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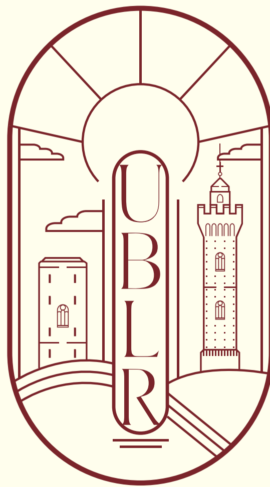

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ISSUE 2. 2025

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Obiter Dictum

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Giuseppe Martinico

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Volume 10 2025 Issue 2

University of Bologna Law Review

E-ISSN 2531-6133

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University of Bologna Law Review

https://doi.org/10.60923/issn.2531-6133/23600

The Wounds of Constitutionalism: An Editorial

I would like to thank the editors of the University of Bologna Law Review for kindly inviting me to contribute these few pages, which, given the current circumstances, offer readers some rather somber reflections on the future of liberal constitutionalism.

Over the last decade, constitutional law scholars have taken a systematic interest in the phenomenon of populism[1] and, above all, in its impact on the structures of constitutional democracy. In doing so, they have used various terms to describe this impact, including "authoritarian reversion," "constitutional retrogression,"[2] "democratic backsliding," "constitutional rot," and "constitutional crisis."[3] In academic reflection, scholars have not been limited to dealing with the question of "How to Do Constitutional Theory While Your House Burns Down"[4]; they have also been trying to address how to "repair"[5] constitutional democracies following an illiberal government. The debate on Poland is particularly instructive in this regard. Even countries regarded as "cradles" of liberal constitutionalism have suffered significant blows to their centuries-old structures. One need only think of what Brexit has meant for the UK constitutional system[6] or the disastrous effects of the two Trump presidencies in the United States.[7] Scholars are also divided on how to respond to these phenomena. On the one hand, some

[1] *See* Corrias's remarks, made only nine years ago, on the lack of interest in populism among scholars of constitutional theory and constitutional law: Luigi Corrias, *Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity*, 12 EUR. CONST. L. REV. 6 (2016): "Constitutional theorists have not devoted a lot of attention to the phenomenon of populism", at 7. More recently, however, we have seen the publication of some very important volumes, for instance *see* Mark Tushnet & Bojan Bugarič, Power to the People: Constitutionalism in the Age of Populism (Oxford Univ. Press, 2021); Wojciech Sadurski, A Pandemic of Populists (Cambridge Univ. Press, 2022). M. Krygier, A. Czarnota, W. Sadurski (eds.), Anti-Constitutional Populism (Cambridge Univ. Press, 2022). J.M. Castellà Andreu, M.A. Simonelli (eds.), Populism and Contemporary Democracy in Europe: Old Problems and New Challenges (London: Palgrave, 2022).

[2] For these concepts *see* Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78 (2018). *See also* Aziz Huq & Tom Ginsburg, *The Comparative Constitutional Law of Democratic Backsliding: A Report on the State of the Field*, Droit Public Comparé, https://publications-prairial.fr/droit-public-compare/index.php?id=88.

[3] On these concepts *see* Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, 77 MD. L. REV. 147 (2017).

[4] *See* Jack M. Balkin, *How to Do Constitutional Theory While Your House Burns Down*, 101 B.U. L. REV. 1723 (2021), SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3860214.

[5] *See* Tom Gerald Daly, *Constitutional Repair: A Comparative Theory*, Constitutional Repair Working Paper Series, No. 2-2023, https://static1.squarespace.com/static.

[6] *See* Patrick Birkinshaw, *Brexit's Challenge to the UK's Unwritten Constitution*, 26 EUR. PUB. L. 29 (2020).

[7] *See* Cas Mudde, *Why Is Trump Deploying National Guard Troops to Washington DC?*, THE GUARDIAN (Aug. 13, 2025), https://www.theguardian.com.

emphasise the importance of constitutional design;[8] on the other, some others stress the need to move beyond a purely defensive stance[9] and to engage with civil society. Arato's studies, for example, illustrate that we cannot expect the courts to do the "dirty work," as they risk eventual capture[10] without the backing of civil society.[11] Constitutional scholars have also examined efforts by constitutional courts to adopt new communication strategies,[12] aiming to explain their work to the public and to shield themselves from disinformation. In other words, constitutional courts are becoming more proactive, explaining their role and mission to the public and civil society before populists can frame them in their own terms. Yet how well equipped are the courts for this task, and to what extent does it truly fall within their mandate? Generally, Arato and Cohen's scholarship reminds us that defending the status quo is not enough to counter the erosion of liberal democracy in the face of rising populism:

> We doubt that, even in the relatively short run, liberal democracy can be successfully defended by a conservative relation to its contemporary forms, i.e., based on a desired return to liberal parliamentarism or presidentialism as they were in the past. In most places, these systems are under strain, whether due to internal oligarchic tendencies in representative systems, the decline of party representation, or the strong external constraints imposed by globalized capitalism on the ability of democratic states to deliver improvements in social welfare or equal life chances to their populations. We also do not believe that populism in any of its forms can successfully address what we will call three deficits: those of democracy, welfare, and social solidarity.[13]

This is a compelling argument that serves as the foundation for their research, which also provides insightful perspectives on the crisis of liberal constitutionalism (and democracy more broadly). As Gargarella notes in *The Law as a Conversation among Equals,*[14] the relationship between constitutionalism and democracy is not always harmonious;

[8] *See* Tom Ginsburg & Aziz Huq, *How to Save a Constitutional Democracy*, 172, Chicago Univ. Press (2018). Giacomo Delledonne, *"Cattura" delle corti costituzionali e designazione dei loro componenti: un quadro comparato*, *Enacting Policy Paper Series*, No. 1/2022, https://www.stals.santannapisa.it/sites/default/files.

[9] *See* Ana M. Alteiro, *Reactive vs. Structural Approach: A Public Law Response to Populism*, in Glob. Constitutionalism, 270 (2019).

[10] *See* Pablo Castillo-Ortiz, *The Illiberal Abuse of Constitutional Courts in Europe*, 15 Eur. Const. L. Rev. 48 (2019); *see also* Davic Kosař & Katarìna Šipulová, Comparative Court-Packing, 21 Int'l J. Const. L. 80 (2023).

[11] *See* Andrew Arato, *How We Got Here? Transition Failures, Their Causes and the Populist Interest in the Constitution*, 45 Philos. & Soc. Crit. 1106 (2019).

[12] *See* Angioletta Sperti, *Constitutional Courts, Media and Public Opinion* (Oxford: Hart Publishing, 2025).

[13] *See* Andrew Arato, *Populism and Civil Society 1* (Oxford Univ. Press, 2022).

[14] *See* Roberto Gargarella, *The Law as a Conversation Among Equals* (Oxford Univ. Press, 2022).

tensions may arise when constitutionalism constrains the political process. In this light, Loughlin's recent *Against Constitutionalism*[15] represents the latest expression—albeit grounded in different reasoning—of a recurring intellectual current that regards constitutionalism and democracy as (at times contingently, at times structurally) incompatible.[16] Within this body of thought, one finds a variety of positions, ranging from critiques of the exceptional authority vested in judges, especially constitutional courts, to objections to the restrictions that eternity clauses[17] impose on the exercise of constituent power.[18] Such arguments are not new; for instance, in 1992, Negri described constitutionalism as the negation of democracy, precisely because it places limits on majority decision-making.[19]

Rather than merely defending the pillars of constitutionalism and liberal democracy, the central question now seems to be how to reactivate the civic energies of civil society—how to transform "mounting distrust into an active democratic virtue".[20] Here too, constitutional lawyers and political scientists have made essential contributions, often emphasising the benefits of deliberative democracy.[21] This effort also involves reinventing our democracies, perhaps even viewing the most recent wave of populisms as a window of opportunity—provided that we filter some of the proposals put forward by these movements, which are often wrongly perceived as purely negative. However, this approach is feasible as long as the untouchable core of liberal constitutionalism remains intact.[22] Yet the high rates of voter abstention that have marked recent popular consultations (whether elections or other popular votes) in many Western countries are hardly encouraging.[23] Perhaps we should ask whether people genuinely wish to be involved.

[15] *See* Martin Loughlin, *Against Constitutionalism* (Cambridge MA: Harvard Univ. Press, 2022).
[16] *See* Antonio Negri, *Il potere costituente: Saggio sulle alternative del moderno* (Milano: SugarCo, 1992).
[17] On eternity clauses in comparative law *see* Silvia Suteu, Eternity Clauses in Democratic Constitutionalism (Oxford Univ. Press, 2021).
[18] *See* Joel I. Colón-Ríos, Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power 33 (London & New York: Routledge, 2012) ("Only a conception of constituent power according to which its exercise can be triggered at any moment in the life of a constitutional regime can be made consistent with the basic thrust of the democratic ideal").
[19] *See* Negri, *supra* note 17, at 368.
[20] *See* Alberto Alemanno, *Lobbying for Change: Find Your Voice to Create a Better Society 103* (London: Icon Books, 2017).
[21] For a comprehensive overview of this debate *see* R. Levy, H. Kong, G. Orr, J. King (eds.), The Cambridge Handbook of Deliberative Constitutionalism, (Cambridge Univ. Press, 2018); A. Bächtiger, J. S. Dryzek, J. Mansbridge, M. D. Warren (eds.), The Oxford Handbook of Deliberative Democracy (Oxford Univ. Press, 2018).
[22] Giuseppe Martinico, *Filtering Populist Claims to Fight Populism: The Italian Case in a Comparative Perspective* (Cambridge Univ. Press, 2021).
[23] G. Delledonne, L. Gori, G. Martinico, F. Pacini (eds.), *Il peso dell'assente: Il fenomeno dell'astensionismo elettorale in Italia* [The weight of the absent: The phenomenon of electoral abstention in Italy] (Soveria Mannelli: Rubbettino, 2025).

This problem is not confined to Europe, as evidenced by the failure of almost all participatory constitutional processes—the most striking examples being those in Chile and Australia.[24]

While these pages have so far focused on attempting to rationalise a debate with primarily practical consequences, elsewhere I have sought to reflect on the role that international law can play in safeguarding national democracies.[25] Here too, however, without retracting what I said on that occasion, international law is not faring well either. It suffices to recall the powerful words spoken a few months ago by the European Court of Human Rights in *Ukraine and the Netherlands v. Russia*:

> As noted above, the Court has previously been required to examine applications arising out of situations of conflict in Europe (see paragraph 167 above). However, the events in Ukraine are unprecedented in the history of the Council of Europe. The nature and scale of the violence, as well as the ominous statements concerning Ukraine's statehood, its independence, and its very right to exist, represent a threat to the peaceful co-existence that Europe has long taken for granted. As already explained, this dangerous rhetoric has also on occasion been extended to encompass other Council of Europe member States, including Poland, Moldova, and the Baltic countries. These actions seek to undermine the very fabric of the democracy on which the Council of Europe and its member States are founded by their destruction of individual freedoms, their suppression of political liberties, and their blatant disregard for the rule of law. In none of the conflicts previously before the Court has there been such near universal condemnation of the "flagrant" disregard by the respondent State for the foundations of the international legal order established after the Second World War and such clear measures taken by the Council of Europe to sanction the respondent State's disrespect for the fundamental values of the Council of Europe: peace, as already underlined, but no less importantly human life, human dignity and the individual rights guaranteed by the Convention.[26]

[24] Sergio Verdugo, Luis E. García-Huidobro: *How Do Constitution-Making Processes Fail? The Case of Chile's Constitutional Convention* (2021–22) 13 GLOB. CONST. 154 (2024); James Gardiner, *Australia Votes 'No' to Constitutional Recognition of Its First Peoples*, 1 *Costituzionalismo Britannico e Irlandese* 361 (2024).

[25] Giuseppe Martinico & Diego Mier Galera, *El desafío iliberal a la independencia judicial: La contribución de los tribunales internacionales*, 22 INT'L J. CONST. L. 1251 (2024).

[26] *Ukraine & the Netherlands v. Russia*, (Applications Nos. 8019/16, 43800/14, 28525/20 and 11055/22), par. 177.

Unsurprisingly, similar concerns have also been raised regarding international economic law, particularly WTO law, which is facing a crisis more acute than ever in this era of renewed unilateralism. This crisis in international law inevitably reverberates within domestic constitutional systems, particularly those established after World War II, given that openness to international law forms a fundamental part of their DNA.[27]

In light of the discussion above, the million-dollar question is how we can safeguard our constitutional democracies. For experts in comparative law, the answer inevitably depends on context. In Europe, one factor that can contribute to "constitutional resilience"[28] is undoubtedly membership in a particular legal and political entity, such as the European Union. Indeed, the EU is not merely an external constraint—as its detractors often claim—but an added value to constitutionalism and national democracy.[29] Consider, for example, its role in containing illiberal tendencies and counterbalancing the forces of transnational global capitalism, as well as the new rights (and remedies) it provides to individuals through the principle of direct effect.[30] And make no mistake: we are not only talking about the rights of economic elites, but also those of the most vulnerable. For example, on 1 August 2025, the Court of Justice of the European Union (CJEU) delivered a significant judgement, ruling that EU law does not preclude a Member State from "designating third countries as safe countries of origin by means of a legislative act, provided that such designation is subject to judicial review—by any national court hearing an action against a decision on an application for international protection examined under the special regime applicable to such countries—of compliance with the substantive requirements set out in Annex I to that directive."[31]

[27] Eric Stein, *International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?*, 88 Am. J. Int'l L. 427, 429 (1994); Antonio Cassese, *Politica estera e relazioni internazionali nel disegno emerso alla Assemblea Costituente*, in Scelte della Costituente e cultura giuridica. I: Costituzione italiana e modelli stranieri 505, 519 (U. de Siervo ed., Bologna: Il Mulino, 1980).

[28] Defined as the "the capacity of a constitutional system to withstand attempts aimed at changing or violating its core elements", by András Jakab, *Constitutional Resilience*, in Max Planck Encyclopedia of Comparative Constitutional Law [MPECCoL] (2021), https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e845?prd=OXCON.

[29] Giuseppe Martinico, *Sovranismo giuridico e Unione Europea: Una introduzione* [Legal Sovereignism and the European Union: An Introduction], in G. Martinico, L. Pierdominici (eds.), Miserie del sovranismo giuridico: Il valore aggiunto del costituzionalismo europeo [Poverty of legal sovereignism: The added value of European constitutionalism] 5 (Roma: Castelvecchi, 2023).

[30] Daniele Gallo, *Direct Effect in EU Law* (Oxford Univ. Press, 2025).

[31] Case C-758/24 *Alace* and Case C-759/24 *Canpelli*, ECLI:EU:C:2025:591 (Aug. 1, 2025) (CJEU). For a first analysis *see*: Chiara Favilli & Luisa Marin, "Alace and Canpelli: The Court of Justice Firmly Constrains Domestic Extraterritorial Asylum Processing Politics" (Aug. 14, 2025), https://eulawanalysis.blogspot.com/2025/08/alace-and-canpelli-court-of-justice.html.

The Italian Presidency of the Council of Ministers responded on President Meloni's social media accounts and on its official website with a highly controversial statement, arguing that such rulings are problematic because they ultimately undermine political decisions.[32]

Even before the ruling of the Court of Justice of the EU, one of the political forces of the current Italian government had proposed a constitutional amendment[33] to affirm the primacy of Italian law over European law and prevent judges from disapplying national rules. Although the reform is unlikely to succeed, it illustrates the effectiveness of EU law as a tool for defending fundamental rights and as a limit on the power of majorities.

In particular, the proposed amendments seek to introduce a clear obstacle to the Simmenthal mandate[34] by establishing that: "In the course of judicial proceedings, where the judicial authority finds a conflict between a legal provision or an act having the force of law and a directly applicable European rule, it must raise the question of constitutionality."[35]

These examples reveal several key points: that immigration is primarily framed as a security issue, and that the EU Court of Justice has been remarkably successful over the years in protecting the rights of the most vulnerable, including irregular immigrants, who enjoy fundamental rights. Courts are then attacked or portrayed by populists as dangerous actors for national democracies. In doing so, it is conveniently forgotten—deliberately so—that democracy is not merely the rule of the majority, but also the protection of pluralism and minorities.

This view, which depicts counter-majoritarian actors as anti-democratic, is a fundamental element of what I have elsewhere called *constitutional counter-narratives*.[36] By this I mean the instrumental, selective, and manipulative use of constitutional law arguments—a common feature of all populisms, especially authoritarian or illiberal ones.

As so often happens, the ideal enemy is a scapegoat—someone unable to defend themselves. Populisms, particularly illiberal variants, excel at mobilising the masses against minorities, especially those perceived as "different": foreigners are the perfect enemy. To activate and unite the masses, these actors often resort to conspiracy theories. In many speeches—for example, those of Salvini, Le Pen, and Orbán—foreigners

[32] *"Decision of the Court of Justice of the European Union on Safe Countries, Note from Palazzo Chigi"*, https://www.governo.it/it/articolo/decisione-della-corte-di-giustizia-ue-merito-ai-paesi-sicuri-la-nota-di-palazzo-chigi/29389.

[33] *"Constitutional Bill No. 1917, 13 June 2024, List of proposed amendments (262) in the First Committee in the relevant chamber published in the Bulletin of the Councils and Committees of 05/11/2024 (no. 396) referring to C. 1917, in order of publication"*, https://documenti.camera.it/apps/emendamenti.

[34] Case C-106/77 *Amministrazione delle finanze dello Stato v Simmenthal*, ECLI:EU:C:1978:49 (Mar. 9, 1978) (CJEU).

[35] *See* amendments 7.02 and 7.03, published on 5 Nov. 2024, https://documenti.camera.it/apps/emendamenti.

[36] *See* Martinico, *supra* note 24.

are portrayed as invaders who seek to take away "our" values and replace us. The "great replacement" theory is a recurring theme.[37] This phenomenon, of course, is not confined to Europe.

Nevertheless, even the EU is not immune, in the long term, to the perilous advance of regressive forces that are gaining traction at the national level. This vulnerability arises from the inherently political, not simply technocratic, nature of the Union. If, in many democracies, the forces that win elections are extremists (mainly, far-right movements),[38] it is reasonable to expect that such trends will eventually influence the composition and orientation of supranational structures as well. This is why, at least on the European continent, the preservation of national democracies depends on our ability to defend the EU against the rampant illiberalism that seems to be spreading everywhere. This issue is the focus of a fascinating book recently written by András Jakab, a judge of the European Court of Human Rights, and Lando Kirchmair.[39] It is a truly remarkable volume, which I highly recommend to our readers. The argument may seem paradoxical, given that the EU has often been accused of contributing to depoliticisation and has been characterised by a democratic deficit.[40] Yet there is also what I would call a cultural battle, one that involves reclaiming specific terms and concepts—such as identity, people, and sovereignty—that, while central to the vocabulary of democracy, are increasingly monopolised by the champions of illiberal populism. This represents the first major pitfall of this complex phenomenon: the emptying of the language of democracy.

It is no coincidence, then, that the European Union is being targeted by the enemies of liberal democracy (and democracy tout court). Consider the harsh words spoken by President Trump and Vice President Vance against the European Union on numerous public occasions, which are reiterated in the United States' 2025 National Security Strategy.[41] In this document, the EU is criticised for undermining political liberty and national sovereignty, suppressing free speech, and enforcing overregulation. It warns that, if current trends continue, some EU countries may struggle to remain strong and reliable allies, and calls for Europe to regain its self-confidence and preserve

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[37] Renaud Camus, *Le Grand Remplacement* (Paris: David Reinharc, 2011).

[38] However, I have tried to explain why illiberalism can also be fueled by extreme left-wing forces: Giuseppe Martinico, *Populists in Power and Constitutional Counternarratives*, 45 CARDOZO L. REV. 1527 (2024).

[39] András Jakab & Lando Kirchmair, *Saving the European Union from Its Illiberal Member States* (Oxford Univ. Press, 2025).

[40] On this debate *see* Andreas Follesdal & Simon Hix, *Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik*, 44 J. COMMON MKT. STUD. 533 (2006).; R. Daniel Kelemen, *Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union*, 52 GOV'T & OPP. 211 (2017).

[41] For a deeper analysis of the topic *see* "National Security Strategy of the United States of America", https://www.whitehouse.gov/wp-content/uploads/2025/12/2025-National-Security-Strategy.pdf.

its civilisational identity. The argument that the EU is a threat to freedom of expression has also been used recently by Elon Musk.[42] This shows that champions of authoritarian culture have appropriated concepts and terms belonging to the language of constitutionalism. Musk also called for the abolition of the EU, an appeal that was echoed by Medvedev and Putin. This is clearly a strategic choice that reinforces the legitimacy of EU law in the eyes of those who value constitutional democracy.

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[42] *See* " 'Abolish the EU': Elon Musk clashes with Europe over X's transparency violations." FRANCE 24, 9 December 2025, https://www.youtube.com/watch?v=ePjZQQmrnq0.

VOLUME 10 ISSUE 2 ARTICLES & ESSAYS

University of Bologna Law Review

https://doi.org/10.60923/issn.2531-6133/23306

Received: 12 Apr. 2025 | Reviewed: 25 Jul. 2025 | Accepted: 27 Jul. 2025 | Published: 14 Jan. 2026

From Socialist to Roman Concepts: The Reform of Property Law in a Developing World

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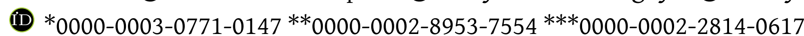
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ABSTRACT

This article examines structural problems in Vietnamese property law arising from the reception of mixed legal transplants during the twentieth and twenty-first centuries. Through historical-comparative analysis of the 2015 Civil Code of Vietnam, it identifies six critical deficiencies in the codification of personal property law (law of obligations and rights in personam): inconsistencies in code model selection, structural incoherence, overlapping provisions, conflicts between orthodox socialist legality and revived civilian tradition, problematic selective borrowing from divergent civil and common law systems, and insufficient engagement with civilian legal science. The analysis demonstrates how Vietnam's unique legal trajectory—combining socialist legal orthodoxy with market-oriented civil law revival—generates systematic tensions that transcend typical mixed jurisdiction challenges. These structural deficiencies manifest in three dimensions: internal contradictions within the code itself, impaired effectiveness in legal application, and compromised consistency in adjudication leading to unjust outcomes. The article argues that the root cause lies not merely in hasty incorporation of new legal phenomena, but in the absence of coherent codification philosophy grounded in civilian legal science. By tracing the historical reception of property law traditions and analysing their interaction within a single national framework, this study contributes to comparative understanding of legal transplant pathologies and offers insights for legal reform in transitional systems navigating between socialist legality and civilian tradition.

KEYWORDS

Vietnam; Civil Code; Law of Property; Law of Obligations; Legal Transplantation

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INTRODUCTION

The development of Vietnam's legal system regarding property in the modern age is characterised by complexity and ongoing transformation. Over a century, the legal system underwent at least three major revolutions, moving in diverse directions according to differing ideologies. The original expansion phase, from 1864 to 1954 in the North and 1975 in the South, witnessed the formation of a colonial and then national legal system influenced by French Civil Law, characterised by a relatively progressive ideology. Following the founding of the Democratic Republic of Vietnam and subsequently the Socialist Republic of Vietnam, the nation initiated a reform process incorporating communist legislation from the Soviet Union. Nonetheless, it retained a considerable segment of the previously enacted French legislation, especially regarding private affairs in 1954 in the North and 1975 in the South. It initially transpired during the era of people's democracy and subsequently under the doctrine of the dictatorship of the proletariat, bolstered by a centrally planned economy. Nonetheless, the so-called socialist legality, established with strict compliance, was amended in 1986, in reaction to the economic reforms enacted that year. The reforms were enacted to facilitate the country's shift towards a more market-oriented and liberal economy. This phase of transformation has continued to the present day.

As a result, civil law in general and property law in particular received significant emphasis in that specific environment. Within the context of complexity and ongoing transformation in Vietnamese legislation for the past hundred years, the change in the legal system has profoundly impacted and altered the fundamental structure and substance of property law at different historical junctures, especially after 1986, when the country introduced a nationwide reform towards a more market-oriented and liberal economy. At first, the reformers of Vietnam employed a pragmatic approach by enacting separate statutory and regulatory instruments to govern different kinds of property. Ordinance on Civil Contract, Ordinance on Economic Contract, Land Law, Marriage and Family Law, Ordinance on Industrial Property Protection, Ordinance on Author's Rights Protection, Ordinance on Succession, Ordinance on Residential Housing, and so on were promptly promulgated from 1986 to 1994. The prevailing strategy at that time involved enacting concise, brief, and condensed statutes that outlined limited essential provisions. These statutes granted the Government extensive authority to issue statutory instruments, allowing them to provide guidance and instructions on implementing these statutes. This approach involved a process of experimentation and observation, allowing the regulated matter to develop and mature before considering the

adoption of a comprehensive statute. It was argued that this law-making programme and its strategies suited Vietnam's law-making competencies and early experiences in dealing with reform towards a new state and national economic development model.

In tandem with this pragmatic approach, a more comprehensive law-making effort was also initiated to codify and promulgate a new Civil Code for Vietnam. It was reported that on 3rd November 1980, a Civil Code Drafting Committee was formed by the Government. And in 1991, the first draft of a new Civil Code was submitted. From 1991 to 1995, fourteen different revised drafts were put up for discussion. Finally, in October 1995, the National Assembly of Vietnam passed the draft, promulgating the first Civil Code of Vietnam after reunification.

However, the results might not have been as effective as the law-making agencies wished. In just thirty years, the Civil Code has been revised extensively and replaced three times. The 2005 Civil Code replaced the 1995 Civil Code. Then, in 2015, a new Civil Code was passed, replacing the 2005 Civil Code, making Vietnam probably the champion in codifying and passing the greatest number of civil codes in the shortest period of time.

In the following sections, this article discusses major problems that make the civil codes of Vietnam ineffective and irrelevant to a certain extent. These range from macro issues such as philosophy of law, legal traditions' structure, sources of law, and history of law to micro problems such as transplantation of law, legal techniques, legal thinking, and law interpretation. The law of property, as codified in the civil codes, suffers from the most serious problematic shortcomings and mistakes.

The law of property in general and the law of obligations in particular, as transplanted into Vietnam in modern history, are the prime and distinctive legal ideas of the civil law tradition, be it French or Soviet. It plays a significant role in the area of private law: numerous and complex relationships of obligation exist between individuals, between companies, between public authorities and individuals, between people of different nationalities, and even between states. Commercial law, administrative law, and private or public international law largely depend on the general theory of property and obligations. The law of property also has a deep relation with other branches of law, such as the law of persons and the law of actions, since property in general and obligations in particular are considered part of a person's patrimony (*patrimoine* in French), which includes all his rights and obligations. Regarding the obligor or debtor, the obligation is a passive element in his patrimony; at the other end, the obligation is an active element of the obligee or creditor's patrimony.

Therefore, the law of property and the law of obligations are highly complex areas that require a high degree of legal technique in codification. In civil law systems,

codification is not simply an aggregation or a compilation of laws but a systematic, synthetic, and methodical organisation of rules governing a particular field of law. According to the Roman-Germanic conception, a code should provide an organised system of general rules from which judges and citizens, through a logical deductive reasoning process, can find an appropriate solution for the issues in question. Its purpose is not to provide concrete solutions for every case, but to create a permanent framework for further development of the law. For this purpose, a code should be durable and leave enough space for necessary evolution.

To codify the law of property and the law of obligations successfully and effectively, one must fully capture the civil law tradition's spirits, models, structures, and working methods. Some fundamentals need to be apprehended, such as the notion of obligation, its legal nature, its sources, and, most importantly, its classification.

All that being said, this article will provide a nuanced and detailed discussion of the reform of the law of property in Vietnam, a developing and transitioning country, from socialist law to Roman concepts as championed in the civilian legal tradition. It aims to unfold major problems, including structural, conceptual, and taxonomic issues that impede a sound and effective codification of the law of property and its successful application. By doing so, it hopes to contribute to the theory of comparative law in general and provide meaningful lessons for other developing and transitioning countries that face similar problems.

1. HISTORICAL PERSPECTIVE

The evolution of property law in general and obligations in particular in Vietnam from 1858 to the present reflects a complex interplay of Roman law principles, French civil law codification, Soviet socialist legal ideology, and Vietnam's unique socio-political context. This section briefly traces the development of these legal concepts from their origins in Roman law, their adaptation in French and Soviet legal science, and their reception in Vietnam through colonial, socialist, and market-oriented phases.

As a cornerstone of the civil law tradition, Roman law established foundational concepts of property and obligations that profoundly influenced modern legal systems, including those transplanted to Vietnam. In Roman law, property (*dominium*) was defined as the absolute right to control a thing, encompassing ownership (*proprietas*),

possession, and real rights such as servitudes and usufruct.[1] Ownership granted the owner the ability to use, enjoy, and dispose of a thing (*ius utendi, fruendi, abutendi*), forming the most complete right over property.[2] Obligations were legal ties (*vinculum iuris*) binding a debtor to perform an act for a creditor, arising from contracts, delicts, or other juridical acts.[3] Roman law distinguished between *ius in rem* (real rights, enforceable against all) and *ius in personam* (personal rights, enforceable against a specific person), a taxonomy that became critical to property and obligations in later civil law systems.[4] Real rights included ownership and lesser rights like easements, while obligations typically arose from consensual agreements (e.g., sale, lease) or wrongful acts (e.g., theft, damage). The relational nature of obligations, encompassing both the debtor's duty and the creditor's right to claim performance, was a hallmark of Roman law, later adopted in civil law jurisdictions.[5] These concepts were systematised in the *Corpus Juris Civilis* under Justinian, providing a comprehensive framework for private law.[6] Roman law also recognised customary practices as supplementary sources when written laws were silent, provided they met criteria like continuity and community acceptance, and legal doctrine from jurists like Gaius and Ulpian played a significant role in interpreting and shaping norms.[7]

French legal science, rooted in Roman law, refined these concepts through the Civil Code of 1804 [hereinafter *Code Civil*], which became a model for Vietnam during French colonial rule (1862–1945). The *Code Civil* defined ownership as the right to enjoy and dispose of a thing in the most absolute manner, provided it did not violate laws or public order, distinguishing between movable and immovable property, real rights (e.g., usufruct, servitudes), and personal rights.[8] Obligations, addressed in Book III, were legal ties whereby a person was bound to perform an act for another, arising from contracts, quasi-contracts, delicts, or quasi-delicts, with principles like good faith and freedom of contract balancing state regulation and individual autonomy.[9] The code's structure reflected Roman law's emphasis on general principles, enabling judges to apply broad

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1 *See* George Mousourakis, Fundamentals of Roman Private Law 123–50 (2012).
2 *See id.* at 127.
3 *See id.* at 201–30.
4 *See id.* at 115–20.
5 *See id.* at 205.
6 Corpus Juris Civilis, Dig. 1.1.10 (Justinian, 6th century), cited in Mousourakis, *supra* note 1, at 45.
7 *See* Antonino Rotolo, *Chapter 7. Sources of Law in the Civil Law*, *in* A Treatise of Legal Philosophy and General Jurisprudence. Volume 3: Legal Institutions and the Sources of Law , 150 (Roger A. Shiner ed., 1. Aufl ed. 2005).
8 Code Civil [C. civ.] [Civil Code] art. 544 (Fr.).
9 *Id.* arts. 1101–1386, art. 1134.

rules to diverse cases, supplemented by custom when statutes were silent.[10] Legal doctrine, influenced by scholars like Pothier, shaped the drafting of the Code Civil, while case law played an interpretive role, particularly in commercial disputes where courts sometimes adopted *contra legem* customs to ensure fairness.[11] During French colonial rule in Vietnam, these principles were introduced through civil codes (e.g., 1883 for Cochin-China, 1931 for Tonkin, 1936 for Annam).[12] The 1925 Decree on Land established a modern property law system, recognising individual land ownership, a concept absent in Vietnam's feudal system.[13] Intellectual property [hereinafter I.P.] laws, such as the 1793 French Literary and Artistic Property Act and the 1941 Ordinance in Annam, treated literary and technological works as movable property, introducing obligations like authors' rights to control their works, aligning with the Code Civil's framework.[14]

In contrast, Soviet legal science, grounded in Marxist-Leninist ideology, reshaped property and obligations to align with socialist principles, profoundly influencing Vietnam from 1945 to 1986. Soviet law rejected private ownership of the means of production, prioritising state and collective ownership, with land, natural resources, and major industries declared state property under the 1936 and 1977 Soviet Constitutions.[15] Individuals were granted use rights through cooperatives rather than ownership, fundamentally diverging from Roman law's proprietary focus.[16] Obligations were redefined to serve state interests, with "economic contracts" functioning as tools to implement central economic plans, binding state enterprises and cooperatives to produce and distribute goods according to state directives.[17] Unlike Roman and French law, obligations lacked a relational aspect, as the state, not individuals, was the primary enforcer, and the creditor's right to claim was subordinate to state policy.[18] The Soviet system relied solely on codified laws and administrative decisions, rejecting judicial precedent and custom as sources, reflecting the principle of democratic centralism.[19]

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[10] *See generally* Yvon Loussouarn, *The Relative Importance of Legislation, Custom, Doctrine, and Precedent in French Law*, XVIII LA. L. REV. 235, 240–45 (1958).

[11] *See id.* at 250.

[12] *See* Ngọc Đ. Nguyễn, *Technical Structure of the Immovable Property Law of Vietnam: A Legal Perspective*, Tạp chí Nghiên cứu Lập pháp (2007) (Viet.).

[13] Decree du 21 Juillet 1925 fixant les règles relatives au régime de la propriété foncière en Cochinchine (Fr.).

[14] *See* Kien Tran, *Politics as a Function of Trademark: A New Perspective from the Historical Development of Trademark Law in Colonial and Socialist Vietnam*, 24 World Intellectual Property 122, 135–140 (2021) (U.K.).

[15] *See* O. S. Ioffe & Peter B. Maggs, The Soviet Economic System a Legal Analysis 59–101 (2021).

[16] *See id.* at 65.

[17] *See* Decree No. 004-TTg of the Prime Minister of the DRV (Jan. 4, 1960) (Viet.).

[18] *See generally* John Quigley, *Socialist Law and the Civil Law Tradition*, 37 THE AMERICAN JOURNAL OF COMPARATIVE LAW 781 (1989).

[19] *See* John Gillespie, *Changing Concepts of Socialist Law in Vietnam*, *in* Asian socialism & legal change: the dynamics of Vietnamese and Chinese reform 45, 50–55 (John Gillespie & Pip Nicholson eds., 1st ed. 2005) (Austl.).

These principles were adopted post-1945 in Vietnam, particularly under the 1959 and 1980 Constitutions. The 1959 Constitution established a people's democratic state, with land reform laws (e.g., 1959 Law on Land Reform) transferring private land to collective ownership via cooperatives, and decrees (e.g., 1950, 1958) transforming private enterprises into public-private partnerships, eliminating bourgeois ownership.[20] Obligations were narrowly defined as duties, with Article 274 of the 1995 Civil Code, influenced by Soviet law, omitting the creditor's right to claim, a stark departure from Roman and French principles.[21] Intellectual property rights, such as patents and trademarks, were not proprietary but served state quality control, with no recognition of exclusive rights until limited provisions in the 1980 Constitution.[22]

Vietnam's pre-colonial legal system (before 1858) was rooted in Confucian principles, with codes like the *Le* Code (15th century) and *Gia Long* Code (19th century) blending criminal and civil norms without distinguishing public and private law.[23] Property was primarily land-based, controlled by the state or village communities, with customary laws governing private relations, including early I.P. practices like *Ca Tru* performance rights.[24] Obligations were enforced through penal sanctions, lacking the Roman relational framework.[25] The French colonial period (1858–1945) marked the first reception of Roman-inspired civil law principles. The 1883, 1931, and 1936 civil codes introduced ownership as a private right, with the 1925 Decree on Land recognising individual land ownership.[26] Obligations were codified as contractual or delictual ties, aligning with the Code Civil. Intellectual property laws, such as the 1941 Ordinance in Annam, treated literary and technological works as property, introducing the term "intellectual property" before France's 1992 Intellectual Property Code.[27] Custom remained a supplementary source, particularly for ethnic minorities, as seen in Article 1453 of the 1931 Northern Civil Code, which allowed local customs to prevail over codified law, reflecting Roman law's recognition of custom.[28]

[20] *See* The Law on Land Reform 1959, art. 1; Decree No. 06/SL of the President of the DRV (Jan. 20, 1950) (Viet.).
[21] *See* Hong Hai Nguyen, *A Study on the Civil Code Revision: The 2015 Civil Code of Vietnam, in* Civil Law Reforms in Post-Colonial Asia (2019).
[22] *See id.* at 14.
[23] *See generally* Duy Nghia Pham, *Confucianism and the Conception of the Law in Vietnam*, *in* Asian socialism & legal change: the dynamics of Vietnamese and Chinese reform 76, 80–85 (John Gillespie & Pip Nicholson eds., 1st ed. 2005) (Austl.).
[24] See Tuyet Nhung Tran, *The Commodification of Village Songs and Dances in Seventeenth- and Eighteenth-Century Vietnam*, *in* State, Society and the market in contemporary Vietnam 141, 145–48 (Hue-Tam Ho Tai & Mark Sidel eds. 2012).
[25] *See id.* at 146.
[26] *See* Kien Tran & Lu Quynh-Anh Nguyen, *From Socialist to Roman Concept of Sources of Law: A Journey to the Past in Vietnam*, 27 Chung Cheng Financial and Economic Law Review 295 (2023) (China).
[27] *See* Tran, *supra* note 14.
[28] *See* Nguyễn, *supra* note 12.

The socialist period (1945–1986) saw a radical shift towards Soviet-inspired law, rejecting partly Roman and French principles. The 1959 Constitution established a people's democratic state, with the 1980 Constitution adopting the dictatorship of the proletariat, prioritising state and collective ownership.[29] Land reform laws and public-private partnership decrees eliminated private ownership, granting individuals use rights under state oversight.[30] Obligations served the command economy, with economic contracts enforcing state plans rather than individual agreements.[31] Sources of law were limited to codified statutes and administrative decisions, with custom and case law implied as incompatible with state authority. Intellectual property rights were state-controlled, with trademarks regulating quality rather than competition, and authors' rights subject to censorship.[32]

The *Đổi Mới* (renovation) reforms 1986, driven by economic crises, marked a return to civil law principles, influenced by French and German traditions. The 1992 Constitution recognised private ownership and a multi-sector economy, phasing out the dictatorship of the proletariat.[33] The 1995, 2005, and 2015 Civil Codes reintroduced Roman-inspired concepts, with the 2015 Civil Code defining property as including movable and immovable things, money, and I.P., restoring ownership as a private right akin to the Code Civil.[34] Obligations were redefined as legal ties, with Article 274 recognising both the debtor's duty and the creditor's right to claim, aligning with Roman and French principles.[35] However, socialist legacies persist, with the Code's structure reflecting the Pandectist model (via Soviet influence) but lacking the logical coherence of the German *Bürgerliches Gesetzbuch* (Civil Code) [hereinafter B.G.B.]. The 2015 Civil Code's sources of law—laws, custom, case law, and fairness—reflect civil law principles but create contradictions. Custom is recognised as a supplementary source, consistent with Roman law. Still, its application after "similar law" is illogical, as analogous application of law is a method of interpretation, not a source. Case law, now binding in some instances, conflicts with its low priority, creating judicial uncertainty. Fundamental principles (e.g., good faith, equality) are codified but misplaced in the application order, undermining their precedence over custom.[36] Vietnam's integration into global treaties (e.g., Berne, Paris Conventions) further reinforced civil law principles, shaping a legal system that balances market-oriented reforms with socialist political structures.

[29] Constitution of Vietnam arts. 2, 4 (1959); Constitution of Vietnam arts. 2, 4 (1980).
[30] *See* Gillespie, *supra* note 19.
[31] *See supra* note 17.
[32] *See* Tran, *supra* note 14.
[33] Constitution of Vietnam arts. 2, 15–29 (1992).
[34] Civil Code art. 105 (2015) (Viet.).
[35] *Id.* art. 274.
[36] *See* Tran & Nguyen, *supra* note 26.

2. STRUCTURAL PROBLEMS – AN UNCERTAIN CODIFICATION MODEL

For a code to be "a coherent body of rules, a whole built around a thought, rules, and institutions which make up its framework",[37] a substantive codification[38] is determined by the structure and the legislative style. While the structure of a code expresses its material and logical internal organisation, its legislative style must express the norms precisely and coherently. Consequently, any codification requires a systematic and coherent structure and presupposes a specific terminology and phraseology.[39] This structure organises provisions systematically and coherently and reflects the nation's dominant doctrinal ideas, concepts, and legal tradition. However, few countries have developed original legal frameworks; most have adopted French or German codification models.

Following the enactment of the French *Code Napoléon* in 1804 and German B.G.B in 1896, these codes emerged as paradigmatic models for civil law codification, inspiring a global wave of codification efforts based on their structural approaches. The French jurists, though not the first ever to realise a modern codification of civil law, are credited for their achievement since the French Code Civil is considered as a model for many countries to adopt its approach and structure, such as the first Italian Civil Code in 1865, the first Spanish Civil Code in 1889, the Civil Code of Louisiana, the Civil Code of Quebec, etc. The German B.G.B., adopted after almost a century, exercises its influence in later civil law codification, being a template for many jurisdictions such as Italy with a new Civil Code in 1942, Switzerland with the Code of Obligations in 1911, Russia with its Civil Codes under and post-Soviet Federation, Japan, Thailand, etc.

France and Germany exemplify a distinct codification methodology, tracing their origins to the influential *Corpus Juris Civilis* promulgated under Emperor Justinian in the sixth century. The French *Code Civil*, shaped by the *Institutes*, integrates Renaissance philosophy, humanism, and natural law principles. In contrast, the B.G.B., inspired by the systematic organisation in the *Digest* compilation, or so-called the Pandectist approach, emphasises abstract principles applicable across private law.

The French jurists and legislators, in drafting their first Civil Code, adopted the structure rooted in Gaius's *Institutes*, which organises civil law into three core parts: the law of persons, the law of things, and the law of actions.[40] Gaius famously stated that

[37] Gérard Cornu, Droit Civil. Introduction, Les Personnes, Les Biens [Civil Law: Introduction, Persons, Property] 287 (2nd ed. 1985) (Fr.).

[38] More on substantive codification, see Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 Louisiana Law Review (1988).

[39] *See id.* at 1084–88.

[40] *See* Alain A. Levasseur, *On the Structure of a Civil Code*, 44 Tulane Law Review 693 (1970).

"[a]ll the law which we make use of has reference either to persons, to things, or to actions".[41] Partly inspired by this structure,[42] the French *Code Civil* of 1804 was thus structured into three books: (1) Book of Persons, (2) Book of Property and Different Kinds of Ownership, and (3) Book of the Different Ways of Acquiring Property,[43] corresponding to persons, real rights, and obligations, respectively. Scholars often critique this structure as lacking logical rigor and optimal coherence.[44] Regarding its style, as the Code was addressed to the layman, the norms must be presented in concise and understandable language.[45] The language of the Code was thus made of "judicialised" common words that were shaped into an abstract concept.[46] However, to ensure enduring applicability, the drafters deliberately left many concepts undefined, entrusting their interpretation to judicial discretion. The notion of "fault" that appeared in former Article 1382 (now Article 1240) could be a great example to illustrate this particular style.[47] As a result, this article could survive to this day despite some drastic economic and social changes. Conversely, the Pandectist approach, developed through 18th-century German legal scholarship and based on Justinian's *Digest*, underpins the structure of B.G.B. This Code is organised into five parts: (1) General Provisions, (2) Law of Obligations, (3) Law of Things, (4) Law of Family, and (5) Law of Succession.[48] This structure illustrates a systematic approach from the general to the specific provisions, with the General Part establishing definitions and legal frameworks that govern the subsequent books.[49] A cohesive interplay among parts, chapters, and sections necessitates frequent cross-referencing between general and specific provisions.[50] It is said that the B.G.B., unlike the *Code Civil*, was not written for the layman but for the legal profession,[51] and consequently, the language of the B.G.B. is rather abstract and complex, demanding a sophisticated understanding of various legal concepts.[52]

[41] Reinhard Zimmermann, The Law of Obligations - Roman Foundations of the Civilian Tradition 25 (1992) (U.K.): "Omne autem jus quo utimur vel ad personas pertinet, vel ad res, vel ad actiones [all the law that we use relates either to persons, to things, or to actions.]."

[42] More on how the structure of the French Civil Code differentiates from the Institutes, see generally Levasseur, *supra* note 40, at 695–97.

[43] *See* Peter de Cruz, Comparative Law in a Changing World 64 (1995) (U.K.).

[44] *See* Konrad Zweigert & Hein Kotz, An Introduction to Comparative Law 93 (3rd ed. 1998) (U.K.); *see also* Levasseur, *supra* note 40, at 696.

[45] *See* de Cruz, *supra* note 43, at 63.

[46] *See* Levasseur, *supra* note 40, at 698.

[47] *See id.*

[48] Gerhard Dannemann & Reiner Schulze, German Civil Code. Bürgerliches Gesetzbuch (BGB) - Article-by-Article Commentary. Volume I: Books 1–3: §§ 1–1296 1 (2020) (Ger.).

[49] *See* de Cruz, *supra* note 43, at 87.

[50] *See id.*

[51] *See id.* at 86.

[52] *See id.* at 88.

As mentioned above, the strong political influence of the Soviet Union explains the reception of Soviet legal ideas and concepts into Vietnamese law, especially while drafting the first Civil Code of communist Vietnam in the last years of the twentieth century.[53] As a result, the Vietnamese Civil Code, since its first ever version in 1995 and two other modified versions in 2005 and 2015 respectively, shows imprints of the Russian Civil Code and, indirectly, the Pandectist methodology. The structure of the Vietnamese Civil Code reflects the Pandectist approach, acknowledged by one of the drafters of this Code,[54] features by five parts: (1) General provisions, (2) Ownership rights and other rights over property, (3) Obligations and contracts, (4) Inheritance, (5) Law applicable to civil relations involving foreign elements. It only differentiates from the original Pandectist structure by two points: (i) the law of family is not included in the Civil Code, and (ii) the provisions of legal conflicts are included as a part of the Civil Code.[55] This structure shows remarkable similarities to the Russian Soviet Federative Socialist Republic's [hereinafter: R.S.F.S.R.] Civil Code in 1964, which was clearly influenced by the B.G.B.[56] However, the codification model question has rarely been raised in the debate among Vietnamese lawmakers and jurists. The lack of research on the codification model, supporting the legislative priority but the specific solutions for specific problems, results in a significant gap between the knowledge of positive law and its doctrinal, including conceptual and structural foundations, especially when the German Pandectist model is adopted, an approach characterised by its abstractness and complexity.

In fact, the Vietnamese Civil Code has never attained the standard Pandectist model. In terms of legislative style, the language of the Code lacks general clarity. It shows almost no coherent interplay between parts, chapters, and provisions within the Code, especially between the general and the specific provisions. Some titles are confusing, such as "Ownership rights and other rights over property" (Part Two) or "Obligations and contracts" (Part Three). This third part of the Civil Code delineates various obligations across six chapters: (1) General Provisions, (2) Common Types of Contracts, (3) Promise of Rewards and Prize Competitions, (4) Unauthorised Performance of Acts, (5) Obligation to Return Property Due to Unlawful Possession, Use, or Derivation of Benefits, and (6) Compensation for Non-Contractual Liability. Although contracts undeniably represent the primary source of obligations, titling this Part to emphasise contracts while encompassing all obligation sources is illogical. Furthermore,

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[53] *See* Hoàng Anh Ngô & Trí Hùng Phạm, *Luật so Sánh và Thực Tiễn Xây Dựng Bộ Luật Dân Sự Việt Nam* [Comparative Law and Practices in Drafting Vietnam's Civil Code], 4 Tạp chí Luật học 32 (2007) (Viet.).

[54] *See* Nguyen, *supra* note 21.

[55] *See id.*

[56] *See* de Cruz, *supra* note 43, at 187.

regulations on contractual obligations appear within the first chapter of General Provisions, suggesting an intent to consolidate core provisions, akin to B.G.B.'s codification style. However, due to deficiencies in legal technique and understanding, Vietnam's Civil Code deviates from the B.G.B.'s logical coherence, exhibiting confusion between the sources of obligations and the obligations themselves, resulting in an incoherent structure. In other words, drafters of the Vietnamese Civil Code failed to create a cohesive structure that unifies its disparate parts, undermining the fundamental requirement for a civil code. Vietnamese jurists have identified this as the primary reason for the code's shortcomings.[57] There are still doubts as to whether the Pandectist or the French model would be a pertinent model for Vietnam, prioritising a carefully selected and thoroughly considered codification model is essential for the Code's next revision.

3. CONCEPTUAL PROBLEMS

3.1 MIXED DEFINITION OF PROPERTY

The concept of property, a cornerstone of private law, has evolved across legal traditions, reflecting diverse cultural, economic, and political contexts. In Roman law, property was fundamentally tied to the concept of *dominium*, representing the most comprehensive control over a thing, encompassing ownership (*proprietas*), possession, and various real rights such as servitudes and usufruct.[58] The *Corpus Juris Civilis*, particularly the *Institutes* of Justinian, provided a systematic classification of things (*res*), dividing them into corporeal (*res corporales*) and incorporeal (*res incorporales*). Corporeal things were tangible, capable of being seen or touched, such as land, garments, gold, or silver, while incorporeal things were intangible, existing only in law, including inheritances, usufructs, servitudes, and obligations.[59] This distinction was critical, as it recognised that legal rights, such as those arising from contracts or delicts, could be treated as property despite their intangible nature. Roman law further categorised things as *res in commercio* (capable of private ownership) and *res extra commercium* (outside private

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[57] *See* Huy Cương Ngô, *Sự Ảnh Hưởng Của Pháp Luật Pháp Tới Luật Tư Việt Nam* [The Influence of French Law on Private Law in Vietnam], *in* Ảnh hưởng của truyền thống pháp luật Pháp tới pháp luật Việt Nam [The influence of the French legal tradition to Vietnamese law] (Arnaud de Raulin et al. eds. 2016) (Viet.).

