate deepfakes go viral: The insufficiency of the UK Online Safety Act. *Computer Law & Security Review* [online]. 2024, 54, 106024 [viewed 19 September 2025]. Available from: doi:10.1016/j.clsr.2024.106024.

³¹ The UK Data (Use and Access) Act 2025. Available from: <https://www.legislation.gov.uk/ukpga/2025/18/contents>.

³² FRANKS, Esther, Bianca LEE, and Hui XU. Report: China's New AI Regulations. *Global Privacy Law Review* [online]. 2024, 5(1), pp. 43–49 [viewed 19 September 2025]. Available from: doi:10.54648/gplr2024007. About the regulatory divergence further illustrates the structural and normative difficulties affecting EU–China economic cooperation, see more in POPA TACHE, Cristina Elena. The EU–China Road to the Comprehensive Agreement on Investment. *Juridical Tribune – Review of Comparative and International Law*, 2022/4, pp. 476–494. Available from: doi:10.24818/TBJ/2022/12/4.03, p. 476.

³³ Bred aftale om deepfakes giver alle ret til egen krop og egen stemme. *Kulturministeriet* [online]. [no date] [viewed 20 September 2025]. Available from: <https://kum.dk/aktuelt/nyheder/bred-aftale-om-deepfakes-giver-alle-ret-til-egen-krop-og-egen-stemme>.

³⁴ DENMARK. The Copyright Act No. 1144 of 23 October 2014 [Lov om ophavsret, jf. lovbekendtgørelse nr. 1144 af 23. oktober 2014]. Available from: <https://www.retsinformation.dk/eli/lt/2023/1093>.

3.1. Proposed protection against deepfakes

The proposed amendment³⁵ (“Amendment”), consistent with the internal logic of the Copyright Act, firstly seeks to safeguard performing artists by prohibiting the public dissemination of realistic, digitally generated imitations of their artistic performances without prior consent. This protection would apply to persons who are nationals of or have permanent residence within the European Economic Area, and would last until fifty years after the year of the performer’s death.³⁶

Second, and more intriguingly, the proposal departs from the traditional copyright framework by extending protection to the physical characteristics of every individual, including foreign nationals. According to the draft, realistic, digitally generated imitations of a person’s likeness or bodily traits may not be made publicly available without that person’s consent. This protection would similarly last until fifty years after the year of the depicted person’s death. The proposal also provides for specific exceptions. The prohibition does not apply to imitations that constitute caricature, satire, parody, pastiche, criticism of authority, social critique, or similar forms of expression, unless such content amounts to disinformation that poses a serious threat to the rights or vital interests of others.³⁷

It is important to emphasize that these provisions are still at the draft stage and have not yet passed through the Danish legislative process, which is expected to unfold in autumn 2025. The current proposal may therefore undergo changes before becoming law, or even may not be accepted, but that does not change the fact that the Amendment deserves attention.

3.2. Reflections on the Danish Model

The first part of the proposal, which extends protection to artistic performances, aligns coherently with the internal logic of copyright law. Performances are already treated as intellectual property, and strengthening performers’ ability to control digital imitations of their work closes a gap in protection that deepfake technology has newly exposed. This element of the proposal, therefore, appears both logical and beneficial, as it provides performers with clear, enforceable rights.

The more intriguing element lies in extending copyright style protection to all individuals’ likenesses and physical traits. Traditionally, likeness and identity belong to the sphere of civil personality rights which emphasize dignity rather

³⁵ DENMARK. Draft law amending the Copyright Act (Forslag til Lov om ændring af lov om ophavsret). Available from: <https://www.ft.dk/samling/20241/almdel/kuu/bilag/232/3050901.pdf>.

³⁶ *Ibid*, point 8.