[58] *See* Mousourakis, *supra* note 1, at 123–50.

[59] *See* Justinian, Institutes, lib. II, tit. 2, pr. 2, cited in Yaëll Emerich, Conceptualising Property Law: Integrating Common Law and Civil Law Traditions 19 (2018) (UK.).

ownership, e.g., public goods like air or navigable rivers), reflecting a balance between individual and communal interests.[60] Ownership under Roman law was unitary, granting the owner absolute rights to use, enjoy, and dispose of a thing (*ius utendi, fruendi, abutendi*), subject to legal limitations that foreshadowed modern neighbour principles.[61] While Roman law did not clearly distinguish between fundamental and personal rights; its concepts principally laid a foundation for such a taxonomy later in the modern legal system. Rights (*jura*) were considered *res*, particularly incorporeal ones, as jurists like Gaius and Ulpian emphasised.[62] This objective conception of rights meant that obligations, as incorporeal things, were integral to the Roman property framework, enforceable through actions like *actio in personam* for contractual duties or *actio in rem* for proprietary claims.[63] Customary practices supplemented written law when statutes were silent, requiring continuity and community acceptance, while legal doctrine from jurists shaped interpretation, embedding property within a broader normative system.[64]

The French *Code Civil* of 1804, heavily influenced by Roman law, codified and refined these concepts, adapting them to the socio-political context of post-revolutionary France. The *Code Civil* defined the right of ownership in Article 544 as the right to enjoy and dispose of a thing in the most absolute manner, provided it does not violate laws or public order, echoing Roman *dominium* but emphasising individual autonomy in line with revolutionary ideals.[65] The Code classified property or things into movable and immovable property, a distinction rooted in Roman law's corporeal categorisation, with immovables including land and buildings, and movables encompassing tangible objects like goods or intangible rights like debts.[66] Articles 516–710 detailed this taxonomy, recognising real rights (e.g., ownership, usufruct, servitudes) and distinguishing them from personal rights, thus formalising the Roman *ius in rem* and *ius in personam* dichotomy partly conceived in Roman law itself.[67] The *Code Civil*'s treatment of incorporeal things, such as obligations, drew directly from Justinian's *Institutes*, treating them as property within the legal framework, particularly in commercial and contractual contexts.[68] The Code's structure prioritised codified statutes as the primary source, supplemented by custom when consistent with law, reflecting Roman law's spontaneity and continuity requirements, while legal doctrine,

[60] *See id.* at 127–30.
[61] *See id.* at 18.
[62] *See* Michel Villey, cited *at* 18.
[63] *See* Mousourakis, *supra* note 1, at 201–05.
[64] *See* Rotolo, *supra* note 7, at 150.
[65] Code Civil 1804 [C. civ.] art. 544 (Fr.).
[66] *Id.* arts. 516–710.
[67] *Id.* arts. 526–528.
[68] *Id.* arts. 1101–1386.

influenced by scholars like Pothier, played a significant interpretive role.[69] During French colonial rule in Vietnam (1862–1945), these principles were transplanted through civil codes (e.g., 1883 for Cochin-China, 1931 for Tonkin, 1936 for Annam), with the 1925 Decree on Land introducing individual ownership, a novel concept in Vietnam's feudal system.[70] This codification marked a significant reception of Roman law's unitary ownership and classification of things, adapted to a modern legal framework emphasising subjective rights.

The French legal tradition further developed the concept of property through the *théorie du patrimoine* (heritage theory) by Charles Aubry and Charles Rau, which posited that obligations constitute a form of property within an individual's patrimony. Introduced in the nineteenth century, this theory conceptualised patrimony as the totality of a person's assets and liabilities, encompassing both real and personal rights, including obligations.[71] Aubry and Rau argued that obligations, as rights *in personam*, are incorporeal property because they represent economic value enforceable against a specific debtor, akin to Roman law's inclusion of obligations as *res incorporales*.[72] In the *Code Civil*, obligations (Articles 1101–1386) are defined as legal ties whereby a person is bound to perform an act for another, arising from contracts, quasi-contracts, delicts, or quasi-delicts, with the creditor's right to claim performance treated as a patrimonial asset.[73] This approach integrated obligations into the property framework, as the creditor's claim, such as a debt or contractual right, could be assigned, inherited, or otherwise treated as property, much like tangible assets.[74] For example, a contractual debt is a movable, incorporeal asset within the creditor's patrimony, enforceable through legal action, aligning with Roman law's recognition of obligations as intangible things. The *théorie du patrimoine* thus bridged Roman law's objective *jura* with modern subjective rights, emphasising the economic unity of a person's legal interests.

In contrast, Article 105 of Vietnam's 2015 Civil Code defines property as including movable and immovable things, money, valuable papers, and property rights, explicitly encompassing I.P. and other rights arising from legal relations.[75] This definition draws principally from the former Soviet Union Civil Code while at the same time still recognising both corporeal and incorporeal property, with "property rights" now

[69] *See* Loussouarn, *supra* note 10, at 240–45.
[70] *See* Nguyễn, *supra* note 12.
[71] *See* Charles Aubry & Charles-Frédéric Rau, Cours de Droit Civil Français : D'après La Méthode de Zachariae [French Civil Law Course: According to the Method of Zacharie]. Tome Deuxième 68–72 (5th ed. 1897) (Fr.).
[72] *Id.* at 72–74.
[73] Code civil 1804 [C. civ.] arts. 1101–1386 (Fr.).
[74] *See id.* art. 1165.
[75] Civil Code art. 105 (2015) (Viet.).

interpreted broadly to include real rights (e.g., ownership, usufruct) and personal rights (e.g., contractual claims), mirroring the *Code Civil*'s taxonomy.[76] However, the 2015 Civil Code definition reveals incompatibilities between Roman and French concepts. It is shaped by Vietnam's socialist legal history from 1945 to 1986 and its incomplete transition to civil law principles post-*Đổi Mới* (1986). In Roman law, property was a unitary concept centred on *dominium*, with obligations as *res incorporales* seamlessly integrated into the property framework, while the *Code Civil* refined this through a clear distinction between real and personal rights, with obligations as patrimonial assets under Aubry and Rau's theory.[77]

As discussed in the previous Section, the socialist period (1945–1986), influenced by Soviet law, fundamentally altered the concept of property, rejecting private ownership of the means of production in favour of state and collective ownership, as codified in the 1959 and 1980 Constitutions.[78] Land and major industries were state-owned, with individuals granted use rights through cooperatives, diverging from Roman *dominium* and French absolute ownership.[79] Obligations were redefined as duties to serve state economic plans, with Article 285 of the 1995 Civil Code (retained from socialist law) omitting the creditor's right to claim, unlike the relational approach of Roman and French law.[80] The *Đổi Mới* reforms of 1986 prompted a return to civil law principles, with the 1992 Constitution recognising private ownership and the 1995, 2005, and 2015 Civil Codes reintroducing Roman-inspired concepts. Article 105's inclusion of "property rights" seems to align with the *Code Civil*'s recognition of incorporeal property, including obligations, but its broad and vague phrasing creates ambiguity. Unlike the *Code Civil*'s precise taxonomy and the *théorie du patrimoine*'s integration of obligations as patrimonial assets, Article 105 does not explicitly clarify whether obligations are property rights, reflecting socialist legacies prioritising state control over individual rights.

3.2 POORLY WORDED DEFINITION OF OBLIGATIONS

Article 274 of the Vietnamese Civil Code of 2015 defines obligations as *"acts whereby one or more subjects (hereinafter obligors) must transfer objects, transfer rights, pay money or provide valuable papers, perform acts or refrain from performing certain acts in the interests of one or*

[76] *See id.* art. 115.
[77] *See* Mousourakis, *supra* note 1, at 115–20; *see also* Aubry & Rau, *supra* note 71, at 68–72.
[78] Viet. Const. arts. 2, 4 (1959) (Viet.); Viet. Const. arts. 2, 4 (1980). (Viet.).
[79] *See* Ioffe & Maggs, *supra* note 15, at 59–101.
[80] Civil Code art. 285 (1995) (Viet.).

more other subjects (hereinafter obligees)." This concept of obligation has undergone a few changes since it was first integrated in 1995, and it is one of the examples that prove the indirect influence of the German B.G.B. on the Vietnamese Civil Code, mediated through the direct political and ideological impact of Soviet Russia on Vietnam. The R.S.F.S.R.'s Civil Code in 1964 includes the similar provision, Article 158, titled "Concept of an obligation and the basis on which it arises": "*By virtue of an obligation, one person (the debtor) is required to do a certain act-e.g., transfer property, perform work, pay money, etc.-for the benefit of another person (the creditor), or to refrain from doing a certain act, and the creditor has a right to demand from the debtor the performance of such duty. Obligations arise from contract or the other grounds indicated in Article 4 of this Code*".[81] This provision persists in the current Russian Civil Code, with Article 307, paragraph 1, reflecting minor modifications.[82] The R.S.F.S.R. Civil Code's approach draws heavily from the B.G.B.'s provisions on *Schuldverhältnisse* (obligations relationship), notably Section 241, entitled *Pflichten aus dem Schuldverhältnis* or Duties arising from the obligatory relationship: "1. By virtue of an obligation, an obligee is entitled to claim performance from the obligor. The performance may also consist of forbearance. 2. An obligation may also, depending on its contents, oblige each party to take account of the rights, legal interests, and other interests of the other party". Despite these similarities, notable differences between the provisions set them apart.

On the one hand, Section 241 of the B.G.B. does not define a legal term but describes a legal relationship. The German term *Schuldverhältnisses,* literally *obligatory relationship,*[83] indicates that an obligation encompasses all legal transactions involving a special relationship between obligee and obligor, in which one has the right to claim and the other bears the duty to perform.[84] On the other hand, the Vietnamese and Russian

[81] Whitmore Gray & Raymond Stults, Civil Code of the Russian Soviet Federated Socialist Republic: An English Translation 43 (1965).

[82] Grazhdanskiĭ Kodeks Rossiĭskoĭ Federatsii [Civil Code], art. 307 (Russ.): "By virtue of an obligation, a person (the debtor) is obliged to make in favour of another person (the creditor) a certain action, such as: to transfer property, to perform a job, to render a service, to make a contribution to joint activities, to pay money, etc., or to abstain from a certain action, while the creditor has the right to demand of the debtor execution of the obligation thereof."

[83] The German term *Schuldverhältnis* is a compound noun derived from two components: (1) *Schuld* - From Old High German sculd or scult, meaning "debt," "obligation," or "guilt." It stems from Proto-Germanic *skuldiz*, related to "owing" or "being obliged." Cognates include Old English *scyld* (crime, guilt) and Old Norse *skuld* (debt). The term evolved to encompass both moral and legal obligations, particularly in the sense of a duty owed to another ; (2) *Verhältnis* - From Middle High German *verhältnisse*, derived from the verb *verhalten* ("to behave," "to relate"). *Verhältnis* means "relationship," "condition," or "ratio," emphasising a mutual connection or obligation between parties. *Schuldverhältnis* thus denotes a "relationship of obligation" or "legal bond of debt," reflecting a juridical connection where one party (the debtor) owes performance to another (the creditor).

[84] *See* Bürgerliches Gesetzbuch [B.G.B.] [German Civil Code], §310, (Gerhard Dannemann & Reiner Schulze eds., 2020).

conceptual approaches are different to the German one, when they both employ terms, respectively *nghĩa vụ* and *обязательства*, which correspond with *obligation*. These terms carry strict yet broad meanings, making their definition in the Civil Codes delicate. The quoted provisions reveal issues that require further comment.

The Russian Civil Code's definition of obligation aligns closely with the Pandectist framework of B.G.B., consistently emphasising the legal bond between obligor and obligee through the latter's right to claim and the former's duty to perform. This approach conceptualises "obligation" broadly, encompassing the relational dynamic between parties. In contrast, Article 274 of the Vietnamese Civil Code adopts a narrower interpretation, defining "obligation" solely as the obligor's duty to perform an act for the obligee, omitting the obligee's right to claim. Consequently, "obligation" is framed as a burden or debt on the obligor, neglecting the broader legal relationship binding both parties. This suggests a legislative misunderstanding, reducing obligation to a mere duty imposed on the obligor towards the obligee.[85]

Some scholars propose that the concept of obligation in Article 274 of the Vietnamese Civil Code should be interpreted broadly to encompass civil, natural, and moral obligations.[86] However, this interpretation conflicts with subsequent provisions on the sources and execution of obligations, which apply exclusively to civil obligations. The absence of specific provisions addressing moral or natural obligations, particularly regarding the legal effects of performing natural obligations, with the lack of a theoretical basis for this distinction, indicates that the legislator did not intend to include these categories in the definition. Furthermore, this broad interpretation is problematic, as neither moral nor natural obligations entail the obligee's right to claim performance: moral obligations are not consistently legal, and natural obligations lack an enforceable claim. In a civil code, the concept of obligation should focus on civil obligations, characterised by three key elements: a legal relationship wherein the obligor has a duty to perform, and the obligee has a corresponding right to claim that performance.

The deficiencies in the definition of obligation in Article 274 stem from limited familiarity with the German legal tradition and civil law principles, despite their significant influence on Vietnamese civil law. At the time of Vietnam's first Civil Code, most jurists had been trained in either Vietnam or Russia, where legal education emphasised public law, neglecting the development of private law. The

[85] *See* Huy Cương Ngô, Giáo Trình Luật Hợp Đồng: Phần Chung [Textbook on Contract Law: General Part] 38 (2013).

[86] *See id.* at 43; *see also* Ngọc Điện Nguyễn, Giáo Trình Luật Dân Sự. Tập 2 [Textbook on Civil Law. Volume 2] 9 (6th ed. 2023).

communist/socialist legacy prioritised public law domains, such as criminal law and administrative regulations, overshadowing civil disputes. Additionally, Vietnamese jurists favoured European and Western legal traditions, particularly the French model, bolstered by governmental cooperation in law and education and the active involvement of French jurists in drafting the 2005 and 2015 Civil Codes. The German legal tradition is not well presented and established among Vietnamese jurists, largely due to its abstractness and complexity. Furthermore, the flawed definition reflects insufficient knowledge of Roman law, the ultimate foundation of the current Vietnamese legal system. A deeper understanding of Roman law would facilitate the reception of German legal concepts. The classical conception of the term "obligation" – a tie that exists between at least two persons which enables one person to request something from the other[87] - is likely to originate from Roman law's *obligatio*.[88] In Justinian's Institutes, an obligation is defined as: "a tie of law by which we are of necessity constrained to pay something according to the laws of our civitas".[89] Another definition, or rather description, can be found in the Digest: "The substance of obligation does not consist in that it makes some property or servitude ours, but it binds another person to us to give, do, or be responsible for something".[90] This conception of obligation as a legal relationship has been reflected in civil codes. For example, Article 1756 of the Louisiana Civil Code defines obligation as "a legal relationship whereby a person, called the obligor, is bound to render a performance in favour of another, called the obligee", and further explains that the performance may consist of giving, doing, or not doing something. This definition implies that obligation means more than just duty. In this legal relationship, on the one end, the duty is confined to the obligor, and on the other end, there is a right that entitles the obligee to demand the performance of the duty. The obligation links the duty to the right so that they cannot exist one without the other.[91] As we can see, what is essential to these definitions is the description of the *obligatio* as a tie of law. An obligation connotes a legal relationship between two parties, and it is based on this legal relationship that the obligation can be enforceable.

[87] *See* J. Ghestin, M. Billiau, & G. Loiseau, Le Régime Des Créances et Des Dettes [The Regime of Claims and Debts], Traité de Droit Civil 3 (2005) (Fr.).

[88] *See* The Oxford Handbook of Roman Law and Society 569 (Paul J. Du Plessis, Clifford Ando, & Kaius Tuori eds., 2016) (U.K.).

[89] J. Inst. 3.13.pr: Obligatio est juris vinculum, quo necessitate adstringimur alicujus solvendae rei secundum nostrae civitatis jura, translation in *id.* at 573.

[90] Dig. 44.7.3: Obligationum substantia non in eo consistit, ut aliquod corpus nostrum aut servitutem nostram faciat, sed ut alium nobis obstringat ad dandum aliquid vel faciendum vel praestandum, translation in *Id.* at 574.

[91] *See* Saul Litvinoff & Ronald J Scalise, The Law of Obligations, 2d (Vols. 5 and 6, Louisiana Civil Law Treatise Series) 2 (2020).

Article 274's definition of obligation in the Vietnamese Civil Code conflates obligation with the concepts of legal transaction/legal act and contract. The Vietnam Civil Code, over the course of twenty-seven years, has been employing the term "civil transaction" to indicate legal acts in civil law matters.[92] Article 116 defines a civil transaction as "contracts or unilateral acts, which give rise to, modify, or terminate civil rights and obligations". This Article is highly influenced by the formula of Article 41 of the R.S.F.S.R.'s Civil Code on the concept of *Сделка,* or legal transactions, which "are acts of citizens and organisations directed towards establishment, alteration or termination of civil rights or obligations", and "may be unilateral, or bi- or multilateral (contracts)". These terms and definitions are quite atypical, since "transaction" is usually employed to indicate multilateral/bilateral acts in contemporary legal language.[93] However, this concept finds its origin in the German Pandectist tradition, with the introduction of the term *Rechtsgeschäft* – literally translated as legal transactions, with *Willenserklärung* (declaration of intent) as a synonym – into German legal doctrine in the eighteenth century[94] and this doctrine of legal transaction, developed by Savigny,[95] was then codified in the B.G.B. The B.G.B. does not provide any definition of *Rechtsgeschäft* but German jurists tend to define this term as "all legal acts by which a party, or the parties, may create certain legal consequences by virtue of their free will".[96] The Pandectist tradition of German jurists developed the concept of *Rechtsgeschäft* as an act type (*Aktstypen*), which focuses on the free will of persons to establish, modify or terminate a legal relationship.[97] In their English translation of the R.S.F.S.R.'s 1964 Civil Code, Whitmore Gray and Raymond Stults indicate a similar meaning for the term "*Сделка*"

[92] Surprisingly, this term is a unique feature of Vietnamese Civil Law. In other communist and post-communist countries such as China and Russia, legislators use the term 'legal acts' or 'civil juristic act'.

[93] *See* Black's Law Dictionary 1635 (Bryan A. Gagner ed., 9th ed. 2009). Definition of transaction: 1. The act or an instance of conducting business or other dealings; esp., the formation, performance, or discharge of a contract. 2. Something performed or carried out; a business agreement or exchange. 3. Any activity involving two or more persons. 4. Civil law. An agreement that is intended by the parties to prevent or end a dispute and in which they make reciprocal concessions.

[94] *See* Werner Flume, Allgemeiner Teil des Bürgerlichen Rechts: Das Rechtsgeschäft [General Part of Civil Law: the Legal Transaction] 28 (Dritte, ergänzte Auflage ed. 1979) (Ger.). It was likely Nettelbladt who introduced the terms actus juridicus and negotium juridicum into legal literature.

[95] *See id.* at 30.

[96] Dannemann & Schulze, *supra* note 48, at 122.

[97] *See* Flume, *supra* note 94, at 105. This concept is contrasted by *Rechtshandlungen*, acts to which legal effects are attached, for whose occurrence the legal order is indifferent as to whether they are intended or unintended by the actors and by *unerlaubte Handlungen*, acts where unintended legal effects (e.g., damages obligations under § 823 BGB) arise from illegal behaviour, like torts.

which is still employed by the current Russian Civil Code,[98] and is equivalent to *Rechtsgeschäft* in German, *acte juridique* in French and juridical act in English.[99]

It is no surprise that this concept is integrated into the Vietnamese Civil Code with the influence of Soviet Russia; the problem, however, rests in the fact that the Vietnamese language devotes a specific meaning to the word *giao dịch* (transaction), which is a relationship of exchange, excluding the meaning of a unilateral act. The use of this concept in Vietnamese thus results in a misunderstanding of its full meaning.

4. TAXONOMIC PROBLEMS

It is a commonly held view that taxonomy shapes the architecture of legal science – as described by Professor Ugo Mattei, it "provides the intellectual framework of the law and makes the law's complexity more manageable", reflects the "legal culture of a given legal system", and becomes "the product of the interaction of the legal tradition and of the new sensibilities".[100] [...] Given its foundational role, taxonomy is a complex and evolving construct that can be understood as encompassing three key aspects: (1) the selection of sets of ideas, categories, and concepts used to describe and order the subject of study, (2) the basis on which norms are created for these concepts and categories, and (3) the relationship between the various categories, concepts, and ideas.[101] Taxonomy in the legal sphere is, therefore, the core element demonstrating the concept of law as a legal system. Any attempt to create a new taxonomic model or to modify an existing one matters, as it reflects changes and developments within the legal system. Consequently, even within the same legal tradition, each legal system has its own distinctive approach to taxonomy.

[98] The current Russian Civil Code still employs this term, in its plural form *Сделки* [Transactions], in the Title of Subsection 4 of Section of Part One.

[99] *See* Gray & Stults, *supra* note 81. In the translation into English of the R.S.F.S.R.'s Civil Code, Whitmore Gray and Raymond Stults well describe one of their particular problems with the term "Сделка": "Generally it may be said to have the meaning of 'legal act,' i.e., the equivalent of the German *Rechtsgeschäft* or the French acte juridique. In this sense it is a technical tool of refined legal analysis. For example, a contract, a will, and an heir's rejection of an inheritance are all classified as 'legal acts.' In some articles of the Code the term is used in this sense, and in those cases 'legal act' seems to be a workable translation, even though the term is not one of art for the Anglo-American reader. The Code also uses the term, however, to describe the whole contract or contract dealings between two persons, and in such situations it would seem that 'transaction' would give the Anglo-American reader a better idea of what is meant. The difficulty of drawing a meaningful line between the two usages, however, and the possible confusion as to whether provisions relating to 'legal acts' would apply to these 'transactions' has led us to use the term 'legal act' in all cases."

[100] Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 The American Journal of Comparative Law 5 (1997).

[101] *See* D. Sheehan & TT. Arvind, *Private Law Theory and Taxonomy: Reframing the Debate*, 35 Legal Studies 480 (2015) (U.K.).

Since taxonomy lies at the heart of a legal system, it is undoubtedly embedded in any process of legal transplant. For example, when a country adopts the corpus of civil law principles from another jurisdiction, it cannot simply copy the law word-for-word. These principles are deeply connected with that system's legal taxonomy that orders property, contract and tort remedies. It is difficult to imagine transplanting a legal concept without bringing along the entire system surrounding it. Any such attempt, if made possible, must result from thorough consideration and careful execution. It requires not only a deep understanding of the source taxonomies but also a deliberate effort to reconcile their differences.

As discussed earlier, the Vietnamese legal principles governing property and obligations reflect an eclectic blend, combining the structural framework of the Russian Civil Code (itself rooted in the German B.G.B.) with the French private law doctrines. This Section examines how the drafters of the Vietnamese Civil Code approached legal taxonomy. Starting with a general overview, it proceeds to focus on matters of property and obligations, highlighting some of the problems that have arisen as a result.

4.1. LACK OF TAXONOMY OF RIGHTS AND LAW

Although Civil Law legal systems may differ in various aspects of their concept of law, they commonly share fundamental taxonomies – such as the distinction between private law and public law, and between real rights and personal rights – tracing back to their roots in Ancient Roman Law.[102] In contrast, the Vietnamese legal system lacks explicit recognition of these taxonomies, resulting in a poorly drafted Civil Code that offers limited clarity on the scope and nature of different rights and obligations.

The first issue concerns the lack of an (explicit) distinction between private law and public law, a fundamental element of the civil law tradition. There is more than one way to conceive this distinction,[103] but in the most conventional understanding, it reflects the difference in the protected interests: while public law concentrates on the general interest of a community, private law is designed to protect the interests of individuals in their legal relationships. As a result, two key differences distinguish these branches of law. First, the main purpose of public law is to ensure collective interests through the organisation of government and public administration, whereas private law primarily serves to satisfy individual interests. Second, reflecting their different

[102] *See* Mousourakis, *supra* note 1, at 125.

[103] *See, e.g.*, Randy E Barnett, *Four Senses of the Public Law-Private Law Distinction*, 9 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 267 (1987).

purposes, each branch employs a distinct method of regulation: public law is imperative, requiring strict compliance with established rules, while private law allows significant freedom for individuals to exercise their will in engaging in private legal relations. Although some critics point to the vague borderlines between the two branches, this distinction remains crucial to the civil law tradition, as it marks a clear division between two contrasting mindsets.

Compared to many other countries whose legal systems are categorised into the civil law tradition, Vietnam's legal system notably lacks a clear distinction between public and private law, a characteristic that can be attributed to its communist legal heritage. As Vladimir Lenin, the leader of the communist U.S.S.R., once said famously:

> We do not recognise anything "private", and regard everything in the economic sphere as falling under public and not private law. We allow only state capitalism, and as has been said, it is we who are the state. Hence, the task is to extend the application of state intervention in "private legal" relations; to extend the right of the state to annul "private" contracts; to apply to "civil legal relations" not the *corpus juris romani* but our revolutionary concept of law.[104]

Recognised as the guiding ideology and foundational legal theory in communist thought,[105] Lenin's conception of law provides the foundation for the rejection of private law as a distinct legal domain. Due to this influence, the distinction between private law and public law has received little attention in Vietnamese legal thinking, notwithstanding its introduction to Vietnam during the French colonial period. Even though the first Vietnamese Civil Code was drafted in the 1990s as Vietnam began transitioning towards a market-oriented economy, the legacy of communist legal thought persisted, as most Vietnamese legal scholars at the time had been trained in the Soviet legal tradition.

After about four decades of legal modernisation, as the Vietnamese legal system has been progressively shaped through numerous legal transplants from developed countries, Vietnamese legal scholars nowadays generally agree that constitutional law, administrative law, and criminal law fall within the realm of public law, while civil law and commercial law are considered typical branches of private law, with civil law serving as its foundational body.[106] However, serious classification challenges arise in other

[104]Lenin Collected Works, Volume 36, 1920 – 1923 563 (Yuri Sdobnikov ed., Andrew Rothsein tran., 2013) (Russ.).

[105]*See* Giáo Trình Lý Luận Nhà Nước và Pháp Luật [Textbook on Theories of State and Law] 341–46 (Thị Kim Quế Hoàng ed., 2015) (Viet.).

[106]*See* Giáo trình Luật dân sự Việt Nam. Tập I (Textbook on Civil Law. Volume I) 19 (Văn Thanh Đinh & Minh Tuấn Nguyễn eds., 2018) (Viet.).

areas, such as land law, financial law, and environmental law, leading to an inappropriate regulatory approach. Land law provides a particularly illustrative example, since the property regime regarding land in Vietnam is a dual one: land is state-owned, while individuals hold rights to use it. The state's authority to appropriate land often causes significant conflicts when it clashes with these private property rights, resulting in many high-profile cases.[107]

The distinction between real rights and personal rights is another heritage of the Civil Law tradition, rooted in Roman Law. Real rights, or rights *in rem,* are directly exercised over a thing and imply a legal relationship between the thing itself and a person or group of persons. In contrast, personal rights, or rights *in personam,* mean a legal relationship between two persons where one party – the debtor or obligor – owes an obligation towards the other party – the creditor or obligee.[108] Despite some criticism and efforts to challenge it, the distinction between real rights and personal rights remains fundamental and indispensable in most Civil Law systems, since it marked the foundation of the law of obligations in the early days, differentiating it from the relationship between a person and a thing – the law of property. From this distinction, legal scholars have developed specific sets of rights attached to each of these two types. Accompanying real rights are the right of pursuit (*droit de suite*), which allows the rights holder to assert their claim over the property regardless of its possession or use, and the right of preference (*droit de préférence*), which grants them the priority over others holding only personal claims or subsequent real rights. Regarding personal rights, the creditor is granted a *droit de gage général* (general security right) – "a floating charge over the debtor's property".[109]

Although some Vietnamese scholars – primarily those familiar with Civil Law concepts – have recognised the importance of distinguishing between real rights and personal rights,[110] this fundamental taxonomy remains largely neglected by both legislators and mainstream legal scholarship.[111] During the 2015 reform of the Vietnamese Civil Code, the possibility of incorporating these terms was discussed,[112] but their crucial role in establishing a coherent theoretical framework for classifying and systematically

[107]*See* John Gillespie, *Narrating Land Disputes in Three Vietnamese Communities*, *in* Resolving Land Disputes in East Asia: Exploring the Limits of Law (Hualing Fu & John Gillespie eds., 2014) (U.K.).

[108]*See* Jean Macqueron, Histoire Des Obligations [History of Obligations], Le Droit Romain 2 (1971) (Fr.); Initially, when there are no rights of obligations yet, Roman jurists use the terms action in rem and action in personam, *see generally* Mousourakis, *supra* note 1, at 125.

[109]De F. H. S. Bridge, The Council of Europe French-English Legal Dictionary 95 (2002).

[110]*See* Giáo trình Luật dân sự Việt Nam. Tập I (Textbook on Civil Law. Volume I), *supra* note 106, at 74.

[111]*See id.* at 8.

[112]In fact, "real rights" (*vật quyền*) and "personal rights" (*trái quyền*) were included in the Draft of the Civil Code in 2015; however in the official version, the legislator decided to leave these terms out.

regulating these rights continued to be underestimated. Significantly, some of the most highly regarded legal scholars in Vietnam have even claimed that the absence of these terms in the Vietnamese Civil Code poses no real practical issue, as their "essence" is already reflected in the Code by specific rules regarding property and civil transactions.[113]

Although it might seem reasonable, given that even the French Civil Code does not formally distinguish between these concepts and yet legal scholarship has nevertheless developed a comprehensive theoretical framework with significant practical implications, this claim deserves closer examination. Let us consider the case of real security rights, such as pledge and mortgage, as our main illustration, since it has been the subject of intense debate within Vietnamese legal scholarship: on one side, scholars like Nguyen Ngoc Dien and Ngo Huy Cuong advocate for the formal recognition of real rights,[114] while on the other hand, Do Van Dai represents the opposing view. The following points draw heavily on this scholarly debate. In most Civil Law systems,[115] pledge and mortgage are categorised as real security rights. In contrast, the Vietnamese Civil Code addresses these real securities under the section on obligation and treats them as personal rights, focusing on the duty of the obligor towards the obligee rather than the legal relationship between the secured creditor and the secured property. As a result, core features of real rights – such as the right of pursuit and the right of preference, as described above – are not clearly recognised in the Code nor guaranteed in practice. Despite assertions that the existing provisions on pledge and mortgage are sufficient to ensure their security function, practical realities suggest otherwise. Because these rights are not treated as real rights but merely as personal (contractual) rights, they depend heavily on the will and solvency of the debtor rather than attaching directly to the property itself. The absence of real security rights also fails to allow the secured creditor to assert their claim over the property and to take precedence over unsecured creditors,

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[113]*See* Văn Đại Đỗ, *"Vật Quyền" Bảo Đảm: Kinh Nghiệm Của Nước Ngoài Cho Việt Nam [Security in Rem: Foreign Experiences for Vietnam]*, 1 Tạp chí Khoa học pháp lý 57 (2015) (Viet.).

[114]*See generally* Ngọc Điện Nguyễn, *Lợi Ích Của Việc Xây Dựng Chế Định Vật Quyền Đối Với Việc Hoàn Thiện Hệ Thống Pháp Luật về Tài Sản* [*The Importance of Establishing a Regime of Real Rights for the Improvement of the Legal System on Property*], Tạp chí Nghiên cứu lập pháp (2018) (Viet.); Ngọc Điện Nguyễn, *Cần Xây Dựng Lại Khái Niệm "Quyền Tài Sản" Trong Luật Dân Sự (The Need to Reconstruct the Concept of "Property Rights" in Civil Law)*, 3 Tạp chí Nghiên cứu lập pháp (2005) (Viet.); Huy Cuong Ngô, *Những Sai Lầm Khi Xây Dựng Chế Định Tài Sản Trong Dự Thảo Bộ Luật Dân Sự Sửa Đổi* [*Mistakes in the Construction of the Property Regime in the Draft Revised Civil Code*], 7 Tạp chí Nghiên cứu lập pháp (2015) (Viet.); Huy Cương Ngô, *Những Bất Cập về Khái Niệm Tài Sản, Phân Loại Tài Sản Của Bộ Luật Dân Sự 2005 và Định Hướng Cải Cách* [*Inconsistencies in the Definition and Classification of Property in the 2005 Vietnamese Civil Code and Recommendations for Reform*], 22 Tạp chí Nghiên cứu lập pháp (2009) (Viet.).

[115]For example, the French Civil Code devotes the entire Book 4 to mechanisms for securing obligations, with two distinct Titres: one addressing real security rights (*sûretés réelles*) and the other covering personal security rights (*sûretés personnelles*). Another example is the Dutch Civil Code, which places its provisions on real security rights within Book 3 on property law in general.

as the Code remains completely silent on the issue of claim priority. Judicial practice in resolving disputes related to pledge and mortgage reveals that, in most cases, disputes over secured loans are treated as ordinary loan disputes, and lenders rarely succeed in exercising their rights over the pledged property.[116] In this context, a formal recognition of the fundamental distinction between real rights and personal rights would have significantly helped to avoid such weakness and legal uncertainty.

Ultimately, the Vietnamese Civil Code's failure to formally recognise this foundational taxonomy reflects a broader conceptual gap that led to doctrinal confusion and persistent practical difficulties in regulating rights coherently and systematically.

4.2. LACK OF TAXONOMY OF OBLIGATIONS

Since regulations vary depending on the type of obligation, in terms of both their formation and legal effects, it is essential to classify obligations based on certain criteria. Accordingly, there are usually two main approaches to obligation classification. One focuses on the formation of obligations, classifying them based on their sources, while the other relates to their execution, classifying them according to the object of the obligation and its resulting legal consequences.[117] Source-based and object-based classifications – these two criteria have been established since Ancient Roman law.[118]

The source-based classification remains one of the most influential legacies of Roman law.[119] Its enduring merit stems from a long history of gradual development.[120] Originally, the Roman jurist Gaius established a twofold division of obligations: those arising from contract (*ex contractu*) and those arising from delict (*ex delicto)*.[121] Later, as the original dichotomy was largely deemed unsatisfactory, a third category – obligations arising from various causes (*ex variis causarum figuris*) – was added, likely by Gaius himself, and eventually figured in Justinian's *Digest*.[122] This threefold classification was

[116]For disputes over loans secured by pledge, *see* District People's Court of Tam Binh, Vinh Long Province, Case No. 07/2021/DS-ST, (13 January 2021) (Viet.); People's Court of Ha Tien City, Ha Giang Province, Case No. 09/2021/DS-ST, (29 April 2021) (Viet.); and for disputes over loans secured by mortgage, *see* People's Court of Tien Giang Province, Case No. 299/2023/DS-PT, (24 May 2023) (Viet.). In these decisions, courts primarily focused on the debtor's failure to repay the loan, and almost always ruled in favour of monetary compensation instead of enforcing the secured creditor's right to claim the asset.

[117]*See* Henri Mazeaud, Léon Mazeaud & Jean Mazeaud, Leçon de Droit Civil. Tome II: Obligations. Théories Générales. 11 (François Chabar ed., 9th ed. 1998) (Fr.).

[118]*See* Yves Lequette et al., Droit Civil. Les Obligations [Civil Law. Obligations] 1329 (12th ed. 2018) (Fr.).

[119]*See* Mazeaud, Mazeaud & Mazeaud, *supra* note 117, at 11.

[120]*See* Mousourakis, *supra* note 1, at 185–87.

[121]*See* G. Inst., 3. 88., in Gai Institvtiones or Institutes of Roman Law by Gaius 315 (Edward Poste (trans.), 1904)

[122]*See* Dig., 44. 7. 1., in Les cinquante livres du Digeste ou des Pandectes de l'empereur Justinien 355 (Henri Hulot (trans.), vol. 30 1805.

probably the precursor of the fourfold division adopted by the compilers of Justinian's Institutes three centuries later, according to which an obligation may arise: (a) from contract (*ex contractu*); (b) as if from contract (*quasi ex contractu*); (c) from delict (*ex delicto* or *ex maleficio*); and (d) as if from delict (*quasi ex delicto* or *quasi ex maleficio*).[123] This final scheme constituted the ultimate Roman classification of the sources of obligations that has ever since shaped the structure of modern civil law systems. Although it has faced considerable criticism, particularly due to the increasingly blurred borderlines between delicts and quasi-delicts[124] as well as the emergence of the force of law itself as a distinct source of obligations (as in the works of the modern French jurist Pothier),[125] this taxonomy remains a foundational element of the civil law tradition. It plays a key role in distinguishing the legal regimes applicable to each type of obligation, particularly regarding the requirement of fault in liability and the burden of proof.

There is an alternative approach to source-based classification that was developed by German jurists in the nineteenth century and later adopted by many civil codes inspired by the B.G.B.: the distinction between juridical acts (*acte juridique*) and juridical facts (*fait juridique*). The 2016 reformed French Civil Code also embraces this distinction in its Article 1100. Accordingly, juridical acts refer to manifestations of will intended to produce legal effects, which include both unilateral engagement and agreement, and are generally governed by the rules governing contracts. In contrast, juridical facts are events to which the law attaches legal consequences and are governed by the rules of extra-contractual liability or other non-contractual sources. This distinction has the merit of encompassing unilateral acts and natural events not caused by human action, thereby offering a broader and more inclusive legal framework.

With respect to the object-based classification of obligations, the Roman law provided a tripartite division: *dare* (to give or to hand over a thing), *facere/non facere* (to do something/to refrain from doing something), and *praestare* (to perform or to be responsible for something).[126] However, as the scope of obligations expanded with the development of different types of contracts, modern legal systems sought to streamline these distinctions for clarity and practicality. *Praestare* was absorbed into *dare* and *facere,* and most civil law systems, especially those influenced by the French Civil Code, have then adopted the distinction between obligation to give (*obligation de donner*), obligation to do (*obligation de faire*), and obligation not to do *(obligation de ne pas faire*). This distinction is primarily significant in determining how these obligations could be

[123]J. Inst., 3. 13. 2.
[124]*See* Boris Starck, Droit Civil. Obligations [Civil Law. Obligations] 7 (1972) (Fr.).
[125]Œuvres de Pothier. Tome Deuxième. 3 (Bugnet ed., 1861) (Fr.).
[126]*See* Mousourakis, *supra* note 1, at 189.

enforced, precisely; obligations to give could be enforced through forced performance or through damages (in case such performance is impossible), while obligations to do and not to do are generally enforced through damages.

Apart from these fundamental classifications, there are some more recent ones developed by contemporary jurists, such as those based on the criterion of intensity, on the method of execution of obligations, on the nature or the plurality of the object, or on the relation between creditors and debtors, etc. Despite their differences, these classifications share the common foundation of being based on clear and precise criteria.

A close examination of the Vietnamese Civil Code's provisions on obligation reveals no such well-established taxonomy. At first glance, Article 274 of the Code appears to reflect the Roman object-based classification by defining obligations as acts whereby an obligor must "transfer objects, transfer rights, pay money or provide valuable papers, perform other acts or refrain from performing certain acts" in the interests of the obligee. However, unlike the French Civil Code, the Vietnamese Code does not go further to clarify the legal implications in terms of enforcing these different types of obligations and instead provides definitions for each category that seem redundant and unnecessary.[127]

A source-based classification of obligations can be found at Article 275, which divides obligations into six categories based on their respective sources. It will be examined in detail in the subsequent section, as the way the Code approaches this classification requires a separate analysis.

There are also several other provisions, from Article 279 to Article 291, in the Section on "Performance of obligations", from which some additional classifications may be inferred. However, these articles merely list various types of obligations without providing any clear criteria to categorise them into coherent categories. For instance, Article 282 on the performance of obligations in stages, Article 283 on the performance of obligations through third parties, Article 284 on the conditional performance of obligations, Article 285 on the performance of obligations having optional subject matters, and Article 286 on the performance of substitutable obligations; the list goes on.

Despite offering numerous provisions concerning different types of obligations, the Vietnamese Civil Code lacks a unified and coherent system for classifying obligations. The various types of obligations appear in a scattered and unstructured manner, without

[127] For example, Article 281 merely defines obligation to perform an act as "obligation whereby the obligor must perform that particular act", and obligation not to perform an act as "obligation whereby the obligor must not perform that particular act".

clear criteria or theoretical work underlying them. As a result, these provisions offer little doctrinal and practical value.

4.3. MISUNDERSTANDINGS ON SOURCES OF OBLIGATIONS

As mentioned in the previous section, Article 275 of the Vietnamese Civil Code offers a source-based classification of obligations with six categories: (1) contract, (2) unilateral juridical act, (3) unauthorised performance of acts, (4) unlawful possession or use of or receipt of benefits from property, (5) causing damage through unlawful acts, and (6) other bases as provided by law. This article suffers from serious problems in both form and substance, reflecting not merely a sloppy drafting process but, more importantly, a much deeper issue: a limited understanding by Vietnamese legislators of the concept and structure of the sources of obligations.

The form-related concern lies in the poor drafting and terminology of Article 275. The article uses lengthy and imprecise terms such as "unauthorised performance of acts", "unlawful possession or use of or receipt of benefits from property" and "causing damage through unlawful acts", instead of, respectively, "management of affairs" or "agency without authorisation", "*unjustified enrichment*" and "*delictual liability*" – those are the concise legal terms systematically used in civil law systems. This seems to be an intentional drafting style throughout the Code, as many other provisions show the same tendency to employ long-worded terms to describe a concept rather than using well-established legal terminology.[128] The main reason for this hesitation to adopt abstract legal terms is that Vietnamese jurists – not only legal practitioners who primarily work with codes and regulations but also legal researchers – are not familiar with them.[129] Since the first codification of civil law in 1995, on the foundation of the communist ideology and the Soviet conception of law, Vietnamese legislators have shown little intention to adopt fundamental legal terms into the existing legal system, fearing it might cause radical changes in both the legal system and legal education.[130] While this drafting style might appear easier to understand, it ultimately leads to a lack

[128]For example, in the Civil Code, Vietnamese legislators employ the term "right on the adjacent immovable property" (*quyền đối với bất động sản liền kề*) instead of the term "servitude", in Article 159.

[129]For example, Do Van Dai explained five reasons why legislators continue to employ the term "*quyền tài sản*" (rights on property) instead of the term "*vật quyền*" (real rights) in the Civil Code: (1) this term is too abstract, so many jurists would not understand its meanings; (2) it would complicate the legal system; (3) the employ of the term would require new programme and method of legal education, especially for current legal practitioners; (4) it is not suitable for the current legal system of Vietnam because there are not only "*vật*" (things) but also other assets such as "*quyền sử dụng đất*" (rights to use land); (5) this term is difficult to translate accurately into English, in Đỗ, *supra* note 113.

[130]*See id.*

of understanding of legal theory and terminology, and results in an incoherent and insufficient theoretical foundation for the Civil Code and the private law system in Vietnam.

The substance-related concern lies in the lack of a deep understanding of the fundamental classification of the sources of obligations. Any Civil Law jurist will immediately remark that Article 275 presents a confused and inconsistent taxonomy. On one hand, it appears to adopt the classical source-based classification of obligations – contracts, quasi-contracts (dressed as "unauthorised performance of acts" and "unlawful possession or use of or receipt of benefits from property"), delicts and quasi-delicts (combined in "causing damage through unlawful acts"), and the force of law. On the other hand, for some reason, it includes unilateral acts, which fall into the category of juridical acts – a concept that belongs to the modern source-based classification between juridical acts and juridical facts. However, this inclusion seems to give rise to significant doctrinal confusion and misunderstanding, largely due to the underdeveloped theoretical framework of juridical acts and juridical facts in Vietnamese legal scholarship. Many scholars have interpreted "juridical acts" as any intentional human acts, which lead to the misclassification of delicts as unilateral juridical acts.[131] This understanding differs substantially from the German classification, where juridical acts are strictly defined as acts manifesting an intention to produce legal effects and not merely any act involving intention.

As a result, while this mixture might be seen as an effort to combine the classical and modern source-based classifications of obligation, it ultimately reflects a lack of understanding of the foundational rationale underlying these classifications, resulting in a confused and incomplete framework.

CONCLUSIONS

The development of the law of property in general and the law of obligations in particular in Vietnam, in the same destiny as the Vietnamese legal concepts and legal science, has witnessed radical changes and diverse transplants since the *Doi Moi* in 1986, with the aim of modernising the legal system. Despite its central role, however, the law of property and obligations was not properly codified with a unified and pertinent legal

[131] *See, e.g.*, Giáo trình Luật dân sự Việt Nam. Tập I (Textbook on Civil Law. Volume I), *supra* note 106, at 60; *see also* Giáo trình Lý Luận Nhà Nước và Pháp Luật (Textbook on Theories of State and Law), *supra* note 105 at 390–402.

theory. At the outset, this may result from the lack of a proper concept of private law and the distinction between real rights and personal rights. This fundamental flaw in theoretical aspects has brought about long-lasting issues that have not been repaired by legislators and jurists since the first codification of civil law in 1995. These problems – including a mixed definition of property, the poorly worded definition of obligations, and the lack of understanding of the taxonomy of obligations and the sources thereof – have led to significant overlap between, for example, contracts and obligations, or between a number of other related legal institutions, such as civil liability, fault, and so on. Since 1995, legislators and jurists in Vietnam have had two opportunities to recodify the Civil Code: one in 2005 and another in 2015. Unfortunately, they failed both chances to carry out a better codification based on two core elements – a coherent theoretical foundation and proper techniques of codification – and continued to pursue the wrong path. At this point, in our most humble opinion, Vietnam's Civil Code is irreparable, no matter which year the legislators would add after its name.

FUNDING DETAILS

This research is funded by the Vietnam National Foundation for Science and Technology Development (NAFOSTED) under grant number 505.01-2021.03.

DISCLOSURE STATEMENT

The authors report there are no competing interests to declare.

DATA AVAILABILITY STATEMENT

Data sharing is not applicable to this article as no new data were created or analysed in this study.

Volume 10 | Issue 2 | Articles & Essays

University of Bologna Law Review

https://doi.org/10.60923/issn.2531-6133/21439

Received: 18 Apr. 2025 | Reviewed: 27 Nov. 2025 | Accepted: 28 Nov. 2025 | Published: 19 Mar. 2026

The Rise of AI Authorities? A Closer Look at Latin America's Institutional Responses and External Influences

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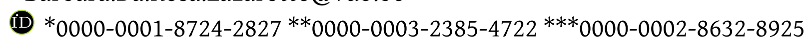
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ABSTRACT

Artificial intelligence governance in Latin America is emerging through new legislative proposals that increasingly draw on the European Union's Artificial Intelligence Act. This article asks how Latin American countries are designing artificial intelligence oversight and enforcement mechanisms, and whether they are replicating the European institutional model for supervisory authorities. Existing scholarship has examined the circulation of European regulatory models in data protection law, but it has not yet adequately addressed how that influence operates in the early institutional design of artificial intelligence governance in Latin America.

The article develops a comparative legal analysis of the Ibero-American context, with particular focus on Brazil and Chile, in order to assess how European regulatory templates are received, adapted, and operationalized. It argues that Latin American artificial intelligence regulation is likely to follow a pattern already observed in second-generation data protection reforms: the adoption of broad statutory frameworks inspired by European law, but reshaped by local institutional capacities, budgetary constraints, and regional political economy. The analysis shows that the central dilemma concerns whether to extend the mandate of existing data protection authorities to artificial intelligence or to establish specialized supervisory agencies. Brazil and Chile illustrate two especially significant pathways, given Brazil's regional influence within BRICS and MERCOSUR and Chile's role as an open economy deeply integrated into transnational digital governance networks.

The article contributes to comparative scholarship on artificial intelligence regulation by showing how supervisory design becomes a crucial site of legal translation between European regulatory influence and Latin American institutional realities.

KEYWORDS

A.I. Regulation; Personal Data Protection; Supervisory Authorities; Brussels Effect; Institutional Design

EDITORIAL NOTE

During the editorial process of this article, including submission, peer review, and publication, several legislative proposals and regulatory initiatives discussed in the manuscript evolved, with some being amended or formally adopted. The analysis presented in this article reflects the legal and policy context available at the time of writing and submission. Where possible, the authors have sought to incorporate key developments during revision; however, subsequent legislative changes may have occurred after the completion of the manuscript. The discussion should therefore be understood as reflecting the state of the regulatory framework at the time of the research and drafting process.

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BETWEEN NORM-SETTING AND ALIGNMENT: THE AMBIVALENT GLOBAL ROLE OF THE EU AI ACT

In recent years, the governance of artificial intelligence [hereinafter A.I.] has become a central concern across international arenas. A.I. is not merely a technological advance, but a force that reshapes social, economic, and legal structures. In the global proliferation of A.I. policy documents, these texts reveal the tensions and uncertainties surrounding a technology that provokes both optimism and apprehension.[1]

Governance debates extend across ethical principles, technical standards, legal obligations, and institutional mechanisms of accountability. Like earlier data-driven technologies, A.I. has turned governance design into a contested space where competing interests and models converge. It is worth noting that A.I. governance is closely linked to A.I. safety, as both aim to ensure the development of beneficial A.I.[2] While A.I. safety focuses on technical aspects of A.I. design, A.I. governance concerns the policies, norms, laws, and institutional contexts that shape how A.I. is developed and deployed.[3]

Institutions such as the Organisation for Economic Co-operation and Development [hereinafter O.E.C.D.] and the United Nations Educational, Scientific and Cultural Organization [hereinafter U.N.E.S.C.O.] have contributed to the global discourse on the rapid growth of A.I., with O.E.C.D. developing A.I. Principles (first adopted in 2019 and updated in 2024)[4] and U.N.E.S.C.O. adopting the Recommendation on the Ethics of Artificial Intelligence in 2021.[5] Various U.N. agencies have also developed frameworks for model policies on A.I. development and use.[6] These range from principles promoting trustworthy A.I. to recommendations addressing ethics and human rights safeguards. Although non-binding, these initiatives establish a common vocabulary and set of expectations for A.I. governance, often guiding national and regional regulatory efforts. At this level, the focus is less on prescribing detailed compliance mechanisms and more on fostering convergence around shared values, objectives, and risk-management approaches.

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[1] *See generally* Inga Ulnicane et al., *Framing Governance for a Contested Emerging Technology: Insights from AI Policy*, 40 Pol'y & Soc'y 158, 165 (2021).

[2] *See* Allan Dafoe, AI Governance: A Research Agenda (2018).

[3] *See* Matthijs Maas, *Concepts in Advanced AI Governance: A Literature Review of Key Terms and Definitions*, Institute For Law Ai (Oct., 2023), https://law-ai.org/advanced-ai-gov-concepts/.

[4] OECD, Recommendation of the Council on Artificial Intelligence, OECD/LEGAL/0449 (May 5, 2019), https://legalinstruments.oecd.org/en/instruments/oecd-legal-0449.

[5] UNESCO, Recommendation on the Ethics of Artificial Intelligence, SHS/BIO/PI/2021/1, (2022), https://unesdoc.unesco.org/ark:/48223/pf0000381137/PDF/381137eng.pdf.multi.

[6] *See* U.N., Chief Executives Board for Coordination (CEB), High-level Committee on Management (HLCM), Framework for a Model Policy on the Responsible Use of Artificial Intelligence in UN System Organizations, CEB/2024/HLCM/28/Add.1/Rev.1, (Oct. 10, 2024).

In contrast to these non-binding frameworks, the Council of Europe's Framework Convention on Artificial Intelligence and Human Rights, Democracy, and the Rule of Law represents the first legally binding international instrument in this field.[7] Opened for signature on the fifth of September 2024, the Convention seeks to ensure that all stages of the A.I. lifecycle, from design and development to deployment and use, adhere to principles of human rights, democratic governance, and the rule of law.

Within this multilateral context, regional regulatory hubs have begun to develop concrete legal frameworks. The European Union has emerged as a key standard-setter, shaping A.I. governance through its comprehensive suite of digital regulations, culminating in the A.I. Act. In Latin America, jurisdictions have pursued significant legislative initiatives, often drawing on European data protection and A.I. principles, yet facing the challenge of integrating these normative approaches with local political and institutional realities. At the national level, countries are experimenting with a combination of comprehensive statutes, sector-specific rules, and administrative guidance, producing a diverse patchwork that reflects varying priorities, technological capacities, and regulatory resources.

The European Commission's own strategy illustrates the depth of this regional legal engineering. Building on the European Data Strategy, the Commission has enacted the Data Governance Act (D.G.A.),[8] the Digital Services Act (D.S.A.),[9] the Digital Markets Act (D.M.A.),[10] the Data Act,[11] and, most recently, the A.I. Act, officially published in the Official Journal of the European Union on the twelfth of July 2024.[12]

The A.I. Act must be understood as part of the European Commission's broader strategy for shaping the digital environment. Although each legislative instrument of the mentioned strategy targets a specific dimension of the digital ecosystem, they are conceptually and functionally interlinked. This interdependence is particularly salient

[7] Council of Europe, *Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law*, CETS No. 225 (Sept. 5, 2024), https://rm.coe.int/1680afae3c.

[8] Regulation (EU) 2022/868, of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act), OJ (L 152) 1.

[9] 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), 2022 O.J. (L 277) 1.

[10] Regulation (EU) 2022/1925, of the European Parliament and of the Council of 14 Sep. 2022 on Contestable and Fair Markets in the Digital Sector and Amending Directives 2019/1937/EU and 2020/1828/EU, 2022 O.J. (L 265) 1.

[11] Regulation (EU) 2023/2854, of the European Parliament and of the Council of 13 Dec. 2023 on Harmonised Rules on Fair Access to and Use of Data and Amending Regulation 2017/2394/UE and Directive 2020/1828/EU, 2023 O.J. (L 2854) 1 (EU).

[12] Regulation (EU) 2024/1689, of the European Parliament and of the Council of 13 June 2024 on Laying Down Harmonised Rules on Artificial Intelligence and Amending Regulations 300/2008/EC, 167/2013/EU, 168/2013/EU, 2018/858/EU, 2018/1139/EU and 2019/2144/EU and 2014/90/EU, 2016/797/EU and 2020/1828/EU, 2024 O.J. (L 1689) 1 (EU).

in A.I., which relies heavily on access to large volumes of data for training, testing, validation, and deployment. In this sense, effective data governance is not merely complementary but foundational to the regulation of A.I.,[13] ensuring consistency, coherence, and legal certainty across the E.U.'s digital regulatory landscape.

The A.I. Act also draws on earlier strategic initiatives. In April 2018, the Commission Communication "Artificial Intelligence for Europe" introduced the European A.I. strategy,[14] an initial approach to the A.I. domain. While presenting itself more as a statement of intent, its holistic approach and recognition of coordinated action between different Member States have allowed it to lay the groundwork for the regulatory future of A.I.[15] in Europe and beyond. Indeed, in its Communication of the eighth of April, the Commission acknowledged the importance of international cooperation in this regard, stating that it "will continue its efforts to bring the Union's approach to the world stage and build a consensus on human-centred AI", further adding that "the European Union have a leadership role in developing international [A.I.] guidelines and, if possible, a related assessment mechanism".[16] From its inception, the A.I. Act was designed with a view to its potential global implications. The A.I. Act applies to A.I. providers and users within the E.U. and extends to non-E.U. actors whose A.I. outputs are deployed in the Union, asserting an extraterritorial scope comparable to that of the G.D.P.R.,[17] which may be reinforced through trade relationships and international cooperation. For these legal instruments to be effective, they must bind non-European actors to European regulatory frameworks, either through local establishment, representation, or extraterritorial enforcement mechanisms.[18] In this context, the A.I. Act has the potential to shape global approaches to the development and deployment of A.I. systems.[19]

[13] *See* Marijn Janssen et al., *Data Governance: Organizing Data for Trustworthy Artificial Intelligence*, GOV'T INFO. Q., July 2020, at 1.

[14] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Artificial Intelligence for Europe, COM (2018) 237 final (Apr. 25, 2018).

[15] Behind this vision are three pillars: i) increasing both public and private investment in A.I., ii) preparing for economic change, and iii) ensuring a European ethical and legal framework. To do this, an Expert Group on A.I. is created to lay down guidelines on trustworthy AI development. *See* Nathalie A. Smuha, *The EU Approach to Ethics Guidelines for Trustworthy Artificial Intelligence*, 20 COMPUT. L. REV. INT'L 97 (2019) (Ger.).

[16] *Supra* note 14.

[17] *See generally* Mateo Aboy et al., *Navigating the EU AI Act: Implications for Regulated Digital Medical Products*, NPJ DIGIT. MED., Sep. 2024, at 1, 3.

[18] *See* VAGELIS PAPAKONSTANTINOU & PAUL DE HERT, THE REGULATION OF DIGITAL TECHNOLOGIES IN THE EU: ACT-IFICATION, GDPR MIMESIS AND EU LAW BRUTALITY AT PLAY 112 (2025).

[19] *See* CHARLOTTE SIEGMANN & MARKUS ANDERLJUNG, THE BRUSSELS EFFECT AND ARTIFICIAL INTELLIGENCE: HOW EU REGULATION WILL IMPACT THE GLOBAL AI MARKET 5 (2022).

This international focus reflects the E.U.'s ambition to establish itself as a global leader, drawing from its past influence on digital regulation beyond its borders, including international agreements and the Brussels Effect,[20] where its regulations set a *de facto* standard globally.[21] The Brussels Effect "detaches globalisation from the idea of deregulation and the race to the bottom",[22] i.e., the idea that countries lower their regulatory standards to improve their relative competitive position in the global economy.[23] Instead, it describes a form of unilateral regulatory globalisation grounded in the E.U.'s market size, institutional capacity, preference for stringent rules, access to inelastic consumer markets, and the non-divisibility of standards.[24] In the case of the A.I. Act, these dynamics may be reinforced by a first-mover advantage.[25]

While many jurisdictions in the majority world often align with E.U. standards to facilitate trade, attract investment, or gain legitimacy in the international arena, the adoption of such standards is rarely straightforward.[26] In Latin America, for example, countries may selectively incorporate aspects of E.U. regulations while adapting them to local political priorities, administrative capacities, and social expectations. This can involve modifying compliance requirements to reflect institutional constraints, prioritising certain rights or protections over others, or integrating regional norms and principles, such as those emerging from inter-American human rights frameworks.[27]

The interest in A.I. governance has resonated beyond the E.U. As noted, international frameworks such as those developed by the O.E.C.D. and U.N.E.S.C.O. provide guiding principles for A.I., each reflecting different emphases and constituencies. While the O.E.C.D. primarily represents high-income economies,[28] U.N.E.S.C.O. brings a more inclusive perspective focused on ethics and human rights.

[20] *See* ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD (2020).

[21] *See* Marco Almada & Anca Radu, *The Brussels Side-Effect: How the AI Act Can Reduce the Global Reach of EU Policy*, 25 GERMAN L.J. 646 (2024) (U.K.).

[22] Interview by Groupe d'Études Géopolitiques with Anu Bradford, Professor of Law, Columbia Univ. (2021) (*The European Union in a Globalised World: The "Brussels Effect"*), https://geopolitique.eu/en/articles/the-european-union-in-a-globalised-world-the-brussels-effect/.

[23] Anu Bradford, *Exporting Standards: The Externalization of the EU's Regulatory Power Via Markets*, 42 INT'L REV. L. & ECON. 158 (2015).

[24] *Id.* at 161.

[25] Siegmann & Anderljung *supra* note 19, at 11.

[26] *See* Patricia Boshe & Carolina Goberna Caride, *Is the Brussels Effect Creating a New Legal Order in Africa, Latin America and the Caribbean?*, 2023 TECH. & REGUL. 12.

[27] *See* Organization of American States (OAS), Updated Principles on Privacy and Personal Data Protection (2021), https://www.oas.org/en/sla/iajc/docs/Publication_Updated_Principles_on_Privacy_and_Protection_of_Personal_Data_2021.pdf.

[28] In the Latin American region, OECD engagement encompasses the member states of Chile, Colombia, Costa Rica, and Mexico, along with Argentina, Brazil, and Peru, which are undergoing accession processes. *See Latin America and the Caribbean*, O.E.C.D. (2025), https://www.oecd.org/en/regions/latin-america-and-the-caribbean.html.

These frameworks have helped set the stage for the E.U.'s A.I. Regulation, which contributes to the expanding reach of the Brussels Effect in the sector.[29] The A.I. Act's influence is likely to emerge more through emulation by other countries than through its direct legal force.[30] Nevertheless, debate continues over the extent to which the A.I. Act will achieve meaningful global impact.[31]

The effectiveness of A.I. Regulation increasingly depends on a coherent, coordinated, and adequately resourced governance framework, especially given the growing demand for harmonised regulatory practices in the digital domain.[32] While the E.U.'s A.I. Act presents a comprehensive and ambitious hybrid framework (primarily focused on product safety and standardisation, with some provisions addressing fundamental rights),[33] it remains deeply rooted in Europe's political, legal, and institutional landscape. Its complexity and resource demands make it an unlikely universal template. Nevertheless, it provides some lessons that can inform and inspire diverse regulatory models elsewhere.[34]

This institutional flexibility illustrates the E.U.'s effort to reconcile unity with subsidiarity, preserving coherence while accommodating national administrative traditions. Such adaptability, however, carries costs: heightened oversight, greater operational complexity, and coordination demands that vary across Member States. Centralised or resource-constrained systems may experience implementation difficulties. In this context, the possibility for Member States to introduce additional safeguards for the use of A.I. by public authorities further illustrates the tension, as it could generate uneven levels of protection across Europe.[35] Similar pressures for differentiation shaped the legislative process itself, where sustained lobbying by big tech, industry, and Member States drove significant carve-outs and concessions in the final text of the A.I. Act.[36] Rather than a one-size-fits-all model, it seems to offer, in theory, a more balanced approach, particularly regarding enforcement powers and

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[29] *See* Bradford, *supra* note 20, at 12.

[30] *See* Graham Greenleaf, *The 'Brussels Effect' of the EU's 'AI Act' on Data Privacy Outside Europe*, 171 Priv. L. & Bus. Int'l Rep. 1 (2021) (Austl.).

[31] *See* Almada & Radu, *supra* note 21, at 2.

[32] *See* Claudio Novelli et al., *A Robust Governance for the AI Act: AI Office, AI Board, Scientific Panel, and National Authorities*, 16 Eur. J. Risk Regul. 566 (2025) (U.K.).

[33] *See* Oskar J. Gstrein, Noman Haleem & Andrej Zwitter, *General-Purpose AI Regulation and the European Union AI Act*, Internet Pol'y Rev., Aug. 2024, at 1 (Ger.).

[34] *See* Marco Almada, *The EU AI Act in a Global Perspective*, Handbook on the Global Governance of AI (Furendal & Lundgren eds., Edward Elgar, forthcoming 2025), https://ssrn.com/abstract=5083993.

[35] *See* Nicoletta Rangone & Luca Megale, *Risks Without Rights? The EU AI Act's Approach to AI in Law and Rule-Making*, 16 Eur. J. Risk Regul. 1082, 1096 (2025) (U.K.).

[36] *See* Raluca Csernatoni, *The EU's AI Power Play: Between Deregulation and Innovation*, Carnegie endowment for int'l peace (May 20, 2025), https://carnegieendowment.org/research/2025/05/the-eus-ai-power-play-between-deregulation-and-innovation.

institutional structure.[37] For global observers, it could function more as a benchmark than a blueprint.

Given these complexities, the international influence of the E.U.'s A.I. Act remains uncertain. While its regulatory framework may inform global A.I. governance debates, its broader applicability hinges on whether other jurisdictions can reconcile the A.I. Act's approach with their systems. As countries grapple with their unique A.I. governance challenges, they face a critical choice: adopt elements of the E.U. model, tailor it to their context, or craft entirely new frameworks aligned with their priorities. Ultimately, the E.U.'s impact on global A.I. Regulation may depend less on the direct uptake of the A.I. Act and more on its ability to catalyse a broader dialogue, one that translates its core principles into adaptable foundations for convergence, rather than rigid templates for replication.

A critical element of A.I. governance is the institutional dimension: who oversees, who enforces, and with what authority and resources. Strong institutions do more than transmit rules: they determine whether regulation is effective. Weak or fragmented oversight can render even the most sophisticated frameworks ineffective. At the same time, well-designed and empowered bodies can ensure that A.I. governance operates not only in theory but in practice. It is precisely this institutional component—its design, capacities, and operational dynamics—that constitutes the central focus of this study.

1. GOVERNANCE FLEXIBILITY IN THE E.U. A.I. ACT: TAILORING INSTITUTIONAL MODELS TO NATIONAL REALITIES

The governance of A.I. at the global level remains fragmented across multiple international initiatives and regional frameworks. In addition to what was already mentioned above about the O.E.C.D. principle and the U.N.E.S.C.O. Recommendations,[38] the United Nations has recently established two key mechanisms for global A.I. governance: the Independent International Scientific Panel on A.I. and the Global Dialogue on A.I. Governance.[39] The Scientific Panel on A.I. will be composed of forty

[37] *See supra* note 33, at 14 (Ger.).
[38] *See supra* notes 4 and 5.
[39] *See* G.A. Draft Res. 79/118 (Aug. 18, 2025).

experts to assess A.I. risks and opportunities, and as stated by the UN Secretary-General, "will serve as a crucial bridge between cutting-edge [A.I.] research and policymaking".[40]

At the regional level, diverse approaches are observed. The E.U. adopted a more precautionary stance towards A.I. governance, as exemplified by the classification of risk levels and the implementation of stricter oversight on high-risk A.I. applications through the A.I. Act. Conversely, the United States [hereinafter U.S] predominantly relies on a market-driven regulatory framework, emphasising voluntary standards and self-regulation.[41]

The situation for Asia is constantly evolving due to a shift from soft to hard regulation, where the existing internet governance framework profoundly influences the A.I. governance.[42] Even though Europe was the first to adopt a comprehensive regulation on A.I., China was the first global superpower to specifically regulate generative A.I. involving multiple agencies, with the Cyberspace Administration of China playing a pivotal role alongside the Ministry of Information and Industry Technology.[43] Remaining in the context of governmental agencies and broadening the vision to the U.S., it can be noted that the agency-level implementation is the critical bottleneck in U.S. A.I. governance due to a lack of technical expertise, resource constraints, and leadership gaps.[44] The discourse on A.I. governance in Latin American countries, which forms the core of this study, particularly regarding the role of competent authorities in enforcing A.I. regulations, will be discussed further in the following sections. In this Section, we will keep the analysis focused on the E.U. approach, highlighting the current situation in specific E.U. Member States.

The A.I. Act's requirement for national enforcement bodies introduces three distinct institutional design paths: the creation of new, dedicated A.I. agencies; the designation of existing bodies; or the establishment of hybrid "competence centres" that combine centralised regulatory expertise with sector-specific knowledge.[45] These

[40] Press Release, United Nations, *Secretary-General Welcomes General Assembly Decision to Establish New Mechanisms Promoting International Cooperation on Governance of Artificial Intelligence*, UN Meetings Coverage and Press Releases sg/sm/2776 (Aug. 26, 2025), https://press.un.org/en/2025/sgsm22776.doc.htm.

[41] *See* Vikram Kulothungan & Deepti Gupta, *Towards Adaptive AI Governance: Comparative Insights from the U.S., EU, and Asia*, Arxiv (Apr. 1, 2025), http://arxiv.org/abs/2504.00652.

[42] *See* Jian Xu, Terence Lee & Gerard Goggin, *AI Governance in Asia: Policies, Praxis and Approaches*, 10 Commc'n Rsch. & Prac. 275 (2024) (Austl.).

[43] *See generally* Matt Sheehan, *China's AI Regulations and How They Get Made*, 24 Horizons: J. Int'l Rels. & Sustainable Dev. 108 (2023) (China); *see also* Hunter Dorwart et al., *Preparing for Compliance: Key Differences between EU, Chinese AI Regulations*, IAPP (Feb. 5, 2025), https://iapp.org/news/a/preparing-for-compliance-key-differences-between-eu-chinese-ai-regulations.

[44] *See* Christie Lawrence, Isaac Cui & Daniel Ho, *The Bureaucratic Challenge to AI Governance: An Empirical Assessment of Implementation at U.S. Federal Agencies*, 2023 AIES '23: Procs. 2023 AAAI/ACM Conf. on AI, Ethics, and Soc'y 606 (Can.).

[45] *See* Novelli et al., *supra* note 32, at 4.

alternatives not only reflect the layered and complex nature of E.U. governance but also underscore the significant challenges involved in translating the A.I. Act's multifaceted architecture to jurisdictions outside the E.U., due to structural differences among the various approaches taken globally to govern A.I. Nevertheless, this fragmentation could "pose challenges to global interoperability, ethical coherence, and policy coordination".[46]

One of the critical issues currently being debated in Europe is whether competent A.I. authorities will comprise the already established D.P.As. in each Member State or whether new regulatory agencies will need to be created to address the unique demands posed by A.I. technologies. In this regard, it is questioned whether, while D.P.As. "are well-versed in privacy issues", they "might not fully address A.I.'s broader impacts",[47] which include aspects such as algorithmic bias, accountability for A.I.-driven decisions, and the societal consequences of widespread A.I. deployment. This has raised a further question on whether D.P.As. should enforce the A.I. Act or not.[48] However, there is currently no standard approach to navigating these complexities, as we will explore in the subsequent paragraphs of this Section. In particular, we will focus on three countries in Europe (France, Italy, and Spain), whose approaches have differed since the first proposal of the E.U. A.I. Act was published in 2021. Indeed, the relevance of analysing Spain reside in its idea of establishing a new agency competent for A.I.; Italy, because of the significant actions of the Italian D.P.A. against A.I. systems even before the A.I. Act was officially published,[49] as well as the attempt to convince Italian government of being the most appropriate authority to deal with A.I. systems (see below); and France due the idea of the same Government to re-organise the current French D.P.A. also for A.I. matters.

The Council of State in France recommended maintaining the French data protection authority, *Commission Nationale de l'Informatique et de les Libertés* [National Commission of Information Technology and Freedoms] [hereinafter C.N.I.L.], as a key player in regulating A.I. A study, published on the thirtieth of August 2022,[50] proposed comprehensive reforms to transform C.N.I.L. into a national regulatory body responsible

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[46] *See* Kulothungan and Gupta, *supra* note 41.

[47] *See id.*

[48] *See* Joanna Mazur, Claudio Novelli & Zuzanna Choińska, *Should Data Protection Authorities Enforce the AI Act? Lessons from EU-Wide Enforcement Data* (June 12, 2025), https://papers.ssrn.com/abstract=5290513.

[49] *See* Garante per la protezione dei dati personali, *Intelligenza artificiale: il Garante blocca ChatGPT. Raccolta illecita di dati personali. Assenza di sistemi per la verifica dell'età dei minori*, Garante Privacy (Mar. 31, 2023) https://www.garanteprivacy.it:443/home/docweb/-/docweb-display/docweb/9870847.

[50] Le Conseil d'État, *Intelligence artificielle et action publique: construire la confiance, servir la performance*, Conseil d'État (Aug. 31, 2022), https://www.conseil-etat.fr/publications-colloques/etudes/intelligence-artificielle-et-action-publique-construire-la-confiance-servir-la-performance (Fr.).

for overseeing A.I. systems, including those used in the public sector. The authority's focus would be on protecting fundamental rights and liberties, promoting innovation, and ensuring public efficiency. In the E.U.'s regulatory framework governing A.I., the C.N.I.L. is set to play a comprehensive role, with responsibilities in data protection and oversight of A.I. systems. Its mission also involves significant coordination among regulatory bodies and other stakeholders involved in advancing AI systems. This model reflects a realignment of an existing agency rather than the establishment of a new one, acknowledging the intrinsic interrelationship between A.I. and personal data.

In Italy, on the other hand, the Data Protection Authority [*Garante per la protezione dei dati personali*] (Garante), sought to persuade the Government of the advantages in terms of both time and resources in assigning it responsibility in the field of A.I. It tried to do that by highlighting the close connection between data and A.I., as well as the independence that characterises the D.P.A.s, enshrined in Article 16 of the Treaty on the Functioning of the European Union [hereinafter T.F.E.U.] and Article 8 of the Charter of Fundamental Rights of the EU [hereinafter C.F.R.U.E.].[51] However, the Government submitted a proposal for a national law on A.I. [hereinafter Draft Law],[52] in which specific provisions are related to national competent authorities under the A.I. Act, distinct from the Garante. Indeed, Article 18 of the Draft Law identifies the *Agenzia per l'Italia Digitale* [Agency for Digital Italy] [hereinafter Ag.I.D.][53] and the *Agenzia Nazionale per la Cybersicurezza* [National Agency for Cybersecurity] [hereinafter A.C.N.] as the national competent authorities for A.I.,[54] two authorities with different roles and functions. In practice, Ag.I.D. is responsible for promoting innovation and the development of artificial intelligence, except for cybersecurity, the promotion of which will be the responsibility of A.C.N.[55] This latter, given its role as a cybersecurity agency, will be responsible for the oversight, including inspection and sanctioning activities, of artificial intelligence systems.[56] The governmental nature of these two agencies is clearly defined in paragraph 2 of Article 18, which outlines the coordination with other authorities under the Coordination Committee at the Presidency of the Council of Ministers. Furthermore, the information provided on Ag.I.D.'s website unambiguously

[51] Garante per la protezione dei dati personali, *Segnalazione al Parlamento e al Governo sull'Autorità per l'I.A.*, GPDP (Mar. 25, 2024), https://www.gpdp.it:443/web/guest/home/docweb/-/docweb-display/docweb/9996493 (It.).

[52] *See Disegno di Legge - Disposizioni e delega al Governo in materia di intelligenza artificiale*, (2024), Senato https://www.senato.it/service/PDF/PDFServer/DF/437373.pdf (It.).

[53] Trans. EN: Agency for Digital Italy.

[54] Trans. EN: Agency for National Cybersecurity.

[55] *See* Disegno di Legge - Disposizioni e delega al Governo in materia di intelligenza artificiale, *supra* note 52, article 18.1 (a).

[56] *Id.* article 18.1 (b).

identifies it as the Italian government agency responsible for the governance of A.I.[57] While Article 18(3) explicitly states that "the competencies, tasks, and powers of the [*Garante*] for the protection of personal data shall remain unaffected", this provision did not meet the [*Garante's*] anticipated outcomes before the official proposal of the Draft Law in Italy.

Among European countries, Spain has historically exerted significant influence and plays an important role in shaping regulatory developments in Latin America.[58] Spain has pioneered a distinct approach regarding its A.I. national competent authority: *Agencia Española de Supervisión de la Inteligencia Artificial* [Spanish Agency for the Supervision of Artificial Intelligence] [hereinafter A.E.S.I.A.].[59] The establishment of the A.E.S.I.A. in Spain officially commenced with Law 22/2021 of 28 December, concerning the General State Budget for 2022.[60] This law called upon the government to create a special agency through legislation. Subsequently, the constitutive Statute was approved with the passing of Royal Decree No. 729 on 22nd August 2023 (Statute),[61] and the Governing Council was constituted in December 2023.[62] It stands out as the first country to establish a legal framework for an AI authority operating independently of the D.P.A. This authority is envisioned as an agency that maintains a direct line of communication with the government. Indeed, all A.E.S.I.A.'s Governing Council members, except one, are linked to a Ministry.[63] Additionally, the President of A.E.S.I.A. is the Secretary of State for Digitalisation and Artificial Intelligence[64] and the Director of A.E.S.I.A. is effectively

[57] "*The Agency for Digital Italy (AgID) is the technical agency of the Presidency of the Council of Ministers that guarantees the achievement of the objectives of the Italian digital agenda, coordinating all Italian public admnistrations".* See the full definition https://www.agid.gov.it/en/agency.

[58] *See generally* Alexandre Veronese et al., *The Influence of European Union Personal Data Protection Standards in Latin America From the Perspective of Social Actors and Latin American Authorities*, UNIO - EU L.J., Dec. 20, 2023, at 118 (Port.). The European model of data privacy has been actively advanced in Latin America through the Ibero-American Data Protection Network, with Spain playing a key role in this process. On this matter, see Arturo J. Carrillo & Matías Jackson, *Follow the Leader? A Comparative Law Study of the EU's General Data Protection Regulation's Impact in Latin America*, 16 ICL J. 177, (2022) (Ger.). Spain is both a member of the Ibero-American Data Protection Network and serves as its Permanent Secretariat. *See also* Países RIPD, Red Iberoamericana de Proteccion de Datos, https://www.redipd.org/la-red/integrantes/paises.

[59] Trans. EN: Spanish Agency for the Supervision of Artificial Intelligence.

[60] Agencia Estatal Boletín Oficial del Estado, BOE-A-2021-21653 Ley 22/2021, de 28 de Diciembre, de Presupuestos Generales Del Estado Para El Año 2022, https://www.boe.es/buscar/act.php?id=BOE-A-2021-21653 (accessed May 2, 2024).

[61] Real Decreto 729/2023, de 22 de agosto, por el que se aprueba el Estatuto de la Agencia Española de Supervisión de Inteligencia Artificial, [Royal Decree 729/2023 of Aug. 22 approving the Statute of the Spanish Agency for Supervision of Artificial Intelligence], BOE-A-2023-18911 (Spain).

[62] *Se Constituye El Consejo Rector de La Agencia Española de Supervisión de La Inteligencia Artificial* [*The Governing Council of the Spanish Agency for the Supervision of Artificial Intelligence Is Constituted*], Gobierno de España. Ministerio de Economía, Comercio y Empresa, https://portal.mineco.gob.es/en-us/comunicacion/Pages/071223_Se_constituye_Consejo_Rector_Agencia_Espanola_Supervision_IA.aspx (last visited May 3, 2024) (Spain).

[63] Real Decreto 729/2023, art. 15 of the Statute.

[64] *Id., article 12.*

considered a General Director of the State Administration.[65] Thus, similar to the Italian agency, Spain intends to regulate and govern A.I. through government intervention. The reasons why Spain acted in this way also lay in the fact that the establishment of A.E.S.I.A. was strategically aligned with its E.U. Council Presidency in the second half of 2023.[66] The Spanish presidency made finalising the A.I. Act one of its main priorities, and having an established A.I. regulatory authority enhanced Spain's credibility and influence in the negotiations.

Despite the different actions taken at the national level as observed above, it is crucial to recognise the emphasis placed by some [Data Protection Authorities] [hereinafter D.P.A.s] on the independence of A.I. regulatory bodies (i.e., Italy). These authorities argue that protecting fundamental rights must be the highest priority, necessitating impartial A.I. governance.[67] This perspective highlights the need for AI regulation to prioritise safeguarding fundamental rights, ensuring that A.I. authorities operate independently and effectively in this role.

Therefore, the insistence on the independence of A.I. regulatory bodies reflects the essential goal of protecting fundamental rights in A.I. governance. However, A.I. governance also implies government involvement in regulating AI, which is fundamentally linked to their responsibility to govern A.I. effectively, with consequences for their economic development in both the E.U. and international markets. *De facto*, the reference to national competent authorities in Article 70 of the A.I. Act pertains to Market Surveillance Authorities [hereinafter M.S.A.s] and Notifying Authorities. These authorities are more closely connected to market regulation and play a relevant role in the development of the internal market and the free movement of goods.[68] Indeed, their role is not new in EU Regulations, given that they are the primary authorities for product safety regulation,[69] and the A.I. Act could be considered a medley of fundamental rights

[65] *Id., article 23.*

[66] *See* European Parliament Press Release, Spanish Presidency debriefs EP committees on priorities (Sept. 8, 2023), https://www.europarl.europa.eu/news/it/press-room/20230904IPR04608/spanish-presidency-debriefs-ep-committees-on-priorities.

[67] *See* European Data Protection Supervisor (EDPS) and European Data Protection Board (EDPB), Joint Opinion 5/2021 on the Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) (June 18, 2021), https://www.edps.europa.eu/node/7140_en. *See also*, European Data Protection Board (EDPB), Statement 3/2024 on Data Protection Authorities' Role in the Artificial Intelligence Act Framework (July 16, 2024), https://www.edpb.europa.eu/system/files/2024-07/edpb_statement_202403_dpasroleaiact_en.pdf.

[68] To have complete overview of the EU product rules and the roles of competent authorities involved, *see* Commission Notice, *The 'Blue Guide' on the implementation of EU product rules 2022*, 2022 O.J. (C 247).

[69] Also in the context of the AI Act, Art. 3 defines MSAs as "the national authority carrying out the activities and taking the measures pursuant to Reg. (EU) 2019/1020", i.e., Reg. (EU) 2019/1020 of the European Parliament and of the Council of June 20, 2019 on market surveillance and compliance of products and amending Directive 2004/42/EC and Regulations (EC) No. 765/2008 (EU) No. 305/2001, 2019 O.J. (L 169) 1.

and product safety regulation,[70] taking into account its legal basis, Articles 16 and 114 T.F.U.E. Although the focus of this study is mainly on the strict connection between data protection and AI regulations, and consequently on the role of D.P.A.s in AI regulations in the E.U. and in Latin American countries, the relevance of this aspect deserves brief mention.

2. LATIN AMERICA'S RECEPTION OF THE EUROPEAN DATA PROTECTION MODEL: A PRECEDENT FOR GOVERNING DATA-DRIVEN TECHNOLOGIES

Data-governance regulations are central in the discourse and formulation of legal frameworks governing data-driven technologies, particularly A.I.[71] These frameworks lay down the legal foundations that define the conditions under which data may be collected, processed, and used, fostering responsible and trustworthy technological developments. Within this broader governance landscape, data protection regulations establish the legal baseline to ensure A. I systems handling personal data operate fairly, transparently, and accountably, while addressing the risks of discrimination, manipulation, and pervasive surveillance arising from the integration of A.I. and big data, including A.I.-driven inferences and profiling.[72]

The governance of emerging technologies depends on data-protection regulations that function as a fundamental, technology-neutral framework, meaning that the same regulatory principles apply across different technologies and prevent the creation of isolated regulatory silos.[73] Whether applied to A.I., big data analytics, or other digital systems, these regulations set out principles and safeguards that guide both the design and deployment of data-driven tools. These baseline standards render data protection indispensable for governing innovation and maintaining a careful balance between technological advancement and the protection of individual rights.

[70] *See* Marco Almada & Nicolas Petit, *The EU AI Act: A Medley of Product Safety and Fundamental Rights?*, Robert Schuman Centre for Advanced Studies Research Paper No. 2023/59 (Oct. 18, 2023), https://dx.doi.org/10.2139/ssrn.4308072.

[71] *See* Stefaan Verhulst & Friederike Schüür, *Interwoven Realms: Data Governance as the Bedrock for AI Governance*, MEDIUM (Nov. 20, 2023), https://medium.com/data-policy/interwoven-realms-data-governance-as-the-bedrock-for-ai-governance-ffd56a6a4543.

[72] *See* Giovanni Sartor & Francesca Lagioia, *The Impact of the General Data Protection Regulation (GDPR) on Artificial Intelligence*, European Parliamentary Research Service (June 2020), https://www.europarl.europa.eu/RegData/etudes/STUD/2020/641530/EPRS_STU(2020)641530_EN.pdf.

[73] *See* Winston J. Maxwell & Marc Bourreau, *Technology Neutrality in Internet, Telecoms and Data Protection Regulation*, 21 COMPUT. & TELECOMM. L. REV. 1, 1 (2015).

As A.I. systems increasingly rely on large-scale, varied datasets for training and decision-making, ensuring their design and operation align with established data protection principles becomes ever more pressing. Core principles such as lawfulness, purpose limitation, data minimisation, transparency, and accountability act as essential safeguards against the risks associated with A.I. models, many of which stem from how data is collected, processed, and used.[74] In this context, data-processing rules are a structural and normative cornerstone of A.I. regulations. Alignment between A.I.-specific regulatory frameworks and pre-existing data protection regimes is indispensable,[75] not only to guarantee legal certainty but also to uphold individual rights and support the responsible development of emerging technologies.

Data protection laws in Latin America have been shaped by two interrelated factors: the region's political history[76] and the influence of European data protection sources and regulatory frameworks,[77] including those of the Council of Europe. Historical experiences with authoritarianism and the misuse of personal information created an acute awareness of the need to protect individual privacy, establishing a political and social context in which data protection became a pressing concern.[78] At the same time, European norms, first embodied in the Data Protection Directive[79] and later reinforced through the G.D.P.R.,[80] exerted a strong transnational influence known as the Brussels Effect. This influence provided both a practical template and a normative

[74] *See* Information Commissioner's Office, *Regulating AI: The ICO's Strategic Approach* (2024), https://ico.org.uk/media2/migrated/4029424/regulating-ai-the-icos-strategic-approach.pdf.

[75] *See* Belgian Data Protection Authority, *Artificial Intelligence Systems and the GDPR: A Data Protection Perspective* (Dec. 2024), https://www.autoriteprotectiondonnees.be/publications/artificial-intelligence-systems-and-the-gdpr—a-data-protection-perspective.pdf.

[76] Data privacy has long been sensitive in Latin America, where histories of authoritarian rule have allowed governments to intrude under the guise of national security. *See* Luisa Parraguez Kobek & Erik Caldera, *Cyber Security and Habeas Data: The Latin American Response to Information Security and Data Protection,* 24 Oasis 109 (2016).

[77] *See* Carrillo & Jackson, *supra* note 58, at 178.

[78] The legacy of totalitarian regimes led to the incorporation of the endemic Habeas Data rights into many South American constitutions. Habeas Data, which grants individuals the right to access, correct, and update their personal data, was adopted as a democratizing tool to counter authoritarian regimes. *See* Andrés Guadamuz, *Habeas Data vs. the European Data Protection Directive*, J. Info. L. & Tech., Nov. 2001, at 1. *See* Katitza Rodriguez & Veridiana Alimonti, *A Look-Back and Ahead on Data Protection in Latin America and Spain*, Elec. Frontier Found. (Sept. 21, 2020), https://www.eff.org/deeplinks/2020/09/look-back-and-ahead-data-protection-latin-america-and-spain. The Brazilian Constitution inaugurated habeas data in the Global South, responding to the secrecy and arbitrariness with which the dictatorship collected, stored, and used personal data. On this matter *see* Marc T. Gonzalez, *Habeas Data: Comparative Constitutional Interventions from Latin America Against Neoliberal States of Insecurity and Surveillance,* 90 Chi.-Kent L. Rev. 641, 651 (2015).

[79] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281).

[80] 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 (General Data Protection Regulation), 2016 O.J. (L119) 1.

benchmark, guiding Latin-American countries in designing legal frameworks that align domestic privacy protections with internationally recognised principles and fundamental rights.[81]

This European influence was not abstract. It materialised through the E.U.'s harmonised framework, beginning with Directive 95/46/EC (1995),[82] which established the first comprehensive system for regulating the collection, processing, and transfer of personal data across Member States. Harmonising standards facilitated cross-border data flows within the E.U. single market and provided a model that influenced emerging data protection frameworks in other regions, including Latin America.[83] The adoption of European-style comprehensive data protection laws in the region unfolded in two waves. The first followed the 1995 Data Protection Directive, with Chile (1999), Argentina (2000), and Paraguay (2000) enacting legislation. The second wave came in the next decade, as Uruguay (2008), Mexico (2010), Costa Rica (2011), Peru (2011), Nicaragua (2012), and Colombia (2012) introduced new laws.[84]

Council of Europe's Convention 108,[85] the first binding international treaty on data protection, has also significantly influenced Latin American data protection.[86] For countries with limited resources and experience in privacy, the Convention has offered essential guidance and contributed to the strengthening of legal frameworks and governance across the region.[87] In this context, three Latin-American countries (Mexico,

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[81] Certain Latin American countries have recognised data protection as a stand-alone right from the right to privacy. For example, the Mexican Constitution enshrines the right to privacy in Article 16, paragraph 1, and the right to data protection in paragraph 2. In Chile, Law No. 21.096, enacted in 2017, amended Article 19, No. 4 of the Constitution to establish the protection of personal data as an independent fundamental right. Similarly, the Brazilian Constitution guarantees the right to privacy and private life in Article 5, section X, along with a right to data protection in section LXXIX.

[82] Directive 1995/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281).

[83] Parraguez Kobek & Caldera, *supra* note 76, at 114 . It should be noted that this process was not homogeneous. Brazil lacked a comprehensive framework for protecting personal data before its General Data Protection Law No. 13,709/2018 (Lei Geral de Proteção de Dados or LGPD) came into effect on August 16, 2020. Its data protection strategy was mainly siloed, *cf.* Pablo Trigo Kramcsák, *Personal Data Protection and Data Transfer Regulation in Brazil* 1-29, 7 (Brussels Priv. Hub, Working Paper Vol. 10 No. 2, 2024). Although Chile's privacy law, Law No. 19,628 of 1999, was enacted after Directive 95/46/EC, the Directive 95/46/EC played no discernible role in its legislative deliberations. Instead, the law reflects a direct regulatory lineage from Spain's Organic Law 5/1992 on the automated processing of personal data. On this matter, *see* Pablo Viollier, El Estado de la Protección de Datos Personales en Chile [The State of Personal Data Protection in Chile] 8 (2017) (Chile).

[84] Carrillo & Jackson, *supra* note 58, at 178.

[85] Council of Europe, *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*, ETS No. 108, (Jan. 28, 1981), https://rm.coe.int/1680078b37.

[86] *See* Parraguez Kobek & Caldera, *supra* note 83, at 114.

[87] *See* Christian Pauletto, *Options Towards a Global Standard for the Protection of Individuals with Regard to the Processing of Personal Data*, Comput. L. & Sec. Rev., Apr. 2021, at 1, 12.

Uruguay, and Argentina) have formally acceded to the Convention.[88] Accession reflects a commitment to internationally recognised principles, thereby embedding domestic legislation within a broader framework of human rights and privacy protection.

With the enactment of the G.D.P.R., another wave of data protection laws took place in the region.[89] Brazil and Ecuador exemplify this trend, with Brazil adopting the *Lei Geral de Proteção de Dados Pessoais* [hereinafter L.G.P.D.] in 2018 and Ecuador following in 2021.[90] In 2018, Uruguay amended its 2008 data protection law to integrate core G.D.P.R. elements.[91] Chile amended its 1999 data privacy law in 2024, also following the G.D.P.R. model.[92]

The influence exerted by the possibility of facilitating cross-border data flows with Europe cannot be disregarded as one of the reasons for following such a regulatory approach, either through accession to Convention 108 or recognition as a third country offering an adequate level of protection through a European Commission decision.[93] However, the reality is that only three countries in the region (Mexico, Argentina, and Uruguay) have acceded to Convention 108 (Argentina and Uruguay have signed Convention 108+), and two countries have an adequacy decision from the E.U. (Argentina, Decision 2003/490/EC; and Uruguay, Implementing Decision 2012/484/EU).

It is worth noting the creation in 2003 of the Ibero-American Data Protection Network [hereinafter R.I.P.D.], which has played a central role in advancing the European model of data privacy,[94] with Spain at the forefront of this process,[95] issuing standards and recommendations that Latin American countries could adopt. From the regulatory perspective, one of the main milestones in the work of the R.I.P.D. is the approval in June 2017, in the framework of the XVI Ibero-American Meeting in Santiago de Chile, of the Standards for Personal Data Protection for Ibero-American States,[96] which the European

[88] *See* Eduardo Bertoni, *Convention 108 and the GDPR: Trends and Perspectives in Latin America*, Comput. L. & Sec. Rev., Apr. 2021, at 1.
[89] *See* Carrillo & Jackson, *supra* note 58, at 178.
[90] *Id.* at 240.
[91] *Id.* at 205.
[92] Lucas MacClure et al., Una introducción a la nueva Ley sobre Protección de Datos Personales y su relevancia para el Derecho de la Libre Competencia [An Introduction to the New Law on Personal Data Protection and Its Relevance for Competition Law] 26 (2024) (Chile).
[93] Alexandre Veronese et al., *The Concept of Personal Data Protection Culture from European Union Documents: A "Brussels effect" in Latin America?*, 9 UNIO - EU L.J. 58, 78 (2023) (Belg.).
[94] *See* Carrillo & Jackson, *supra* note 58, at 196.
[95] *See* Elías Chavarría-Mora, *(Lack of) Patterns in Commitment: Data Protection in the Latin America and Caribbean Personal Data Protection Laws*, Soc. Media + Soc'y, Apr-June 2025, at 1, 2.
[96] Ibero-American Network on Data Protection, *Standards for Personal Data Protection for the Ibero-American States* (June 20, 2017), https://www.redipd.org/sites/default/files/2022-04/standars-for-personal-data.pdf.

Commission has supported.[97] These standards constitute a set of guidelines that may contribute to the issuance of regulatory initiatives for the protection of personal data in the Ibero-American region, which encompasses those countries that do not have these regulations yet, or, in the case where they may serve as a reference for the modernisation and updating of existing legislation. In this sense, the primary purpose of these standards is to establish common principles and rights for the protection of personal data, thereby establishing homogeneous rules across the Ibero-American region. The preamble to the Standards for Personal Data Protection for Ibero-American States cites Convention 108 and the G.D.P.R. as key international instruments influencing its development. It acknowledges the G.D.P.R. as a benchmark for crafting national data protection laws in Ibero-America.

This evolution shows more than a technical effort to harmonise data protection rules; it reflects the gradual embedding of European approaches within Latin American digital regulatory thought. Grounding privacy rights in common principles and aligning national laws with international benchmarks such as Convention 108 and the G.D.P.R. has established the basis for a broader culture of governance over information technologies. That orientation extends well beyond traditional data protection, reaching domains where personal data drives technological innovation, most prominently A.I. The parallels are striking. Both regimes govern cross-border markets, aim to balance innovation with the protection of individual rights, and confront persistent challenges of accountability, transparency, and fairness. In this light, the regulatory trajectory established through data protection does more than offer a template; it lays the groundwork for A.I. governance. It furnishes policymakers with conceptual tools and institutional practices that can be recalibrated for new technological contexts, ensuring that the principles of data governance continue to shape the design, deployment, and oversight of A.I. systems.

Building on this regulatory trajectory, it is possible to underscore the relevance of the E.U. A.I. framework for Latin America, particularly in contexts where A.I. systems intersect with personal data.[98] Data protection principles are not simply legal obligations. They form the foundation for robust data governance practices that support the design, development, and deployment of A.I. systems. Clear rules on data collection, processing, and usage help ensure that A.I. operations incorporate transparency, accountability, and controllable bias mitigation from the very beginning. In B2C environments, where personal data plays a central role in A.I. functionality, the

[97] Superintendencia de Industria y Comercio (SIC), *Colombia and the Ibero-American Data Protection Network (RIPD)* (July 24, 2025), https://sedeelectronica.sic.gov.co/international-relations/colombia-and-iberoamerican-data-protection-network-ripd.

[98] *See* Siegmann & Anderljung, *supra* note 19, at 70.

application of these rules provides both a conceptual and practical framework for regulating A.I., guiding policymakers and developers toward responsible and trustworthy systems.[99]

A factor that contributes to this influence is the phenomenon identified by Papakonstantinou and De Hert as "G.D.P.R. mimesis." This concept captures how new regulatory frameworks replicate the structure, principles, and institutional architecture of the G.D.P.R. The G.D.P.R. has become a cornerstone of data protection law, yet its overwhelming influence has constrained legislators' creativity in regulating digital technologies. Its dominance is such that lawmakers often feel compelled to adopt its protective approach when introducing ambitious regulatory frameworks with broad societal impact.[100]

Viewed through this lens, A.I. legislation in Latin America is emerging within a data protection-infused framework, as the rules governing personal data do not merely coexist with A.I. regulations but actively shape them. Following the G.D.P.R.-inspired logic of mimesis allows policymakers to ensure that A.I. governance is not only legally coherent but also practically enforceable, supporting the responsible development and use of A.I. technologies. In this sense, the E.U. model could function as both a template and a touchstone, demonstrating how data protection principles can provide the foundation for the complex regulatory architecture necessary for effective A.I. oversight.

3. TRACING THE RECEPTION OF THE EUROPEAN A.I. REGULATORY APPROACH IN LATIN AMERICA THROUGH DATA PROTECTION PROVISIONS

Some of the first regulatory efforts to address data-driven A.I. systems in Latin America have been closely linked to the evolution of data protection law. Because A.I. systems often process personal data, existing data protection provisions provide both a conceptual and practical foundation for regulating these technologies. Examining these A.I.-related data protection rules is therefore essential, as they have already been incorporated into the legal frameworks of certain Latin American countries, serving as a point of entry into European-inspired approaches to A.I. governance. Understanding this intersection helps clarify why data protection norms continue to shape the emerging regulatory landscape for A.I. in the region.

[99] *See* Pablo Trigo Kramcsák, *Can Legitimate Interest Be an Appropriate Lawful Basis for Processing Artificial Intelligence Training Datasets?*, COMPUT. L. & SEC. REV., Apr. 2023, at 1 (U.K.).
[100] *See* Papakonstantinou & de Hert, *supra* note 18, at 1.

Through their next-generation data protection laws that follow the G.D.P.R. model, some Latin American countries are undertaking the first regulatory attempts to address specific challenges related to the use of A.I. systems, as we will explore further in the following section. Indeed, the G.D.P.R. and its enforcement by D.P.A.s[101] play a relevant role in mitigating some A.I. effects, particularly when these systems involve processing personal data. A.I. has been intertwined with the development of data protection law from its inception, whose adaptive nature ensures its continued relevance in addressing contemporary A.I.-related issues.[102] As a consequence, A.I. is addressed within the scope of the G.D.P.R., aligning with its existing conceptual framework.[103]

The G.D.P.R. provides rules for big data processing, profiling, and automated decision-making systems. Among other aspects, the G.D.P.R. grants individuals (in Article 22) the right to know when automated decision-making, including profiling, is being used to make decisions that have legal or similarly significant effects on them.[104] It also grants them the right to obtain meaningful information about the logic involved and the consequences of such processing. Individuals also have the right to object to such processing and request human intervention.

Drawing on these foundations, some Latin American countries are translating G.D.P.R. standards into domestic frameworks, adapting them to local contexts while preserving core protections. The G.D.P.R.'s rules on automated decision-making, profiling, and data subject rights provide a conceptual blueprint for regulating A.I. systems that process personal data. These provisions demonstrate how data protection law functions as the initial point of regulatory engagement with A.I., providing concrete safeguards against algorithmic harms. Examining national implementations, such as those in Brazil, illustrates how these A.I.-related norms are operationalised, reflecting both alignment with European rules and adaptations to local legal and social priorities.

[101]*See* Gabriela Zanfir-Fortuna, *How Data Protection Authorities Are De Facto Regulating Generative AI*, Future Of Privacy Forum Blog (Sept. 12, 2023), https://fpf.org/blog/how-data-protection-authorities-are-de-facto-regulating-generative-ai/.

[102]*See* Gabriela Zanfir-Fortuna, *Why data protection legislation offers a powerful tool for regulating AI*, LSE: EUROPP Blog (Febr. 10, 2025), https://blogs.lse.ac.uk/europpblog/2025/02/10/why-data-protection-legislation-offers-a-powerful-tool-for-regulating-ai/(U.K.).