³⁷ *Ibid*, point 10.

than property. By treating identity as something that can be “owned” and “licensed” within copyright logic, the Danish model risks commodifying human identity³⁸. Beyond these doctrinal debates a more practical concern arises: in cases of misuse, should an affected individual primarily rely on civil personality rights, the new copyright based claims, or even criminal provisions? This potential overlap could lead to parallel or conflicting proceedings, raising uncertainty in practice about which legal path offers the most effective remedy. Copyright also operates on the basis of temporality, protection for the lifetime of the rightsholder plus fifty years. Identity, however, does not expire³⁹. Civil law regimes for personality rights recognize this by offering perpetual, non-transferable protection. Under the Danish draft, once fifty years have passed after an individual’s death, the specific copyright protection would end. In practice, though, this would not mean that a person’s likeness could be freely and unconditionally exploited, since civil personality rights and even criminal law provisions may still apply in cases of extreme violations. The proposal, therefore, raises questions about how different layers of protection would interact and whether a temporal copyright regime is conceptually compatible with the enduring nature of human dignity.

The inclusion of exceptions for parody, satire, caricature, and criticism reflects a legitimate attempt to balance protection of identity with freedom of expression as enshrined in the European Convention on Human Rights (ECHR)⁴⁰ and the EU Charter⁴¹. Yet, these exceptions may create a loophole that malicious actors can exploit, for instance, by disguising defamatory or pornographic deep-fakes as “satire.” Anticipated litigation will likely revolve around drawing boundaries between legitimate parody and harmful manipulation, a process that may be unpredictable and burdensome for victims.

Another difficulty might lie in enforcement. The model relies heavily on individuals bringing civil claims, which are often slow, costly, and ineffective against anonymous or foreign infringers. In practice, many deepfake creators are anonymous internet users who can mask their origin through technical tools, making identification extremely difficult. Even in criminal proceedings, where investigative authorities have far stronger instruments than private parties in litigation, uncovering such perpetrators is a challenging task, and within civil or copyright claims, while not impossible, the costs and technical requirements of

³⁸ RUEL, Anouk, and Wing MING CHOI. *Combating Deepfakes: Denmark Implements Copyright Status to Personal Likeness*. Culbert Ellis. *Culbert Ellis* [online]. [2025] [viewed 20 September 2025]. Available from: <https://www.culbertellis.com/news/combating-deepfakes-denmark-implements-copyright-status-to-personal-likeness-0p2b4>.

³⁹ However, it should be noted that its protection in some EU countries may be subject to time limits.

⁴⁰ Council of Europe. *European Convention on Human Rights*. Article 10. Available from: https://www.echr.coe.int/documents/d/echr/convention_ENG.

⁴¹ European Union. *Charter of Fundamental Rights of the European Union*. OJ C 326, 26.10.2012.

identification are often disproportionate to the harm suffered. At the same time, in today's world, online platforms play an increasingly important role in the spread of deepfakes, so in most cases, court proceedings may not even occur if platforms act quickly enough to remedy the situation, which we will explain below. Critics have also pointed to the limited territorial capacity of the proposed measures. The law would apply only within Denmark meaning that although infringing deepfakes might be taken down for users accessing platforms from Danish territory, the same content could remain accessible abroad, particularly on websites outside EU jurisdiction.⁴² Given the global nature of the internet, and the anonymity of online dissemination, this issue might weaken the model's practical impact, but not necessarily render the framework ineffective. Its full potential could be realised through cross-border cooperation and, ultimately, the development of an EU-wide or international legal framework to address deepfake misuse.

Despite its identified limitations, the Danish model may play an important role in shaping the broader EU debate. A notable advantage of the copyright based approach is that infringement arises automatically through the very act of using a person's likeness in a deepfake, without the need to prove whether the interference was disproportionate as under civil personality rights. In today's legal framework, creating a deepfake of an individual is not automatically unlawful unless one demonstrates a violation of their personality rights. By contrast, under the Danish proposal, any use of a person's likeness without consent would constitute an infringement of copyright and therefore be unlawful. This feature is particularly relevant in the context of the DSA, which obliges platforms to remove illegal content⁴³, and deepfakes being primarily disseminated through such platforms. There is thus a synergy between EU regulation and the Danish proposal. However, if its application remains limited to Denmark its territorial reach would be constrained, raising a broader question for discussion at the EU level. Even if imperfect, the proposal raises valuable questions about whether EU law should adopt a similar approach, or whether hybrid solutions that combine copyright with civil personality rights would provide a more coherent balance between dignity, property, and freedom of expression.