[103]*See* Sartor & Lagioia, *supra* note 72.

[104]Article 22 of the GDPR builds on Article 15 of the Data Protection Directive, which focused on decisions made solely by automated means. On this matter, *see* Olivia Tambou, *Art. 22: Automated Individual Decision-making, Including Profiling*, General Data Protection Regulation: Article-by-Article Commentary 525 (Indra Spiecker gen. Döhmann et al. eds., 2023) (Ger.).

Brazil's General Data Protection Law[105] stipulates in Article 20 that data subjects have the right to request the review of decisions made solely automated processing of personal data affecting their interests, including decisions intended to define their personal, professional, consumer, and credit profiles, or aspects of their personality. Additionally, if requested, the controller shall provide clear and adequate information on the criteria and procedures used for automated decision-making, subject to commercial and industrial secrecy. Finally, the national authority may audit to verify discriminatory aspects in the automated processing of personal data.[106]

Following years of legislative deliberation in Chile, the 1999 Personal Data Protection Law (Law No. 19.628, Law on Protection of Private Life) was comprehensively updated with the enactment of Law No. 21.719, published in the Official Gazette in December 2024.[107] This new legislation marks a substantial reform of the national data protection framework, bringing it closer to international standards and addressing emerging challenges in digital governance. The principles and substantive rules of the G.D.P.R. have strongly influenced the amendment process. In this vein, the new Personal Data Protection Law establishes in Article 8 bis that data subjects have the right to object to and not be subject to decisions based on automated processing of their data, including profiling, that produces legal effects or significantly affects them, except when the decision is necessary for the conclusion or performance of a contract between the data subject and the controller; when data subjects give their consent; or when provided by law (under certain safeguards). In any case, the controller must adopt the necessary measures to ensure the rights and freedoms of data subjects, their right to information and transparency, the right to obtain an explanation, the right to human intervention, the right to express their point of view, and the right to request a review of the decision.

Given the preceding, Brazil and Chile, having enacted next-generation data protection laws inspired by the GDPR, are beginning to incorporate regulatory measures

[105]*See* https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/l13709.htm. For unofficial English translation, *see* https://cyberbrics.info/wp-content/uploads/2020/02/The-Brazilian-LGPD-English-Version.pdf, translated Luca Belli, Laila Lorenzon and Luã Fergus. (Braz.).

[106]Brazil's data protection authority (ANPD) published Technical Note No. 12/2025 on 15 May 2025 summarising public input in relation to the establishment of interpretative parameters for the application of Article 20 LGPD, https://www.gov.br/anpd/pt-br/acesso-a-informacao/participacao-social/outras-acoes/documentos/ts-06-2024-nt-12-2025-consolidacao-das-contribuicoes.pdf/view (accessed Aug. 19, 2025) (Braz.).

[107]Ley Núm. 21.719: Regula la Protección y el Tratamiento de los Datos Personales y Crea la Agencia de Protección de Datos Personales, https://www.bcn.cl/leychile/navegar?idNorma=1209272 (accessed Sept. 12, 2025) (Chile).

that address specific uses and effects of A.I. systems.[108] Although this first regulatory attempt is sectoral and not comprehensive, it cannot be ignored that it is framed within the European vision for regulating digital technologies and presents an approach that seeks to harmonise its various regulations. It should be noted that the provisions of the A.I. Act on the processing of personal data do not overlap with the rules of the G.D.P.R. "The A.I. Act and the G.D.P.R. are bound to work in tandem – they are both grounded on Article 16 T.F.E.U. and they have many areas where they complement each other, as well as areas where they could be better coordinated so that both their goals are achieved".[109] This scenario, in some way, could contribute to framing the regional discussion around comprehensive A.I. laws using the European framework as a model.

In this evolving regulatory landscape, a closer examination of G.D.P.R. mimesis reveals how data protection logic shapes A.I. regulation. Its influence spans high-level principles, legislative structure, and oversight mechanism design. Definitional mimesis appears in the use of familiar G.D.P.R. terminology and the introduction of new actors who create a regulatory system reminiscent of the G.D.P.R. Substantive mimesis is evident in provisions such as the principle of accountability, which clearly reflects G.D.P.R. influence. Institutional mimesis emerges through the establishment of cooperation mechanisms, coordination procedures, and risk assessment requirements, alongside supervisory authorities at the Member State level. Together, these dimensions illustrate how G.D.P.R.-inspired logic informs A.I. governance, fostering transparency, accountability, and bias mitigation across A.I. systems.[110]

It is worth noting that the R.I.P.D. published the "General Recommendations for Data Processing in Artificial Intelligence" in 2019.[111] These recommendations are aimed at developers of A.I. systems, guiding them from the design phases to ensure compliance

[108]It is also worth noting that Ecuador's Organic Law on the Protection of Personal Data, enacted in 2021, establishes in Article 20 the right not to be subject to a decision based solely or partially on automated processing, following a formulation similar to that of Article 22 of the GDPR. *Cf. See* Ecuador, Ley Orgánica de Protección de Datos Personales (May 26, 2021), https://www.finanzaspopulares.gob.ec/wp-content/uploads/2021/07/ley_organica_de_proteccion_de_datos_personales.pdf (accessed Aug. 19, 2025) (Ecuador) Uruguay's data protection law, Ley 18.331 (2008), explicitly grants individuals the right to object to decisions based solely on automated processing (Art. 16). The same provision ensures access to information about the logic and criteria underlying such AI-driven decisions. On this matter, *see* Alexandre Veronese & Amanda Nunes Lopes Espiñeira Lemos, *Regulatory Paths for Artificial Intelligence in Latin American Countries with Data Protection Law Frameworks: Limits and Possibilities of Integrating Policies*, Revista Latinoamericana de Economía y Sociedad Digital, Aug. 2021, at 1, 13 (Arg.).

[109]*See* Gabriela Zanfir-Fortuna, *GDPR and the AI Act Interplay: Lessons from FPF's ADM Case Law Report*, Future of Privacy Forum (Feb. 27, 2024), https://fpf.org/blog/gdpr-and-the-ai-act-interplay-lessons-from-fpfs-adm-case-law-report/.

[110]*See* Papakonstantinou & de Hert, *supra note* 18, at 48-49.

[111]*See General Recommendations for the Processing of Personal Data in Artificial Intelligence*, Red Iberoamericana de Proteccion de Datos, https://www.redipd.org/en/documents/guide-general-recommendations-processing-personal-data-ai.

with personal data protection regulations. This approach was reflected in May 2023, when the R.I.P.D. authorities initiated a coordinated supervisory action concerning the ChatGPT service, focusing on its data processing activities.[112]

4. EMERGING REGULATORY A.I. TRENDS IN LATIN AMERICA

While the A.I. Act's regulatory structure has close alignment with the E.U.-specific institutional structures, posing significant barriers to its transposition beyond the Union's jurisdiction,[113] since its entry into force on the first of August 2024, the A.I. Act has resonated in Latin America, prompting these countries to discuss the necessity of regulating the use of artificial intelligence and how to do so effectively.

4.1. NATIONAL PLANS AND STRATEGIES

From the outset, it is evident that the Latin American region has been actively formulating national A.I. strategies to govern the adoption and management of A.I. technologies. The following analysis will examine the region's initiatives chronologically.[114]

Mexico was one of the first Latin American countries to raise awareness of the need to develop an artificial intelligence national strategy, launching a report in March 2018.[115] Yet the change in the presidential administration in 2018 led to a pause in the plan's development. In the following year, Argentina, Uruguay, and Colombia launched national A.I. strategies. The Argentinian National Plan for 2019-2029, which started to be crafted in 2018, primarily focuses on enhancing state productivity,[116] while both

[112]*See Las autoridades de la Red Iberoamericana de Protección de Datos Personales inician una acción coordinada en relación con el servicio ChatGPT*, RED IBEROAMERICANA DE PROTECCION DE DATOS (May 8, 2023) https://www.redipd.org/noticias/autoridades-red-iberoamericana-de-proteccion-de-datos-personales-inician-accion-chatgpt. To date, there has been no other official initiative that could assess the impact of these Recommendations.

[113]*See* Greenleaf, *supra* note 30, at 4.

[114]This section examines initiatives across Latin American countries, excluding the Caribbean.

[115]*See* EMMA MARTINHO-TRUSWELL ET AL., TOWARDS AN AI STRATEGY IN MEXICO: HARNESSING THE AI REVOLUTION (2018) (U.K.).

[116]*See* Presidencia de la Nación, *Plan Nacional de Inteligencia Artificial*, https://oecd-opsi.org/wp-content/uploads/2021/02/Argentina-National-AI-Strategy.pdf (Arg.).

Uruguay's[117] and Colombia's[118] plans, launched in the same year, prioritise the transformation of the public sector through A.I. initiatives.

In 2021, Brazil introduced its A.I. Strategy, emphasising ethical principles, governance frameworks, and innovation brought by A.I.[119] In the same year, Chile also published its plan, integrating the tenets of human rights and sustainable development.[120] Conversely, Peru's 2021-2026 strategy aspires to situate the country as a leader in regional A.I. advancements[121] while Panama is currently engaged in discussions regarding its own A.I. strategy.

In October 2024, the High-Level Authorities Summit on A.I. Ethics held in South America and the Caribbean culminated in the Declaration of Montevideo, which reaffirms a commitment to upholding human rights, democracy, and the sustainable development of A.I. technologies.[122] The summit also led to the approval of a regional A.I. Roadmap delineating five priority areas: governance and regulation, talent development, the protection of vulnerable groups, environmental sustainability, and infrastructure enhancement. It is noteworthy, however, that not all South American nations were represented at the summit, with official delegations from selected countries, including Brazil, Chile, Colombia, and Peru.

4.2. LEGISLATIVE ACTIONS

While Latin American countries have been active in publishing national strategies, they have yet to approve comprehensive bills to regulate A.I., though various proposals have emerged.

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[117] *See* Agencia de Gobierno Electrónico y Sociedad de la Información y del Conocimiento (Agesic), *Estrategia de Inteligencia Artificial para el Gobierno Digital* (2020), https://www.gub.uy/agencia-gobierno-electronico-sociedad-informacion-conocimiento/comunicacion/publicaciones/estrategia-inteligencia-artificial-para-gobierno-digital/estrategia (Uru.).

[118] *See* Ministerio de Ciencia, Tecnología e Innovación, *Hoja de Ruta para la Adopción Ética y Sostenible de la Inteligencia Artificial en Colombia* (2024), Hoja de Ruta AI (PDF) (Colom.).

[119] *See Estratégia Brasileira de Inteligência Artificial (EBIA)* (2021), https://www.gov.br/mcti/pt-br/acompanhe-o-mcti/transformacaodigital/estrategia-brasileira-de-inteligencia-artificial (Braz.).

[120] *See* Ministerio de Ciencia, Tecnología, Conocimiento e Innovación, *Política Nacional de Inteligencia Artificial* (2021), https://minciencia.gob.cl/uploads/filer_public/bc/38/bc389daf-4514-4306-867c-760ae7686e2c/documento_politica_ia_digital_.pdf (Chile).

[121] *See* Sergio Vélez Maldonado, *Estrategia Nacional de Inteligencia Artificial en Perú: Un Análisis Exhaustivo*, FuturIA (July 7, 2024), https://futuria.substack.com/p/estrategia-nacional-de-inteligencia-31e.

[122] *See* Declaration Of Montevideo (2024), https://www.gub.uy/agencia-gobierno-electronico-sociedad-informacion-conocimiento/sites/agencia-gobierno-electronico-sociedad-informacion-conocimiento/files/documentos/noticias/EN%20-%20Montevideo%20Declaration%20approved.pdf [https://parlamentomercosur.org/innovaportal/file/12593/1/parlandino.pdf].

The first identified legal initiative to regulate A.I. in the region was taken by Peru. In July 2023, Law No. 31814 was approved, aiming to promote the use of A.I. in favour of the economic and social development of the country.[123] Yet, three other proposals regarding A.I. are currently pending. None of them aims to comprehensively regulate the technology, as the EU's A.I. Act does. Bill of Law No. 07651/2023-CR, introduced in April 2024, proposes to regulate the use of algorithms and AI systems for real-time vehicle recognition and for tampered license plates. The second proposal, No. 2338/2023: 05182/2022, seeks to promote the use of A.I. in Peru's ground transportation system, which has been discussed since its introduction in May 2023. The third proposal, No. 07033/2023, aims to establish a general framework to regulate A.I. in the country, adopting a risk-based approach similar to the A.I. Act.[124] It designates the task of supervising A.I. systems to the Government Agency of Digital Transformation (*Secretaría de Gobierno y Transformación Digital de la Presidencia del Consejo de Ministros*), which will inspect, investigate. Audit A.I. systems, create a public registry, receive complaints, and prohibit the deployment of A.I. systems that violate the proposed law.

Argentina has followed a similar path. The country has not passed any regulations on the topic, but various proposals have been introduced ,demonstrating varying levels of influence from the EU's A.I. Act. On June 4, 2023, Morales Gorleri, a member of the opposition party, introduced PL 2504/2023 to the House of Representatives, a comprehensive framework for A.I. regulation aimed at establishing measures to promote the ethical development of A.I., protect human rights, ensure transparency and accountability, and foster innovation. On the eighth of August 2023, Pamela Calletti (member of the party at the government) introduced PL 3161/2023 to the House of Representatives. This alternative bill establishes a governmental body to oversee and advise on A.I. policy, composed of public officials to promote A.I. research, ethics, and public awareness. Finally, on the fourteenth of August 2023, Senator Juan Carlos Romero, member of the Justicialist Party, introduced PL 1743/2023 to the Senate. Compared with other regulations, Romero's proposal most closely resembles the EU's A.I. Act. It aims to establish controls and guiding principles for the development, implementation, and use of A.I. systems to protect human dignity, human rights, and the well-being of people by defining different risk levels for A.I. systems, including "limited risk," "minimal or no risk," "high risk," and "unacceptable" systems.[125]

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[123] *See* Congreso de la República del Perú, *Ley N.º 31814, Ley que promueve el uso de la inteligencia artificial en favor del desarrollo económico y social del país* [Law No. 31814, Law Promoting the Use of Artificial Intelligence for the Economic and Social Development of the Country] (July 5, 2023) (Peru).

[124] *See* Proyecto de Ley nº 07033/2023-CR (2023) (Peru).

[125] *See* EGA, Artificial Intelligence: Latin America's Regulatory and Policy Environment (2024).

Also in August 2023, Uruguay submitted a short A.I. Regulation Proposal No. 1737/2023. Yet the proposal is quite limited and only emphasises that the deployers of A.I. systems must label their systems. However, the proposal does not include any labelling system or any form of authority to regulate A.I. systems.[126] Additionally, Uruguay's National AI Strategy 2024-2030 was approved on the twenty-first of November 2024 by the Public Sector Strategic Committee for Artificial Intelligence and Data.[127] Unlike the original 2019 strategy, which focused primarily on the public sector (titled "Artificial Intelligence for Digital Government"), the new 2024-2030 strategy covers both public and private sectors.

In the following month, the first proposal to regulate A.I. was submitted to the Colombian House of Representatives. The bill, PL 200/2023, was a statutory law focused on labor rights in the context of A.I., aiming to address the potential for job displacement arising from the implementation of A.I. systems in companies. Following the bill's rejection, three other proposals emerged in the Senate. PL 059/2023 established public policy guidelines for the development, use, and implementation of A.I., focusing on creating a framework for data protection, intellectual property protection, and a code of ethics for A.I. use. PL 091/2023, which aims to mandate a duty of information for the responsible use of A.I., ensuring transparency, ethical practices, and the protection of user rights. PL 130/2023 returns to the topic of A.I. and labour rights, aiming to protect workers' rights and ensure the proper use of A.I., guaranteeing job stability and harmonising technological advancements with labour laws. Finally, Proposal 154/2024 is a more comprehensive proposal focusing on general A.I. regulation across all sectors by introducing a risk-based approach, classifying A.I. systems as "unacceptable," "high risk," "limited risk," and "minimal risk," similar to the EU A.I. Act. In August 2024, the Executive Government established a Commission to enhance debates and dialogue on the regulation of A.I. The Commission is tasked with unifying the submitted projects and constructing public policies regarding A.I. while respecting principles of transparency, equality, and justice.[128] When it comes to the establishment of A.I. enforcement authorities, among the four projects currently running in Colombia, PL 059/2023, PL

[126]*See* Proyecto de ley con exposición de motivos presentado por el señor Senador Juan Sartori (2023) (Uru.).

[127]*See* Agencia de Gobierno Electrónico y Sociedad de la Información y del Conocimiento, *Se aprobó la Estrategia Nacional de Inteligencia Artificial 2024 - 2030* [The National Artificial Intelligence Strategy 2024 – 2030 Was Approved] (Nov. 22, 2024), https://www.gub.uy/agencia-gobierno-electronico-sociedad-informacion-conocimiento/comunicacion/noticias/se-aprobo-estrategia-nacional-inteligencia-artificial-2024-2030 (Uru.).

[128]*See* Ministerio de Tecnologías de la Información y las Comunicaciones (MinTIC), *Colombia avanza en la regulación de la inteligencia artificial con la creación de Comisión Accidental en el Congreso para articular proyectos en curso* [Colombia advances in the regulation of artificial intelligence with the creation of an Accidental Commission in Congress to coordinate ongoing projects] (Aug. 27, 2024) (Colom.).

091/2023, PL 130/2023, and PL 154/2024, only the last mentions possible regulatory agencies, yet it does not designate any.

In June 2024, Ecuador proposed a bill to regulate A.I., titled "*Proyecto de Ley Orgánica de Regulación y Promoción de la Inteligencia Artificial en Ecuador*".[129] The bill is a comprehensive proposal that mirrors the E.U.'s A.I. Act by adopting a risk-based approach, classifying AI systems into different categories to apply a proportionate level of regulation. The proposal is still under consideration at the National Assembly. It has included a dedicated chapter establishing an A.I. Authority, named *Autoridad Nacional de Regulación de Inteligencia Artificial*, which will be responsible for implementing and enforcing A.I. regulations in Ecuador, ensuring compliance with this law.

The following table summarises all the proposals in chronological order.

Country	Year / Date	Initiative	Status
Peru	2022	Bill No. 2338/2023: 05182/2022 – AI use in ground transportation; under discussion	Proposal
	July 2023	Law No. 31814 – Promotes AI for economic and social development	Approved
	April 2024	Bill No. 07651/2023-CR – Regulates AI for real-time recognition of stolen/tampered vehicles	Proposal
	2024	Bill No. 07033/2023 – General AI framework (risk-based, AI Act-inspired); supervisory role given to the Government Agency of Digital Transformation	Proposal
Argentina	June 4, 2023	PL 2504/2023 – Ethical AI development, human rights protection, transparency, accountability, and innovation	Proposal
	Aug 8, 2023	PL 3161/2023 – Establishes a governmental AI advisory and oversight body	Proposal
	Aug 14, 2023	PL 1743/2023 – Risk-based AI controls to protect human dignity and rights	Proposal
Uruguay	Aug 2023	Proposal No. 1737/2023 – Requires labeling of AI systems; no supervisory authority	Proposal
Colombia	Sept 2023	PL 200/2023 – Defines and regulates AI aligned with human rights standards	Rejected
	Late 2023	PL 059/2023 – Public policy guidelines for AI development and use	Proposal
	Late 2023	PL 091/2023 – Duty to inform; transparency and user rights	Proposal
	Late 2023	PL 130/2023 – AI and labor law harmonization	Proposal
	2024	PL 154/2024 – Comprehensive AI framework inspired by EU AI Act	Proposal
Ecuador	June 2024	Proyecto de Ley Orgánica de Regulación y Promoción de la IA – Creates National AI Regulatory Authority	Proposal

Table 1: Overview of AI-related legislative proposals in selected Latin American countries

[129] *See* Proyecto de Ley Orgánica de Regulación y Promoción de la Inteligencia Artificial en Ecuador (As. Patricia Núñez / 450889), https://www.asambleanacional.gob.ec/es/multimedios-legislativos/97303-proyecto-de-ley-organica-de-regulacion (Ecuad.).

Overall, it is possible to observe that, while initially there was a surge of regulatory proposals to regulate AI systems in Latin American countries, most likely inspired by the EU's AI Act, this impulse has not, so far, resulted in any comprehensive regulation similar to the EU's. This might be due to multiple factors. As previously mentioned, the EU's AI Act has close alignment with the EU-specific institutional structures, demanding that Latin American countries adapt this regulatory model to their social and cultural concerns.[130] Moreover, most Latin American countries are considered emerging markets that actively embrace AI technologies, with the expectation of increasing economic growth and technological development.[131] This desire may hinder the approval of comprehensive regulations that may represent the halting of AI innovation.[132]

5. EXPLORING THE BRAZILIAN AND CHILEAN A.I. GOVERNANCE SCHEMES

This section focuses on the emerging AI governance frameworks in Brazil and Chile. The decision to focus on these two countries reflects a combination of legal, economic, political, and regional factors that render their regulatory trajectories particularly relevant when considered alongside the European Union's approach.

Brazil and Chile, both civil law jurisdictions, offer distinct yet potentially complementary perspectives on AI governance in Latin America. As a key regional actor and member of both BRICS and MERCOSUR, Brazil holds a prominent position in shaping regulatory developments across the region.[133] Its proposed AI framework reflects domestic priorities and broader geopolitical considerations, with possible implications for neighbouring countries within these regional blocs.[134] Chile, by contrast, is characterised by an open economy and an extensive network of free trade and digital trade agreements. Its strong ties to the Asia-Pacific region have positioned it as an early

[130] *See* María L. Flórez Rojas, *The Shaping of AI Policies in Latin America: A Study of International Influence and Local Realities*, *in* PUBLIC GOVERNANCE AND EMERGING TECHNOLOGIES: VALUES, TRUST, AND REGULATORY COMPLIANCE 263 (Jurgen Goossens et al. eds., 2025).

[131] *See* Anastassia Lauterbach, *Artificial Intelligence and Policy: Quo Vadis?*, 21 DIGIT. POL'Y, REGUL. & GOVERNANCE 238 (2019) (U.K.).

[132] *See* Meera Sarma et al., *Challenges and Opportunities of Ethical AI and Digital Technology Use in Emerging Economies*, *in* ELGAR COMPANION TO REGULATING AI AND BIG DATA IN EMERGING ECONOMIES 42 (Mark Findlay et al. eds., 2023).

[133] *See* Kramcsak, *supra* note 83, at 4.

[134] *See Brazil Places AI Governance at Top of BRICS and G20 Negotiation Agenda*, TV BRICKS (Feb. 11, 2025), https://tvbrics.com/en/news/brazil-places-ai-governance-at-top-of-brics-and-g20-negotiation-agenda/.

mover in digital regulation,[135] and a "regional leader in promoting AI regulations",[136] seeking alignment between domestic governance and international standards.

The experiences of Brazil and Chile provide a valuable comparative perspective for understanding how Latin American countries engage with global regulatory debates while responding to their specific institutional and socio-economic contexts. Although both are adapting their legal systems to address the challenges posed by A.I., they do so within different institutional configurations. In addition, both countries have taken active steps in adopting and regulating A.I., making them particularly relevant case studies in the Latin American context.[137] Their approaches highlight the practical and normative considerations of balancing innovation with legal safeguards.

Comparing these developments with the European Union's supranational regulatory model also offers a broader understanding of the potential trajectories of A.I. governance in Latin America. While the E.U. has advanced a comprehensive legal framework, Brazil and Chile are progressing at different speeds, influenced by political priorities, economic conditions, and institutional readiness.

5.1. BRAZILIAN AI GOVERNANCE MODEL

5.1.2. BACKGROUND

The European A.I. Act commenced its Brussels Effect in Brazil even before it was approved. Brazilian legislators' first tentative attempt to regulate A.I. began with Proposal No. 5.051/2019,[138] closely followed by Proposal No. 21/2020 initiated by the Chamber of Deputies in 2020.[139] This proposal was considered a succinct 10-Article "anti-regulation regulation" since it only enacted recommendations with no

[135] *See* PABLO TRIGO KRAMCSÁK & MICHELLE BORDACHAR BENOIT, THE (POTENTIAL) IMPACT OF THE DIGITAL ECONOMY PARTNERSHIP AGREEMENT ON THE FUTURE OF CROSS-BORDER PERSONAL DATA FLOWS (2023).

[136] Andrés Mosqueira & Shaanty E. Rubio Gonzalez, *Foster Innovation or Mitigate Risk? AI Regulation in Latin America*, WHITE & CASE (Nov. 18, 2024), https://www.whitecase.com/insight-our-thinking/latin-america-focus-2024-ai-regulation.

[137] *See* Airlie Hilliard, *How Is Brazil Leading South America's AI Legislation Efforts?*, HOLISTIC AI (Nov. 20, 2023), https://www.holisticai.com/blog/brazil-ai-legislation-proposals.

[138] *See* Senado Federal (Brazil), *Projeto de Lei No. 5.051, de 2019* [Bill No. 5.051 of 2019], (Braz.), https://www25.senado.leg.br/web/atividade/materias/-/materia/138790.

[139] *See* Câmara dos Deputados (Braz.), Projeto de Lei No. 21, de 2020 [Bill No. 21 of 2020], (Braz.), https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2236340&fichaAmigavel=nao.

enforcement schemes and no creation of new rights related to the ones impacted by A.I. systems, only referring to existing rights in the Brazilian legal framework.[140]

However, this first proposal was criticised for its swift approval process in the Chamber of Deputies, with no public participation, and for its reduced regulatory framework, which did not regulate or enact any new rights concerning A.I. risks. As a response, a Commission of 18 Jurists ("CJSUBIA") was formed, and after nine months of work, the Commission proposed a replacement ("*substitutivo*") Proposal to the Senate.

In 2023, proposal 2338/2023 (now in the Senate) was submitted, inspired by the Commission of Jurists' draft and the previous Chamber of Deputies. This new proposal is considered to be aligned with the already approved European A.I. Act, although with some differences,[141] such as the development of three main pillars: the creation of rights for those affected by A.I. systems, a risk-based approach (similar to the European A.I. Act), and the establishment of governance measures applied to companies that develop or deploy A.I. systems.[142]

5.1.3. THE GOVERNANCE FRAMEWORK

As mentioned, the most recent Brazilian proposal is grounded in the European A.I. Act but has a few caveats, including the governance framework. The structure of governance brought by the proposal establishes on Article 40, the National System of Regulation and Governance of Artificial Intelligence ("*Sistema Nacional de Regulação e Governança de Inteligência Artificial* – S.I.A.") [hereinafter S.I.A.], which is a multifold system which is formed by multiple regulation authorities namely: the general coordinating authority responsible for regulating artificial intelligence which according to the new amendments to the proposal will be the Brazilian Data Protection Authority [hereinafter

[140]*See* Laura Schertel Mendes, *Projeto de Lei da Inteligência Artificial: armadilhas à vista* [Artificial Intelligence Bill: Pitfalls Ahead], O Globo (Nov. 26, 2021), https://blogs.oglobo.globo.com/fumus-boni-iuris/post/laura-schertel-mendes-pl-da-inteligencia-artificial-armadilhas-vista.html.

[141]*See* Carolina Aguerre, *Strategies, Norms, Cooperation: Three Approaches to AI Governance in Latin America*, KU Leuven: AI Summer School Blog (Oct. 15, 2024), https://www.law.kuleuven.be/ai-summer-school/blogpost/Blogposts/strategies-norms-cooperation-three-approaches-to-ai-governance-in-latin-america.

[142]*See* Laura Schertel Mendes, *A regulação da inteligência artificial no Brasil: Fundamentos do anteprojeto de lei apresentado pela Comissão de Juristas do Senado Federal* [*The Regulation of Artificial Intelligence in Brazil: Fundamentals of the Draft Bill Presented by the Senate Federal Commission of Jurists*], Fumus Boni Iuris (Jan. 27, 2023), https://oglobo.globo.com/blogs/fumus-boni-iuris/post/2023/01/laura-schertel-mendes-a-regulacao-da-inteligencia-artificial-no-brasil.ghtml; *see also* Augusto Castro, *IA: relator apresenta proposta alinhada com regulamentos da Europa e dos EUA* [AI: Rapporteur Presents Proposal Aligned with European and U.S. Regulations], Senado (Apr. 24, 2024), (Braz.), https://www12.senado.leg.br/noticias/materias/2024/04/24/ia-relator-apresenta-proposta-alinhada-com-regulamentos-da-europa-e-dos-eua.

A.N.P.D], State's A.I. regulators, the Administrative Council of Defense and Competition, self-regulatory entities, and certification entities.

The main objective of this System is to enhance and harmonise the regulatory competencies of its multiple regulatory authorities with the system's general coordinator authority and with other agencies that are not part of S.I.A., such as environmental agencies and consumer protection (Art. 40 § 2).

Amongst the competencies of the S.I.A's general coordinator authority is to be the Brazilian international representative when it comes to matters related to A.I. (Art. 41, I), to elaborate in coordination with the other agencies that part of the System binding decisions related to the following matters: the exercise of the A.I. rights, shape and form of public information shared regarding the use of A.I. systems, proceedings, and requisites for the certification of the development of high-risk A.I. systems, proceedings and requisites of algorithmic impact assessments, and proceedings for communicating grave incidents, especially when fundamental rights are impacted (Art. 41, II). Moreover, the S.I.A.'s general coordinator authority has the competence to elaborate non-binding opinions about the development, implementation, and use of A.I. systems, celebrate regulatory agreements with the other S.I.A.'s authorities, express non-binding opinions in every legislative regulation regarding these regulatory authorities, exercise legislative, regulatory and sanctioning powers when it comes to the use, development, and implementation of A.I. systems when there is no sectorial regulatory entity. Finally, the authority will be certified and will be able to give opinions on regulatory sandboxes (Art. 41 III to VII).

Article 43 of the Proposal describes the exclusive attributions and powers of the S.I.A.'s general coordinator authority, namely to protect the rights of those affected by A.I. systems, stimulate good practices, including the development of codes of conduct to the development and use of A.I. systems, cooperate with international authorities that regulate A.I., request information from A.I. systems deployed and developed by public authorities regarding the scope, data, and details of its development with the possibility of enacting opinions to guarantee the compliance to the law, celebrate regulatory agreements to eliminate non-compliance with the law, law uncertainties, and administrative processes, receive noncompliance complaints of other S.I.A. authorities, write annual reports, lead audits of A.I. systems, issue credentials to private audits companies and research institutions, receive anonymous complaints regarding A.I. systems, and develop rules and schemes to the development and use of responsible A.I. systems (Art. 43, I-XIII).

Yet, it is important to emphasise that the creation of an independent regulatory entity to regulate A.I. has been criticised by the Brazilian National Data Protection Authority [hereinafter, A.N.P.D.], which considers that there is significant overlap in competencies between the two agencies. For this reason, recent amendments have placed the A.N.P.D. as the leading authority responsible for regulating artificial intelligence in the S.I.A. system.[143]

Nevertheless, the A.N.P.D., as the leading authority responsible for coordinating the S.I.A. system, may address some concerns, but agency concerns may arise. When the L.G.P.D. was proposed in 2012 (an evident influence of the G.D.P.R.'s Brussels Effect), one of the biggest discussions was the Federal government's competence to regulate the protection of the fundamental right to data protection. As a result of this discussion, Constitutional Amendment No. 115/2022 added incise LXXIX to Article 5 of the Brazilian Constitution, granting the Brazilian government the authority to protect the right to personal data. Additionally, the amendment said Incise XXVI to Article 21, giving the Union the competence to "organise and visualise the protection and the treatment of personal data, under the legal terms" and Incise XXX to Article 22, giving the Union the competence "to legislate about data protection and the treatment of personal data". This resolved the unconstitutionality of the A.N.P.D.'s existence, although the L.G.P.D. was published before the constitutional amendment, which raises constitutional problems under Brazilian law. In this light, the same discussion may arise regarding the A.N.P.D.'s competence to regulate and oversee the enforcement of the Brazilian A.I. Act. Another constitutional amendment may be necessary to address this incompatibility, creating yet another constitutional conundrum.[144]

Besides the constitutional discussion, the efficiency of such a fragmented enforcement frame has also yet to be tested; however, the horizon does not look bright, drawing on examples from the G.D.P.R. Member States' enforcement practices.

[143] *See* the Legal Opinion of Deputy Eduardo Gomes (Braz.), https://legis.senado.leg.br/sdleg-getter/documento?dm=9640105&ts=1718733815121&rendition_principal=S; *see also* Ministério da Justiça e Segurança Pública, ANPD é formalizada como coordenadora do Sistema Nacional de Inteligência Artificial [ANPD Is Formalized as Coordinator of the National Artificial Intelligence System], Gov.br (June 20, 2024) (Braz.), https://www.gov.br/anpd/pt-br/assuntos/noticias/anpd-e-formalizada-como-coordenadora-do-sistema-nacional-de-inteligencia-artificial.

[144] There little to no scholarly sources on the topic. Most of the public debate took place in opinion pieces in relevant Brazilian media. *See* Felipe de Paula & Vitor Rabelo Naegele, *Há vício de iniciativa na criação da Autoridade Nacional de Proteção de Dados?*, [*Is There a Defect of Initiative in the Creation of the National Data Protection Authority?*], JOTA (July 26, 2018), https://www.levysalomao.com.br/files/publicacao/anexo/20180727165904_ha-vicio-de-iniciativa-na-criacao-da-autoridade-nacional-de-protecao-de-dados.pdf; *see also* Luis H. de Menezes Acioly et al., *A Emenda Constitucional nº 115 de 10 de fevereiro de 2022 e o enforcement da proteção de dados pessoais no Brasil* [*Constitutional Amendment No. 115 of 10 February 2022 and the Enforcement of Personal Data Protection in Brazil*], Revista de Investigações Constitucionais [J. Const. Rsch.], Oct. 2024, at 1 (Braz.).

Conflicting decisions, significant overlaps, high bureaucratic burdens, and legal uncertainty might pose obstacles for the Brazilian A.I. regulatory framework in the future. It should be noted that Belli et al. stress that Brazil's proposed A.I. Regulatory Framework "contradicts several existing legal provisions, notably regarding consumer protection, L.G.P.D. transparency and non-discrimination clauses".[145]

In this complex institutional landscape, Brazil's decision to position the A.N.P.D. as the general coordinating authority within the S.I.A. framework reveals both a pragmatic move to leverage existing regulatory expertise and a potential flashpoint for future constitutional and operational frictions. While this approach may help consolidate oversight and mitigate institutional fragmentation, it raises critical concerns regarding the legal soundness of the A.N.P.D.'s expanded mandate, given its original constitutional basis. Moreover, the coexistence of multiple sectoral regulators, certification bodies, and self-regulatory entities introduces layers of coordination that risk diluting accountability and undermining enforcement coherence. These challenges have already surfaced in jurisdictions implementing the G.D.P.R. Brazil's A.I. governance model, which thus reflects a balancing act between aligning with global normative trends and responding to domestic legal and institutional particularities.

5.2. CHILEAN A.I. GOVERNANCE MODEL

5.2.1. BACKGROUND

On April 12, 2023, a bill (parliamentary motion) was introduced to the Chilean Chamber of Deputies to regulate artificial intelligence systems, robotics, and related technologies across various applications (Bill No. 15,869-19).[146] The bill's primary objective was to establish a comprehensive legal framework for developing, commercialising, and using A.I. technologies. In the preamble, the bill expressly states that its provisions are based on the E.U. A.I. Act (recital 2), as evidenced by its risk-based approach.

Although the bill aimed to establish a framework for A.I. governance, it suffered from serious shortcomings. Its key concepts were left undefined, creating uncertainty

[145] Luca Belli et al., *AI Regulation in Brazil: Advancements, Flows, and Need to Learn from the Data Protection Experience*, Comput. L. & Sec. Rev., Apr. 2023, at 1, 2 (U.K.).

[146] Cámara de Diputadas y Diputados de Chile, Proyecto de Ley No. 15869-19, Regula los sistemas de inteligencia artificial, la robótica y las tecnologías conexas, en sus distintos ámbitos de aplicación, [Regulates artificial intelligence systems, robotics, and related technologies in their various areas of application] (Apr. 24, 2023), (Chile), https://www.camara.cl/legislacion/proyectosdeley/tramitacion.aspx?prmID=16416&prmBOLETIN=15869-19&utm_source=chatgpt.com.

about the scope and meaning of its provisions. It also failed to engage with existing regulatory regimes, such as those for data protection and consumer protection, leaving significant intersections unexplored. Most strikingly, it introduced a rigid approval process for A.I. systems that applied across the board, with no attempt to differentiate among types of systems or contexts of use. This parliamentary motion proposed the creation of the National Artificial Intelligence Commission (art. 5) with functions that include evaluating authorisation requests from A.I. developers, providers, and users; developing regulatory recommendations; preparing annual reports on A.I. systems; creating and maintaining an A.I. systems registry; and addressing serious incidents or malfunctions. A notable feature of this bill was that it mandated prior authorisation from the National Artificial Intelligence Commission before developing, commercialising, distributing, or using any A.I. system (art. 6). AI systems classified as unacceptable risk are ineligible for authorisation. In contrast, high-risk A.I. systems may be approved if they meet specific requirements, such as risk management plans or input data management plans.

On 29 May 2024, this bill was formally consolidated with Bill No 16,821-19,[147] an executive initiative on the regulation of A.I. systems submitted to the National Congress. The resulting unified proposal adopts a horizontal approach, reflecting the Ministry of Science's announcement of an updated version of the National Artificial Intelligence Policy.[148] The consolidated bill is currently under consideration before the Chamber of Deputies.[149]

In its preamble, the Executive Branch bill references several key documents and efforts: UNESCO Readiness assessment methodology: a tool of the Recommendation on the Ethics of Artificial Intelligence; the updated National Artificial Intelligence Policy; the work carried out by the Senate's Commission on Future Challenges, Science, Technology,

[147]Cámara de Diputadas y Diputados de Chile, 372ª Legislatura Proyecto de Ley No. 16821-19, Regula los sistemas de inteligencia artificial, la robótica y las tecnologías conexas, en sus distintos ámbitos de aplicación,[Regulates artificial intelligence systems, robotics, and related technologies in their various areas of application] (May 7, 2024), (Chile), https://www.camara.cl/legislacion/proyectosdeley/tramitacion.aspx?prmID=17429&prmBOLETIN=16821-19.

[148]This instrument outlines AI guidelines, directives, and principles through 70 priority actions and 185 public service initiatives, primarily targeting social, economic, and educational aspects across public and private sectors. *See* FRANCO GIANDANA GIGENA ET AL., REGULATORY MAPPING ON ARTIFICIAL INTELLIGENCE IN LATIN AMERICA: REGIONAL AI PUBLIC POLICY REPORT (2024).

[149]*See Chile lanza una política nacional de IA y presenta un proyecto de ley sobre IA siguiendo las recomendaciones de la UNESCO*, [Chile launches a national AI policy and presents a bill on AI following UNESCO recommendations], UNESCO (May 4, 2024), https://www.unesco.org/es/articles/chile-lanza-una-politica-nacional-de-ia-y-presenta-un-proyecto-de-ley-sobre-ia-siguiendo-las.

and Innovation in 2023 on A.I. topics, which convened a technical working group;[150] and the existing consensus, following the model of the E.U. A.I. Act, on the need to adopt a risk-based approach to the regulation of technologies based on A.I. systems. Nonetheless, the proposal is commonly seen as drawing on the E.U. A.I. Act as a reference point, while emphasising a more pronounced ex post regulatory approach that allows for flexibility, self-regulation, and experimentation in AI development.[151]

The bill comprises 31 Articles, and a transitory chapter contains four articles. The general provisions include definitions such as "Artificial Intelligence System", "risk", and "significant risk", identifying "the stakeholders involved in the A.I. cycle, from developers and vendors to users".[152]

The new draft law establishes several principles for A.I. systems, including human intervention and oversight; technical robustness and safety; data privacy and governance; transparency and explainability; diversity; non-discrimination and fairness; social and environmental well-being; accountability and responsibility; and the protection of consumer rights. A.I. systems are classified by risk level: Unacceptable Risk A.I. systems, which are prohibited due to incompatibility with fundamental rights; High-risk A.I. systems, which can negatively impact health, safety, fundamental rights, the environment, and consumer rights; Limited-Risk A.I. systems, which present no significant risks; and No Apparent Risk A.I. systems, which do not fall into the previous categories. High-risk systems must meet stringent requirements for risk management, data governance, technical documentation, record-keeping, accuracy, cybersecurity, transparency, human oversight, and post-market monitoring.

5.2.2. THE GOVERNANCE FRAMEWORK

The Executive Branch bill provides a different institutional framework, including the establishment of an A.I. Technical Advisory Council (art. 14). This consultative body will advise the Ministry of Science, Technology, Knowledge, and Innovation on the development, promotion, and continuous improvement of A.I. systems. This council,

[150]Ministerio de Ciencia, Tecnología, Conocimiento e Innovación (Chile), *Proyecto de ley que regula los sistemas de IA,* [Draft bill regulating AI systems], MinCiencia, (Chile), https://www.minciencia.gob.cl/areas/inteligencia-artificial/Inteligencia-Artificial/Proyecto-Ley-regula-sistemas-IA/.

[151]*See* Carolina Aguerre, *supra* note 141. *See also* Josefina Lira, *Regulación versus innovación: ¿Está en riesgo el desarrollo de la IA en Chile?*, [*Regulation versus Innovation: Is the Development of AI in Chile at Risk?*] Pontificia Universidad Católica de Chile (Aug. 11, 2025), https://www.uc.cl/noticias/regulacion-versus-innovacion-esta-en-riesgo-el-desarrollo-de-la-ia-en-chile/.

[152]Franco Giandana Gigena, *supra* note 148, at 68.

composed of representatives from the public and private sectors, as well as academia, will play a crucial role in identifying A.I. systems that pose high or limited risks and providing guidance on the regulatory framework for their operators. Additionally, the council will be instrumental in formulating guidelines for creating controlled test environments and setting compliance and accountability standards.

In parallel, the proposal states that the newly established Personal Data Protection Agency (created under Law No. 21,719, enacted in December 2024, that amends and substantially reforms Chile's 1999 data protection law) will oversee and ensure compliance with the A.I. law (art. 19). This assignment of enforcement powers to the Data Protection Agency is particularly noteworthy, considering its contentious status during the parliamentary discussions on amending Chile's Personal Data Law. The A.I. bill acknowledges the critical importance of data governance in developing and deploying A.I. systems. In its preamble (I. Foundations, 6. Specialised Institutions), the draft bill highlights that the choice of the authority responsible for monitoring and enforcing sanctions under the A.I. law is based on the understanding that any A.I. system's operation relies on data.

However, establishing the Personal Data Protection Agency presents several challenges. The agency is slated to commence operations in October 2026 (Transitory Article Four of Law No. 21,719), with full implementation expected by December 2026. As of now, the agency is not yet operational, and its capacity to effectively oversee A.I. governance is uncertain. The agency's mandate primarily focuses on data protection and privacy, and it lacks specialisation in areas such as product safety or AI system assessment. Consequently, its expertise may be limited to data governance issues, potentially hindering its ability to oversee A.I. systems comprehensively.

Moreover, the lack of established capacity raises concerns about its readiness to enforce the A.I. law effectively upon its commencement. While the integration of data governance into A.I. oversight is commendable, the agency's current limitations may impede its ability to fulfill this expanded role. Therefore, careful consideration must be given to the agency's capacity-building and potential collaboration with other specialised bodies to ensure effective A.I. governance.

Chile's A.I. governance model reflects a cautious yet evolving institutional strategy that remains in flux due to broader regulatory dependencies, most notably, the creation of a dedicated Data Protection Agency. While the Executive Branch's draft law signals a shift from a centralised authorisation regime to a more consultative, risk-based oversight structure, it leaves key enforcement mechanisms contingent on ongoing debates over the country's data protection framework. The reliance on the future

supervisory authority introduces legal and institutional uncertainty, particularly as the Data Protection Agency is expected to assume a dual mandate over personal data processing and A.I. system compliance. This layering of responsibilities reflects a growing convergence between A.I. and data governance, but may also raise operational and legitimacy concerns without a clearly defined institutional architecture. Moreover, the fragmented approach, featuring an advisory council and an independent agency, could prove challenging in practice if coordination mechanisms are not robustly implemented. As such, Chile's regulatory trajectory underscores the importance of integrating A.I. oversight into existing and emerging data governance ecosystems while ensuring that supervisory bodies are adequately equipped, both legally and structurally, to engage with the evolving complexities of algorithmic accountability.

CONCLUSION

The European Union's A.I. Act is increasingly recognized as a normative reference point in transnational discourse on artificial intelligence governance. Although its drafters intend to exert some degree of international influence, the transboundary impact of the regulation beyond European borders, particularly in regions such as Latin America, should not be presumed to involve straightforward replication. Instead, a pattern of selective adaptation emerges, mirroring the earlier diffusion of E.U.-style data protection frameworks across the region. This suggests that the adoption of the AI Act is mediated by both the normative gravitas of the E.U.'s regulatory paradigm and the specific local constraints that shape its reception.

In this context, data governance emerges as a crucial aspect of regulatory alignment. This research highlights that data protection frameworks are not merely related to A.I. regulation; they form its legal and normative basis. This is particularly evident in Latin America, where many jurisdictions have already adopted European-style data protection standards, though adapted to their unique social and institutional apparatus. These existing frameworks provide a familiar legal structure for regulators and stakeholders, making it easier to engage with the A.I. Act's underlying logic. However, it should be kept in mind that, unlike data protection regulations, the regulation of A.I. is strictly connected to a broader discourse of governance, which must inevitably be read in the context of that specific country (or region) in the global A.I. race.

Structural similarities between the E.U.'s data protection framework and the A.I. Act strengthen the attractiveness (and to some degree, the practicality) of aligning with the E.U. model. Both systems target similar categories of actors, impose restrictions on data-driven practices, and promote a regulatory ethos focused on rights protection, transparency, and market accountability. These common features are significant; they help position A.I. governance as an extension of data governance rather than a completely distinct domain the E.U.'s data protection regime introduced a coercive element that is less evident in the A.I. Act. Specifically, the D.P.D. and G.D.P.R. incorporate mechanisms that encourage third countries to amend their laws to align with E.U. standards in return for benefits such as unrestricted access to the E.U.'s internal market. This "transactional" or "coercive" dimension,[153] in which countries modify their laws to gain or avoid specific regulatory advantages, is significant for the global diffusion of the E.U.'s data protection framework. The recognition of third-party legal regimes as "adequate" serves as an incentive for countries to harmonise their regulations, facilitating cross-border data flows. In contrast, the E.U. A.I. Act does not explicitly incorporate such coercive mechanisms. While the Act promotes alignment through its risk-based framework and regulatory principles, it lacks the same clear leverage for encouraging third-party jurisdictions to adopt similar laws. This represents the major difference with the E.U. data protection regime and the designation of G.D.P.R. as the gold standard[154]. At the same time, the A.I. Act serves as the first comprehensive regulation on A.I.

The A.I. Act also introduces institutional sophistication, complicating its external translation. Its risk-based, sector-sensitive design resists easy transplantation, functioning more as a flexible regulatory prototype than a turnkey model. Nowhere is this more evident than in its supervisory architecture. The Act envisages a multi-level enforcement structure involving national authorities, market surveillance bodies, and the newly established European Artificial Intelligence Office within the E.U. This model reflects the layered character of E.U. governance and its internal fragmentation.

For Latin American countries, these institutional complexities pose a significant challenge. As this research has shown, the A.I. Act implicitly sets out three potential pathways for institutional design: the establishment of new, dedicated A.I. agencies; the

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[153]Greenleaf, *supra* note 30, at 3.

[154]*See* Giovanni Buttarelli, *The EU GDPR as a Clarion Call for a New Global Digital Gold Standard*, 6 INT'L DATA PRIV. L. 77 (2016) (U.K.); *see also* Alessandro Mantelero, *The Future of Data Protection: Gold Standard vs. Global Standard*, COMPUT. L. & SEC. REV., Apr. 2021, at 1 (U.K.), where it is argued that more than GDPR as global standard it should be considered Convention 108 and its modernised version (Convention 108+) providing "a solution that is good enough and workable in many different contexts, without necessarily reaching a gold standard".

designation of existing bodies as competent regulators; or the creation of hybrid "competence centres" that combine centralised expertise with sector-specific knowledge. Each option has distinct implications regarding regulatory coherence, thematic alignment, and administrative capacity. Importantly, this is not simply a legal question: institutional design choices hinge on pragmatic considerations, including budgetary constraints and the maturity of existing oversight bodies.

Despite an early wave of regulatory initiatives to govern artificial intelligence systems across Latin America, the region has yet to produce comprehensive legislation comparable to the European Union's A.I. Act. Several interconnected factors explain this regulatory gap. First, the E.U.'s legislative framework reflects institutional arrangements and governance structures that may not readily translate to Latin American legal and political contexts, requiring substantial localization efforts. Second, Latin American nations, operating as emerging economies with strong growth imperatives, prioritize harnessing A.I.'s potential for economic development and technological progress. This developmental focus creates tension with comprehensive regulatory approaches that might be perceived as constraining innovation and competitive advantage in the global A.I. landscape. Against this backdrop, Brazil and Chile illustrate divergent trajectories that reflect their respective legal traditions, regulatory configurations, and political economies. Brazil has opted for a sectoral and adaptive approach, leveraging existing agencies with domain-specific mandates and favouring soft law instruments over binding rules. While this allows for flexibility and incrementalism, it raises concerns about consistency and cross-sectoral coordination. Recent proposals in Chile envision an intersectoral advisory council complemented by the enforcement powers vested in the new Data Protection Agency. Both cases reveal institutional ambiguity, particularly concerning enforcement mandates and the ongoing construction or reform of regional data protection regimes.

These developments suggest that while the E.U.'s A.I. Act serves as a reference point, primarily through its risk-based logic, its supervisory architecture is unlikely to be reproduced wholesale. Instead, countries like Brazil and Chile appear to converge on hybridised governance arrangements that blend advisory, sectoral, and centralised functions. These configurations reflect domestic regulatory ecosystems and the political and institutional priorities shaping how A.I. governance is imagined and implemented.

The core question of our study, concerning the role of D.P. in the context of A.I. and situations where new specialised agencies are required, it does not lend itself to a straightforward, definitive answer. In Latin America, the choice between expanding D.P.A. responsibilities and establishing dedicated A.I. agencies should be guided by

practical considerations, including institutional capacity, available resources, and democratic governance principles. Although the region has a relatively advanced data protection infrastructure that offers a strong basis for A.I. oversight, the complex, technical, and cross-sectoral nature of A.I. governance demands innovative institutional approaches.

Effective strategies will likely involve leveraging existing D.P.A. expertise while developing new coordination mechanisms that align with each country's unique institutional landscape. For example, large economies (Brazil, Argentina, Chile) with developed institutional capacity should expand D.P.A. mandates while creating specialised coordination mechanisms. Brazil's S.I.A. model provides the most sophisticated template for this approach. In the case of medium-sized countries, a specialised A.I. coordination authority should be established while maintaining strong cooperation agreements with D.P.As. Peru's centralised model could work for countries with strong digital transformation leadership.

Ultimately, Latin America's potential contribution to global A.I. governance may not lie solely in choosing between existing models but rather in pioneering adaptive, hybrid approaches. These should aim to balance technical expertise with democratic accountability and foster regional cooperation, thereby creating frameworks that embody the region's values while addressing the practical challenges of governing transformative A.I. technologies.

CONTRIBUTORSHIP STATEMENT

Saverino, R., Trigo Kramcsák, P., and da Rosa Lazarotto, B. jointly conceived the overall argument and structure of the article. Saverino, R. took the lead in drafting the introductory section and Sections 1–2 and the Conclusion. Trigo Kramcsák, P. took the lead in drafting Sections 3–4 and Section 5.2. Da Rosa Lazarotto, B. took the lead in drafting Sections 5 and 5.1. All parts of the manuscript were developed through extensive joint discussion and iterative revision among the three authors. All authors reviewed and revised the full manuscript for intellectual content, approved the final version, and agreed to be accountable for the work.

FUNDING DETAILS

This article is partially funded through the support that one of the authors receives from the project "Articulating Law, Technology, Ethics and Politics: Issues of Enforcement and Jurisdiction of EU Data Protection Law under and beyond the General Data Protection Regulation (ALTEP-DP)", funded by the Vrije Universiteit Brussel (VUB) Strategic Research Programme. The funder had no role in the design of the study, the analysis, or the decision to publish.

DISCLOSURE STATEMENT

The authors report there are no competing interests to declare.

DATA AVAILABILITY STATEMENT

Data sharing is not applicable to this article as no new data were created or analysed in this study.

Volume 10 Issue 2 Articles & Essays

University of Bologna Law Review

https://doi.org/10.60923/issn.2531-6133/20646

Received: 08 Nov. 2024 | Reviewed: 08 Dec. 2025 | Accepted: 13 Jan. 2026 | Published: 27 May 2026

The "Ne Bis in Idem" Principle in Serbian Criminal Law: Application, Challenges, and Supranational Influences

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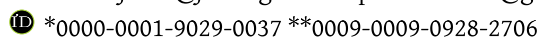
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ABSTRACT

This article investigates the application of the *ne bis in idem* principle in Serbian criminal law, with particular focus on its doctrinal interpretation and procedural challenges. While the principle has been widely discussed in international literature, limited attention has been given to its practical implementation across multiple legal proceedings—criminal, misdemeanor, economic, and disciplinary—in the Serbian legal system. This study analyzes how the principle is shaped by both international instruments and domestic constitutional and statutory frameworks. It adopts a doctrinal and case law–based methodology, focusing on the jurisprudence of the European Court of Human Rights (E.Ct.H.R.) and its influence on Serbian judicial reasoning. The findings highlight interpretative inconsistencies in Serbian courts' application of the Engel criteria, the scope of criminal matters, the idem element, and the prohibition of duplication of proceedings. Special attention is paid to challenges arising from institutional fragmentation and overlapping jurisdictions. Ultimately, the article contributes to the ongoing scholarly discussion by identifying normative and practical gaps and proposing alignment with supranational standards. The results offer insights into Serbia's capacity to uphold fundamental rights under the ECHR framework, with broader implications for comparative criminal procedure and European human rights law.

KEYWORDS

Ne Bis in Idem; Serbian Criminal Law; Engel Criteria; European Court of Human Rights; Dual Proceedings

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INTRODUCTION

The principle of *ne bis in idem* (not twice about the same thing)—or double jeopardy in common law systems—prohibits an individual from being prosecuted or punished more than once for the same criminal offense.[1] It operates both as a safeguard against retrial following a final judgment and as a procedural barrier against concurrent legal actions involving the same person and the same factual circumstances. Although long regarded as a universal principle of criminal justice,[2] its contours have evolved in response to shifting legal interpretations within national and supranational frameworks. As will be shown in the following sections, this evolution has led to fragmentation among supranational standards, complicating the consistent application of the principle.

In the Republic of Serbia, the principle of *ne bis in idem* holds constitutional and procedural significance. Article 34 of the Constitution[3] guarantees the right to legal certainty in criminal law, expressly incorporating the prohibition of double jeopardy.[4] Similarly, Article 4 of the Criminal Procedure Code codifies the principle,[5] establishing its role as a foundational guarantee in the domestic criminal justice system. However, its

[1] *See* Valsamis Mitsilegas & Fabio Giuffrida, *Ne Bis in Idem and Conflicts of Jurisdiction, in* EU Criminal Law 148 (Valsamis Mitsilegas ed., 2022); *see also* Valsamis Mitsilegas & Fabio Giuffrida, *Ne Bis in Idem*, *in* General Principles for a Common Criminal Law Framework in the EU 209 (Rosaria Sicurella et al eds., 2017); Carl-Friedrich Stuckenberg, *Double Jeopardy and Ne Bis in Idem in Common Law and Civil Law Jurisdictions*, *in* The Oxford Handbook of Criminal Process 457 (Darryl K. Brown et al eds., 2019).

[2] Sir William Blackstone made an unforgettable contribution to the development of the double jeopardy concept. *See* George C. Thomas III, Double Jeopardy: The History, the Law (1998). Also, double jeopardy has its place in American law and is prescribed by the fifth amendment of the Constitution. The principle of ne bis in idem means that a final judgment in criminal proceedings against an individual is treated as exactly that - final. *See* Robin Lööf, Defending Liberty and Structural Integrity: A Social Contractual Analysis of Criminal Justice in the EU 163 (2008). *See* José Luis de la Cuesta, *Concurrent National and International Criminal Jurisdiction and the Principle 'Ne Bis in Idem'*, 73 Revue internationale de droit pénal 707, 709 (2002); *supra note* 1.3; Sven Frisch, *Ne Bis in Idem Under an Optimal Antitrust Enforcement Framework*, 24 ERA F. 183 (2023); Stanko Bejatović, Krivično procesno pravo [Criminal Procedural Law] 132 (2019); Milan Škulić, Krivično procesno pravo [Criminal Procedural Law] 104 (2015); Vojislav Đurđić, Osnovni principi jugoslovenskog krivičnog postupka i zaštita ljudskih prava i sloboda [Main *Principles of Yugoslav Criminal Procedure and Protection of Human Freedoms and Liberties]*, 39 revija za kriminologiju i krivično pravo [yugoslavian J. Criminology & Crim. L.], May-Dec. 2001, at 75, 84.

[3] Ustav Republike Srbije [Constitution of the Republic of Serbia] (Official Gazette of the Republic of Serbia, Nos. 98/2006 & 115/2021).

[4] *See* Saša Knežević, Krivično procesno pravo: opšti deo [Criminal Procedural Law: General Part] 89–100 (2019); *see also* Stanko Bejatović, *supra* note 2, at 124–127; Dragoljub V. Dimitrijević, Đorđe Lazin & Milica Stefanović-Zlatić, Krivično procesno pravo [Criminal Procedural Law] 79–81 (1987); Vojislav Đurđić, Krivično procesno pravo: opšti deo [Criminal Procedural Law: General Part] 97–105 (2014); Momčilo Grubač, Krivično procesno pravo: uvod i opšti deo [Criminal Procedural Law: Introduction and General Part] 144–48 (2004); Milan Škulić, *supra* note 2, at 53, 62–65.

[5] Zakonik o krivičnom postupku [Criminal Procedure Code] *(CPC)* (Official Gazette of the Republic of Serbia, Nos. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019 & 27/2021) (CC decision), 62/2021 (CC decision).

application is not limited to criminal proceedings.[6] Misdemeanor procedures and cases involving economic offenses may also invoke *ne bis in idem*, while the legal status of disciplinary proceedings remains contested in Serbian doctrine and case law.[7] This doctrinal ambiguity raises pressing questions about the breadth of procedural safeguards available under Serbian law.

The present legal framework further complicates the practical implementation of the principle. Tensions persist between the constitutional commitment to legal certainty and the realities of procedural fragmentation across criminal, misdemeanor, and administrative domains.[8] In many instances, Serbian law does not clearly delineate punishable acts across these categories, allowing for overlapping proceedings and inconsistent jurisprudence. Moreover, the potential for concurrent or sequential prosecutions—particularly through the strategic use of misdemeanor procedures—poses serious risks to the integrity of *ne bis in idem* as a safeguard of due process.[9]

This paper explores whether Serbian law and practice adequately reflect the obligations stemming from international human rights instruments, with particular

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[6] In Serbian legal scholarship, a criminal proceeding is often defined as one whose outcome is of a penal nature, i.e. a procedure in which the state's right to punish (*ius puniendi*) is exercised (*see* Milica Pavlović Turkalj, *Pojmovno određenje kaznenog postupka prema Evropskoj konvenciji za zaštitu ljudskih prava i osnovnih sloboda [Conceptual Definition of Criminal Procedure According to the European Convention for the Protection of Human Rights and Fundamental Freedoms]*, Glasnik prava, 2022, at 73, 76). By contrast, in E.Ct.H.R. jurisprudence, the concept of "criminal" has an autonomous meaning, developed most prominently in the *Engel* judgment (*Engel and Others v. The Netherlands*, App. Nos. 5100/71, 5101/71, 5102/71, 5354/72 & 5370/72 (June 8, 1976), https://hudoc.echr.coe.int/eng?i=001-57479; *Vegotex International S.A. v. Belgium*, App. No. 49812/09 (Nov. 3, 2022), https://hudoc.echr.coe.int/eng?i=001-220415), which looks beyond domestic classifications to the nature of the offense and sanction. Serbian constitutional jurisprudence has gradually incorporated this broader understanding, although the doctrinal definition rooted in *ius puniendi* remains influential.

[7] It has been shown that, in the normative element, the differences between misdemeanors and criminal offences arising from their legal definitions and theoretical considerations, such as different levels of social danger, abstract–concrete endangerment of the protected interest, severity of the threatened sanction, guilt (intention–negligence), etc., lose importance for distinguishing between criminal offences and misdemeanors *in abstracto*, and only loose instructions remain for the legislator whether to prescribe an unwanted behavior as a misdemeanor or as a criminal offense or not to sanction it at all. *See* Ivo Josipović & Karmen Novak Hrgović, *The Principle of Ne Bis In Idem in the Context of Misdemeanor, Criminal and Administrative Law*, 23 Croatian Y.B. for Crim. Scis. Prac. 483 (2016); *see also* Maria Fletcher, *The Problem of Multiple Criminal Prosecutions: Building an Effective EU Response*, 26 Y.B. Eur. L. 33 (2007); Drago Radulović, *Načelo ne bis in idem i kazneno zakonodavstvo Crne Gore* [*The Principle of Ne Bis In Idem and the Penal Legislation of Montenegro*], *in* Načelo ne bis in idem i pravna sigurnost građana [The Principle of Ne Bis in Idem and Legal Security of Citizens] 229 (Stanko Bejatović & Nataša Novaković eds., 2022).

[8] *See* Emir Ćorović, Osnove prekršajnog prava Crne Gore [The basics of Montenegrin Misdemeanor Law] 22-3 (2021).

[9] *See* Stanko Bejatović, *Načelo ne bis in idem i pravna sigurnost građana (međunarodni pravni standardi, regionalna zakonodavstva i iskustva u primeni)* [*The principle of ne bis in idem and legal security of citizens (international legal standards, regional legislation and experiences in application)*], *in* Načelo ne bis in idem i pravna sigurnost građana (međunarodni pravni standardi, regionalna zakonodavstva i iskustva u primeni) [The principle of Ne Bis in Idem and legal security of citizens (international legal standards, regional legislation and experiences in application)] 7, 8 (Stanko Bejatović & Nataša Novaković eds., 2022).

emphasis on the jurisprudence of the European Court of Human Rights [hereinafter E.Ct.H.R.]. The analysis considers both the normative framework and the judicial interpretation of the *ne bis in idem* principle, focusing on four foundational elements elaborated in leading E.Ct.H.R. judgments: the criminal nature of the matter, duplicity of proceedings, factual identity, and the finality of decisions. At the same time, attention is also given to the interaction between E.Ct.H.R. and the Court of Justice of the European Union [hereinafter C.J.E.U.] case law, given their significant overlap and growing influence on Serbian law. Special attention is devoted to the misuse of misdemeanor proceedings, the fragmented treatment of economic offenses, and the uncertain status of disciplinary measures in relation to criminal liability.

Ultimately, this paper argues that although Serbian law formally recognizes the *ne bis in idem principle*, significant discrepancies remain in its practical application. These inconsistencies risk undermining legal certainty, due process, and Serbia's alignment with European legal standards. The paper concludes by proposing reforms to strengthen the coherence and credibility of the principle within the national legal system, particularly in light of lessons learned during periods of legal stress, such as the COVID-19 pandemic.

The following chapter examines the principle of *ne bis in idem* within international legal regulations, beginning with its recognition in universal and regional human rights instruments and proceeding to its elaboration in the jurisprudence of the E.Ct.H.R. and, where relevant, the C.J.E.U..

1. LEGAL REGULATION OF *NE BIS IN IDEM* IN INTERNATIONAL LAW

1.1. THE PRINCIPLE OF *NE BIS IN IDEM* IN INTERNATIONAL LEGAL REGULATIONS

Traditionally confined to national criminal justice systems,[10] the scope of *ne bis in idem* has expanded significantly through the jurisprudence of international and regional bodies, particularly within the European Union legal order. This principle ensures that an individual who has been finally convicted or acquitted of a criminal offense cannot be prosecuted again for the same offense in another proceeding within the European Union [hereinafter E.U.] legal order.[11] In this context, *ne bis in idem* represents a restrictive application of mutual recognition, functioning to prevent further prosecution rather

[10] *See* John A. Colman Grant, *The "Lanza" Rule of Successive Prosecutions*, 32 Colum. L. Rev. 1309, 1317 (1932).

[11] *See, e.g.*, Anne Weyembergh & Inés Armada, *The Principle of Ne Bis In Idem in Europe's Area of Freedom, Security and Justice*, *in* Research Handbook on EU Criminal Law 189 (Valsamis Mitsilegas et al eds., 2016).

than to facilitate it.[12] However, the *ne bis in idem* principle does not prevent the European Union from imposing sanctions on an individual for the same conduct that has already been prosecuted or punished outside the E.U., unless an international agreement expressly prohibits such action.[13] The *Menci* case[14] clarified the boundaries of this principle in situations involving dual administrative and criminal proceedings,[15] reinforcing the requirement for proportionality and complementarity in sanctioning systems. This evolution underscores the complexity of balancing individual rights with public interests in effective law enforcement across borders.[16]

Historically, the *ne bis in idem* principle was first recognized within national criminal justice systems as a safeguard against repeated prosecutions for the same offense. Over time, the principle was elevated to the international plane,[17] finding expression in instruments such as Article 14(7) of the International Covenant on Civil and Political Rights [hereinafter I.C.C.P.R.] and Article 4 of Protocol No. 7 to the European Convention on Human Rights [hereinafter E.C.H.R.], as well as in the practice of international criminal tribunals and the International Criminal Court. With the development of the E.U. legal order,[18] the principle acquired a further supranational dimension, enabling its application across the borders of individual Member States. It was limited to criminal justice. The application of administrative sanctions was prevented,[19] but the *Menci* case[20] clarified the criteria for when both administrative and

[12] *See* AUKE WILLEMS, THE PRINCIPLE OF MUTUAL TRUST IN EU CRIMINAL LAW 80 (2021); *accord* SAMULI MIETTINEN, CRIMINAL LAW AND POLICY IN THE EUROPEAN UNION 181 (2012).

[13] *See* KOEN LENAERTS & PIET VAN NUFFEL, EU CONSTITUTIONAL LAW 693 (2022).

[14] Case C-524/15, Criminal proceedings against Luca Menci, ECLI:EU:C:2018:197 (Mar. 20, 2018).

[15] *See* Giulia Lasagni & Sofia Mirandola, *The European Ne Bis In Idem at the Crossroads of Administrative and Criminal Law*, 2019 EUCRIM 126.

[16] *See* Constanţa Mătuşescu, *The Scope of Application of Fundamental Rights Guaranteed by European Union Law on Member States' Action: Some Jurisprudential Landmarks*, L. REV., 2017, at 22, 38; BOŽIDAR BANOVIĆ, STANKO BEJATOVIĆ & VELJKO TURANJANIN, Ме ународно кривично право [INTERNATIONAL CRIMINAL LAW] 458 (2020).

[17] *See* KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW - VOLUME 1: FOUNDATIONS AND GENERAL PART 396–406 (2013); *see also* de la Cuesta, *supra* note 2.3, at 708.

[18] *See, e.g.*, Charlotte Genschel, Lara Schalk-Unger & Nikolina Kulundzˇija, *The European Investigation Order – National Report Austria*, *in* THE EUROPEAN INVESTIGATION ORDER: LEGAL ANALYSIS AND PRACTICAL DILEMMAS OF INTERNATIONAL COOPERATION 19 (Kai Ambos et al eds., 2023); Mário Simões Barata, Ana Paula Guimarães & Daniela Serra Castilhos, *The European Investigation Order in Portugal – Legal Analysis and Practical Dilemmas*, *in* THE EUROPEAN INVESTIGATION ORDER: LEGAL ANALYSIS AND PRACTICAL DILEMMAS OF INTERNATIONAL COOPERATION 87 (Kai Ambos et al eds., 2023); Miha Šepec, Tamara Dugar & Jan Stajnko, *European Investigation Order – A Comparative Analysis of Practical and Legal Dilemmas*, *in* THE EUROPEAN INVESTIGATION ORDER: LEGAL ANALYSIS AND PRACTICAL DILEMMAS OF INTERNATIONAL COOPERATION 123 (Kai Ambos et al eds., 2023); Martin Böse, *The Transnational Dimension of the Ne Bis In Idem Principle and the Notion of Res Judicata in the EU*, *in* JUSTICE WITHOUT BORDERS: ESSAYS IN HONOUR OF WOLFGANG SCHOMBURG 49 (Martin Böse et al. eds., 2018).

[19] *See* John A.E. Vervaele, *Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?*, UTRECHT L. REV., Sept. 2013, at. 211, 212.

[20] *See* Case C-524/15, Criminal proceedings against Luca Menci, ECLI:EU:C:2018:197 (Mar. 20, 2018).

criminal penalties might apply and helped define the limits of the *ne bis in idem* principle in relation to dual proceedings.

The relationship between administrative and criminal sanctions had already been addressed in the case law of the E.Ct.H.R., most notably in *A and B v. Norway* (2016),[21] where the E.Ct.H.R. accepted that dual proceedings may be compatible with Article 4 of Protocol No. 7 [hereinafter A4P7] if they are sufficiently connected in substance and time. Building on this reasoning, the C.J.E.U. in *Menci* (2018)[22] followed the jurisprudence of the E.Ct.H.R., as reflected in the Opinion of the Advocate General and subsequently in the judgment itself, while further clarifying the criteria for when both administrative and criminal penalties may apply. This line of reasoning has since been refined through later judgments of both the E.Ct.H.R. and the C.J.E.U., such as *Garlsson Real Estate SA and Others v. Italy* (2018)[23] and *Österlund v. Finland* (2019),[24] which further elaborated on the relationship between administrative and criminal proceedings in the application of the *ne bis in idem* principle. Multiple international legal instruments affirm the *ne bis in idem* principle. At the universal level, it is recognized in Article 14(7) of the I.C.C.P.R.,[25]

[21] A and B v. Norway, App. Nos. 24130/11 & 29758/11, (Nov. 15, 2016), https://hudoc.echr.coe.int/eng?i=001-168972.

[22] Case C-524/15, Criminal proceedings against Luca Menci, ECLI:EU:C:2018:197 (Mar. 20, 2018).

[23] Case C-537/16, Garlsson Real Estate SA and Others v. Commissione Nazionale per le Società e la Borsa (Consob), ECLI:EU:C:2018:193 (Mar. 20, 2018).

[24] Österlund v. Finland, App. No. 53197/13 (Sept. 10, 2015), https://hudoc.echr.coe.int/fre?i=001-150997.

[25] *International Covenant on Civil and Political Rights*, United Nations General Assembly, 2200A, Dec. 16, 1966. Since their adoption in 1966, the International Covenant on Civil and Political Rights (I.C.C.P.R.) and its counterpart, the International Covenant on Economic, Social and Cultural Rights (ICESCR), have formed the normative pillars of the post-war international human rights architecture. Originally negotiated in the ideological climate of the Cold War, these instruments were separated along the East–West divide into distinct categories of rights, each governed by its own legal framework. On historical development, *see* Jamil Ddamulira Mujuzi, *The Right Against Double Jeopardy (Non Bis in Idem) and the Drafting History of Article 14(7) of the International Covenant on Civil and Political Rights, 1966,* FUNDAMINA, 2023, at. 1. However, as Schrijver notes, the last few decades have witnessed a growing movement toward integrating these two dimensions of human rights into a more cohesive and universal system of protection. *See* Nico Schrijver, *Fifty Years International Human Rights Covenants: Improving the Global Protection of Human Rights by Bridging the Gap Between the Two Covenants,* 41 NTM 457 (2016). This development evolved from the limitations of the UN Charter, which—despite its rhetorical commitment to human rights—contained mostly promotional and vague provisions. Scholars such as Alston and Forsythe have argued that this lack of specificity spurred the immediate drafting of a more detailed and justiciable human rights framework, first realized in the 1948 Universal Declaration of Human Rights, and later codified in the two Covenants opened for signature in 1966. *See* Philip Alston, *Critical Appraisal of the UN Human Rights Regime*, *in* THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 1 (Philip Alston ed., 1995); HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, AND MORALS (1996); DAVID P. FORSYTHE, THE INTERNATIONALIZATION OF HUMAN RIGHTS (1991).

although this paper does not examine the case-law of the Human Rights Committee.[26] Within the Council of Europe framework, the principle is guaranteed in A4P7 of the E.C.H.R.,[27] which serves as the central reference point for the present analysis. In the European Union legal order, it appears in Article 50 of the Charter of Fundamental Rights of the European Union [hereinafter C.F.R.][28] and Article 54 of the Convention Implementing the Schengen Agreement [hereinafter C.I.S.A.].[29] The principle is also embedded in the statutes of international criminal tribunals and courts, including Article 20 of the Rome Statute of the International Criminal Court [hereinafter I.C.C.],[30] Article 10 of the Statute of the International Criminal Tribunal for the former Yugoslavia [hereinafter I.C.T.Y.],[31] and Article 9 of the Statute of the International Criminal Tribunal for Rwanda.[32] Similar provisions are found in Article 9 of the Statute of the Special Court for Sierra Leone[33] and Article 7 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia,[34] although these instruments are of more limited relevance for the Serbian legal context. While acknowledging this broader international framework, the paper devotes particular attention to the E.C.H.R. and, to a complementary extent, the C.F.R and C.I.S.A., given their direct relevance to Serbian law and practice.

[26] Among the rights guaranteed by the I.C.C.P.R., Article 14(7) enshrines the *ne bis in idem* principle, prohibiting the prosecution or punishment of an individual for a criminal offense for which they have already been finally acquitted or convicted. This provision affirms the finality of adjudication as a key component of legal certainty and the right to a fair trial, reinforcing the broader goals of justice and individual liberty in criminal proceedings. However, scholarly analyses have raised questions regarding the practical enforcement of such guarantees. For example, Linda Camp Keith, drawing on empirical research across ratifying states, argues that mere ratification of the I.C.C.P.R. does not necessarily lead to improved human rights practices unless supported by domestic political will and institutional capacity. *See* Linda Camp Keith, *The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?*, 36 J. Peace Rsch. 95 (1999). Article 14(7) of the International Covenant on Civil and Political Rights (I.C.C.P.R.) states that "[n]o one may be prosecuted or punished for a criminal offense in connection with which he has already been acquitted or convicted by a final judgment according to law and the criminal procedure of each country." This provision enshrines *ne bis in idem* as a fundamental procedural safeguard, ensuring individuals are not subjected to repeated prosecution or punishment for the same offense once a final decision has been rendered. *See also* Paul M. Taylor, A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of I.C.C.P.R. Rights 424-28 (2020); Sarah Joseph & Melissa Castan, The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary 518 (2013); *supra* note 26.2, at 369.

[27] Convention for the Protection of Human Rights and Fundamental Freedoms, (Nov. 4, 1950), E.T.S. No. 5, 213 U.N.T.S. 221.

[28] Charter of Fundamental Rights of the European Union, (Dec. 18, 2000), 2000 O.J. (C 364) 1.

[29] Convention Implementing the Schengen Agreement art. 54, (June 14, 1985), art. 54, 2000 O.J. (L 239) 19.

[30] Rome Statute of the International Criminal Court art. 20, (July 17, 1998), 2187 U.N.T.S. 3.

[31] Statute of the International Criminal Tribunal for the Former Yugoslavia art. 10, S.C. Res. 827 (May 25, 1993).

[32] Statute of the International Criminal Tribunal for Rwanda art. 9, S.C. Res. 955 (Nov. 8, 1994).

[33] Statute of the Special Court for Sierra Leone art. 9, (Jan. 16, 2002), 2178 U.N.T.S. 137.

[34] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 7, NS/RKM/1004/006 (Oct. 27, 2004).

1.2. EUROPEAN CONVENTION ON HUMAN RIGHTS (E.C.H.R.) AND PROTOCOL NO. 7

A4P7 provides that "[n]o one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted." This provision codifies the *ne bis in idem* principle as a component of the right to a fair trial, prohibiting the re-prosecution or double punishment of an individual for the same criminal offense. Crucially, the second paragraph of the article introduces a limited exception, permitting the reopening of proceedings "in accordance with the law and criminal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings." This exception underscores the E.C.H.R.'s emphasis on both finality and fairness, allowing for correction in the event of miscarriages of justice while maintaining safeguards against abusive retrials. Before the adoption of Protocol VII, the E.C.H.R. did not foresee the principle of *ne bis in idem* as part of Article 6.[35] A4P7 introduces a stronger regional formulation of *ne bis in idem*, with important caveats allowing for the reopening of proceedings under specific conditions. Before the adoption of Protocol No. 7, this principle was not expressly included in Article 6 E.C.H.R., though scholarly commentary and E.Ct.H.R. jurisprudence have since explored its implicit presence through interpretations of "criminal charge" and "punishment" under Articles 6 and 7.[36][37] As Allegrezza (2012) and Vervaele (2005) argue, this formulation balances the finality of judgments with the necessity to correct miscarriages of justice, reflecting the E.Ct.H.R.'s nuanced view of procedural fairness.[38] The E.Ct.H.R. has clarified the scope of this provision in key judgments, such as *Zolotukhin v. Russia*,[39] interpreting the phrase "same offence" in a factual, not legal, sense (*idem factum* rather than *idem crimen*). This standard has broadened protection against double jeopardy,

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[35] *Accord* Xavier Groussot & Angelica Ericsson, *Ne Bis In Idem in the EU and ECHR Legal Orders: A Matter of Uniform Interpretation?*, *in* NE BIS IN IDEM IN EU LAW 56 (Willem Bastiaan van Bockel ed., 2016);John A.E. Vervaele, *The Transnational Ne Bis in Idem Principle in the EU: Mutual Recognition and Equivalent Protection of Human Rights*, 1 UTRECHT L. REV. 100, 102 (2005); COMMENTARIO BREVE ALLA CONVENZIONE EUROPEA DEI DIRITTI DELL'UOMO E DELLE LIBERTÀ FONDAMENTALI 894 (Sergio Bartole et al. eds., 2012).

[36] Groussot et al., *supra* note 35.

[37] Ruotsalainen v. Finland, App. No. 13079/03, § 41 (June 16, 2009), https://hudoc.echr.coe.int/eng?i=001-92961; Nikitin v. Russia, App. No. 50178/99, § 35 (July 7, 2004), https://hudoc.echr.coe.int/eng?i=001-61928; Gradinger v. Austria, App. No. 15963/90, § 53 (Oct. 23, 1995), https://hudoc.echr.coe.int/tur?i=001-57958; PETER WHELAN, THE CRIMINALIZATION OF EUROPEAN CARTEL ENFORCEMENT: THEORETICAL, LEGAL, AND PRACTICAL CHALLENGES 160 (2014); Cristoffer Wong, *Criminal Sanctions and Administrative Penalties: The Quid of the Ne Bis In Idem Principle and Some Original Sins*, *in* DO LABELS STILL MATTER? BLURRING BOUNDARIES BETWEEN ADMINISTRATIVE AND CRIMINAL LAW: THE INFLUENCE OF THE EU 219, 225 (Francesca Galli & Anne Weyembergh eds., Université de Bruxelles 2014).

[38] Vervaele, *supra* note 35; Allegrezza, *supra* note 36.

[39] Sergey Zolotukhin v. Russia [GC], App. No. 14939/03 (Feb. 10, 2009), https://hudoc.echr.coe.int/eng?i=001-91222.

especially in cases where the same conduct might fall under multiple legal classifications.

For Serbia, as a signatory to the E.C.H.R. and Protocol No. 7, these standards carry binding force. Domestic law must not only formally incorporate *ne bis in idem*, but must do so in a manner consistent with the E.Ct.H.R.'s evolving jurisprudence. As will be discussed in subsequent sections, tensions remain between Serbian procedural law and the E.C.H.R. framework, particularly regarding the use of misdemeanour proceedings and inconsistencies in defining the "same offence." The challenge of harmonization lies in ensuring that exceptions to the rule—such as retrials based on newly discovered evidence—are applied narrowly and transparently. Any broader interpretation risks undermining legal certainty and eroding the principle's core protective function. Strengthening compliance with A4P7 is therefore essential to safeguarding individual rights and promoting the rule of law within Serbia's judicial system.

1.2.1. DETERMINING THE CRIMINAL NATURE OF PROCEEDINGS: THE ENGEL CRITERIA

The first condition for the application of the *ne bis in idem* principle is that the matter in question must be "criminal" in nature.[40] While domestic legal systems provide their own formal classifications of offenses, the E.Ct.H.R. has developed an autonomous concept of a "criminal matter" under Article 6 E.C.H.R. In its landmark judgment *Engel and Others v. Netherlands*,[41] the E.Ct.H.R. formulated a tripartite test—known as the *Engel criteria*—to determine whether proceedings should be considered criminal for Convention purposes,

[40] Seražin v. Croatia, App. No. 19120/15, 63 (Oct. 9, 2018), https://hudoc.echr.coe.int/fre?i=001-187707; Ghoumid and Others v. France, App. No. 52273/16 and 4 others, 68 (June 25, 2020), https://hudoc.echr.coe.int/eng?i=001-20353; Velkov v. Bulgaria, App. No. 34503/10, 45 (July 21, 2020), https://hudoc.echr.coe.int/eng?i=001-203844.

[41] Engel and Others v. The Netherlands, App. Nos. 5100/71, 5101/71, 5102/71, 5354/72 & 5370/72, (June 8, 1976), https://hudoc.echr.coe.int/eng?i=001-57479.

even if they are formally classified as disciplinary or administrative under national law.[42] The three criteria are: (1) the legal classification of the offense in domestic law, which, although relevant, is not decisive; (2) the intrinsic nature of the offense, examining whether the conduct involves elements typically associated with criminal liability, such as moral blameworthiness or social harm; and (3) the type and severity of the penalty, with sanctions such as imprisonment or substantial fines generally qualifying as criminal.[43] Taken together, these criteria ensure that the scope of Article 6—and by extension A4P7—is not limited by national labels but instead reflects the substantive reality of punitive proceedings.

Although these criteria were developed in the context of Article 6 (fair trial rights), the E.Ct.H.R. has subsequently confirmed their applicability to A4P7. The reason is that both provisions rely on the same autonomous concept of a "criminal charge" (*accusation en matière pénale*) under the E.C.H.R. system.[44] The concept of a "charge," as clarified in the E.Ct.H.R.'s *Deweer v. Belgium* judgement,[45] is understood for Article 6(1) E.C.H.R. as the formal notification issued by a competent authority informing an individual of the allegation that he or she has committed a criminal offense. Since the scope of A4P7 hinges on whether earlier or subsequent proceedings are criminal in nature, the *Engel criteria* provide the analytical framework for determining when the

[42] *Id.* In the judgment *Engel and Others v. Netherlands*, members of the armed forces filed a petition concerning proceedings conducted against them before a military court in relation to offenses such as refusal to obey, which Dutch law qualifies as disciplinary offenses. The applicants were members of the military with various ranks in the Dutch army. According to the decisions of their superiors, they were given different punishments in separate and non-simultaneous proceedings for violating military discipline. These punishments included sentences to several days of "light," "heavy," or "strict" detention. The applicants appealed to the E.Ct.H.R. (after exhausting all legal remedies available in their country), claiming that the disciplinary proceedings had a criminal character. They argued that the proceedings conducted by the military authorities and the Supreme Military Court did not meet the criteria of Article 6 of the ECHR regarding criminal charges. In assessing the criminal nature of the proceedings, the Court established three criteria to determine whether a procedure can be considered criminal: (1) the legal qualification of the act under national law, (2) the legal nature of the act, and (3) the degree of severity of the punishment to which the individual is exposed. Based on these criteria, the Court found that the proceedings in this case did not constitute criminal charges.

[43] *See also* Cavca v. The Republic of Moldova, App. No. 21766/22, 31 (Apr. 4, 2025), https://hudoc.echr.coe.int/eng?i=001-238660; Gestur Jónsson & Ragnar Halldór Hall v. Iceland, App. Nos. 68273/14 & 68271/14, ¶ 75 (Dec. 22, 2020), https://hudoc.echr.coe.int/eng?i=001-207115.

[44] Maugeri, *supra* note 40, at 6.

[45] Deweer v. Belgium, App. No. 6903/75, 46 (Feb. 27, 1980), https://hudoc.echr.coe.int/eng?i=001-57469.

guarantee against double jeopardy applies.[46] This ensures consistency across the E.Ct.H.R.'s case law and prevents states from circumventing the prohibition by reclassifying punitive proceedings under domestic law.

The first criterion concerns the legal classification of the offence under national law. It is of relative weight and serves only as a starting point for the E.Ct.H.R.'s analysis.[47] If domestic law explicitly classifies the offence as criminal, this determination is decisive for the application of Article 6 and, by extension, A4P7.[48] However, this criterion, though important, is not necessarily decisive[49] in determining whether a procedure falls under Article 6 of the E.C.H.R. if national law categorizes the act as a criminal offense. This classification is conclusive for the E.Ct.H.R.. No further criteria are needed for consideration. However, if the national legal order designates the offence as administrative, disciplinary, or otherwise non-criminal, the E.Ct.H.R. will not treat this as conclusive.[50] Instead, it will look beyond the domestic label and examine the substantive reality of the procedure in question, applying the second and third *Engel* criteria. In this way, the E.Ct.H.R. prevents states from circumventing Convention guarantees simply by reclassifying punitive measures under national law.

[46] Although the Engel criteria remain the cornerstone of the E.Ct.H.R.'s jurisprudence for determining the "criminal nature" of proceedings, they continue to be the subject of scholarly and judicial debate. Critics argue that the criteria, while flexible, may lead to legal uncertainty and an over-extension of the criminal sphere, demonstrating that their scope and application remain contested even today. *See* Thomas H. Bickel, Engel Was Grievously Wrong and Should Be Overruled, HARV. J.L. & PUB. POL'Y PER CURIAM (Mar. 2, 2023), https://journals.law.harvard.edu/jlpp/engel-was-grievously-wrong-and-should-be-overruled-thomas-h-bickel/?utm_source=chatgpt.com; Matteo Mastracci, *Judiciary Saga in Poland: An Affair Torn Between European Standards and E.Ct.H.R. Criteria*, POLISH REV. INT'L & EUR. L., Nov. 2020, at 39 (Pol.).

[47] *See* Gestur Jónsson & Ragnar Halldór Hall v. Iceland [GC], App. Nos. 68273/14 & 68271/14, 85 (Dec. 22, 2020), https://hudoc.echr.coe.int/eng?i=001-207115; Žugić v. Croatia, App. No. 3699/08, ¶ 65 (May 31, 2011), https://hudoc.echr.coe.int/eng?i=001-104933.

[48] *See* Păcurar v. Romania, App. No. 17985/18, 124 (June 24, 2025), https://hudoc.echr.coe.int/eng?i=001-243776.

[49] *See* Mihalache v. Romania, App. No. 54012/10, 53 (July 8, 2019), https://hudoc.echr.coe.int/fre?i=001-194523; Serazin v. Croatia, App. No. 19120/15, 64 (Oct. 9, 2018), https://hudoc.echr.coe.int/fre?i=001-187707; Sergey Zolotukhin v. Russia [GC], App. No. 14939/03, ¶ 52 (Feb. 10, 2009), https://hudoc.echr.coe.int/eng?i=001-91222. This approach was illustrated in *Păcurar v. Romania*, where the confiscation of unexplained assets was formally designated as an administrative sanction under Romanian law and adjudicated before administrative courts applying civil procedure. The E.Ct.H.R. nonetheless reiterated that such domestic classification is not determinative, since the first criterion carries only relative weight and must be assessed in light of the second and third criteria. In this way, the E.Ct.H.R. prevents states from circumventing ECHR guarantees by formally reclassifying punitive measures, ensuring that the substantive reality of the proceedings remains decisive.

[50] Gestur Jónsson and Ragnar Halldór Hall v. Iceland, App. Nos. 68273/14 & 68271/14, 77-78, 85 (Jan. 22, 2020), https://hudoc.echr.coe.int/eng?i=001-207115; *See* Andreas Th. Muller & Theresa M. Weiskopf, *Leading Cases in the European Court of Human Rights' Jurisprudence 2020*, 76 ZöR - ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 1371 (2021) (Austria).

A pertinent example of this approach is *Ravnsborg v. Sweden*,[51] which concerned the internal qualification of a fine imposed for inappropriate statements made during civil proceedings. Although Swedish national law did not classify the act as a criminal offense, the E.Ct.H.R. found that the severity of the penalty (a fine) could be considered akin to a criminal sanction. Thus, the E.Ct.H.R. concluded that the proceedings fell under Article 6, despite the offense not being classified as criminal within Sweden's legal framework.[52] This case illustrates the E.Ct.H.R.'s flexible approach to defining "criminal" matters under the Convention. Additionally, it is important to note that the Engel criteria are not always straightforward, and the E.Ct.H.R. may take a contextual approach. This is especially true when national law categorizes the offense differently, as the E.Ct.H.R. weighs the overall impact of the proceedings, including the severity of sanctions and whether they resemble criminal penalties in their purpose and consequences.

A key development in recent years has been the evolution of the E.Ct.H.R.'s approach towards fines and sanctions, particularly in administrative offenses that are not traditionally criminal. The E.Ct.H.R. has expanded its understanding of what constitutes a "criminal charge" in light of evolving national laws and the increasing use of administrative sanctions for offenses that would have previously been treated as criminal acts.[53] This includes the growing use of financial penalties or administrative sanctions in cases involving public officials or business activities, which may now trigger

[51] Ravnsborg v. Sweden, App. No. 14220/88, (Mar. 23, 1994), https://hudoc.echr.coe.int/eng?i=001-57871; *see* Achilles C. Emilianides, *Contempt in the Face of the Court and the Right to a Fair Trial: The Implications of Kyprianou v. Cyprus*, 13 Eur. J. Crime, Crim. L. & Crim. Just. 401 (2005) (Neth.); David Pannick, *Commercial Judicial Review and the Human Rights Act 1998*, 4 Jud. Rev. 177 (1999) (U.K.).

[52] Ravnsborg v. Sweden, App. No. 14220/88, 33 (Mar. 23, 1994), https://hudoc.echr.coe.int/eng?i=001-57871 (assessing no violation of Article 6 of the ECHR, examined under *Engel* criteria).

[53] *See* Katja Šugman Stubbs, *An Increasingly Blurred Division Between Criminal and Administrative Law*, *in* Visions of Justice: Liber Amicorum Mirjan Damaška 351 (Bruce Ackerman et al eds., 2016) (Ger.); Nadine Zurkinden, *Swiss Peculiarities of the Enforcement Mechanisms in Core, Secondary and Administrative Criminal Law*, *in* Criminal and Quasi-Criminal Enforcement Mechanisms in Europe: Origins, Concepts, Future 38 (Vanessa Franssen & Christopher Harding eds., 2022) (U.K.); Sarah Wilson & Gary Wilson, *The Interplay between Criminal and Quasi-Criminal Enforcement Mechanisms in the UK Context Explored through the Prism of 'Market Abuse': Current Approaches and Historical Perspectives*, *in* Criminal and Quasi-Criminal Enforcement Mechanisms in Europe: Origins, Concepts, Future 84 (Vanessa Franssen & Christopher Harding eds., 2022) (U.K.). In Spanish law, the principle of double jeopardy not only bars multiple criminal punishments for the same offense but also precludes the concurrent imposition of both criminal and administrative sanctions arising from the same conduct. *See* Carlos Gómez-Jara Díez & Luis E. Chiesa, *Spain*, *in* The Handbook of Comparative Criminal Law 488, 492 (Kevin Jon Heller & Markus D. Dubber eds., 2010).

Article 6 protections if the penalty is severe enough.[54] Furthermore, recent case law has addressed with detention and custodial sentences that may initially be classified as non-criminal under national law but are found to trigger the E.C.H.R.'s criminal procedural safeguards because of their consequences for personal liberty.

The second *Engel* criterion is the legal nature of the disputed act. With this criterion, the E.Ct.H.R. takes into account the position of the act within the national legal framework, considering the reasons why the act is prescribed as prohibited and punishable. This involves examining the values and protected interests that the legislator intended to safeguard. The E.Ct.H.R. has consistently held that criminal or penal acts include behaviors that may not be explicitly classified as criminal in national legislation but are still subject to sanctions due to their harmful nature.[55] The E.Ct.H.R. will treat an act as criminal if it determines that the protected values fall within the criminal sphere. The E.Ct.H.R. has emphasized that any procedure governed by criminal procedural safeguards may fall within the ambit of criminal law.[56] This principle extends to acts that fall under what is referred to in Serbia as secondary criminal legislation.[57] Such acts, even if not traditionally considered criminal offenses, should be interpreted within the framework of criminal law, especially when criminal procedural norms apply.

When assessing whether the legal nature of the act is criminal, the following details must also be taken into account: whether the legal rule applies to a specific group

[54] The E.Ct.H.R. has developed a nuanced approach toward the classification of sanctions and fines, particularly in the context of administrative offenses that are not traditionally viewed as criminal. The Court has primarily used the Engel criteria—comprising the legal classification of the act under national law, the nature of the offense, and the severity of the penalty—to determine whether a particular case falls within the "criminal charge" category under Article 6 of the European Convention on Human Rights. For example, in the *Jussila v. Finland* case (2006), for instance, the Court highlighted the importance of assessing both the nature of the sanction and its seriousness. Administrative fines with a deterrent effect, even if not classified as criminal by national law, might still invoke the protections under Article 6 if they are deemed to have a criminal character due to their punitive or deterrent effects. *See* Jussila v. Finland [GC], App. No. 73053/01, (Nov. 23, 2006), https://hudoc.echr.coe.int/eng?i=001-78135. In *Oleksandr Volkov v. Ukraine* (2013), the Court held that even severe disciplinary actions such as the dismissal of a judge could be classified outside the "criminal" domain, depending on how the state structured the disciplinary system, despite the significant impact of such decisions.

[55] *See* Campbell and Fell v. United Kingdom, App. Nos. 7819/77 & 7878/77, 71 (June 28, 1984), https://hudoc.echr.coe.int/eng?i=001-57456; Jussila v. Finland, App. No. 73053/01, 38 (Nov. 23, 2006), https://hudoc.echr.coe.int/eng?i=001-78135; Ziliberberg v. Moldova, App. No. 61821/00, 30 (Feb. 1, 2005), https://hudoc.echr.coe.int/eng?i=001-68119; Kyprianou v. Cyprus, App. No. 73797/01, 31 (Jan. 27, 2004), https://hudoc.echr.coe.int/eng?i=001-71671; Zaicevs v. Latvia, App. No. 65022/01, (July 31, 2007), https://hudoc.echr.coe.int/fre?i=001-82001.

[56] Öztürk v. Germany, App. No. 8544/79, 51 (Feb. 21, 1984), https://hudoc.echr.coe.int/eng?i=001-57553.

[57] Veljko Turanjanin, *KRIVIČNI ZAKONIK I KRIVIČNA DELA SPOREDNOG KRIVIČNOG ZAKONODAVSTVA* [The Criminal Code and Criminal Offenses of Secondary Criminal Legislation] (2022) (Serb.).

of people[58] (e.g. doctors, fans) or applies to all citizens,[59] whether the legal rule has a deterrent effect or punitive purpose,[60] whether sentencing depends on guilt, as well as whether the legal rule protects the interests of society that are otherwise protected by criminal law.[61] Thus, a broad range of punishable behaviors—although not formally criminal—may be considered as falling within the scope of criminal law.

The E.Ct.H.R.'s approach to the *Engel* criteria and the legal nature of the act has evolved in recent case law. Particularly in cases concerning administrative offenses or regulatory violations, the E.Ct.H.R. has increasingly focused on the punitive and deterrent effects of sanctions, even when they are not formally classified as criminal under national law. In *Ravnsborg v. Sweden*,[62] for example, the E.Ct.H.R. scrutinized whether a fine imposed for inappropriate statements made during a civil proceeding could be considered a criminal sanction. This case underscored the E.Ct.H.R.'s growing tendency to classify penalties as "criminal" when they are sufficiently severe or have a punitive or deterrent effect. The E.Ct.H.R. emphasized that the key question is whether the sanction serves the same purpose as a criminal penalty, even if the act is not classified as criminal under national law. Therefore, in cases where national legislation imposes penalties that serve to deter or punish certain behaviors, the E.Ct.H.R. is more likely to treat the procedure as criminal, even if the offense does not fall within the

[58] Ramos Nunes de Carvalho e Sá v. Portugal [GC], App. Nos. 55391/13, 57728/13 & 74041/13, 125 (Nov. 6, 2018), https://hudoc.echr.coe.int/eng?i=001-187507. *See* Mathieu Leloup, *The Concept of Structural Human Rights in the European Convention on Human Rights*, 20 Hum. Rts. L. Rev. 480 (2020) (U.K.).

[59] *Id.* § 53; Vegotex Int'l S.A. v. Belgium [GC], App. No. 49812/09, 69 (Nov. 3, 2022), https://hudoc.echr.coe.int/eng?i=001-220415; Bendenoun v. France, App. No. 12547/86, ¶47 (Feb. 24, 1994), https://hudoc.echr.coe.int/tur?i=001-57863; Milenković v. Serbia, App. No. 50124/13, ¶ 35 (Nov. 26, 2013), https://hudoc.echr.coe.int/eng?i=001-161001; Mihalache v. Romania, App. No. 54012/10, ¶ 59 (July 8, 2019), https://hudoc.echr.coe.int/eng?i=001-194523; Šimkus v. Lithuania, App. No. 41788/11, ¶ 43 (June 13, 2017), https://hudoc.echr.coe.int/eng?i=001-174398; Žaja v. Croatia, App. No. 37462/09, 88 (Oct. 4, 2016), https://hudoc.echr.coe.int/eng?i=001-166925; Muslija v. Bosnia and Herzegovina, App. No. 32042/11, ¶ 28 (Jan. 14, 2014), https://hudoc.echr.coe.int/fre?i=001-139988.

[60] *E.g.*, Benham v. United Kingdom, App. No. 19380/92, 56 (June 10, 1996), http://hudoc.echr.coe.int/eng?i=001-57990; Welch v. United Kingdom, App. No. 17440/90, 26 (Feb. 9, 1995), http://hudoc.echr.coe.int/eng?i=001-57927; Öztürk v. Germany, App. No. 8544/79, 53 (Feb. 21, 1984), http://hudoc.echr.coe.int/eng?i=001-57553. Here we will emphasize that both criminal and administrative/administrative procedures can have both a punitive and deterrent purpose, while the boundary line between them lies in the instruments and consequences of public repressive action, which are more difficult in criminal proceedings, taking into account that greater values and interests in question. *See also* Antonio Tarallo, *About Disorder in the "Cuisine Interne" of Mihalache Grand Chamber Judgment: Some Reasons for a Radical Change of Approach in Ne Bis In Idem Issues*, 32 Crim. L.F. 317, 325 (2021) (Neth.).