4. CONCLUSION

The phenomenon of deepfakes illustrates both the transformative promise and the disruptive risks of artificial intelligence. As this article has shown, the legal responses to date, whether at the EU level, within individual EU Member

⁴² WOODS, Cat. Denmark proposes copyright laws to protect against deepfakes. *Law Society Journal* [online]. 2025 [viewed 21 September 2025]. Available from: <https://lsj.com.au/articles/denmark-proposes-copyright-laws-to-protect-against-deepfakes/>.

⁴³ DSA, Article 16.

States, or globally, remain fragmented and insufficient to fully address the challenges posed by the rapid proliferation of digital media. This state of affairs is natural, given that technology advances at a rapid pace and the law will always respond with a certain delay.

Against this backdrop, the Danish legislative proposal stands out as a particularly innovative attempt to close existing loopholes. By introducing a dual model that protects both performing artists and all individuals against unauthorised digital imitation, Denmark has placed copyright law at the centre of the deepfake debate. The Amendment's key novelty lies in its extension of copyright style protection to personal likenesses. Unlike traditional civil personality rights, which usually require proof of disproportionate interference with dignity, the Danish model establishes infringement automatically whenever a likeness is used without consent. This lowers the evidentiary threshold for victims and potentially strengthens the ability to remove harmful content from online platforms, particularly in synergy with the obligations of the Digital Services Act.

At the same time, the proposal raises several conceptual and practical challenges. On the doctrinal level, it risks commodifying human identity by treating likeness as property capable of ownership and licensing. From a practical perspective, enforcement is likely to remain difficult. Many deepfake creators are anonymous, use foreign servers, and operate outside EU jurisdiction. Even with stronger rights in hand, victims may struggle to identify infringers or to obtain remedies across borders. Moreover, the inclusion of exceptions for parody, satire, and critique, while essential to safeguard freedom of expression, will inevitably generate uncertainty and litigation over the scope of lawful versus unlawful deepfakes.

The Danish proposal therefore contributes both strengths and open questions to the state of the art. Its main contribution is to reframe the protection of identity through the lens of copyright, thereby offering a more immediate and enforceable cause of action. This in turn highlights a research gap at the European level: should the EU consider harmonizing rules on digital likeness and deepfake misuse through copyright, civil personality rights, or a hybrid model? Furthermore, the Danish initiative underscores the need to study the interaction between national solutions and EU wide instruments, especially in light of the Digital Services Act. The territorial limits of national copyright law suggest that without broader European harmonization, enforcement will remain piecemeal and inconsistent.

In conclusion, Denmark's legislative proposal does not offer a perfect solution, nor could any national measure fully resolve the challenges of deepfakes in a global digital environment. Yet it provides an important idea for rethinking how law can respond to AI-generated identity manipulation. Its significance lies less in its immediate territorial impact than in the broader debate it provokes across Europe and beyond. Whether through copyright, personality rights, or innovative hybrid solutions, the task ahead for legislators and scholars is to design

frameworks that secure both human dignity and technological progress in a rapidly evolving digital society.