[61] *E.g.*, *A. Menarini Diagnostics S.R.L. v. Italy*, App. No. 43509/08, 40 (Sept. 27, 2011), https://hudoc.echr.coe.int/eng?i=001-106438; Mihalache v. Romania, App. No. 54012/10, 59 (July 8, 2019), https://hudoc.echr.coe.int/eng?i=001-194523; Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia, App. No. 47072/15, 42 (Jan. 23, 2019), https://hudoc.echr.coe.int/eng?i=001-187199; Milenković v. Serbia, App. No. 50124/13, 35 (Mar. 1, 2016), https://hudoc.echr.coe.int/eng?i=001-161001; Sergey Zolotukhin v. Russia, App. No. 14939/03, 55 (Mar. 10, 2009), https://hudoc.echr.coe.int/eng?i=001-91222.

[62] Ravnsborg v. Sweden, App. No. 14220/88 (Mar. 23, 1994), http://hudoc.echr.coe.int/eng?i=001-57871.

traditional scope of criminal law. This approach reflects the E.Ct.H.R.'s broader interpretation of what constitutes a "criminal charge", ensuring that individuals are afforded the protections guaranteed by Article 6 of the E.C.H.R.

The third *Engel* criterion—the type and severity of the sanction—is pivotal in determining whether a matter qualifies as criminal under Article 6 of the E.C.H.R. This criterion often becomes decisive when the first two (the legal classification of the offence and the nature of the act) do not yield a clear answer. In its case law, the E.Ct.H.R. has emphasized that the assessment must focus not only on the formal designation of the sanction but also on its potential impact on the individual. In *Păcurar v. Romania*,[63] the E.Ct.H.R. observed that the sanctions the applicant risked under the asset-verification framework were disciplinary in nature and did not involve imprisonment, distinguishing the case from *Anghel v. Romania*[64] and *Bendenoun v. France*,[65] where sanctions included fines or tax surcharges with the possibility of imprisonment in default. The E.Ct.H.R. has further clarified, in line with its reasoning under Article 7 E.C.H.R., that the severity of a sanction alone is not determinative of its criminal nature, since many non-penal measures may nevertheless impose a substantial burden on the person concerned.[66] In this respect, it has been accepted that even significant financial penalties may remain outside the "criminal" sphere if their primary purpose is regulatory or disciplinary rather than punitive. Thus, in *Müller-Hartburg v. Austria,*[67] a potential fine of €36,000 was held insufficient to render the matter criminal. In contrast, in *Ramos Nunes de Carvalho e Sá v. Portugal*[68] a maximum penalty of €43,750 did not alter the essentially disciplinary character of the proceedings. Similarly, in *Grosam v. Czech Republic,*[69] the E.Ct.H.R. concluded that disciplinary proceedings against bailiffs, which entailed removal from office and a fine of nearly €31,000, did not involve the determination of a criminal charge. Taken together, this jurisprudence demonstrates that the third Engel criterion is applied with caution: although the severity of the

[63] Păcurar v. Romania, App. No. 17985/18, ¶125–30 (June 24, 2025), https://hudoc.echr.coe.int/eng?i=001-243776.

[64] Anghel v. Romania, App. No. 28183/03, 52 (Oct. 4, 2007), https://hudoc.echr.coe.int/eng?i=001-108558.

[65] Bendenoun v. France, App. No. 12547/86, 47 (Feb. 24, 1994), https://hudoc.echr.coe.int/eng?i=001-57863.

[66] *E.g.*, Welch v. United Kingdom, App. No. 17440/90, 32 (Feb. 9, 1995), https://hudoc.echr.coe.int/eng?i=001-57927; Del Rio Prada v. Spain [GC], App. No. 42750/09, ¶ 82 (Oct. 21, 2013), https://hudoc.echr.coe.int/eng?i=001-127697; *Longo v. Italy*, App. No. 35780/18, 67 (Aug. 27, 2024), https://hudoc.echr.coe.int/fre?i=001-235959.

[67] Müller-Hartburg v. Austria, App. No. 47195/06, 47 (Feb. 19, 2013), https://hudoc.echr.coe.int/eng?i=001-116734.

[68] Ramos Nunes de Carvalho e Sá v. Portugal [GC], App. Nos. 55391/13, 57728/13 & 74041/13, 25, 71 & 126, 217 (Nov. 6, 2018), https://hudoc.echr.coe.int/eng?i=001-187507.

[69] Grosam v. Czech Republic [GC], App. No. 19750/13, 120–21 (June 1, 2023), https://hudoc.echr.coe.int/eng?i=001-225231.

sanction is an important factor, it is not sufficient by itself to bring a matter into the criminal sphere unless combined with punitive purpose or general applicability.[70]

The importance of this criterion is highlighted in the *Milenković v. Serbia* judgment,[71] which emphasized that the severity of the measure imposed is primarily determined by the maximum potential sentence set out in the relevant domestic law. While the actual sentence imposed is also relevant, it cannot diminish the primary focus, which is the maximum penalty prescribed by law.[72] This underscores that the potential for severe sanctions is key in determining whether a legal matter falls within the criminal domain.[73] Therefore, the purpose of prescribing and imposing criminal sanctions is predominantly repressive, and also serves a preventive goal.

As established by the E.Ct.H.R., the second and third criteria are considered alternative rather than cumulative.[74] This means that it is sufficient for either the nature of the act or the severity of the sanction to suggest a criminal charge under Article 6.[75] However, when neither of these two elements provides a clear answer, the criteria may be applied cumulatively to ensure a more comprehensive determination.[76] The alternative application is particularly useful when dealing with cases where the legal qualification of the act is not clear-cut. As such, in some instances, the E.Ct.H.R. may choose to analyze both the nature of the act and the severity of the sanction in combination. This approach ensures that even when one of the elements fails to establish a criminal charge, the other can provide the necessary context to uphold the principles of fairness and justice under Article 6 of the E.C.H.R.

[70] *See* Özmurat İnşaat Elektrik Nakliyat Temizlik San. ve Tic. Ltd. Şti. v. Turkey, App. No. 48657/06, 22–26 (Nov. 28, 2017), https://hudoc.echr.coe.int/eng?i=001-178942; *see also* Sancaklı v. Turkey, App. No. 1385/07, 28–31, (May 15, 2018), https://hudoc.echr.coe.int/eng?i=001-182847; *see also* Dilek Genç v. Türkiye, App. Nos. 74601/14 & 78295/14, (Jan. 21, 2025), https://hudoc.echr.coe.int/?i=001-240182.

[71] Milenković v. Serbia, App. No. 50124/13, 36 (Nov. 26, 2013), https://hudoc.echr.coe.int/eng?i=001-161001.

[72] *See* Emir Ćorović, *Načelo ne bis in idem i Evropska konvencija za zaštitu ljudskih prava i osnovnih sloboda i praksa Evropskog suda za ljudska prava* [*The Principle of Ne Bis in Idem and the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Practice of the European Court of Human Rights*], *in* NAČELO NE BIS IN IDEM I PRAVNA SIGURNOST GRAĐANA [THE PRINCIPLE OF NE BIS IN IDEM AND LEGAL SECURITY OF CITIZENS] 131, 137 (Stanko Bejatović & Nataša Novaković eds., 2022) (Pol.).

[73] A. and B. v. Norway, App. Nos. 24130/11 & 29758/11, 136-154 (Nov. 15, 2016), https://hudoc.echr.coe.int/eng?i=001-168972.

[74] Ezeh and Connors v. United Kingdom, App. Nos. 39665/98 & 40086/98 (Oct. 9, 2003), https://hudoc.echr.coe.int/eng?i=001-61333; *see also* Mirko Bonačić & Marko Rašo, *Characteristics of Misdemeanor Law and Trial: Current Issues and Priorities*, 2012 CROATIAN ANN. CRIM. L. & PRAC. 443 (2012) (Croat.).

[75] Lutz v. Germany, App. No. 9912/88, 23, 55 (Aug. 25, 1987), https://hudoc.echr.coe.int/eng?i=001-57531.

[76] *E.g.*, Janosevic v. Sweden, App. No. 34619/97, 67 (Jan. 26, 2000), https://hudoc.echr.coe.int/eng?i=001-60628; Sergey Zolotukhin v. Russia, App. No. 14939/03, 53 (Feb. 10, 2009), https://hudoc.echr.coe.int/eng?i=001-91222.

1.2.2. IDENTITY OF THE ACT *(IDEM)*

The second element of the *ne bis in idem* principle —*idem*— addresses the identity of the act and has proven to be the most contentious in both legal doctrine and jurisprudence. Before the *Zolotukhin v. Russia* judgment in 2009, the E.Ct.H.R. applied divergent approaches to interpreting what constitutes the "same offense," resulting in significant inconsistency. In cases such as *Gradinger v. Austria,*[77] *Oliveira v. Switzerland,*[78] and *Franz Fischer v. Austria,*[79] the E.Ct.H.R. alternatively focused on the legal qualification, factual background, and protected legal interests, leading to legal uncertainty regarding the scope of the principle. *Gradinger v. Austria*[80] focused on the legal classification and aimed to assess whether the criminal elements of the two proceedings were the same. *Oliveira v. Switzerland*[81] introduced a broader approach, emphasizing the factual circumstances rather than legal definitions. In *Franz Fischer v. Austria*,[82] the Court evaluated both the facts and the protected legal interest. These divergent rulings led to uncertainty, as they suggested different ways of interpreting whether offenses in separate proceedings were indeed the same.

The *Zolotukhin*[83] judgment marked a pivotal shift, establishing that the key criterion for determining the identity of the offense is factual sameness. The E.Ct.H.R. clarified that *ne bis in idem* is engaged when both proceedings concern "identical facts or facts which are substantially the same." This entails that if the factual allegations underpinning one proceeding reappear—wholly or substantially—in a subsequent indictment, the two are deemed materially identical. This decision brought greater predictability and alignment in E.Ct.H.R. case law by focusing on factual identity rather than the formal legal categorization of offenses.

The *idem* element is perhaps the most controversial aspect of the *ne bis in idem* principle[84] and has both subjective and objective aspects. Subjective identity (*eadem persona*) exists when the same individual (*eadem persona*) who was prosecuted or tried in one case faces prosecution in another proceeding. The person's identity remains the same even if, for instance, the form of intent or culpability shifts between proceedings.

[77] Gradinger v. Austria, App. No. 15963/90, (Oct. 23, 1995), https://hudoc.echr.coe.int/eng?i=001-57958.
[78] Oliveira v. Switzerland, App. No. 25711/94, (July 30, 1998), https://hudoc.echr.coe.int/eng?i=001-58210.
[79] Franz Fischer v. Austria, App. No. 37950/97, (May 29, 2001), https://hudoc.echr.coe.int/eng?i=001-59475.
[80] Gradinger v. Austria, App. No. 15963/90, (Oct. 23, 1995), https://hudoc.echr.coe.int/eng?i=001-57958.
[81] Oliveira v. Switzerland, App. No. 25711/94, (July 30, 1998), https://hudoc.echr.coe.int/eng?i=001-58210.
[82] Franz Fischer v. Austria, App. No. 37950/97, (May 29, 2001), https://hudoc.echr.coe.int/eng?i=001-59475.
[83] Sergey Zolotukhin v. Russia, App. No. 14939/03, (Feb. 10, 2009), https://hudoc.echr.coe.int/eng?i=001-91222.
[84] *See* Bas van Bockel, *The 'European' Ne Bis in Idem Principle: Substance, Sources, and Scope, in* NE BIS IN IDEM IN EU LAW 47 (Willem Bastiaan van Bockel ed., 2016) (U.K.).

Objective identity (*eadem res*) refers to the sameness of the act itself. Following *Zolotukhin,*[85] the E.Ct.H.R. emphasized that the most essential aspect is the material identity of the facts. It is also necessary to show a temporal and spatial connection between those facts, indicating that both cases are grounded in the same core incident or series of actions.

1.2.3. DUPLICATION OF PROCEEDINGS AND PENALTIES OF CRIMINAL NATURE *(BIS)*

The third core element of the *ne bis in idem* principle concerns the prohibition of duplicate proceedings (*bis*). While multiple proceedings may arise from the same factual circumstances, they do not automatically breach A4P7. Since *Zolotukhin v. Russia,*[86] the E.Ct.H.R. has clarified that the decisive question is whether the proceedings are "sufficiently close in substance and in time".[87] Where this condition is met, the proceedings may be considered an integrated response to a single offense rather than an impermissible duplication. This standard was built on earlier case-law, including *Nykänen v. Finland*[88] and *Rinas v. Finland,*[89] where the E.Ct.H.R. emphasized that parallel tax surcharge and criminal proceedings lacking a sufficiently close connection amounted to a violation, and was later reaffirmed in *Johannesson and Others v. Iceland,*[90] which further clarified the proportionality and foreseeability requirements.

In *A and B v. Norway*, the E.Ct.H.R. articulated four key factors for determining whether two proceedings form such an integrated whole: a) each procedure pursues a distinct yet complementary objective, addressing different aspects of the same socially harmful behavior; b) *bis* is a foreseeable consequence *idem*: conducting two different proceedings (*bis*) is, based on law and practice, a foreseeable consequence of the same illegal behavior (*idem*); c) duplication of evidentiary proceedings was avoided: the procedures were carried out in such a way as to avoid duplication of presentation and assessment of evidence to the greatest extent possible; d) the totality of the sanctions is proportional to the committed act: the sanction from the procedure that was first

[85] Sergey Zolotukhin v. Russia, App. No. 14939/03, (Feb. 10, 2009), https://hudoc.echr.coe.int/eng?i=001-91222.

[86] *Id.*

[87] A. and B. v. Norway, App. Nos. 24130/11 & 29758/11, 13 (Nov. 15, 2016), https://hudoc.echr.coe.int/eng?i=001-168972; *see also* Jesus Pinhal v. Portugal, App. Nos. 48047/15 & 2276/20, (Oct. 8, 2024), https://hudoc.echr.coe.int/eng?i=001-237560; (Eur.) 2024; *See also* Case C-27/22, Volkswagen Group Italia S.p.A. v. Autorità Garante della Concorrenza e del Mercato (AGCM), ECLI:EU:C:2023:663, 94 (Sep. 14, 2023).

[88] Nykänen v. Finland, App. No. 11828/11, (July 20, 2014), https://hudoc.echr.coe.int/eng?i=001-144112.

[89] Rinas v. Finland, App. No. 17039/13, (Jan. 27, 2015), https://hudoc.echr.coe.int/eng?i=001-150668.

[90] Jóhannesson & Others v. Iceland, App. No. 22007/11, (May 18, 2017), https://hudoc.echr.coe.int/eng?i=001-173498.

concluded with a legally binding decision must be taken into account in the second procedure because this prevents the imposition of an excessive burden on an individual.[91]

This approach ensures that dual administrative and criminal responses may coexist only if they collectively form a coherent, proportionate, and foreseeable framework. Where these conditions are absent, successive or parallel proceedings constitute an impermissible duplication contrary to the *ne bis in idem* principle.

When dealing with administrative or misdemeanor proceedings, the E.Ct.H.R. suggests considering two additional factors to determine whether the combination of procedures imposes an undue burden: a) whether the procedure in which the sanction was imposed is "criminal" in the sense of the ECHR (criminal nature of the procedure) - if it is not, it is less likely that the principle of *ne bis in idem* will be violated and b) the degree of stigmatization that the administrative/misdemeanor procedure has on the perpetrator - if the degree of stigmatization is not significant, it is more likely that the combination of procedures did not impose an excessive burden on the applicant.[92] The connection between two procedures must also be temporal. This does not imply that proceedings must run in perfect parallel; however, authorities should conduct them efficiently to avoid prolonged uncertainty for the individual about potential additional proceedings. The E.Ct.H.R.'s reasoning in *A and B v. Norway*[93] thus consolidated and refined principles first signaled in *Nykänen*[94] and *Rinas*[95], and later confirmed in *Johannesson and Others,*[96] thereby establishing a coherent framework for assessing the compatibility of dual proceedings with A4P7.

Recent E.Ct.H.R. rulings continue to refine these principles, emphasizing proportionality and the nature of connections between proceedings. In *Marguš v. Croatia* [GC],[97] the E.Ct.H.R. clarified two important dimensions of A4P7. First, it confirmed that the discontinuance of criminal proceedings by a public prosecutor does not amount to a 'final acquittal or conviction,' and therefore falls outside the protective scope of *ne bis in idem*. Second, it held that amnesty decisions relating to grave breaches of fundamental rights—such as war crimes—cannot be regarded as final judgments within the

[91] *Id.* at 132.
[92] *Id.* at 133.
[93] A. and B. v. Norway, App. Nos. 24130/11 & 29758/11, (Nov. 15, 2016), https://hudoc.echr.coe.int/eng?i=001-168972.
[94] Nykänen v. Finland, App. No. 11828/11, (July 20, 2014), https://hudoc.echr.coe.int/eng?i=001-144112.
[95] Rinas v. Finland, App. no. 17039/13, (Jan. 27, 2015), https://hudoc.echr.coe.int/eng?i=001-150668.
[96] Jóhannesson & Others v. Iceland, App. no. 22007/11, (May 18, 2017), https://hudoc.echr.coe.int/eng?i=001-173498.
[97] Marguš v. Croatia [GC], App. No. 4455 /10, 116–118 &126–139 (May 27, 2014), https://hudoc.echr.coe.int/fre?i=001-144276.

autonomous E.C.H.R. meaning of Article 4.[98] The E.Ct.H.R. emphasized the growing tendency in international law to consider amnesties for serious violations of human rights as impermissible, stressing that Articles 2 and 3 E.C.H.R. impose positive obligations on states to investigate and prosecute such crimes. Consequently, Croatia's decision to re-indict and convict the applicant for war crimes was found consistent with the E.C.H.R. framework.[99] Additionally, *Lupeni Greek Catholic Parish v. Romania*[100] reiterated the importance of procedural safeguards and consistent application of A4P7.

1.2.4. EXISTENCE OF FINAL DECISION

The drafting history of Protocol No. 7 provides important context for interpreting Article 4. According to the Explanatory Report to Protocol No. 7,[101] the protection against double jeopardy applies only once a person has been "finally acquitted or convicted" in accordance with the domestic law and criminal procedure of the State concerned. This confirms that the principle is not engaged by every final decision in a

[98] *See* Elizabeth S. Bates, *Introductory Note to Margus v. Croatia (Eur. Ct. H.R.)*, 53 Int'l Legal Materials 751 (2014); Svetlana Nenadic, *Ne Bis in Idem Principle in European Convention on Human Rights and Implementation of the Principle in Jurisprudence of European Court of Human Rights*, 52 J. CRIMIN. & CRIM. L. 141 (May-August 2014); *supra* note 60 (Neth.); Michail Vagias, *Rethinking Amnesties and the Function of the Domestic Judge*, 9 Const. Rev. 142 (2023) (Indon.); Tarhan Yusif ogli Shukurov, *Application of ECHR Case-Law by International Regional Courts of Human Rights*, 2021 Ukr. J. Int'l L. 155 (Ukr.); Veljko Turanjanin & Jelena Stanisavljević, *Human Trafficking and Forced Prostitution Under Article 4 of the European Convention on Human Rights*, 25 German L.J. 262 (2024) (Germ.); McKenzie Gallagher, *Amnesty Laws in Modern Peace Agreements: An Analysis of the Northern Ireland Legacy Act under International Law,* 39 Am. U. Int'l L. Rev. 327 (2024) (2024); Michael Hamilton & Antoine Buyse, *Human Rights Courts as Norm-Brokers*, 18 Hum. Rts. L. Rev. 205 (2018) (U.K.); Miles Jackson, *Amnesties in Strasbourg*, 38 Oxford J. Legal Stud. 451 (2018) (U.K.); Teodor-Viorel Gheorghe, *Particular Cases of Application of the Ne Bis In Idem Principle*, The Annals of "Dunarea de Jos" University of Galati, June 2023, at 87 (Rom.); Goran Ilic, *Ne Bis in Idem Principle in Practice of the European Court of Human Rights*, 61 Strani Pravni Zivot 21 (2017) (Serb.); Paolo Caroli, *Behind the Rhetoric: The Implications of Prohibiting Amnesties*, 13 J. Comp. L. 95 (2018).

[99] A central question in the E.Ct.H.R.'s jurisprudence concerns what qualifies as a "final" decision triggering the protection of *ne bis in idem*. In *Gözütok and Brügge*, Joined Cases C-187/01 and C-385/01, ECLI:EU:C:2003:87, the Court held that decisions of public prosecutors to discontinue proceedings following the fulfilment of conditions imposed on the accused must be treated as final for the purposes of Article 4 of Protocol No. 7, even though they were not issued by a court. In contrast, the Grand Chamber in *Marguš v. Croatia* emphasized that not every procedural termination falls within the protective scope of the provision. In that case, domestic proceedings had been discontinued on the basis of a general amnesty law covering acts committed during the war. The E.Ct.H.R. concluded that amnesty decisions relating to grave breaches of fundamental rights, such as war crimes, could not be regarded as "final acquittals or convictions" within the autonomous meaning of the Convention. The Court underscored that Article 4 of Protocol No. 7 must be interpreted consistently with Articles 2 and 3 of the ECHR, which impose positive obligations on states to investigate and prosecute serious human rights violations. As such, Croatia's decision to re-indict and convict the applicant was found compatible with the Convention framework.

[100] Lupeni Greek Catholic Parish v. Romania [GC], App. No. 76943/11, 84 (Nov. 29, 2016), https://hudoc.echr.coe.int/eng?i=001-169054.

[101] Council of Europe, Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. No. 117 (Nov. 22, 1984).

broad sense, but only by those that carry the effect of res judicata, whether by acquittal or conviction. The Report thus establishes a narrow gateway to the protection of Article 4, limiting its scope to decisions that conclusively terminate criminal liability.

The protection afforded by A4P7 applies only where there has been a "final acquittal or conviction." As clarified in the *Explanatory Report to Protocol No. 7*,[102] this provision does not extend to every form of final decision, but only to those that determine criminal responsibility on the merits of the case. The E.Ct.H.R. in *Mihalache v. Romania [GC]*[103] emphasized that the decisive factor is not the formal classification of the decision, but its substantive content and legal effects. Crucially, judicial intervention is not required for a decision to qualify as an "acquittal" or "conviction": decisions of non-judicial authorities may fall within the scope of Article 4 if they involve an evaluation of the evidence and a determination of responsibility. In *Felix Guțu v. Moldova,*[104] the E.Ct.H.R. confirmed that even prosecutorial decisions may trigger ne bis in idem protection, provided that they include an assessment of the merits and produce binding legal effects.

Even in the absence of judicial involvement, a prosecutorial decision may qualify as a "conviction" if it entails an assessment of the evidence, a determination of responsibility, and the imposition of a sanction with punitive or deterrent purposes. In *Mihalache*, the prosecutor's discontinuance of proceedings, combined with the imposition of a penalty, was found to constitute a "conviction" within the meaning of Article 4 of Protocol No. 7.[105]

Conversely, decisions that merely terminate proceedings without an evaluation of the accused's guilt or innocence fall outside the scope of the provision. In *Smoković v. Croatia (dec.),*[106] the E.Ct.H.R. held that a ruling terminating criminal proceedings on grounds of statutory limitation could not amount to either a conviction or an acquittal, as

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[102]*Id.*

[103]Mihalache v. Romania, App. No. 54012/10, 88-101 (July 8, 2019), https://hudoc.echr.coe.int/eng?i=001-194523; *See* Maria Beatrice Berna, *Hotărârea Curții Europene a Drepturilor Omului în cauza Mihalache împotriva României* [*Decision of the European Court of Human Rights in the Case Mihalache v. Romania*], Drepturile Omului, 2019, at 91 (Rom.); Cedric Serneels, *'Unionisation' of the European Court of Human Rights' Ne Bis in Idem Jurisprudence: The Case of Mihalache v Romania*, 11 New J. Eur. Crim. L. 227 (2020) (U.K.); Matei Bratu & Mihaela Mazilu-Babel, *The Grand Chamber, ECHR. Mihalache v. Romania (Conviction): Ne Bis in Idem and the Final Decision of the Public Prosecutor. Implications in the Romanian Criminal Proceedings and on European Union Law*, 2019 Pandectele Romane 147 (Rom.); *supra* note 60. (Neth.).

[104]Felix Guțu v. Moldova, App. No. 13112/07, 47–54 (Mar. 24, 2020), https://hudoc.echr.coe.int/eng?i=001-205641; Anamaria Groza, *Res Judicata and the Principle of Effectiveness of European Law: A (Sometimes) Difficult Encounter?*, 13 Persp. L. & Pub. Admin. 654 (2024) (Rom.).

[105]Mihalache v. Romania [GC], App. No. 54012/10, 99-101 (July 8, 2019), https://hudoc.echr.coe.int/fre?i=001-194523.

[106]Smoković v. Croatia (dec.), App. No. 57849/12, 43-45 (Nov. 21, 2019), https://hudoc.echr.coe.int/eng?i=001-199300.

no assessment of the facts or of the applicant's responsibility had taken place.[107] Thus, for the *ne bis in idem* protection to apply, the decision in question must reflect a substantive adjudication of the alleged conduct, not merely a procedural impediment to prosecution.

The *ne bis in idem* guarantee under A4P7 applies only once there is a "final" decision in the sense of res judicata. According to the Explanatory Report to Protocol No. 7, a decision is deemed final when it has become irrevocable—either because no further ordinary remedies are available, or because the parties have exhausted such remedies or allowed the time-limit to expire without pursuing them. The E.Ct.H.R. confirmed this in *Zolotukhin v. Russia [GC],*[108] holding that decisions subject to ordinary appeal fall outside the scope of the guarantee until the appeal period expires.[109] By contrast, extraordinary remedies, such as reopening proceedings or extending expired deadlines, are not taken into account when determining finality, as they are considered a continuation of the first proceedings rather than a bar to their finality.

In *Mihalache v. Romania [GC]*, the E.Ct.H.R. elaborated a structured methodology for assessing finality. It stressed that domestic law—both substantive and procedural—must satisfy the principle of legal certainty, which requires a clear and foreseeable time-limit for ordinary remedies.[110] A remedy that grants unlimited discretion to reopen proceedings or is otherwise imbalanced in its accessibility to the parties cannot be considered "ordinary" for Article 4. Applying this logic, the E.Ct.H.R. held that a higher-ranking prosecutor's unlimited power to re-examine a lower prosecutor's decision did not qualify as an ordinary remedy, and thus did not prevent the earlier decision from acquiring finality.[111]

The E.Ct.H.R. has consistently excluded certain procedural outcomes from the definition of a "final acquittal or conviction." For example, in *Sundqvist v. Finland*,[112] a decision by a prosecutor not to prosecute under domestic law did not qualify as final, thereby allowing subsequent proceedings. Likewise, in *Smirnova and Smirnova v. Russia (dec.)*[113] and *Harutyunyan v. Armenia (dec.),*[114] the E.Ct.H.R. reiterated that prosecutorial discontinuance does not amount to acquittal or conviction. Moreover, in *Marguš v.*

[107] *Id.*

[108] Sergey Zolotukhin v. Russia [GC], App. No. 14939/03 (Feb. 10, 2009), https://hudoc.echr.coe.int/eng?i=001-91222.

[109] *Id.*

[110] Mihalache v. Romania [GC], App. No. 54012/10, 115 (July 8, 2019), https://hudoc.echr.coe.int/fre?i=001-194523.

[111] *Id.* at 117–25.

[112] Sundqvist v. Finland (dec.), App. No. 75602/01, (Nov. 22, 2005), https://hudoc.echr.coe.int/fre?i=001-71668.

[113] Smirnova v. Russia, App. Nos. 46133/99 & 48183/99 (Oct. 3, 2022), https://hudoc.echr.coe.int/eng?i=001-22725.

[114] Harutyunyan v. Armenia (dec.), App. No. 34334/04 (Dec. 26, 2006), https://hudoc.echr.coe.int/eng?i=001-78739.

Croatia [GC],[115] the E.Ct.H.R. ruled that termination of proceedings by amnesty for grave breaches of human rights—such as war crimes—falls outside the protection of Article 4, as granting impunity for such crimes would contravene Articles 2 and 3 of the E.C.H.R. (§§). Similarly, in *Horciag v. Romania (dec.)*,[116] a prosecutor's order for provisional psychiatric internment was excluded from the scope of "final" decisions.

Finally, the E.Ct.H.R. has clarified that the relevance of finality may depend on whether the case involves dual but integrated proceedings. In *Johannesson and Others v. Iceland*,[117] it was unnecessary to determine when the tax proceedings became final, as they formed part of a single integrated response. By contrast, in *Nodet v. France*[118] and *Korneyeva v. Russia*,[119] the Court examined finality more closely because the two proceedings could not be treated as a single proceeding. Thus, while finality is a precondition for A4P7 to apply, its practical importance varies depending on whether the case concerns duplicative or complementary proceedings.

1.3. E.U. CHARTER OF FUNDAMENTAL RIGHTS (C.F.R.)

The establishment of the European Union's Area of Freedom, Security and Justice [hereinafter - A.F.S.J.] has significantly shaped the development of E.U. criminal law and the protection of fundamental rights. As Koen Lenaerts explains, the A.F.S.J. is rooted in the progressive communitarisation of justice and home affairs, culminating in the Treaty of Lisbon,[120] which conferred binding legal status to the Charter of Fundamental Rights of the European Union [hereinafter - C.F.R.].[121] This shift acknowledged that free movement within the E.U. required not only mutual recognition of judgments, but also minimum procedural guarantees to foster mutual trust within the E.U. legal order among

[115] Marguš v. Croatia [GC], App. No. 4455/10, 120–141 (May 27, 2014), https://hudoc.echr.coe.int/fre?i=001-144276.

[116] Horciag v. Romania, App. No. 70982/01, (Mar. 15, 2005), https://hudoc.echr.coe.int/eng?i=001-68815.

[117] Johannesson & Others v. Iceland, App. No. 22007/11, 48 (May 18, 2017), https://hudoc.echr.coe.int/eng?i=001-173498.

[118] Nodet v. France, App. No. 47342/14, 46 (June 6, 2019), https://hudoc.echr.coe.int/fre?i=001-193457. *See* Mario Libertini, *Cumulative Enforcement of European and National Competition Law and the Ne Bis In Idem Principle: Case Comment to the Judgement of EU Court of Justice of 3 April 2019 Powszechny Zaklad Ubezpieczen na Zycie S.A. v Prezes Urzedu Ochrony Konkurencji i Konsumentow (Case C-617/17)*, YARS, (Aug. 2019), at 231 (Pol.).

[119] Korneyeva v. Russia, App. No. 72051/17, 48, 58 (Oct. 8, 2019), https://hudoc.echr.coe.int/fre?i=001-196372. *See* Ben Wild, *E.Ct.H.R. Cases October-December 2019*, 11 New J. Eur. Crim. L. 93 (2020) (Eur.).

[120] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (Dec. 13, 2007), 2007 O.J. (C 306) 1.

[121] Charter of Fundamental Rights of the European Union art. 50, (Dec. 7, 2000), 2000 O.J. (C 364) 1; *see also* Koen Lenaerts, *The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice*, 59 Int'l & Comp. L.Q. 255, 256-57 (2010) (U.K).

Member States. However, since the Tampere Programme,[122] legislative initiatives have largely prioritized prosecutorial efficiency over defence rights, raising concerns about whether the balance between freedom, security, and justice remains sustainable.[123]

The *ne bis in idem* rule, also known as the prohibition of double jeopardy, has long been recognized in international human rights law and in the domestic systems of all European Economic Area states.[124] While Article 14(7) of the I.C.C.P.R. and A4P7 to the E.C.H.R. enshrine the principle, their application is confined to proceedings within the same state. The C.F.R. subsequently introduced a regional guarantee in Article 50, ensuring its application across the E.U. legal order. As Fletcher observes, the first genuine attempt to extend this protection to the inter-state level within the E.U. emerged in the 1987 Convention under the European Political Cooperation framework,[125] which—though never ratified—paved the way for its formal incorporation into the Schengen acquis through Article 54 of the C.I.S.A.[126] In parallel, the E.Ct.H.R. has built a robust jurisprudence, from *Zolotukhin v. Russia*[127] to *A and B v. Norway,*[128] clarifying the factual scope of "same offence" and the permissible limits of dual proceedings. Against this backdrop, a critical assessment of E.U. policy has noted that, particularly since Tampere, emphasis has been placed on prosecutorial efficiency rather than minimum procedural safeguards.[129] This imbalance raises concerns about the E.U. 's ability to ensure a coherent and rights-oriented A.F.S.J., particularly in light of the reliance on mutual recognition mechanisms. For candidate states such as Serbia, this dual framework—anchored in both Strasbourg and Luxembourg jurisprudence—poses an additional challenge: harmonising domestic law with evolving supranational standards.

[122]Presidency Conclusions, Tampere European Council (15–16 October 1999), https://www.europarl.europa.eu/summits/tam_en.htm.

[123]*Id.* at 257–58.

[124]*See* Boštjan M. Zupančič, *Ne Bis in Idem – Zabrana Ponovnog Suđenja za Isto Delo – La Belle Dame Sans Merci*, 2 Crimen 171 (2011) (Serb.).

[125]Convention Between the Member States of the European Communities on Double Jeopardy, (May 25, 1987), 1987 O.J. (C 151) 2 (not in force).

[126]*See* Maria Fletcher, *Some Developments to the Ne Bis In Idem Principle in the European Union: Criminal Proceedings Against Hüseyn Gözütok and Klaus Brügge*, 66 Mod. L. Rev. 769, 769–70 (2003) (U.K.); *see also* Marina Matić Bošković & Jelena Kostić, *The Application of the "Ne Bis in Idem" Related to Financial Offences in the Jurisprudence of the European Courts*, 25 NBP: Nauka, Bezbednost, Policija 67 (2020) (Serb.).

[127]Sergey Zolotukhin v. Russia [GC], App. No. 14939/03 (Feb. 10, 2009), https://hudoc.echr.coe.int/eng?i=001-91222.

[128]A. and B. v. Norway, App. Nos. 24130/11 & 29758/11, (Nov. 15, 2016), https://hudoc.echr.coe.int/eng?i=001-168972.

[129]*See* Laurens van Puyenbroeck & Gert Vermeulen, *Towards Minimum Procedural Guarantees for the Defence in Criminal Proceedings in the EU*, 60 INT'L & COMP. L.Q. 1017, 1017–38 (2011) (U.K.).

The Lisbon Treaty's elevation of the C.F.R. gave Article 50 binding legal force, thereby consolidating *ne bis in idem* as a core component of E.U. fair trial rights.[130] The provision prohibits a person from being tried or punished twice for the same offence once a final judgment has been rendered, and—unlike national double jeopardy rules—it applies transnationally across Member States, thus strengthening legal certainty and mutual trust in cross-border cooperation.[131] The C.J.E.U. has interpreted Article 50 broadly, focusing on the material facts of the case (*idem factum*) rather than its legal characterisation,[132] and has stressed uniform application across the Union.[133] This jurisprudence confirms the central role of Article 50 C.F.R. in shaping the balance between mutual recognition and fundamental rights protection within the A.F.S.J.[134]

This functional approach has been consistently applied in landmark cases. In *Van Esbroeck*[135] and *Van Straaten,*[136] the C.J.E.U. held that *ne bis in idem* applies where prosecutions involve the same set of factual circumstances, regardless of national legal

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[130] Aart de Vries, *The Principle of Ne Bis In Idem (Article 50 of the Charter) at the Cross-Border Interface of Punitive Administrative and Criminal Proceedings in the European Union*, REV. EUR. ADMIN. L., July 2024, at 123 (Neth.); *see also* Jonathan Tomkin, *Right Not to Be Tried or Punished Twice in Criminal Proceedings for the Same Criminal Offence*, *in* THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY 1373 (Steve Peers et al. eds., 2021) U.K.); *see* Magdalena Ličková, *Article 50: The Elusive Shape of the Ne Bis In Idem Rule*, *in* THE EU CHARTER OF FUNDAMENTAL RIGHTS IN THE MEMBER STATES 385 (Michal Bobek & Jeremias Adams-Prassl eds., 2022) (U.K.).

[131] *See* André Klip, *Jurisdiction and Transnational Ne Bis In Idem in Prosecution of Transnational Crimes*, *in* THE OXFORD HANDBOOK OF CRIMINAL PROCESS 477 (Darryl K. Brown et al eds., 2019) (U.K.).

[132] *See* Case C-617/10, Åklagaren v. Åkerberg Fransson, ECLI:EU:C:2013:105 (Feb. 26, 2013). *See also* Ulf Bernitz, *The Scope of the Charter and its Impact on the Application of the ECHR The Åkerberg Fransson Case on Ne Bis in Idem in Perspective*, in Sybe de Vries, Ulf Bernitz & Stephen Weatherill, The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing 155-173 (Bloomsbury, 2015), 163; Ger Coffee, An Interpretative Analysis of the European Ne Bis in Idem Principle Through the Lens of ECHR, CFR and CISA Provisions: Are Three Streams Flowing in the Same Channel?, 14 New J. Eur. Crim. L. 345 (2023), https://doi.org/10.1177/20322844231160246.

[133] *See, e.g.*, Annegret Engel, Xavier Groussot & Emilia Holmberg, *The Digital Markets Act and the Principle of Ne Bis In Idem: A Revolution in the Enforcement of EU Competition Law?*, *in* NEW DIRECTIONS IN DIGITALISATION: PERSPECTIVES FROM EU COMPETITION LAW AND THE CHARTER OF FUNDAMENTAL RIGHTS 187 (Annegret Engel et al eds., 2025) (U.K.).

[134] *See* Tomkin, *supra* note 130; Ličková, *supra* note 130.

[135] Case C-436/04, Criminal Proceedings Against Van Esbroeck, 2006 E.C.R. I-2333. *See also* Michiel Luchtman, *Transnational Law Enforcement in the European Union and the Ne Bis in Idem Principle*, 4 in REALAW, REVIEW OF EUROPEAN ADMINISTRATIVE LAW 5 (December 2011); Eleanor Sharpston & José Maria Fernández-Martín, *Some Reflections on Schengen Free Movement Rights and the Principle of Ne Bis in Idem*, 10 Cambridge Y.B. Eur. Legal Stud. 413 (2008), https://doi.org/10.1017/S1528887000001385; Alessandro Rosano, *Ne Bis Interpretatio in Idem? The Two Faces of the Ne Bis in Idem Principle in the Case Law of the European Court of Justice*, 18 GERMAN L.J. 39 (January 2017).

[136] Case C-150/05, Jean Leon Van Straaten v. Staat der Nederlanden and Republiek Italië, 2006 E.C.R. I-9327.

definitions.[137] In *Kraaijenbrink,*[138] the C.J.E.U. introduced the "essential elements" test to assess whether materially identical conduct could nonetheless constitute separate offenses due to differing legal components.[139] Later, in *M and Others,*[140] the C.J.E.U. reaffirmed that administrative and criminal proceedings concerning the same facts may trigger Article 50 if the sanctions are punitive in nature.[141]

The jurisprudence evolved further in *Åkerberg Fransson*[142] and *Menci,*[143] which addressed the limits of dual proceedings involving tax and financial offenses. The C.J.E.U. acknowledged that administrative and criminal sanctions may coexist if they pursue

[137]In the first place, *Van Esbroeck* (Case C-436/04, Criminal Proceedings Against Van Esbroeck, 2006 E.C.R. I-2333) involved an individual prosecuted in Belgium for importing narcotics into the country, after having already been convicted in Norway for exporting the same narcotics. The CJEU held that the *ne bis in idem* principle applies to "the same acts", rather than offenses defined by specific national laws. Therefore, the CJEU looked at the material facts of the case (the acts) rather than the legal characterization of the offenses in each country. This case established the standard that the "same offense" should refer to the same set of facts, not necessarily the same legal classification of the offense. Secondly, Van Straaten (Case C-150/05, Jean Leon Van Straaten v. Staat der Nederlanden and Republiek Italië, 2006 E.C.R. I-9327) was convicted in Italy for narcotics trafficking and then faced prosecution in the Netherlands for transporting the same drugs. The CJEU ruled that if the material acts that constituted the offense were the same, and there had already been a final decision in one EU country, a second prosecution was barred by the *ne bis in idem* principle. Accordingly, this case reinforced that the focus is on the actual conduct rather than the specific legal definitions, confirming that the CJEU's interpretation centers on material facts.

[138]Case C-367/05, Criminal Proceedings Against Kraaijenbrink, 2007 E.C.R. I-6619.

[139]The *Kraaijenbrink* case (Case C-367/05, Criminal Proceedings Against Kraaijenbrink, 2007 E.C.R. I-6619) concerned financial crimes and involved an individual prosecuted in Belgium for laundering money earned through criminal activities committed in other EU countries. The CJEU clarified that where offenses are distinct in their legal classification but involve materially identical conduct—i.e., the same concrete facts—the principle of *ne bis in idem* may apply. However, if the offenses include additional and separate elements, such as different victims or intents, they may constitute separate offenses. In this way, the CJEU introduced what has become known as the "essential elements" test, explaining that multiple prosecutions may be permissible when the offenses are not materially identical despite factual overlap.

[140]Case C-398/12, Criminal Proceeding Against M, ECLI:EU:C:2014:1057 (June 5, 2014).

[141]The *M and Others* case (Case C-398/12, Criminal Proceeding Against M., ECLI:EU:C:2014:1057 (June 5, 2014)) involved an individual subject to sanctions in Italy and then in the UK for similar anti-money laundering offenses. The CJEU reiterated that offenses are considered the "same" for the purposes of *ne bis in idem* if they concern identical material acts (same facts) and are indivisibly linked. It also held that administrative penalties may trigger the principle if they have a punitive nature. This case reinforced the focus on identical material acts and emphasized that both administrative and criminal sanctions could fall under *ne bis in idem* if the administrative sanctions are punitive.

[142]Case C-617/10, Åklagaren v. Åkerberg Fransson, ECLI:EU:C:2013:105 (Feb. 26, 2013). *See* Dawid Miasik & Kamil Kapica, *The Duty of National Administrative Authorities to Respect the EU's Fundamental Rights in Fining Procedures and the Consequences Thereof*, 28 BIAŁOSTOCKIE STUDIA PRAWNICZE 35 (2023).

[143]Case C-524/15, Criminal Proceedings Against Luca Menci, ECLI:EU:C:2018:197 (Mar. 20, 2018).

complementary aims, are proportionate, and avoid excessive punitive duplication.[144] Since *Menci*, the C.J.E.U. has refined these criteria in a series of judgments.[145] In *Garlsson Real Estate* (2018),[146] it held that financial penalties imposed by a supervisory authority precluded subsequent criminal proceedings where both addressed the same conduct with punitive effect. Similarly, in *Di Puma and Zecca* (2018),[147] the C.J.E.U. clarified that the discontinuation of criminal proceedings due to insufficient evidence barred further

[144]The *Luca Menci* case (Case C-524/15, Criminal Proceedings Against Luca Menci, ECLI:EU:C:2018:197 (Mar. 20, 2018) concerned tax offenses, where an individual faced both administrative and criminal proceedings for failing to pay VAT. The CJEU acknowledged that certain types of dual proceedings—administrative and criminal—could be compatible with *ne bis in idem*, provided they pursue different aims and are proportionate. However, if the penalties are for the same facts and serve no additional purpose, then *ne bis in idem* would apply. The *Menci* case clarified the criteria for when both administrative and criminal penalties might apply and helped define the limits of the *ne bis in idem* principle in relation to dual proceedings. Finally, the *Åkerberg Fransson* case (Case C-617/10, Åklagaren v. Åkerberg Fransson, ECLI:EU:C:2013:105 (Feb. 26, 2013) concerned a person faced both administrative and criminal sanctions in Sweden for tax evasion. The CJEU found that the *ne bis in idem* principle may prevent double penalties for the same tax-related offenses if they are of a criminal nature. However, it allowed some flexibility, noting that both sanctions could be permissible if they met certain proportionality and necessity criteria. This case highlighted the possibility of separate sanctions under specific conditions and provided a framework for proportionality and necessity in dual sanctions. About this case *see also* Ulf Bernitz, *The Scope of the Charter and its Impact on the Application of the ECHR: The Åkerberg Fransson Case on Ne Bis in Idem in Perspective*, in THE EU CHARTER OF FUNDAMENTAL RIGHTS AS A BINDING INSTRUMENT: FIVE YEARS OLD AND GROWING 155, 155-173 (Sybe de Vries et al. eds.); *see* Anna Błachnio-Parzych, *Gloss to the Judgment of the Court of Justice of the European Union in Case C-524/15, Criminal Proceedings against Luca Menci*, 45 REV. EUR. & COMP. L. 207 (2021). We could say that these cases together illustrate the CJEU's approach to interpreting "same offense" based on the material facts rather than solely on the legal characterization of the offense, allowing *ne bis in idem* to apply even in cases of dual administrative and criminal proceedings under certain conditions.

[145]*See* Koen Lenaerts, *Limits on Limitations: The Essence of Fundamental Rights in the EU*, 20 GERMAN L.J. 779 (2019).

[146]Case C-537/16, Garlsson Real Estate SA and Others v. Commissione Nazionale per le Società e la Borsa (Consob), ECLI:EU:C:2018:193 (March 20, 2018). *See also* Sanda Ileana Pelea, Ne Bis in Idem - Addition of Criminal and Fiscal or Administrative Proceedings. The Case of Italy, 2020 CDP 42 (2020); Gianni Lo Schiavo, *The Principle of Ne Bis in Idem and the Application of Criminal Sanctions: Of Scope and Restrictions*, 14 EUROPEAN CONSTITUTIONAL LAW REVIEW 644 (2018); Case C-537/16, Garlsson Real Estate SA and Others v. Commissione Nazionale per le Società e la Borsa (Consob), ECLI:EU:C:2018:193 (Mar. 20, 2018); Joined Cases C-596/16 and C-597/16, Enzo Di Puma v. Commissione Nazionale per le Società e la Borsa (Consob) and Commissione Nazionale per le Società e la Borsa (Consob) v. Antonio Zecca, ECLI:EU:C:2018:192 (Mar., 20, 2018); Jeroen Dewispelaere & Joren Vuylsteke, *Request for a Preliminary Ruling on the Non Bis in Idem Principle in Competition Law Matters, or How to Reconcile Homogeneity and Effectiveness*, 4 EUR. COMPETITION & REG. L. REV. 111 (2020); Giulia D'Agnone, *On the Criteria Used for the Interpretation of the Charter of Fundamental Rights of the European Union: Some Short Remarks after Twenty Years from Its Proclamation*, 13 ITALIAN J. PUB. L. 619 (2021).

[147]Joined Cases C-596/16 and C-597/16, Enzo Di Puma v. Commissione Nazionale per le Società e la Borsa (Consob) and Commissione Nazionale per le Società e la Borsa (Consob) v. Antonio Zecca, ECLI:EU:C:2018:192 (Mar. 20, 2018). *See also* Max Vetzo, *The Past, Present and Future of the Ne Bis in Idem Dialogue between the Court of Justice of the European Union and the European Court of Human Rights: The Cases of Menci, Garlsson and Di Puma*, 11 REALAW, REVIEW OF EUROPEAN ADMINISTRATIVE LAW 55 (2018); Anita Clifford, Introductory Note to Menci & Garlsson Real Estate SA and Others v. Commissione Nazionale per la Societa e la Borsa (Consob) & Joined Cases Di Puma v. Consob and Consob v. Zecca (CJEU) 57 INT'l LEGAL MATERIALS 583 (2018); Zoran Buric, *Ne Bis in Idem in European Criminal Law - Moving in Circles?*, 3 ECLIC 507 (2019); Vesna B. Ćorić & Ana S. Knežević Bojović, *Autonomous Concepts and Status Quo Method: Quest for Coherent Protection of Human Rights before European Supranational Courts*, 2020 STRANI PRAVNI ŽIVOT 27 (2020); Michael Chatzipanagiotis, *Disrupted Flights and Information Duties of Air Carriers: The Interplay Between Regulation (EC) No 261/2004 on Air Passenger Rights and the Unfair Commercial Practices Directive*, 43 AIR & SPACE L. 431 (2018).

administrative prosecution of the same facts. More recently, in *bpost* (2022)[148] and *Nordzucker* (2022),[149] the C.J.E.U. confirmed that parallel administrative and criminal proceedings may be permissible only when they pursue complementary objectives and are closely coordinated in time and substance. The pending and subsequent judgments, including *Volkswagen (C-27/22, 2023)*,[150] further highlight the cross-border implications of Article 50 C.F.R. in complex economic crime cases.

Taken together, these decisions illustrate the four cumulative requirements under EU law: the proceedings must concern the same person, relate to matters of a criminal nature, involve the same material facts (*idem factum*), and amount to a duplication of proceedings (*bis*). Where these conditions are satisfied, Article 50 C.F.R. provides robust protection against double prosecution. At the same time, the C.J.E.U. has emphasized that Member States remain free to provide a higher level of protection domestically. Still, Article 50 sets a binding minimum threshold that governs both national and cross-border enforcement.

While Article 50 C.F.R. provides a robust transnational guarantee within the E.U's legal framework, the broader international application of the *ne bis in idem* principle remains uneven. As Van den Wyngaert and Stessens have observed, the principle serves three distinct functions at the international level: as a bar to territorial prosecutions, to extraterritorial jurisdiction, and as a ground for refusal in international cooperation procedures.[151] However, national legal systems diverge significantly in their recognition of foreign judgments as having res judicata effect. In many civil law jurisdictions, such as Belgium, Austria, and France, foreign convictions or acquittals do not preclude domestic prosecution for the same act. In contrast, some common law countries—most notably the United States—grant constitutional status to the *ne bis in idem* principle and are more

[148]Case C-117/20, bpost SA v. Autorité belge de la concurrence, ECLI:EU:C:2022:202 (Mar. 22, 2022). *See also* Marco Cappai & Giuseppe Colangelo, *Applying Ne Bis In Idem in the Aftermath of Bpost and Nordzucker: The Case of EU Competition Policy in Digital Markets*, 60 COMMON MKT. L. REV. 431 (2023) (U.K.); Pieter Van Cleynenbreugel, *BPost and Nordzucker: Searching for the Essence of Ne Bis in Idem in European Union Law*, 18 EUCONST 357 (2022); Alessandro Nascimbeni, *The Italian Supreme Court and the European Ne Bis in Idem Principle: A Correct Decision Worthy of Some Criticism*, 3 ITALIAN REV. INT'L & COMPAR. L. 555 (2023) (It.).

[149]Case C-151/20, Bundeswettbewerbsbehörde v. Nordzucker AG and Others, ECLI:EU:C:2022:203 (Mar. 22, 2022). *See also* Carmen Balaci, *Relația dintre Curtea Europeană a Drepturilor Omului și Curtea de Justiție a Uniunii Europene în contextul cooperării judiciare internaționale în materie penală* [*The Relationship Between the European Court of Human Rights and the Court of Justice of the European Union in the Context of International Judicial Cooperation in Criminal Matters*], 31 REVISTA DREPTUL 115 (2020); Auke Willems, *The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal*, 20 GERMAN L.J. 468 (2019) (U.K.).

[150]Case C-27/22, Volkswagen Group Italia S.p.A. e Volkswagen Aktiengesellschaft v. Autorità Garante della Concorrenza e del Mercato (AGCOM), ECLI:EU:C:2023:663 (Sep. 14, 2023).

[151]*See* Christine Van den Wyngaert & Guy Stessens, *The International Non Bis In Idem Principle: Resolving Some of the Unanswered Questions*, 48 INT'L & COMPAR. L.Q. 779, 783 (1999) (U.K.).

willing to respect foreign res judicata.[152] These disparities reflect the challenges of harmonizing legal standards across jurisdictions and underscore the need for more comprehensive international consensus on the scope and binding force of the principle beyond the E.U. context.

As scholars and jurists have observed, divergent national interpretations of *ne bis in idem* risk undermining the coherence and effectiveness of judicial cooperation in criminal matters within the E.U. Siniša Rodin has warned that reasoning about *ne bis in idem* strictly within national procedural frameworks can have adverse systemic consequences, including legal uncertainty and even impunity.[153] This underscores the need for a transnational, E.U.-wide interpretation of the principle, such as that provided by the C.J.E.U. under Article 50 C.F.R. Only by interpreting *ne bis in idem* through a harmonized, supranational lens—focused on factual identity and finality of judgment—can mutual recognition function effectively in a shared legal space.

1.4. SCHENGEN AREA AND ARTICLE 54 OF THE C.I.S.A.

While Article 50 C.F.R. enshrines the *ne bis in idem* principle within the E.U.'s constitutional order, the foundation for its transnational application was laid earlier through the Schengen acquis. As Van den Wyngaert and Stessens recount, the pursuit of an effective multilateral *non bis in idem* regime emerged from the failure of prior Council of Europe treaties to secure sufficient ratification.[154] In contrast, the 1990 Schengen Implementation Convention [hereinafter C.I.S.A.] succeeded where earlier instruments fell short, offering binding *erga omnes* protection among participating States. Article 54 C.I.S.A. explicitly provides that a person who has been finally judged by one Contracting Party "may not be prosecuted by another Contracting Party for the same acts," provided that any sentence imposed has been served, is being served, or can no longer be executed. This framework introduced a novel form of transnational res judicata within the European legal space—one that, unlike earlier efforts, was directly tied to the abolition of internal border controls and the need for mutual trust among Member States.

Article 54 of the C.I.S.A. articulates the *ne bis in idem* principle in the context of transnational criminal justice within the Schengen Area. It provides that an individual whose trial has been "finally disposed of" in one Contracting Party may not be

[152] *Id.* at 783-784.
[153] *See* Siniša Rodin, *Constitutional Relevance of Foreign Court Decisions*, 64 AM. J. COMPAR. L. 815, 827 (2016).
[154] *See* Van den Wyngaert & Stessens, *supra* note 151, at 781–783 (1999) (U.K.).

prosecuted in another for the same acts, provided that any penalty imposed has been enforced, is in the process of enforcement, or can no longer be executed under the sentencing state's law. This provision is pivotal in ensuring cross-border legal certainty and preventing multiple prosecutions across Member States for the same factual conduct. Consistent with the C.J.E.U.'s interpretation in *Van Esbroeck* and *Van Straaten*, the "same acts" standard refers to the material facts of the case, irrespective of legal classification under national laws. Thus, a prosecution in one Schengen state bars further action in another, even where the offense is categorized differently.

A key condition for triggering Article 54 is finality—the judgment must no longer be subject to appeal—and enforceability of the sentence. This ensures that the rule cannot be used to escape accountability by exploiting jurisdictional boundaries within the E.U. The effectiveness of Article 54 rests on the principle of mutual recognition and mutual trust among Schengen states. In *Kretzinger* (C-288/05), the C.J.E.U. reaffirmed that such trust underpins cross-border cooperation, allowing national courts to rely on the finality and fairness of each other's judicial outcomes.[155] This doctrine of trust facilitates legal integration while upholding individual rights and procedural safeguards in the shared E.U. judicial space.

1.5. RELATIONSHIP BETWEEN ARTICLE 50 C.F.R. AND ARTICLE 54 C.I.S.A.

In this place, it is necessary to explain the geographic, historic, and legal relationship between Article 50 C.F.R. and Article 54 C.I.S.A. The relationship between Article 50 of the C.F.R. and Article 54 of the C.I.S.A. is a complex interplay of geographic, historical, and legal factors, centered around the *ne bis in idem* principle, which protects individuals from being prosecuted or punished twice for the same offense. The geographic dimension of this relationship stems from the partial overlap between the territorial scope of E.U. law and the Schengen Area, as the Charter applies to E.U. Member States. At

[155] The C.J.E.U. emphasized the importance of mutual trust for smooth cross-border cooperation and the recognition of judicial outcomes in *Kretzinger* (Case C-288/05, Criminal proceedings against Jürgen Kretzinger, E.C.R. 2007 I-06441). In this case, the C.J.E.U.underscored that mutual trust among Member States is fundamental to the Schengen Area's functioning, particularly in applying the *ne bis in idem* principle under Art. 54 of the *Convention Implementing the Schengen Agreement* (CISA). In *Kretzinger*, the CJEU explored how mutual trust underpins the Schengen framework and enables Member States to recognize and respect each other's legal outcomes. The C.J.E.U. reasoned that trust is crucial to maintaining a system where individuals are not prosecuted multiple times across Member States for the same acts, provided the criteria under Art. 54 are met. The case helped clarify that such mutual trust facilitates cooperation in judicial matters and enhances the efficiency of cross-border justice. This principle has since been reinforced in subsequent C.J.E.U. cases, affirming its importance in ensuring smooth legal operations within the EU and the Schengen Area.

the same time, the Schengen acquis—including Article 54 C.I.S.A.—extends both to most E.U. Member States and to several associated non-EU countries (e.g., Norway, Switzerland, Iceland, and Liechtenstein). Article 50 C.F.R. applies to all E.U. Member States. In contrast, Article 54 C.I.S.A. is directly applicable within the Schengen Area, supporting the *ne bis in idem* principle in cross-border criminal justice cooperation.

The relationship between Article 50 C.F.R. and Article 54 C.I.S.A. illustrates the historical layering of supranational safeguards against double prosecution. Article 54 first introduced a cross-border *ne bis in idem* guarantee within the Schengen framework, extending also to associated non-E.U. states such as Norway and Switzerland. With the Lisbon Treaty, Article 50 C.F.R. elevated this protection to Union-wide status, consolidating it as a general principle of E.U. law. Together, the two provisions establish a coherent transnational shield against repeated prosecution, though operating within distinct institutional frameworks.

Historically, Article 54 C.I.S.A. predates the C.F.R., having been introduced to ensure legal safeguards in the context of open borders established by the Schengen Agreement (1985) and its 1990 Convention. It created a judicial mechanism to prevent multiple prosecutions for the same acts across national boundaries. The C.F.R., adopted in 2000 and gaining binding status through the Treaty of Lisbon (2009), consolidated fundamental rights protections within the E.U., including ne bis in idem, into a unified legal instrument.

Legally, the two provisions are complementary but distinct. Article 50 C.F.R. provides a general prohibition of double jeopardy under E.U. law, applicable both within and across Member States when E.U. law is engaged. In contrast, Article 54 C.I.S.A. is specifically tailored to cross-border cooperation, applying only to final judgments involving "the same acts," provided any sentence has been executed or is unenforceable under the law of the first forum.

The C.J.E.U. has played a central role in clarifying this relationship. While both articles uphold *ne bis in idem*, Article 54 is more procedurally bounded: it applies only after

a judgment has res judicata status and includes enforceability conditions.[156] Although these criteria are not explicitly part of Article 50 C.F.R, the C.J.E.U. has interpreted the two provisions harmoniously, promoting a coherent standard of legal certainty and mutual trust.

In sum, Article 50 C.F.R. and Article 54 C.I.S.A. work together to form a cohesive framework protecting individuals from duplicative criminal proceedings within the E.U. and Schengen Area. Article 50 affirms a foundational right applicable throughout the Union, while Article 54 operationalizes that right in transnational judicial cooperation. Together, they reinforce the E.U.'s commitment to fundamental rights and the rule of law in a shared legal space.

[156]The C.J.E.U. has specified various limits to the *ne bis in idem* principle under Art. 54 of the Convention Implementing the Schengen Agreement (CISA) in several key cases. These cases have clarified the conditions under which the *ne bis in idem* principle applies, focusing particularly on the "finality" of judgments, the requirement that penalties have been "executed" or "enforceable," and the concept of the "same offense". Besides the already mentioned *Van Esbroeck* (Case C-436/04, Criminal proceedings against Leopold Henri Van Esbroeck, E.C.R. 2006 I-02333), *Kretzinger* (Case C-288/05, Criminal proceedings against Jürgen Kretzinger, E.C.R. 2007 I-06441), *Gözütok and Brügge* (Joined Cases C-187/01 and C-385/01, Criminal proceedings against Hüseyin Gözütok (C-187/01) and Klaus Brügge (C-385/01), E.C.R. 2003 I-01345) cases, the C.J.E.U. ruled that the *ne bis in idem* principle applies not only to judicial convictions but also to situations where a prosecution was discontinued under certain conditions, such as when a settlement has been reached. The principle applies even if the case was resolved without a formal judgment, as long as it was discontinued in a way that prevents further prosecution for the same offense in that state. This established that the *ne bis in idem* principle can apply to cases not resulting in a traditional verdict, broadening the scope of Article 54 CISA to include alternative resolutions. In *Gasparini* (Case C-467/04, Criminal proceedings against Giuseppe Francesco Gasparini and Others, E.C.R. 2006 I-09199), the C.J.E.U. dealt with a case where a person was acquitted in one state and then prosecuted in another for the same offense. The C.J.E.U. ruled that an acquittal due to insufficient evidence still qualifies as a "final judgment" under Art. 54, thus barring further prosecution in another Member State, so this ruling affirmed that an acquittal, even if based on procedural grounds, could trigger ne bis in idem protection under Art. 54. In *Kozłowski* (Case C-66/08, Proceedings concerning the execution of a European arrest warrant issued against Szymon Kozłowski, E.C.R 2008 I-06041) the CJEU addressed what it means for a sentence to be "enforced" or "executable" under Article 54 CISA. The C.J.E.U. found that for Art. 54 to apply, the person must have either served the sentence or be in a situation where enforcement has effectively commenced or can still be carried out. The decision clarified that the *ne bis in idem* principle does not apply if a penalty has been imposed but not executed and is not enforceable in the state of the first conviction. (Case C-398/12, Criminal Proceeding Against M, ECLI:EU:C:2014:1057 (June 5, 2014)) examined situations where different offenses arising from the same factual circumstances could lead to prosecutions in different countries. The C.J.E.U. ruled that prosecutions for different legal interests (e.g., tax versus customs offenses) could proceed, even if based on the same facts, as long as the nature of the offenses differs significantly. This judgment introduced a limit on the *ne bis in idem* principle by allowing prosecutions for offenses that protect different legal interests, even if they share factual overlaps. In *Spasic* (Case C-129/14 PPU Zoran Spasic, ECLI:EU:C:2014:586 (May 27, 2014)), the C.J.E.U. addressed whether a conviction in one Member State barred prosecution in another if the sentence was not yet fully enforced. This court held that *ne bis in idem* applies only if the sentence has either been executed or is no longer enforceable in the issuing state. This decision reinforced that the execution or enforceability of a sentence is crucial to invoking the *ne bis in idem* principle under Art. 54 CISA. *See* Libor Klimek, *Ne Bis in Idem as a Modern Guarantee in Criminal Proceedings in Europe*, 4 AJEE 101 (2022).

1.6. THE *NE BIS IN IDEM* PRINCIPLE IN INTERNATIONAL CRIMINAL LAW: I.C.C. AND AD HOC TRIBUNALS

In the domain of international criminal law, Serbia has accepted the jurisdiction of the I.C.C. through ratification of the Rome Statute.[157] Article 20 of the Rome Statute enshrines the *ne bis in idem* principle by prohibiting the I.C.C. from retrying individuals who have already been finally convicted or acquitted for the same conduct. At the same time, it restricts domestic courts from prosecuting individuals for crimes within the I.C.C. 's jurisdiction who have already been tried, unless the prior proceedings were conducted to shield the accused from accountability or were manifestly lacking in independence and impartiality. This dual structure reinforces the principle of complementarity by ensuring that both international and national proceedings respect the finality of judgments while preventing impunity through sham trials.[158]

The Statutes of international tribunals such as the I.C.T.Y. and I.C.T.R. likewise embed the principle of *ne bis in idem*.[159] Article 10 of the I.C.T.Y. Statute grants the Tribunal primacy over national courts, ensuring that once proceedings have occurred at the international level, domestic prosecutions cannot conflict with or undermine them (downward effect).[160] Conversely, the Statute also recognizes an upward effect: a final

[157] Law on Ratification of the Rome Statute of the International Criminal Court, Official Gazette of the FRY - International Treaties, no. 5/2001. *See* Banović et al., *supra* note 16.

[158] *See* Rome Statute of the International Criminal Court art. 20, (July 17, 1998). In art. 20 para. 1 it is prescribed that "no one shall be tried before this Court for conduct that constitutes a criminal offense for which this Court has already convicted or acquitted him, except in cases provided by the Statute", while the same article in para. 3 provides that "anyone who has been tried before another court for a criminal offense from art. 6, 7 or 8 shall not be tried before this Court, unless the proceedings before another court are conducted: (a) In order to avoid criminal responsibility for criminal acts within the jurisdiction of the Court; or (b) because the trial was not conducted in a way that would ensure independence in decision-making and impartiality in accordance with the principles of conducting the proceedings, or the proceedings were conducted in a manner that, under the given conditions, was inconsistent in carrying out the intention to bring the defendant to justice." This is about the principle of complementarity. *See generally* Evode Kayitana, *Complementarity and Completed Trials: Reforming the Ne Bis In Idem Clause of Article 20(3) of the Rome Statute*, Afr. J. Hum. Rts. 1 (2017); Gerard Conway, *Ne Bis In Idem in International Law*, 3 Int'l Crim. L. Rev. 217 (2003); Rome Statute of the International Criminal Court: A Commentary 899-931 (Otto Triffterer & Kai Ambos eds., 2016); Kai Ambos, Rome Statute of the International Criminal Court: Article-by-Article Commentary 1094-1128 (2022); Linda E. Carter, *The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis In Idem*, 8 Santa Clara J. Int'l L. 165 (2010).

[159] *See* Kai Ambos, Treatise on International Criminal Law: Volume II – The Crimes and Sentencing 278 (2014) (U.K.).

[160] *See* Statute of the International Criminal Tribunal for the Former Yugoslavia art. 10, S.C. Res. 827 (May 25, 1993). *See also* Nezir Pivić & Leila Zilić-Čurić, *Ne bis in idem i pravna sigurnost građana (norma i praksa u Bosni i Hercegovini)* [*Ne Bis In Idem and Legal Security of Citizens (Norm and Practice in Bosnia and Herzegovina)*], *in* Načelo ne bis in idem i pravna sigurnost građana (međunarodni pravni standardi, regionalna zakonodavstva i iskustva u primeni) [The principle of ne *BIS IN IDEM* and legal security of citizens (international legal standards, regional legislation and experiences in application)] 269, 273 (Stanko Bejatović & Nataša Novaković eds., 2022).

decision by a national court may, under certain conditions, preclude prosecution before the Tribunal, provided that the prior proceedings were impartial, independent, and not intended to shield the accused from responsibility.[161] These dual-direction protections elevate *ne bis in idem* into a fundamental safeguard of international criminal justice, preserving legal certainty, preventing duplicative prosecutions, and reinforcing the finality of authoritative decisions.

2. *NE BIS IN IDEM* PRINCIPLE IN SERBIAN LEGAL SYSTEM - LEGAL FRAMEWORK AND ITS EFFECTS

2.1. CONSTITUTIONAL FRAMEWORK OF THE *NE BIS IN IDEM* PRINCIPLE IN SERBIA

The *ne bis in idem* principle is enshrined in several international legal instruments, most of which have been ratified by the Republic of Serbia. In Serbian national legislation, the principle of *ne bis in idem* is primarily upheld by the Constitution of the Republic of Serbia, the highest legal act governing fundamental relations in the state and society. According to Article 16 of the Constitution of the Republic of Serbia, ratified international treaties and generally accepted rules of international law form an integral part of the domestic legal order and are directly applicable, provided they do not conflict with the Constitution. This framework grants international standards—especially those safeguarding due process—a direct influence on domestic jurisprudence, including the application of *ne bis in idem* across criminal and quasi-criminal domains.

The Constitution of the Federal Republic of Yugoslavia of 1992 was the first to elevate the prohibition of double jeopardy to the status of a constitutional principle, codifying it in Article 28.[162] This provision was nearly identical to the current constitutional formulation and marked a departure from earlier Yugoslav constitutions, which did not prohibit it.

Specifically, the Constitution stipulated that no one could be reconvicted or punished for a crime if the legal proceedings had been definitively terminated—whether by dismissal of the indictment, suspension of proceedings, or a final acquittal or

[161] *See* Robin Geiß & Jelena Bäumler, *Ne bis in idem*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INT'L LAW (Rüdiger Wolfrum ed., updated Aug. 2022), https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e66?d=%2F10.1093%2Flaw%3Aepil%2F9780199231690%2Flaw-9780199231690-e66&p=emailAW1dJLD3T5Wds.

[162] Constitution of the Federal Republic of Yugoslavia, Official Gazette of the FRY, no. 1/92.

conviction. The Constitution of the Republic of Serbia has maintained and expanded this safeguard. Article 34(4) of the current Constitution provides:

"No one can be prosecuted or punished for a criminal offense for which they were acquitted or convicted by a final verdict, nor for an offense where the charge was finally rejected, or proceedings were finally suspended. Additionally, no court decision can be changed to the detriment of the defendant in procedures based on extraordinary legal remedies."

Importantly, the Constitution broadens the scope of *ne bis in idem* to cover proceedings beyond purely criminal matters. Article 34(5) prohibits not only renewed prosecution for the same offense, but also proceedings for other criminal offenses when essential elements overlap. This expansive formulation goes beyond the protections guaranteed under Protocol No. 7 to the E.C.H.R, which generally permits concurrent or successive proceedings of a criminal and non-criminal nature.[163]

Nonetheless, this constitutional guarantee is not absolute. Paragraph 5 of Article 34 permits the reopening of proceedings when new, significant facts emerge that could materially affect the outcome, or when grave procedural violations marred prior proceedings. Such retrials are narrowly construed and must adhere to due process guarantees. This broader framing of the *ne bis in idem* principle in Serbia's Constitution reflects an evolving legal landscape that increasingly emphasizes human rights protections. In line with international standards, Serbian law seeks to enhance legal certainty by expanding safeguards against double jeopardy. This evolution mirrors a broader trend in contemporary constitutional jurisprudence, in which principles such as *ne bis in idem* are regarded as fundamental to the rule of law and the protection of individual liberties.

[163]The Constitution expressly prohibits the simultaneous or successive initiation and conduct of another, non-criminal (misdemeanor, commercial offense) court proceeding against the same person for illegal behavior with essential elements of a criminal offense, for which a criminal proceeding has already been conducted before, which is a difference in relation to the Protocol VII to the European Convention, which in principle allows simultaneous or successive conduct of criminal and non-criminal proceedings for the same offense. *See* Miodrag N. Simovic & Vladimir M. Simovic, *Načelo ne bis in idem u kaznenom zakonodavstvu Bosne i Hercegovine i praksa Evropskog suda za ljudska prava i Ustavnog suda Bosne i Hercegovine* [*The Principle of Ne Bis In Idem in the Penal Legislation of BiH and the Practice of the European Court of Human Rights and the Constitutional Court of BiH*], *in* Načelo ne bis in idem i pravna sigurnost građana (međunarodni pravni standardi, regionalna zakonodavstva i iskustva u primeni) [The principle of Ne bis in idem and legal security of citizens (international legal standards, regional legislation and experiences in application)] 181 (Stanko Bejatović & Nataša Novaković eds., 2022).

2.2. CRIMINAL PROCEDURE CODE AND THE STRUCTURE OF PUNITIVE PROCEEDINGS

Before examining the specific provisions in Serbian criminal legislation that enshrine the principle of *ne bis in idem*, commonly understood as "'not twice for the same thing," it is essential to outline the structure of punitive legal proceedings in Serbia. National legislation distinguishes between three primary categories: criminal,[164] misdemeanor,[165] and economic offense proceedings.[166] This tripartite classification addresses various degrees of legal violations and sanctions. However, disciplinary procedures—which may involve serious breaches of professional duty or misconduct—present an area of ongoing debate within both legal scholarship and judicial practice, raising the question of whether such proceedings should be treated as punitive or as a distinct legal category.

Article 4 of the Serbian Code of Criminal Procedure [hereinafter C.P.C.] explicitly incorporates the *ne bis in idem* principle, providing that:

"No one can be prosecuted for a criminal offense for which they were acquitted or convicted by a court decision, or for which the charge was dismissed, or the proceedings were legally suspended. A legally binding court decision cannot be changed to the detriment of the defendant."[167]

This statutory provision reflects and reinforces the guarantees enshrined in Article 34 of the Constitution. However, it is somewhat narrower in scope. While the Constitution extends *ne bis in idem* protections to other forms of punishable conduct beyond criminal offenses, the C.P.C. confines its application solely to criminal proceedings. Nonetheless, both legal sources converge on their core objective: to ensure legal certainty and to shield individuals from the burden of repeated prosecution for the same factual conduct once a final judgment has been rendered.

The C.P.C. thus affirms that the prohibition against double jeopardy is not merely a procedural technicality, but a substantive guarantee linked to the broader human

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[164]*See* art. 14, KRIVIČNI ZAKONIK [CRIMINAL CODE], *Sl. glasnik RS*, Nos. 85/2005, 88/2005 (corr.), 107/2005 (corr.), 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019 & 94/2024 (Serb.) (defining a criminal offense as an unlawful, culpable act that has been designated by law as a criminal offense).

[165]*See* art. 2, Zakon o prekršajima [Law on Misdemeanors], *Sl. glasnik RS*, Nos. 65/2013, 13/2016, 98/2016 (CC decision), 91/2019, 91/2019 (other law) & 112/2022 (CC decision) (Serb.) (defining a misdemeanor as an unlawful act determined by law or other regulation of a competent authority as a misdemeanor, for which a misdemeanor sanction is prescribed).

[166]*See* art. 2, Zakon o privrednim prestupima [Law on Economic Offenses], *Sl. list SFRJ*, Nos. 4/77, 36/77 (corr.), 14/85, 10/86 (consol.), 74/87, 57/89 & 3/90, *Sl. list SRJ*, Nos. 27/92, 16/93, 31/93, 41/93, 50/93, 24/94, 28/96 & 64/2001, and *Sl. glasnik RS*, No. 101/2005 (other law) (defining an economic offense as a socially harmful violation of regulations on economic or financial operations that caused or could have caused serious consequences, and which has been determined as such by the competent authority).

[167]ZAKONIK O KRIVIČNOM POSTUPKU [CRIMINAL PROCEDURE CODE] art. 4, Sl. glasnik RS [Official Gazette of the RS], no. 72/2011, with subsequent amendments.

rights framework. It supports the finality and authority of judicial decisions, which is fundamental to the integrity of criminal justice and public confidence in the rule of law. Moreover, this alignment with international standards—such as A4P7—underscores Serbia's commitment to harmonizing domestic legal protections with its international obligations.

2.2.1. MISDEMEANORS AND ECONOMIC OFFENSES: STATUTORY APPLICATION OF THE *NE BIS IN IDEM* PRINCIPLE

a) Law on Misdemeanor Procedure

At this point, a brief doctrinal clarification is necessary. Unlike legal systems in which misdemeanours are conceived as a subcategory of criminal offences, Serbian law adopts a structurally dualistic approach. In Serbian criminal law theory, the relationship between criminal offences and misdemeanours has long been debated from both quantitative and qualitative perspectives.[168] According to the quantitative view, misdemeanours are understood as less serious forms of punishable conduct, reflecting a lower degree of social harm. By contrast, the qualitative approach emphasizes a substantive distinction between the two categories, arguing that criminal offences and misdemeanours differ not merely in degree but in nature, particularly about culpability and the socio-ethical condemnation attached to criminal punishment.[169] Contemporary Serbian doctrine predominantly endorses a mixed approach, which does not deny the existence of unlawfulness and social harm in misdemeanours. Nonetheless, it maintains that their lower level of wrongdoing and reduced socio-ethical reproach justify their regulation within a separate punitive regime. This doctrinal framework—reflected in distinct statutory sources, procedural rules, and institutional competences—explains why misdemeanours are not treated as a subset of criminal law in Serbia. When combined with the autonomous Convention concept of a "criminal matter," this structural dualism renders the interaction between misdemeanor and criminal proceedings a legally significant and non-trivial issue for the application of the *ne bis in idem* principle.

Article 8 of the Law on Misdemeanor Procedure enshrines the *ne bis in idem* principle by explicitly prohibiting the retrial or re-sanctioning of an individual for a misdemeanor offense that has already been adjudicated through a final decision.[170] Once

[168] *See* Emir Ćorović, *supra* note 8, at 69-70.
[169] *See* Zoram Stojanović, *Krivično Pravo* [Criminal Law] at 10 (2019) (Serb).
[170] *See* art. 8, Zakon o prekršajima [Law on Misdemeanors], Official Gazette of the Republic of Serbia, No. 65/2013, 13/2016, 98/2016 (CC decision), 91/2019, 91/2019 (other laws), 122/2022 (CC decision).

a judgment becomes final, the accused may not be subjected to another misdemeanor proceeding for the same act, thereby aligning national procedural guarantees with broader constitutional and international protections against double jeopardy. However, the law permits the reopening of proceedings in narrowly defined circumstances—such as when new evidence emerges or when serious procedural violations are identified—ensuring that fairness is maintained without compromising the finality of judgments. Moreover, Article 8 extends the scope of *ne bis in idem* across different offense categories by stipulating that a person already found guilty of a criminal or economic offense with identical elements cannot face additional misdemeanor proceedings for the same conduct.[171] If a misdemeanor proceeding has already commenced, it must be terminated upon recognition of a corresponding criminal or economic conviction. This inter-categorical safeguard reflects a legislative effort to ensure coherence and prevent overlapping sanctions.

In the Serbian legal system, the relationship between misdemeanor and criminal proceedings has posed considerable practical challenges for the application of the *ne bis in idem* principle. Before legislative reform, it was not uncommon for both proceedings to be initiated simultaneously for the same underlying conduct. Because a final decision by a misdemeanor court could trigger the *ne bis in idem* bar against subsequent criminal prosecution, defense counsel often sought to expedite misdemeanor proceedings to secure a judgment that would preclude criminal liability for the more serious offense. This practice created a structural imbalance: the less serious proceeding could effectively undermine the primacy of criminal adjudication.[172]

This problem has been directly addressed in *Milenković v. Serbia.*[173] In that case, the applicant was first convicted in misdemeanor proceedings for disturbing the peace, which the E.Ct.H.R. qualified as "criminal proceedings" within the autonomous Convention meaning of the term. Despite this final conviction, the applicant was subsequently prosecuted and convicted for a criminal offense arising from the same conduct and based on substantially the same facts. The E.Ct.H.R. held that this constituted a violation of A4P7, emphasizing that the Serbian Constitutional Court had failed to apply the principles set out in *Zolotukhin v. Russia* and thus had not remedied the applicant's situation. The judgment illustrates that, regardless of domestic classifications that distinguish between criminal and misdemeanor proceedings, the Strasbourg

[171] *Id.*

[172] It should be noted that, although the legislative intent was to prevent the misuse of *ne bis in idem* through tactical acceleration of misdemeanor proceedings, this approach could be problematic. In certain instances, misdemeanor sanctions may exceed in severity those prescribed for some criminal offenses, thereby raising concerns about proportionality and coherence within the punitive framework.

[173] Milenković v. Serbia, App. No. 50124/13, 35 (Mar. 1, 2016), https://hudoc.echr.coe.int/eng?i=001-161001.

standard requires that any punitive proceeding of a criminal nature trigger the *ne bis in idem* guarantee. Accordingly, the initiation of criminal proceedings following a final misdemeanor conviction is incompatible with the Convention, highlighting the need for Serbian law and practice to be brought closer into alignment with supranational human rights standards.

To address this issue, the Law on Misdemeanor Procedure was amended to provide that, once criminal proceedings are pending, any parallel misdemeanor proceedings must be stayed and cannot be continued until the criminal case is concluded. This ensures that the outcome of the criminal trial,given its greater gravity and broader societal implications, takes precedence over the resolution of misdemeanor liability. At the same time, once a final judgment has been rendered in either forum, the principle of *ne bis in idem* applies reciprocally: a final acceleration of misdemeanor proceedings. This approach could be problematic. In certain instances, misdemeanor sanctions may exceed in severity those prescribed for some criminal offenses, thereby raising concerns about proportionality and coherence within the punitive framework.

A misdemeanor judgment will bar criminal prosecution for the same conduct, and *vice versa*. The rule thus reflects a deliberate attempt to reconcile the need to protect individuals from double prosecution with the imperative to safeguard the integrity and effectiveness of criminal justice.[174]

b) Law on Economic Offenses

A similar structure applies under the Law on Economic Offenses. Article 14 provides that "a responsible person who has been legally declared guilty of a criminal offense that has characteristics of an economic offense shall not be punished for the economic offense."[175] Additionally, Article 26a ensures that any fine imposed in a prior misdemeanor proceeding is credited toward the sentence for an overlapping economic offense, reinforcing the prohibition of dual punishment.[176] These provisions underscore Serbia's commitment to implementing *ne bis in idem* consistently across legal classifications.

Nevertheless, the Law on Economic Offenses includes only these two provisions directly addressing the principle. This limited framework is insufficient to prevent dual

[174]Unfortunately, the ongoing amendments to the Serbian Code of Criminal Procedure do not address the issue of *ne bis in idem*. As a result, this matter remains largely entrusted to judicial practice, leaving legal certainty dependent on case law developments rather than comprehensive legislative reform.

[175]Art. 14, ZAKON O PRIVREDNIM DELIKTIMA [LAW ON ECONOMIC OFFENCES] SFRY, no. 4/77, 36/77 (corrected), 14/85, 10/86 (corrected), 74/87, 57/89, 3/90; Official Gazette of the FRY, Nos. 27/92, 16/93, 31/93, 41/93, 50/93, 24/94, 28/96 & 64/2001; Official Gazette of the Republic of Serbia, No. 101/2005.

[176]*See id.* art. 26a.

or parallel proceedings in practice. In particular, corporate legal entities are not explicitly covered by the prohibition in Article 14, leaving a potential gap where companies may still face duplicative sanctions for the same act.

Furthermore, Article 63, paragraph 3 of the Criminal Code[177] provides that "imprisonment or a fine that the convicted person has served or paid for a misdemeanor or economic offense [...] shall be included in the sentence imposed for a criminal offense whose features include misdemeanors, economic offenses, or violations of military discipline." While this provision prevents excessive accumulation of sanctions, it does not necessarily preclude separate proceedings, thereby raising concerns over fragmented enforcement. These ambiguities highlight a legislative gap, particularly when a single act satisfies the legal elements of multiple offenses. Without more explicit procedural bars to dual proceedings, the application of *ne bis in idem* remains vulnerable to circumvention.

2.2.2. NORMATIVE TENSIONS AND INSTITUTIONAL FRAGMENTATION: CHALLENGES TO THE COHERENT APPLICATION OF *NE BIS IN IDEM*

Analyzing the legislative framework governing punitive proceedings in Serbia reveals a discernible trend toward harmonizing the application of the *ne bis in idem* principle across criminal, misdemeanor, and economic offense procedures.[178] This legislative convergence—evident in the general clauses of the C.P.C., the Law on Misdemeanors, and the Law on Economic Offenses—signals a broader intent to create a unified safeguard against double jeopardy. However, despite such efforts, the formal distinction among these categories persists, particularly in the legal treatment of economic offenses, which remain a separate and active classification despite ongoing discussions about their potential abolition.

The persistence of economic offenses creates structural and doctrinal challenges, particularly in cases involving overlapping legal qualifications. For example, a single act may simultaneously constitute a misdemeanor and a criminal offense, raising the risk of parallel or sequential proceedings. Article 4 of the C.P.C. prohibits the prosecution of an individual for an offense for which they have already been acquitted, convicted, or where proceedings have been terminated. However, the language of the provision focuses

[177] Art. 63, Krivični Zakonik [Criminal Code], Službeni glasnik RS, Nos. 85/2005, 88/2005 (corr.), 107/2005 (corr.), 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 & 35/2019.

[178] *See* Zakonik o krivičnom postupku [criminal procedure code] (Serb.), Službeni glasnik RS No. 72/2011, art. 4; *Zakon o prekršajima* [Law on Misdemeanors] (Serb.), Službeni glasnik RS No. 65/2013, art. 8; *Zakon o privrednim prestupima* [Law on Economic Offences] (SFRY), Službeni list SFRJ No. 4/77, arts. 14, 26a.

exclusively on “prosecution, “omitting ”punishment“—a subtle omission that may create ambiguity regarding its full protective reach.

Both the Constitution and the C.P.C. adopt a more expansive formulation of *ne bis in idem* compared to most international instruments, as they explicitly cover not only acquittals and convictions, but also final dismissals of charges and terminated proceedings. Still, the availability of extraordinary legal remedies permits retrials under specific conditions.[179] Article 34, paragraph 5 of the Constitution allows for retrial in cases where new facts or procedural defects could have influenced the outcome, mirroring Article 473 of the C.P.C., which outlines the formal grounds for reopening proceedings. Importantly, any retrial must respect the constitutional prohibition on worsening the defendant’s position in such circumstances.

Despite legislative attempts at coherence, institutional fragmentation remains an obstacle. Jurisdictional boundaries between courts for criminal, misdemeanor, and economic offenses are rigid, with no legal mechanism allowing transfer of proceedings between court types. Criminal courts have no jurisdiction over misdemeanors, and vice versa. This strict segmentation can lead to inconsistent outcomes, especially when the same factual conduct is assessed in separate forums under different legal labels.

In the domain of misdemeanors, Article 8(3) of the Law on Misdemeanor Procedure prevents proceedings if the same conduct has already resulted in a conviction for a criminal or economic offense. Although this creates a vertical ordering of legal responses—giving priority to criminal over misdemeanor procedures—it fails to define which types of decisions are legally binding and to whom they apply, leaving gaps in interpretation. Likewise, in the Law on Economic Offenses, Article 14 only applies to ”responsible persons,“ potentially excluding legal entities from the *ne bis in idem* protection, and Article 26a allows partial crediting of misdemeanor fines without necessarily precluding further proceedings.[180] These narrow formulations permit maneuvering that undermines legal certainty.

In summary, although Serbia’s legal system exhibits a normative commitment to *ne bis in idem*, its practical application is weakened by overlapping legal categories, jurisdictional fragmentation, and insufficient statutory clarity—especially in the area of economic offenses. A more holistic legislative reform is needed to ensure the effective prevention of double proceedings and to align Serbia’s practice with international

[179] *See* María L. Villamarín López, *Report on Spain*, *in* PERSONAL PARTICIPATION IN CRIMINAL PROCEEDINGS: A COMPARATIVE STUDY OF PARTICIPATORY SAFEGUARDS AND IN ABSENTIA TRIALS IN EUROPE 421, 430 (Serena Quattrocolo & Stefano Ruggeri eds., 2019) (Swaz.).

[180] *See* Nikša Bulatović & Dejana Đorđić, *Privredni prestupi od prijave do presude u Republici Srbiji [Commercial Offenses from Reporting to Judgment in the Republic of Serbia]*, 49 BAŠTINA 179 (2019) (Serb.).

standards and the requirements stemming from the Council of Europe and the European Union.

The Law on Economic Offenses, though somewhat outdated as it was adopted in 1977, contains limited *ne bis in idem* provisions. Article 14 stipulates that a responsible person convicted of a criminal offense with characteristics of an economic offense cannot be penalized for the economic offense itself. However, this wording limits the principle’s application to the responsible individual, creating a possible loophole for entities (such as corporations) that could technically be prosecuted for the same act. Furthermore, Article 26a, which allows fines from one type of offense to be credited toward penalties in overlapping economic or misdemeanor offenses, could inadvertently permit double jeopardy. This undermines the *ne bis in idem* principle and highlights a need for legislative clarification to prevent repeated prosecution for the same conduct under different classifications.

2.3. THE EFFECTS OF THE *NE BIS IN IDEM* PRINCIPLE

Before turning to the detailed analysis of Serbian law and its interaction with international standards, it is necessary to consider the broader effects of the *ne bis in idem* principle and how it structures legal certainty in practice. The prohibition operates at multiple levels: it defines the scope of protected decisions and their finality, it shapes the conduct of prosecutors through mechanisms such as conditional deferral of prosecution, and it extends beyond national borders into supranational and international frameworks. Taken together, these dimensions illustrate that *ne bis in idem* is not merely a procedural safeguard but a foundational guarantee of legal certainty, judicial economy, and fairness in both domestic and cross-border criminal justice.

2.3.1. SCOPE AND STRUCTURE OF THE PROHIBITION

The practical effect of the *ne bis in idem* principle is central to assessing whether it is fully and effectively implemented in the Republic of Serbia’s criminal legislation. Within the Serbian legal system, it is not uncommon for multiple punishable offenses to arise from a single set of factual circumstances. This creates specific challenges in the consistent and fair application of the principle.

At its constitutional foundation, the *ne bis in idem* principle in Serbia encompasses two distinct prohibitions. The first concerns the prohibition of reopening

criminal or other punitive proceedings against an individual once the matter has been conclusively resolved. According to Serbian law, a case is deemed resolved when a judgment or procedural decision acquires the status of res judicata—that is, legal finality—which bars any subsequent prosecution or punishment for the same offense. This safeguard is essential to upholding procedural fairness and the rights of the accused, preventing repeated state action for conduct that has already been adjudicated.

The second prohibition targets the simultaneous conduct of multiple proceedings based on the same factual conduct. This ensures that an individual is not subjected to overlapping or parallel prosecutions for a single offense, thereby reinforcing legal certainty and avoiding unnecessary emotional, reputational, or financial burdens. In this way, the principle plays a vital role in guaranteeing legal security and public trust in the administration of justice.

Nonetheless, the application of *ne bis in idem* in Serbia is not absolute. Domestic procedural law provides for exceptional avenues to reopen or revise final judgments—such as retrials (*ponavljanje postupka*)—in cases involving newly discovered evidence or grave procedural violations. These mechanisms are permissible under the Constitution and the C.P.C., provided they serve the interests of justice and due process. Crucially, even in such cases, the Constitution explicitly prohibits any outcome that would place the defendant in a worse position than before the retrial. Thus, while the *ne bis in idem* principle is broadly effective in shielding individuals from double jeopardy, its application remains qualified, allowing narrowly defined exceptions that aim to strike a balance between procedural finality and substantive justice. This nuanced approach reflects a legal philosophy that prioritizes fairness, accuracy, and the legitimacy of judicial outcomes.

A further complexity arises from the extraordinary legal remedies available under the Law on Misdemeanors. Articles 280–284 explicitly regulate the possibility of reopening final misdemeanor proceedings under narrowly defined circumstances, such as reliance on false evidence, criminal misconduct by judicial officers, or the discovery of new facts or evidence. Significantly, Article 280(1)(3) provides that a misdemeanor judgment may be reopened if the convicted individual had already been punished for the same act in criminal or economic offense proceedings. This provision illustrates the legislator's awareness of potential conflicts between different categories of punishable conduct and attempts to mitigate inconsistencies in the application of *ne bis in idem*.

From a systemic perspective, however, this solution is double-edged. On the one hand, it strengthens legal coherence by ensuring that parallel or successive proceedings do not result in contradictory outcomes. On the other hand, it weakens the finality of misdemeanor judgments by allowing them to be set aside to preserve the primacy of

criminal adjudication. Critics have argued that this framework implicitly privileges criminal proceedings over misdemeanors, even when misdemeanor sanctions may be more severe than those for certain criminal offenses. As a result, although the principle of *ne bis in idem* formally applies across categories of offenses, its practical effect remains conditioned by the hierarchical structure of Serbian procedural law, with criminal proceedings retaining a dominant role.

The Law on Economic Offenses adopts a similar approach to extraordinary remedies. Articles 128–129 provide that proceedings concluded by a final judgment may be reopened not only in the situations enumerated under the C.P.C. but also where it is established that the responsible person convicted for an economic offense has already been finally convicted in criminal proceedings for the same act. This provision reflects the legislator's attempt to reconcile overlaps between economic and criminal liability by ensuring that criminal adjudication prevails and by avoiding contradictory outcomes. As with misdemeanors, however, this solution entails a trade-off: while it enhances systemic coherence, it also undermines the stability of final judgments in economic offense cases.

The second prohibition is particularly challenging in the Serbian legal context, where criminal, misdemeanor, and economic offense proceedings coexist as separate punitive frameworks. While the constitutional and statutory provisions of *ne bis in idem* should, in principle, preclude the initiation of new proceedings irrespective of their formal classification, in practice, overlaps do occur. It remains possible that a person convicted in one category of proceedings may subsequently face prosecution in another, despite the underlying conduct being identical. This has generated inconsistent case law at the lower-court level, with some interpreting the prohibition narrowly by reference to the type of proceeding. In contrast, others have adopted a broader conduct-based approach consistent with the Strasbourg and Luxembourg standards. The Supreme Court of Cassation has increasingly emphasized that the decisive criterion is not the legal label attached to the proceeding but whether the prior decision addressed the same punishable conduct (*idem factum*), thereby aligning domestic jurisprudence with the requirements of the E.Ct.H.R. and C.J.E.U. This judicial tendency reflects a gradual shift towards a harmonized standard, even if statutory provisions remain fragmented and leave room for divergent interpretations.

2.3.2. FINALITY AND THE RANGE OF PROTECTED DECISIONS

The scope of the *ne bis in idem* principle in Serbian law is not limited solely to acquittals and convictions. Rather, Serbian legislation adopts a broad interpretation, under which other final procedural outcomes—such as rejection or dismissal decisions—may also trigger protection against double jeopardy. This broader application distinguishes Serbia from many other jurisdictions, where *ne bis in idem* generally applies only to final judgments of acquittal or conviction. The Serbian approach reflects a strong commitment to procedural finality and the protection of individual rights.

Pursuant to Article 422 of the C.P.C., a rejecting judgment is rendered when permanent procedural obstacles exist. More specifically, Article 422 CPC provides that a rejecting decision (*odbijajuća presuda*) shall be rendered when:

- The public prosecutor withdraws the indictment or the injured party withdraws the request for prosecution;
- The defendant has already been finally convicted or acquitted of the same offense, or the indictment has been finally rejected, or the proceedings have been finally terminated;
- The defendant has been released from prosecution by virtue of an amnesty or pardon, or when prosecution is barred by limitation or by another circumstance permanently precluding criminal prosecution.

Dismissal decisions in Serbian criminal procedure take the form of rulings (*rešenja o obustavi postupka*) and are primarily regulated by Articles 338 and 352 of the C.P.C. Article 338 C.P.C. provides that, upon examining the indictment, the panel shall issue a ruling that there are no grounds for prosecution and that the criminal proceedings are to be dismissed if it finds that:

- The act alleged in the indictment does not constitute a criminal offense, and there are no grounds to apply a security measure.
- criminal prosecution has become statute-barred, or the act is covered by amnesty or pardon, or other circumstances exist which permanently preclude prosecution;
- There is insufficient evidence to support a reasonable suspicion that the accused committed the act charged.

Article 352 C.P.C. further stipulates that the presiding judge shall issue a ruling dismissing the criminal proceedings if it is established that:

- the public prosecutor has withdrawn the indictment, or the injured party has withdrawn the motion for prosecution;

- the accused has already been finally convicted or acquitted for the same criminal offense, or the indictment has already been finally rejected, or the proceedings have been finally terminated;

- The accused has been released from prosecution by virtue of an amnesty or pardon, or criminal prosecution is otherwise permanently barred by limitation or another statutory impediment.

When grounded on such permanent impediments, these outcomes acquire res judicata status and trigger the protection of *ne bis in idem*.[181] The inclusion of such decisions serves not only to protect the defendant's rights but also to reduce the burden on judicial resources by preventing repetitive trials for conduct that has already been definitively addressed. However, not all suspensions of proceedings confer res judicata effect. Serbian criminal procedure law also provides for situations in which proceedings are interrupted without producing the finality necessary to trigger the *ne bis in idem* guarantee. A clear example is the interruption of an investigation under Article 307 C.P.C. The public prosecutor must suspend the investigation where, after the commission of the offense, the suspect develops a mental illness or other serious condition preventing participation in the proceedings, or where prosecution is temporarily barred for lack of the injured party's proposal or the authorization of a competent state body. The investigation may also be suspended if the suspect's whereabouts are unknown or if the suspect has absconded and cannot be reached by state authorities. In such circumstances, the suspension is provisional in nature: once the impediment ceases to exist—for instance, the suspect recovers or becomes available—the proceedings can be resumed. These decisions, therefore, do not attain res judicata status, since they do not represent a conclusive determination of the case but rather a temporary halt in the procedure. Distinguishing between final and non-final suspensions is essential to prevent confusion and to ensure that the protective function of *ne bis in idem* is reserved only for outcomes that definitively preclude further prosecution.

[181]*See* Paul A. McDermott, The Law on Res Judicata and Double Jeopardy (1999) (Ir.).

2.4. CONDITIONAL DEFERRAL OF PROSECUTION AND THE ROLE OF PROSECUTORIAL DISCRETION

A particularly contentious area in Serbian criminal procedure concerns prosecutorial discretion, especially in the form of conditional deferral of prosecution (*odlaganje krivičnog gonjenja*). Under Articles 283 and 284(3) of the C.P.C., a public prosecutor may conditionally dismiss a criminal complaint even where reasonable suspicion exists, provided the suspect agrees to fulfill specific obligations (e.g., compensating the injured party, performing humanitarian work, or undergoing therapy).[182] These obligations must be completed within a period not more than one year. If fulfilled, the prosecutor formally dismisses the complaint without initiating formal proceedings.[183]

Importantly, in such cases, the injured party is not entitled to object to the dismissal, as Article 51(2) C.P.C. explicitly disallows such recourse. This asymmetry raises legitimate concerns about victims' rights, particularly precedence in their interests in pursuing justice through standard criminal adjudication. Although the principle of legality requires the use of the res in the prosecution of all criminal acts, the principle of opportunity takes precedence in such cases, allowing flexibility when the offense and the suspect's conduct justify a deviation from formal prosecution.

From the perspective of the suspect, conditional dismissal provides legal certainty and a strong guarantee against further prosecution—assuming all obligations

[182]*See* Veljko Turanjanin & Dragana Čvorović, Pojednostavljene forme postupanja u krivičnim stvarima [Simplified Forms of Procedure in Criminal Matters] (2023) (Serb.).

[183]*See* Zakonik o krivičnom postupku [Criminal Procedure Code] (Serb.), arts. 283, 51(2). The public prosecutor may postpone criminal prosecution for criminal offenses punishable by a fine or a prison sentence of up to five years, if the suspect accepts one or more of the following obligations: 1) to remove the harmful consequences caused by the commission of a criminal offense or to compensate for the damage caused; 2) to pay a certain amount of money to the account prescribed for the payment of public revenues, which is used for humanitarian or other public purposes; 3) to perform certain socially useful or humanitarian work; 4) to fulfill due support obligations; 5) to undergo withdrawal from alcohol or narcotic drugs; 6) to undergo psychosocial treatment in order to eliminate the causes of violent behavior; 7) to fulfill the obligation established by a legally binding court decision, i.e. respect the limitation established by a legally binding court decision. In the order on the postponement of the criminal prosecution, the public prosecutor will determine the deadline in which the suspect must fulfill the obligations, with the fact that the deadline cannot be longer than one year. Supervision over the execution of obligations is carried out by a commissioner from the administrative body responsible for the execution of criminal sanctions, in accordance with the regulation issued by the minister responsible for judicial affairs.If the suspect fulfills the obligation from para. 1 of this article within the deadline, the public prosecutor will dismiss the criminal complaint by decision and inform the injured party about it, and the provision of art. 51, para. 2 of the Code will not be applied. Paragraphs 3 of the Criminal Procedure Code: In the case of criminal offenses for which a prison sentence of up to three years is prescribed, the public prosecutor may dismiss the criminal complaint if the suspect, due to genuine remorse, prevented the occurrence of damage or has already fully compensated for the damage, and the public prosecutor, according to the circumstances of the case, assesses that the imposition criminal sanctions would not be fair. Under these conditions, the provisions of art. 51, para. 2 of this Code shall not be applied.

are met. However, for the injured party, this mechanism may feel inadequate, especially if it forecloses the possibility of a full criminal trial and judgment. The result is a tension between prosecutorial efficiency and victim participation, with the *ne bis in idem* principle operating as a legal barrier to further proceedings even in unresolved emotional or moral contexts.