REFERENCES

1. ACEMOGLU, Daron. The simple macroeconomics of AI. *Economic Policy*. 2024, 40(121), 13 - 58. [viewed 15 September 2025]. Available from: doi: 10.1093/epolic/eiae042.
2. DAMIANI, Jesse. A Voice Deepfake Was Used to Scam a CEO out of \$243,000. *Forbes* [online]. 2019 [viewed 15 September 2025]. Available from: <https://www.forbes.com/sites/jessedamiani/2019/09/03/a-voice-deepfake-was-used-to-scam-a-ceo-out-of-243000/>.
3. FRANKS, Esther, Bianca LEE, and Hui XU. Report: China's New AI Regulations. *Global Privacy Law Review* [online]. 2024, 5(1), pp. 43–49 [viewed 19 September 2025]. Available from: doi:10.54648/gplr2024007.
4. GRIMMELMANN, James. Deconstructing the Take It Down Act. *Communications of the ACM* [online]. 2025 [viewed 19 September 2025]. Available from: doi:10.1145/3747203.
5. JOHNSON, Samuel. Victorious Laughter: Satirical Photomontage in Brigade KGK's Photo Series From the 16th to the 17th Congress of the All-Union Communist Party (Bolsheviks). *Getty Research Journal* [online]. 2025, (20) [viewed 15 September 2025]. Available from: doi: 10.594 91/wgvy8306.
6. KIRA, Beatriz. When non-consensual intimate deepfakes go viral: The insufficiency of the UK Online Safety Act. *Computer Law & Security Review* [online]. 2024, 54, 106024 [viewed 19 September 2025]. Available from: doi: 10.1016/j.clsr.2024.106024.
7. KOREC Branislav, HOCHMANN Roland, and ADAMKOVIČ Marek. Deepfake pornografia - nová výzva v oblasti kyberkriminality. *Justičná revue*. 2025, 77(4), 414–422.
8. ŁABUZ, Mateusz. Deep fakes and the Artificial Intelligence Act—An important signal or a missed opportunity? *Policy and Internet* [online]. 2024, 16(4), 783 – 800. [viewed 15 September 2025]. Available from: doi: 10.1002/poi3.406.
9. MESARČÍK, Matúš, and Ondrej ZIMEN. Deep fakes a ochrana súkromia. *Acta facultatis iuridicae Universitatis Comenianae*. 2019(2), 227–242.
10. MONTGOMERY, Blake. Big tech has spent \$155bn on AI this year. It's about to spend hundreds of billions more. *The Guardian* [online]. 2025 [viewed 15 September 2025]. Available from: <https://www.theguardian.com/technology/2025/aug/02/big-tech-ai-spending>.
11. PAINTER, Richard W. Deepfake 2024: Will Citizens United and Artificial Intelligence Together Destroy Representative Democracy? *SSRN Electronic Journal* [online]. 2023, 14(121), 120 - 149. [viewed 15 September 2025]. Available from: doi:10.2139/ssrn.4558216.
12. PEROT, Emma, and Frederick MOSTERT. Fake it till you make it: an examination of the US and English approaches to persona protection as applied to deepfakes on social media. *Journal of Intellectual Property Law & Practice* [online]. 2020, 15(1), 32–39 [viewed 19 September 2025]. Available from: doi:10.1093/jiplp/jpz164.

13. POPA TACHE, Cristina Elena. The EU–China Road to the Comprehensive Agreement on Investment. *Juridical Tribune – Review of Comparative and International Law*, 2022/4, pp. 476–494. Available from: doi: 10.24818/TBJ/2022/12/4.03
14. RUEL, Anouk, and Wing MING CHOI. Combatting Deepfakes: Denmark Implements Copyright Status to Personal Likeness. Culbert Ellis. *Culbert Ellis* [online]. [2025] [viewed 20 September 2025]. Available from: <https://www.culbertellis.com/news/combating-deepfakes-denmark-implements-copy-right-status-to-personal-likeness-0p2b4>.
15. SLÁMKOVÁ, Kristína. Regulation of social media advertising in Poland. In: *Mil'niky práva v stredoeurópskom priestore 2025*. Bratislava: Univerzita Komenského v Bratislave. Právnická fakulta UK, 2025, pp. 220–230.
16. WAKEFIELD, Jane. Deepfake presidents used in Russia-Ukraine war. BBC [online]. 2022 [viewed 15 September 2025]. Available from: <https://www.bbc.com/news/technology-60780142>.
17. WOODS, Cat. Denmark proposes copyright laws to protect against deepfakes. *Law Society Journal* [online]. 2025 [viewed 21 September 2025]. Available from: <https://lsj.com.au/articles/denmark-proposes-copyright-laws-to-protect-against-deepfakes/>.
18. ZIGO, Jana. Alternative dispute resolution in the digital environment: challenges and perspectives of the mechanism under the DSA. In: *Mil'niky práva v stredoeurópskom priestore 2025*. Bratislava: Právnická fakulta Univerzity Komenského v Bratislave, 2025, pp. 716–727.