2.5. SUPRANATIONAL AND INTERNATIONAL DIMENSIONS OF THE *NE BIS IN IDEM* PRINCIPLE

While the *ne bis in idem* principle operates primarily within national legal systems, its scope and significance are increasingly shaped by supranational oversight and international judicial cooperation. For Serbia, this dimension is reflected in its obligations under the E.C.H.R., the jurisprudence of the E.Ct.H.R., and its engagement with international criminal tribunals such as the I.C.T.Y. and the I.C.C.

International legal instruments play a significant role in shaping Serbia’s approach to the *ne bis in idem* principle. Serbia ratified the E.C.H.R. on March 3, 2004, along with Protocol No. 7, which introduced Article 4 prohibiting double jeopardy in criminal proceedings.[184] The E.Ct.H.R. plays a pivotal role in this regard. Its capacity to review national decisions involving potential violations of *ne bis in idem*—particularly under A4P7 to the ECHR—serves as an indirect but powerful acknowledgment of the principle’s cross-border relevance. By subjecting itself to E.Ct.H.R. oversight, Serbia accepts that final judicial decisions within its territory may be scrutinized against the human rights standards of the Council of Europe and the Convention system, thereby extending the practical reach of *ne bis in idem* beyond national borders. Landmark E.Ct.H.R. decisions have confirmed that the scope of criminal proceedings under the ECHR is not restricted to formal criminal law, but may include other punitive administrative processes.[185] From the perspective of Serbia, the E.Ct.H.R. judgment in

[184]Law on the ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms, amended in accordance with Protocol No. 11, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which ensures certain rights and freedoms which are not included in the Convention and the first Protocol to it, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty, Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 12 to the Convention for the Protection of Human Rights and fundamental freedoms and Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty in All Circumstances, Official Gazette of SCG - International Treaties, no. 9/2003, 5/2005, 7/2005 - corr. and Official Gazette of the RS - International Agreements, Nos. 12/2010 & 10/2015.

[185]*Sergey Zolotukhin v. Russia* [GC], App. No. 14939/03, 52 (Feb. 10, 2009), https://hudoc.echr.coe.int/eng?i=001-91222.

Milenković v. Serbia[186] is of particular significance. Although not a landmark case in Strasbourg jurisprudence, it clarified the domestic implications of A4P7 by extending the scope of "criminal proceedings" to encompass certain punitive administrative processes. As such, the judgment highlights the challenges Serbia faces in aligning its legal order with the evolving Strasbourg standards on *ne bis in idem*.

The E.Ct.H.R. plays a pivotal role in defining the content and scope of the *ne bis in idem* principle under Article 4 of Protocol No. 7 to the E.C.H.R. Its function is not to extend the principle across borders, but to ensure that national decisions comply with the standards of the Convention as interpreted by Strasbourg jurisprudence. In this way, the E.Ct.H.R. provides authoritative guidance on how domestic judgments must respect the prohibition of double jeopardy. For Serbia, this oversight means that final judicial decisions are subject to review against supranational human rights standards, thereby reinforcing the importance of applying *ne bis in idem* consistently within the domestic legal order.[187]

Further evidence of Serbia's commitment to the supranational effect of the principle can be found in its relationship with the I.C.T.Y. Under the Law on Cooperation with the I.C.T.Y.,[188] Serbia recognizes the binding force of judgments rendered by this international tribunal. This domestic legislation, enacted in compliance with U.N. Security Council Resolution 827, effectively integrates I.C.T.Y. decisions into Serbia's legal system. As a result, final decisions of the I.C.T.Y. carry res judicata effect in Serbia, precluding renewed prosecution for the same conduct by domestic courts.

[186] *See* Milenković v. Serbia, App. No. 50124/13, 35 (Mar. 1, 2016), https://hudoc.echr.coe.int/eng?i=001-161001 (finding that the dismissal of a misdemeanour case did not preclude subsequent criminal proceedings, thereby raising issues under Art. 4 of Protocol No. 7). This is the first judgment against Serbia that refers to the violation of the principle of *ne bis in idem*. Namely, in the aforementioned verdict, it was about the fact that in Oct. 2006 the applicant, together with another person, participated in an incident, after which the police initiated misdemeanor proceedings against him for disturbing public order and peace, and in Nov. 2007, the applicant convicted and sentenced to a fine in the amount of 4,000.00 dinars, which in case of non-payment would turn into a prison sentence. In the meantime, in Apr. 2007, criminal proceedings were initiated against the applicant due to the same incident for serious bodily injury, and in 2011 he was sentenced to three months' imprisonment. The applicant turned to the Court claiming that his right was violated, covered by the principle of ne bis in idem, which is guaranteed by the Constitution of the Republic of Serbia, the Code of Criminal Procedure and the Law on Misdemeanors. The Government accepted that the conviction of the applicant in the misdemeanor proceedings of 6 Nov. 2007 was "criminal" in nature. However, she argued that the offense for which the applicant was prosecuted should be distinguished, both factually and legally. *Milenkovic v. Serbia*, s. 28.

[187] *See* Convention Implementing the Schengen Agreement art. 54, (June 14, 1985), 2000 O.J. (L 239) 19.

[188] Zakon o saradnji Srbije i Crne Gore sa Međunarodnim tribunalom za krivično gonjenje lica odgovornih za teška kršenja međunarodnog humanitarnog prava počinjena na teritoriji bivše Jugoslavije od 1991. godine [Law on Cooperation of Serbia and Montenegro with the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991] (FRY), Službeni list SRJ No. 18/2002; (SCG) Službeni list SCG No. 16/2003.

Through these mechanisms, Serbia has effectively accepted a multilevel framework in which the *ne bis in idem* principle may be triggered by judgments rendered by international or foreign courts. This reflects an important normative evolution: the principle is no longer confined solely to national legal systems but is increasingly embedded in a transnational legal order shaped by mutual recognition, judicial cooperation, and supranational oversight. Consequently, Serbia's legal system not only acknowledges the cross-border dimension of *ne bis in idem* in theory but also facilitates its application in practice, particularly in cases involving international criminal tribunals, the European Court of Human Rights, and other Convention-based human rights bodies. This commitment affirms Serbia's alignment with global standards of legal certainty and the finality of judgments, reinforcing the protective value of *ne bis in idem* as a cornerstone of both domestic and international criminal justice.

3. THE APPLICATION OF THE PRINCIPLE OF *NE BIS IN IDEM* AND PROBLEMS IN SERBIA

3.1. METHODOLOGICAL FRAMEWORK FOR ANALYZING THE *NE BIS IN IDEM* PRINCIPLE

To determine whether the *ne bis in idem* principle has been violated, it is necessary to employ a clear, structured analytical framework. The principle's application, though seemingly straightforward, is in practice nuanced and requires a multi-layered assessment grounded in both legal theory and the jurisprudence of the E.Ct.H.R. and the C.J.E.U. Four cumulative elements must be established before the protection of A4P7 or Article 50 C.F.R. can be invoked.

(1) Is the matter "criminal in nature"? This first element concerns the scope of application of the principle. While domestic law may formally classify certain offenses as disciplinary, administrative, or criminal, the E.Ct.H.R. applies an autonomous interpretation under Article 6 E.C.H.R. through the *Engel criteria*: (a) the legal classification of the offence under national law; (b) the intrinsic nature of the offence; and (c) the severity of the sanction that may be imposed. These criteria, which are alternative rather than strictly cumulative, ensure that even proceedings formally designated as non-criminal may fall within the "criminal" sphere of the Convention. This step is thus broader than a formal qualification under domestic law, and requires a substantive assessment of whether the proceedings are "criminal in nature."

(2) Are there two distinct proceedings (*bis*)? The principle presupposes the existence of two separate sets of proceedings capable of leading to criminal liability. The E.Ct.H.R. has emphasized that the decisive issue is whether the proceedings are genuinely distinct or whether they may be regarded as forming part of an "integrated scheme of sanctions" with a sufficiently close connection in substance and in time.[189] Thus, "bis" does not arise where two procedures constitute a single coherent response, but only where an individual is exposed to multiple proceedings of a criminal nature that are not sufficiently coordinated.

(3) Are the charges factually identical or substantially the same (idem)? The *ne bis in idem* principle protects against repeated prosecution for the same underlying conduct. Since *Zolotukhin v. Russia [GC],*[190] the E.Ct.H.R. has interpreted "same offence" to mean identity of facts (*idem factum*), rather than legal characterization (*idem crimen*). In subsequent jurisprudence, including *A and B v. Norway*, the Court refined the test, clarifying that the factual basis of the charges must be "identical or substantially the same".[191] This criterion ensures that the principle is not circumvented by reclassifying the same conduct under different legal headings.

(4) Has there been a final judgment (res judicata)? Finally, the principle applies only where one of the proceedings has been concluded by a "final" decision, that is, a judgment or equivalent decision which is binding and no longer subject to ordinary appeal. As clarified in *Mihalache v. Romania [GC],*[192] the "final" character of a decision depends on whether domestic remedies have been exhausted or the time limit for their use has expired, consistent with the principle of legal certainty. Only in such circumstances can *ne bis in idem* prevent the re-opening of new proceedings for the same matter.

Taken together, these four elements—criminal nature, dual proceedings, factual identity, and finality—provide a structured methodology for assessing whether the *ne bis in idem* principle has been violated. This analytical framework ensures consistency with Strasbourg and Luxembourg jurisprudence, safeguards individuals against undue cumulative proceedings, and reinforces the authority of final judicial decisions.

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[189] A. and B. v. Norway, App. Nos. 24130/11 & 29758/11, 130 (Nov. 15, 2016), https://hudoc.echr.coe.int/eng?i=001-168972.

[190] Sergey Zolotukhin v. Russia, App. No. 14939/03, 82 (Mar. 10, 2009), https://hudoc.echr.coe.int/eng?i=001-91222.

[191] A. and B. v. Norway, App. Nos. 24130/11 & 29758/11,¶108 (15 Nov. 2016),https://hudoc.echr.coe.int/eng?i=001-168972.

[192] Mihalache v. Romania, App. No. 54012/10, (88–89) (July 8, 2019), https://hudoc.echr.coe.int/eng?i=001-194523;

3.2. THE CRIMINAL NATURE REQUIREMENT - RELATIONSHIP BETWEEN CRIMES, MISDEMEANORS, AND OTHER ADMINISTRATIVE OFFENSES

3.2.1. THE CONSTITUTIONAL DIMENSION OF *NE BIS IN IDEM* IN SERBIA: DOCTRINAL EVOLUTION AND JURISPRUDENTIAL CONSOLIDATION

The first analytical step in assessing the application of *ne bis in idem* in Serbia concerns the question whether the matter is "criminal in nature" within the meaning of the E.C.H.R. According to the E.Ct.H.R, this determination is guided by the *Engel* criteria, which require an assessment of (1) the legal classification of the offence under domestic law, (2) the intrinsic nature of the offence, and (3) the type and severity of the sanction at stake. While the first criterion serves as a starting point, the Court has repeatedly stressed that it is not decisive; even proceedings classified as "administrative" or "disciplinary" under domestic law may fall within the scope of Article 6 E.C.H.R. and A4P7 if they involve punitive objectives or severe sanctions. Landmark cases such as *Engel and Others v. Netherlands,*[193] *Öztürk v. Germany,*[194] *Jussila v. Finland,*[195] and *A and B v. Norway*[196] illustrate how the Strasbourg Court interprets "criminal nature" broadly, extending Convention guarantees beyond traditional criminal law.

Against this background, Serbian constitutional jurisprudence has progressively aligned with Strasbourg standards, particularly after *Zolotukhin v. Russia.*[197] Article 34(4) of the Constitution enshrines the prohibition of double jeopardy, and the Constitutional Court has played a central role in clarifying how this protection extends to misdemeanors and, in certain contexts, even to other punitive proceedings.

The principle of *ne bis in idem*, enshrined in Article 34(4) of the Constitution of the Republic of Serbia, prohibits the repeated prosecution or punishment of an individual for the same criminal offense once a final judgment has been rendered. The Serbian Constitutional Court has played a crucial role in interpreting and enforcing this guarantee, progressively aligning its jurisprudence with the standards articulated by the E.Ct.H.R, most notably in the *Zolotukhin v. Russia* judgment.[198] The E.Ct.H.R. 's evolving case law demonstrates both consistency in applying the material identity test (*idem*) and

[193]Engel and Others v. Netherlands, App. Nos. 5100/71; 5101/71; 5102/71; 5354/72 & 5370/72, (June 8, 1976) https://hudoc.echr.coe.int/eng?i=001-57479.
[194]Öztürk v. Germany, App. No. 8544/79, 51 (Feb. 21, 1984), https://hudoc.echr.coe.int/eng?i=001-57553.
[195]Jussila v. Finland, App. No. 73053/01, 30-31 (Nov. 23, 2006), https://hudoc.echr.coe.int/eng?i=001-78135.
[196]*A. and B. v. Norway*, App. Nos. 24130/11 & 29758/11, (Nov. 15, 2016), https://hudoc.echr.coe.int/eng?i=001-168972.
[197]*Sergey Zolotukhin v. Russia*, App. No. 14939/03, ¶ 82 (Mar. 10, 2009), https://hudoc.echr.coe.int/eng?i=001-91222.
[198]*Id.*

a growing attentiveness to the functional overlap between misdemeanor and criminal proceedings.

A particularly illustrative case is Už-11106/2013, where the Court found a violation of Article 34(4) because the applicant was subjected to criminal proceedings after a misdemeanor case had already been resolved with finality. The applicant had been acquitted in misdemeanor proceedings for allegedly assaulting a fisheries inspector. Nonetheless, he was later convicted in criminal court for the same act. Applying the Engel criteria and referencing Zolotukhin, the Court found that both proceedings were based on the same factual conduct and shared a punitive nature, thus triggering constitutional protection against double jeopardy.[199]

In *Už-1285/2012*, the Court likewise found a violation of the *ne bis in idem principle*. The applicant had already been sanctioned in misdemeanor proceedings for verbal and physical altercations and was later criminally convicted for the same conduct. The Court reaffirmed that the identity of facts—not the legal classification of the offense—is the decisive criterion.[200] This case also highlighted the inadequacies of Serbian procedural law in distinguishing misdemeanors from criminal offenses, which often leads to overlapping sanctions and legal uncertainty.

The jurisprudence took a contrasting turn in *Už-9476/2019*, where the Court rejected the applicant's complaint. Despite the prior initiation of misdemeanor proceedings for the same incident, the Court held that there was no violation because the facts underpinning the two proceedings were not identical. The criminal court addressed different methods of assault and legally distinct protected interests—bodily integrity as opposed to public peace. The Court emphasized that a factual continuum can be segmented into separate legal reactions, provided the courts observe the limits of their respective jurisdictions.[201]

Similarly, in *Už-2227/2020*, the Court held that the applicant's criminal conviction for endangering public traffic did not violate the *ne bis in idem principle*, even though he had previously been sanctioned in a misdemeanor proceeding for driving under the influence. The Court reasoned that the criminal conviction was based on distinct conduct—failing to drive on the right side of the road and causing an accident—while the misdemeanor conviction concerned only the applicant's intoxication.[202]

[199]*Ustavni sud Republike Srbije* [Constitutional Court of Serbia], Už-11106/2013, (Mar. 16, 2017).
[200]*Ustavni sud Republike Srbije* [Constitutional Court of Serbia], Už-1285/2012 (Mar. 26, 2014), Official Gazette of the Republic of Serbia No. 45/2014.
[201]*Ustavni sud Republike Srbije* [Constitutional Court of Serbia], Už-9476/2019 (14 July 2022).
[202]*Ustavni sud Republike Srbije* [Constitutional Court of Serbia], Už-2227/2020 (Apr. 6, 2023).

In *Už-9397/2016*, the Court dealt with the interplay between military disciplinary procedures and criminal prosecution. The applicant was first subjected to disciplinary proceedings for abuse of office, which were later terminated due to the cessation of his professional military service. He was then criminally prosecuted for the same conduct. The Court held that the disciplinary proceedings did not have a punitive character within the meaning of *Engel*, and thus did not preclude subsequent criminal prosecution. The decision clarified that only proceedings with penal characteristics and a final judicial outcome can trigger the *ne bis in idem* guarantee.[203]

This approach was echoed in *Už-9956/2016*, where the Court addressed the legal consequences of a prosecutorial decision to discontinue criminal proceedings following the application of the opportunity principle. The applicant alleged that a misdemeanor proceeding concerning the same conduct violated the *ne bis in idem principle*. However, the Court ruled that since a court never adjudicated the original criminal case, the prohibition of double jeopardy was not applicable.[204]

Conversely, the Court reaffirmed the binding nature of final misdemeanor judgments in *Už-2513/2014*. The applicant had previously been acquitted in a misdemeanor case for physical aggression, only to be subsequently convicted of minor bodily harm in criminal court. The Constitutional Court found that the misdemeanor judgment constituted res judicata and barred further prosecution for the same conduct. The case strengthened the domestic application of the material facts test and clarified that finality in misdemeanor adjudication suffices to invoke constitutional protection.[205]

By contrast, in *Už-8463/2018*, the Court dismissed the constitutional complaint due to procedural default. The applicant, convicted of abuse of office, claimed that a pending misdemeanor case for the same conduct violated her rights under Article 34(4). However, the Court found that she failed to raise the *ne bis in idem* argument before the ordinary courts, particularly in her request for protection of legality before the Supreme Court of Cassation. This case underlined the procedural preconditions for invoking constitutional protection.[206]

A similar outcome occurred in Už-6986/2018, where the applicant was fined in customs misdemeanor proceedings and later convicted of smuggling. Despite the material overlap, the Court, invoking the E.Ct.H.R's *A and B v. Norway* judgment, held that the two

[203] *Ustavni sud Republike Srbije* [Constitutional Court of Serbia], Už-9397/2016 (3 Dec. 2020) (Dec. 3, 2020); Gheorghe Reniță, Cumulation of Criminal and Disciplinary Liability in the Case of the Manipulation of the Sports Competitions: European Standards and the Experience of the Republic of Moldova, 16 Cogito: Multidisciplinary Res. J. 94 (June 2024).

[204] *Ustavni sud Republike Srbije* [Constitutional Court of Serbia], Decision Už-9956/2016 (Oct. 28, 2021).

[205] Ustavni sud Republike Srbije [Constitutional Court of Serbia], Už-2513/2014, (Oct. 15, 2020).

[206] Ustavni sud Republike Srbije [Constitutional Court of Serbia], Už-8463/2018, (July. 1, 2021).

proceedings pursued complementary objectives and were sufficiently connected in time and substance.[207]

Finally, the case Už-1320/2018 emphasized the courts' obligation to assess double jeopardy claims substantively. The Supreme Court of Cassation had dismissed a request for protection of legality due to a clerical error in the application, ignoring the substantive *ne bis in idem* argument. The Constitutional Court found this omission to violate the applicant's right to a fair trial under Article 32(1).[208]

3.2.2. ORDINARY COURTS AND THE APPLICATION OF *NE BIS IN IDEM* TO MISDEMEANOR AND CRIMINAL MATTERS

In line with the methodological framework developed by the E.Ct.H.R, the application of the *ne bis in idem* principle requires a cumulative assessment of four elements: (i) whether the matter is "criminal in nature," as defined through the Engel criteria (*Engel and Others v. Netherlands*); (ii) whether there has been a duplication of proceedings (*bis*) that are not "sufficiently connected in substance and time" (*A and B v. Norway [GC]*); (iii) whether the charges are "identical or substantially the same" in terms of the underlying facts (*Zolotukhin v. Russia [GC]*); and (iv) whether one of the proceedings has been concluded by a final and binding decision (*Mihalache v. Romania [GC]*).

Serbian ordinary courts have been required to interpret these elements in practice, particularly in cases involving the overlap of misdemeanor and criminal proceedings. The jurisprudence illustrates both convergence with Strasbourg standards and persistent inconsistencies, especially regarding the relationship between *idem* and *bis* in contexts where the same factual matrix is split across separate punitive tracks.

Serbian courts have, at least in principle, acknowledged the applicability of res judicata between misdemeanor and criminal proceedings. This approach was notably affirmed in a 2014 appellate judgment, where it was emphasized that the prohibition against double jeopardy applies not only to criminal offenses in the strict sense but to any punishable act. As stated:

"[C]ontrary to the position of the Court of Appeal, the provisions of the Code of Criminal Procedure and the Constitution of the Republic of Serbia guarantee the exercise of the right to legal certainty in criminal proceedings by prohibiting the conduct of

[207] Ustavni sud Republike Srbije [Constitutional Court of Serbia], Už-6986/2018, (Mar. 18, 2021).
[208] Ustavni sud Republike Srbije [Constitutional Court of Serbia], Už-1320/2018, (Apr. 29, 2021).

proceedings and a trial not only for a 'criminal offense' but for any punishable offense."[209]

In this context, the Tax Administration's decision in misdemeanor proceedings was considered legally relevant in assessing whether the criminal charge concerned the same matter. The Appellate Court in Kragujevac confirmed this approach, recognizing *idem factum* and *eadem persona* between the misdemeanor judgment (VAT offense) and the criminal indictment (tax evasion), thereby concluding that the matter had already been adjudicated.

The European Court of Human Rights further examined the principle in *Stamenković v. Serbia.*[210] The E.Ct.H.R. ruled that the *ne bis in idem* guarantee had been violated, even though the misdemeanor charge included an additional element of continuous behavior. The Court held that both the misdemeanor and criminal charges stemmed from the same violent act—committed at the same time and place—and that this factual overlap constituted a violation of the *idem* criterion under Article 4(1) of Protocol No. 7.[211]

While the proceedings were not conducted in parallel and the criminal case began seven months after the misdemeanor ruling, the E.Ct.H.R. determined that the

[209]*See* Judgment of the Appellate Court in Niš, No. 19 Kž 1 3842/13 (Dec. 17, 2014). Similarly, the first-instance court, acting in accordance with the objections presented in the decision of this court Kž 1-1590/15 (Jan. 05, 2016), correctly determined that in this criminal case, in the sentence of the first-instance verdict, the charge should be rejected for the reasons stated in the explanation of the contested verdict, since in that part it is about a decided matter, because the first-instance court, by comparing the factual description from the indictment proposal of the public prosecutor and the factual description of the final verdict of the Misdemeanor Court in Kragujevac 5 Pr. No. 25573/10 (Apr. 28, 2015), correctly determined that there is an identity of the act and the person-perpetrator, between the matter included in the judgment of the Misdemeanor Court and the criminal matter included in that part of the indictment, which was part of the extended criminal offense of tax evasion from Art. 229 st. 2 in connection with para. 1 and Art. 61 CC. Therefore, the first-instance court correctly applied the provisions of Art. 34(3) of the Constitution of the Republic of Serbia, Art. 4th para. 1, CPC and Art. 4 of Protocol No. 7 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, given that it appears from the case file that the judgment of the Misdemeanor Court in Kragujevac, the accused as a legal entity, were found guilty of the misdemeanor from Art. 60 para. 1 point 12 and paragraph 2 of the Law on value added tax, where the factual description of the misdemeanor from the aforementioned judgment of the misdemeanor court is identical to the factual description of the criminal offense of tax evasion from Art. 229 st. 2 in connection with Art. 61 of the CC, in relation to the value added tax, described in paragraph one of the detailed indictment, in terms of the time, place of the executor and type of tax liability, i.e. it is an identical factual situation, so according to the opinion of the Appellate Court, the correct conclusion of the first instance court is that in the specific case, for the actions described in more detail in the sentence of the first-instance judgment, it is about a decided matter, and accordingly, the appeal of the public prosecutor in that part was assessed as unfounded, because with the proper application of the provisions of Art. 422 point 2 of the CPC, the charge against the defendant in that part was dismissed. Apelacioni sud u Kragujevcu [App. Ct. in Kragujevac] Apr. 19, 2016, Kž1-418/16; *see more in* Veljko Turanjanin, *Anatomija privrednih krivičnih dela* [Anatomy of Economic Crimes] 49 (Faculty of Law, University of Kragujevac 2019).

[210]Stamenković v. Serbia, App. No. 30009/15, (Mar. 1, 2022), https://hudoc.echr.coe.int/eng?i=001-215918.

[211]*See id.*

lack of temporal proximity and independent collection of evidence were insufficient to break the substantive link between the two cases. Ultimately, the Court emphasized that the nature and timing of the proceedings are decisive in determining whether a breach of *ne bis in idem* has occurred.[212]

This nuanced interpretation by the E.Ct.H.R. underscores the importance of both factual and temporal links in determining the applicability of the *ne bis in idem principle*. The question of whether proceedings constitute the same criminal matter does not depend solely on the simultaneous conduct of the procedures but also on their substantive connection. In light of these standards, it is essential to examine how Serbian courts have approached the relationship between misdemeanor and criminal proceedings in practice. A series of domestic judgments provides insight into the application of the principle and highlights both alignment and divergence from the European Court's case law. Having examined the core elements of the *ne bis in idem* principle—including the criteria of *idem*, *bis*, and the requirement of a final decision—this section turns to the practical application and challenges in the Serbian legal system.

The judgment issued by the High Court in Čačak on October 28, 2021 (Kz 198/2021) exemplifies a case where the principle of *ne bis in idem* does not apply, as the offenses in question stem from different factual bases. Specifically, the court ruled that a defendant cannot be subjected to both criminal and misdemeanor proceedings based on the same life event if the offenses involve unrelated elements. In this case, the defendant was charged with the criminal offense of endangering public traffic due to unsafe driving, and with a misdemeanor for operating a foreign-registered vehicle without the required insurance under Serbian law. The court concluded that because the offenses did not share essential elements—one being related to public safety in traffic and the other to the administrative matter of insurance—the offenses were not considered to derive from the same factual basis. Therefore, the principle of *ne bis in idem*, which protects individuals from being prosecuted for the same offense twice, was not violated. This judgment reinforces the idea that for *ne bis in idem* to apply, the legal charges must be based on the same factual circumstances, and merely involving the same defendant or event is insufficient. The separation between the two types of offenses (criminal and misdemeanor) in this case ensures that each proceeding addressed distinct issues, without overlapping in substance or legal basis.

In its ruling Kzl 118/2020 of October 8, 2020, the High Court in Čačak addressed a case involving both a misdemeanor and a criminal offense stemming from the same event. The defendant was initially punished in a misdemeanor proceeding for violating

[212]*See id.* ¶ 9.

an emergency measure that prohibited him from contacting his wife, a victim of domestic violence. He had disregarded this prohibition by entering the family home and forcing his wife to leave. The misdemeanor court found him guilty of this violation under the Law on Prevention of Domestic Violence.[213] However, the defendant was also facing criminal charges for threatening his wife verbally within the family home, a crime under the criminal law. The factual description in the criminal indictment included threats not mentioned in the misdemeanor court's final judgment. Despite this difference in the specifics of the charges, the High Court in Čačak concluded that both the misdemeanor and criminal proceedings were based on the same underlying event, i.e., the defendant's conduct within the family home on the same occasion. Therefore, the court ruled that the principle of res judicata applied, and the defendant could not be prosecuted again for the same factual basis, as the matter had already been adjudicated. We could say that this case highlights the application of *ne bis in idem* to both misdemeanor and criminal offenses arising from the same event, emphasizing that if the underlying facts of the two proceedings are identical, a new trial or punishment is prohibited, even if the legal characterizations of the offenses differ.

The judgment of the High Court in Valjevo, Kzl 55/2018, from March 20, 2018, provides an interesting example of the application of the *ne bis in idem* principle. In this case, the same defendants were prosecuted in two separate proceedings: one criminal and one misdemeanor. The criminal court found the defendants guilty of violent behavior in conjunction with grievous bodily harm, based on their actions that led to the physical harm of another individual. Specifically, the defendants were responsible for inflicting serious and minor injuries to the victim, following a confrontation during which the victim had warned them against their behavior. In parallel, the Misdemeanor Court had found the same defendants guilty of shameless and reckless behavior under the Law on Public Order and Peace. They were penalized for violating public order by urinating in a public space, which had led to a disruption of public peace. The High Court ruled that *ne bis in idem* did not apply in this case, even though both proceedings arose from the defendants' actions on the same occasion. The court found that the misdemeanor and criminal charges were not based on the same set of facts. While the criminal offense was linked to the violent actions that caused physical harm to the victim, the misdemeanor charge was connected to a different aspect of the defendants' behavior—their public indecency and disregard for public order. In other words, the High Court differentiated between the two proceedings by considering the nature and

[213] Zakon o sprečavanju nasilja u porodici [Law on Prevention of Domestic Violence], Official Gazette of the Republic of Serbia, No. 64/2016 & 10/2023 (Serb.).

consequences of the actions. The actions described in the misdemeanor verdict, which dealt with public indecency, were deemed to precede and contribute to the more serious criminal event (the violence). Therefore, the criminal conduct (violent behavior and bodily harm) was considered separate from the misdemeanor (disrupting public peace), despite the events being temporally and contextually linked.

Additionally, the consequences of the criminal offenses were deemed to be significantly more severe than those of the misdemeanor, further supporting the court's decision that they were not the same offense. This ruling underscores how *ne bis in idem* is applied with nuance, especially when the legal nature and consequences of the charges differ, even when they arise from the same life event. It also highlights the principle that different types of responsibility—criminal and misdemeanor—are not interchangeable and that res judicata in criminal law may not apply when the factual bases of the offenses are distinct.

On January 29, 2018, the Court of Appeal in Kragujevac issued the verdict Kzl 84/2018, in which it addressed whether criminal proceedings could be pursued after a misdemeanor case had already been legally suspended. The court concluded that when the factual description of the misdemeanor clearly pertains to the same defendants, the same life event, occurring at the same time and place, involving the same actions of the defendants that resulted in the same consequences, the criminal charge against the defendants must be rejected due to the principle of res judicata. In this specific case, the defendants were accused of both a misdemeanor and a criminal offense arising from the same set of facts: their failure to comply with safety regulations and technical standards on a construction site, which resulted in a fatal accident. The tragic incident involved a concrete panel falling from a crane and fatally injuring an individual. The Court of Appeal determined that, since both the misdemeanor and the criminal charges were based on identical factual circumstances and the same actions leading to the same fatal outcome, the matter had already been decided in the misdemeanor case. As such, the court ruled that the criminal case could not proceed, invoking the principle that a defendant should not be tried twice for the same offense or event. This decision illustrates the application of the *ne bis in idem* principle and reinforces the notion that when the core facts are identical, the legal matter has already been adjudicated.

Together, these cases establish a robust framework for interpreting *ne bis in idem* in Serbian constitutional jurisprudence. The Constitutional Court of Serbia has shown increasing sensitivity to the material identity of facts, procedural safeguards, and the necessity of harmonizing domestic standards with the human rights requirements stemming from the European Convention on Human Rights. Its jurisprudence affirms

that final judgments in misdemeanor cases can trigger constitutional protection, while simultaneously insisting on procedural diligence from litigants to preserve their rights.

These decisions confirm that while *ne bis in idem* protects individuals against legal uncertainty and abusive duplications of prosecution, it must be applied in a balanced manner. The Court's reasoning reflects a convergence with E.Ct.H.R. standards, especially post-*Zolotukhin*, but also incorporates a domestic sensitivity to the structure of Serbia's dual-track punitive system (criminal and misdemeanor). The constitutional case law thus provides an increasingly refined model for distinguishing when procedural duplication becomes constitutionally impermissible. The cases analyzed above demonstrate that Serbian courts have progressively adopted a more refined approach to the *ne bis in idem* principle, especially in contexts where misdemeanor and criminal offenses stem from the same factual matrix. While some judgments affirm a strict adherence to the identity of facts and legal consequences, others reveal a tendency to differentiate proceedings based on the legal characterization or severity of the offenses. This evolving jurisprudence suggests that although the principle of res judicata is increasingly recognized, its consistent and harmonized application remains a challenge. Further alignment with the E.Ct.H.R's jurisprudence—particularly regarding the material and temporal connection between proceedings—would enhance legal certainty and better safeguard the rights of the accused under A4P7.

In conclusion, the case law of Serbian ordinary courts reveals both progress and persistent challenges in applying the *ne bis in idem* principle to the relationship between misdemeanor and criminal matters. While certain judgments—particularly those of appellate courts—demonstrate a clear alignment with the Strasbourg standards by focusing on the identity of facts and the finality of decisions, other rulings still rely heavily on formalistic distinctions between different categories of punishable conduct. This fragmented approach undermines legal certainty and opens the door to inconsistent judicial practice. To ensure full compliance with A4P7, Serbian courts must adopt a uniform interpretation that prioritizes the material reality of proceedings over their formal classification. Strengthening the consistency of domestic jurisprudence along the lines articulated in *Zolotukhin* and *A and B v. Norway* would not only safeguard individual rights but also enhance public trust in the fairness and predictability of the criminal justice system.

3.3. THE RELATIONSHIP BETWEEN DISCIPLINARY AND CRIMINAL PROCEEDINGS

Building upon the examination of the interplay between misdemeanor and criminal proceedings, this section turns to another important intersection in the Serbian legal system—the relationship between disciplinary and criminal procedures and its implications for the ne bis in idem principle.

The Republic of Serbia demonstrates a varied approach in interpreting and applying the principle of *ne bis in idem*, particularly regarding its interaction with disciplinary procedures. As previously mentioned, the legal nature of disciplinary procedures is a subject of ongoing debate in Serbian legal literature, and this debate influences the judicial interpretation of the principle of double jeopardy in these cases.

The Supreme Court of Cassation has issued several rulings that highlight its stance on the potential conflict between disciplinary and criminal proceedings. In particular, the Court has ruled that criminal proceedings can be initiated after disciplinary actions have been taken, without violating the *ne bis in idem* principle. This is based on the understanding that disciplinary measures and criminal responsibility are distinct forms of liability. The judgment in case *UZP 143/2022 (April 29, 2022)* exemplifies this reasoning. In this case, the Court concluded that an employee could be subject to disciplinary liability for breaches of the employer's work obligations and, simultaneously, face criminal liability if the circumstances warrant it. The Court emphasized that these are two separate types of responsibility, and as such, the principle of *ne bis in idem* does not apply.[214]

Similarly, in judgment *Kzz 1179/2021 (February 10, 2021)*, the Supreme Court assessed that there was no violation of *ne bis in idem* when both criminal and disciplinary proceedings were conducted concerning the same event. This decision was based on the fact that the legal nature of disciplinary sanctions is linked to status or labor law, rather

[214] In this case, two separate proceedings were conducted based on the same underlying event: one disciplinary and one criminal. The disciplinary proceeding addressed a serious breach of official duty under art. 207, para. 1, point 1, of the Law on Police, while the criminal proceeding concerned the offense of abuse of official position under art. 359, paragraph 1 of the Criminal Code. The disciplinary proceeding, conducted due to a significant breach of duty under art. 207, para. 1, point 7, of the Law on Police, resulted in a disciplinary fine imposed on the prosecutor. This fine, however, pertains solely to labor law, as disciplinary sanctions are designed to limit or revoke certain employee rights or privileges within the scope of employment, applying only as long as the person maintains their employment status. Given the labor-specific nature of disciplinary sanctions, the Administrative Court concluded that conducting a criminal proceeding on the same event did not violate the *ne bis in idem* principle. The court emphasized that the disciplinary procedure's outcomes relate to employment status rather than criminal liability, allowing separate proceedings to address distinct legal concerns. The Supreme Court of Cassation concurred with this reasoning, affirming the Administrative Court's conclusion that no legal barrier existed to prevent the criminal case from proceeding independently.

than to the criminal law context. In this view, the Court determined that imposing both criminal and disciplinary sanctions does not constitute "double punishment" for the same offense, as they serve different legal purposes: criminal sanctions aim to address criminal conduct, while disciplinary sanctions focus on maintaining the proper functioning of employment relationships or professional standards.

The Supreme Court of Cassation's ruling regarding the application of the *ne bis in idem* principle in cases involving both disciplinary and criminal proceedings is insightful, especially in the context of Serbian jurisprudence. As stated in the explanation, the Constitutional Court of the Republic of Serbia aligns its interpretation with the E.Ct.H.R., setting specific criteria to assess whether two proceedings for the same act represent a violation of *ne bis in idem*. These criteria are:

- Whether both proceedings are for an act that, by its nature, constitutes a punishable offense, and whether the sanction in the disciplinary procedure is criminal in nature.
- Whether the acts for which the defendant is being prosecuted are the same (*idem*).
- Whether there has been a double procedure (*bis*).

In the case discussed, the Supreme Court of Cassation held that disciplinary proceedings under the Law on Civil Employees do not meet the criteria for criminal charges, primarily because the sanctions in the disciplinary process are of a labor-law nature rather than criminal in nature. These sanctions, such as limiting or removing certain rights or positions, are designed to regulate the employment relationship and cease to have effect once the person is no longer employed. The Court emphasized that the sanctions in question are not criminal in nature, as they do not carry the same punitive and repressive purpose as criminal sanctions. Therefore, despite disciplinary and criminal proceedings concerning an event that shared some of the same facts, the Supreme Court ruled that the *ne bis in idem* principle was not violated. The legal distinction between labor-law sanctions and criminal punishment was crucial in this judgment. The Court clarified that the disciplinary procedure, which ended before the criminal procedure commenced, did not constitute a final legal resolution of the matter related to the criminal offense (in this case, falsification of a document). Consequently, there was no procedural barrier preventing the initiation of criminal proceedings. This ruling underscores the principle that different legal systems—disciplinary versus criminal—can address the same event without infringing the prohibition against double

jeopardy, provided the proceedings are grounded in distinct legal foundations and objectives.

Finally, we can say that these cases underscore the complex and evolving nature of legal interpretations regarding *ne bis in idem* in Serbia. While disciplinary and criminal proceedings may sometimes overlap in the facts or circumstances of a case, Serbian courts have found that the distinct legal functions of these proceedings permit their parallel application without violating the constitutional principle prohibiting double punishment for the same offense.

Together with the findings presented in the previous section, these judgments illustrate how the principle of *ne bis in idem* is interpreted in Serbia not only in terms of the substantive identity of offenses but also through the lens of the nature and function of parallel procedures—whether misdemeanor, disciplinary, or criminal. In sum, the Serbian approach to the relationship between disciplinary and criminal proceedings reflects a dual focus: on the one hand, protecting individuals from duplicative criminal sanctions, and on the other, preserving the autonomy of distinct legal regimes such as labor or professional law. The prevailing view of the Supreme Court of Cassation is that disciplinary measures do not possess a "criminal nature" within the meaning of the Engel criteria, and therefore do not trigger the *ne bis in idem* guarantee when followed by criminal prosecution. This jurisprudence shows partial convergence with the standards of the E.Ct.H.R, which emphasizes the substantive nature of the sanction rather than its formal classification. However, it also reveals areas of potential friction: in cases where disciplinary sanctions take on punitive or deterrent characteristics beyond mere labor-law regulation, Serbian courts will need to reassess their current position carefully.

3.4. RES JUDICATA IN DISMISSALS BASED ON THE PRINCIPLE OF OPPORTUNITY

The application of res judicata in criminal law is particularly complex when a criminal complaint is dismissed under the principle of opportunity. This prosecutorial mechanism, codified in Article 283 of the Serbian Code of C.C.P., allows the public prosecutor to defer prosecution on condition that the defendant fulfills specific obligations (such as paying a sum to charity, undergoing treatment, or compensating the injured party). Once these obligations are met, the prosecutor issues a decision formally dismissing the complaint. Although such dismissals occur without judicial adjudication,

they raise important questions regarding legal certainty, finality, and the scope of the *ne bis in idem* guarantee.[215]

Amid public debates on the amendments to the C.C.P., it is envisaged that the scope of the *ne bis in idem* principle will be formally defined regarding criminal complaints dismissed by the public prosecutor under the conditional application of the principle of opportunity. Where a criminal complaint has been dismissed based on fulfilled obligations imposed by conditional deferral of prosecution, the suspect may not be prosecuted again for the same offense. This is considered a sound solution from the standpoint of legal certainty, as it resolves a formal problem that had previously been addressed in Serbian judicial practice only through interpretative positions adopted by the Supreme Court of Cassation.[216]

According to the A4P7 and the E.Ct. H.R's Grand Chamber judgment in *Mihalache v. Romania,*[217] the protection under A4P7 requires that there be both an "acquittal or conviction" and a "final decision". The E.Ct.H.R. has emphasized that it is the substance of the decision that matters: where the prosecutorial body has assessed the merits of the case, evaluated evidence, and imposed a sanction with punitive or deterrent character, the resulting dismissal can amount to a "conviction" even in the absence of judicial intervention.[218] By contrast, as clarified in *Smoković v. Croatia (dec.)*,[219] a decision based purely on procedural grounds, such as the expiry of statutory limitation periods, does not qualify as either an acquittal or a conviction.

In Serbian practice, this issue came to the forefront in a 2017 case (*KT 1876/16, 5 Apr. 2017*). The prosecutor had conditionally deferred prosecution against an accused for endangering public traffic, imposing an obligation to pay 20,000 RSD for humanitarian purposes. Upon compliance, the prosecutor dismissed the complaint. However, in 2018 (*KTO 586/18, 9 July 2018*), the same person was indicted for a more serious traffic offense arising from the same factual matrix—same event, time, place, and injuries caused. Lower courts rejected the *ne bis in idem* plea on the theory that there was no res judicata because, formally, a "criminal proceeding" had not been commenced within the

[215] Vojislava Nikolić, Načelo *ne bis in idem* i odluke javnog tužioca, [The Principle of Ne Bis in Idem and Decisions of the Public Prosecutor], 15 Crimen 234 (2024) (Serb.).

[216] *See* Milan Škulić, *Nova rešenja u Nacrtu zakona o izmenama i dopunama Zakonika o krivičnom postupku (kriminalno-politički razlozi normiranja i očekivanja od primene)* [New Solutions in the Draft Law on Amendments to the Criminal Procedure Code (Criminal-Policy Reasons for Regulation and Expectations from Application)], in *Nova rešenja u krivičnom zakonodavstvu (kriminalno-politički razlozi normiranja i očekivanja od primene)* [New Solutions in Criminal Legislation (Criminal-Policy Reasons for Regulation and Expectations from Application)] 34–78 (Veljko Turanjanin & Dragana Čvorović eds., Zlatibor, 2025) (Serb.).

[217] Mihalache v. Romania, App. No. 54012/10, (July 7, 2019), https://hudoc.echr.coe.int/fre?i=001-194523.

[218] *Id.* 95-101.

[219] Smoković v. Croatia, App. No. 57849/12, (Nov. 12, 2019), https://hudoc.echr.coe.int/eng?i=001-199300.

meaning of Article 7 C.P.C. (no order to investigate, no confirmed indictment, etc.), and the earlier stage involved only deferred prosecution. The Supreme Court of Cassation reversed. It held that the decisive inquiry is not the formal commencement of proceedings under Article 7 C.P.C., but whether there has been a final disposition of the case in the criminal justice system such that the person may not be prosecuted again for the same facts. The Court reasoned that, in the deferral setting, the prosecutor acts as an organ of criminal justice; once the accused fulfils the conditions and the prosecutor dismisses the complaint, the matter is finally disposed of in that phase. That finality engages Article 4(1) C.P.C.'s guarantee that no one may be prosecuted again for an offense for which they have been finally acquitted or convicted, the indictment finally dismissed, or the proceedings finally discontinued. Accordingly, bringing a new charge drawn from the same factual matrix violates *ne bis in idem*.[220]

This approach aligns Serbian law with the standards of both the E.Ct.H.R. and the C.J.E.U. The C.J.E.U. in *Hüseyin Gözütok and Klaus Brügge*[221] held that a prosecutor's decision to discontinue proceedings after the accused complies with imposed conditions amounts to a final disposal barring renewed prosecution for the same facts under Article 54 C.I.S.A. Conversely, in *Miraglia,*[222] the C.J.E.U. emphasized that where national authorities discontinue a case without examining the merits of the accusation—for instance, due to prosecutorial discretion or reasons of procedural economy—the principle of *ne bis in idem* is not triggered. This distinction is crucial: only dismissals that include an assessment of the factual basis and criminal responsibility engage the protection. The E.Ct. H.R's *Mihalache* confirmed this logic, stressing that prosecutorial decisions qualify as "final" when they definitively resolve the case, are enforceable, and are not subject to further ordinary remedies.[223]

[220] VKS, (Nov. 2, 2020), Kzz 740/2020.

[221] This interpretation aligns with the CJEU's reasoning in *Gözütok and Brügge*, where prosecutions in the Netherlands and Germany had been terminated by public prosecutors following out-of-court settlements with the defendants. The CJEU was asked whether such discontinuations, without judicial involvement, could activate the *ne bis in idem* safeguard under Art. 54 of the Convention Implementing the Schengen Agreement (CISA). The CJEU responded affirmatively, emphasizing that the absence of court participation did not preclude the application of *ne bis in idem*, provided that the obligations imposed on the accused had been fulfilled. While some national systems may require judicial validation of such settlements, Art. 54 CISA is not contingent upon harmonization of criminal procedures. Rather, it presumes a foundational principle of mutual trust among Member States, accepting diverse prosecutorial practices as equally capable of producing final and binding legal effects. *See* Mitsilegas and Giuffrida, *supra note* 1, at 153.

[222] Case C-469/03, Criminal Proceedings Against Miraglia, E.C.R. 2005 I-02009; *see also*, Case C-505/19, WS v. Bundesrepublik Deutschland, ECLI:EU:C:2021:376 (May 12, 2021), the Court confirmed that *ne bis in idem* applies even to decisions by public prosecutors to discontinue proceedings, provided that the decision is final and based on an assessment of the merits of the case (73–74); Mitsilegas and Giuffrida, *supra note* 1, at 154.

[223] Mihalache v. Romania, App. No. 54012/10, 115-125 (July 7, 2019), https://hudoc.echr.coe.int/fre?i=001-194523.

In line with this reasoning, the Serbian Supreme Court of Cassation has explicitly confirmed that a prosecutorial decision on deferred prosecution under Article 283 of the C.C.P. produces res judicata effects. In its judgment *Przz 18/2016* (22 Dec. 2016), the Court emphasized that the application of opportunity presupposes that the prosecutor first establishes the existence of a criminal offense and then imposes specific obligations on the suspect, such as payment of a sum for humanitarian purposes. Fulfillment of this obligation amounts to a form of punishment, providing the legal basis for the dismissal of the criminal complaint. Consequently, initiating a subsequent misdemeanor proceeding for the same conduct constitutes a violation of Article 8(3) of the Misdemeanor Act, which prohibits double proceedings for an identical factual event. This reasoning places Serbian jurisprudence in harmony with the standards developed in the case law of the European Court of Human Rights and the Court of Justice of the European Union, articulated in *Mihalache v. Romania*[224] and *Hüseyin Gözütok and Klaus Brügge,*[225] where prosecutorial settlements were recognized as final decisions triggering the *ne bis in idem* protection.[226]

The Serbian Supreme Court invoked this jurisprudence to underscore that what matters is the substantive finality of the prosecutorial decision within the criminal justice system, not the act's formal label or whether a court participated in the proceedings. This reasoning is also consonant with the evolution of Strasbourg and Luxembourg case law on dual proceedings and finality. The E.Ct. H.R's Grand Chamber in *A and B v. Norway* accepted that dual tracks may be permissible only where they are sufficiently connected in substance and time; conversely, where an earlier disposition is genuinely final, renewed prosecution for the same facts is barred.[227] The E.Ct.H.R.'s *Mihalache v. Romania* further emphasized that prosecutorial decisions can qualify as "final" under A4P7 where they definitively terminate the case and are not subject to further ordinary remedies, thereby triggering *ne bis in idem*.[228] Likewise, the C.J.E.U.'s *Menci* confirmed that duplication is not automatically precluded, but it must satisfy proportionality and complementarity; where a prior disposition achieves finality in a penal sense, a second prosecution on the same facts will generally offend the principle.[229]

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[224] *Id.*

[225] Joined Cases Case C-187/01 & C-385/01, Criminal proceedings against Hüseyin Gözütok (C-187/01) and Klaus Brügge (C-385/01), 2003 E.C.R. I-1345.

[226] Vrhovni kasacioni sud [VKS] [Supreme Court of Cassation], Przz 18/2016, (Dec. 22, 2016) (Serb.).

[227] A. and B. v. Norway, App. Nos. 24130/11 & 29758/11 (Nov. 15, 2016), https://hudoc.echr.coe.int/eng?i=001-168972.

[228] Mihalache v. Romania, App. No. 54012/10, (July 7, 2019), https://hudoc.echr.coe.int/fre?i=001-194523.

[229] Case C-524/15, Criminal Proceedings Against Luca Menci, ECLI:EU:C:2018:197 (Mar. 20, 2018).

Seen from this perspective, dismissals based on the principle of opportunity in Serbia clearly fall within the protective scope of the *ne bis in idem* principle. They involve the prosecutor's assessment of the merits, include punitive or deterrent obligations, and result in a binding dismissal once the conditions are met. Treating such decisions as final enhances legal certainty, prevents prosecutorial overreach, and harmonizes Serbian practice with the standards developed in the case law of the European Court of Human Rights and the Court of Justice of the European Union. Importantly, the mechanism is not marginal: data suggest that more than twenty percent of criminal cases in Serbia are resolved annually through conditional deferral, which underscores its systemic significance.[230]

By acknowledging the res judicata effect of opportunity-based dismissals, Serbian courts strengthen the protection of individuals from repeated prosecution, promote consistency with E.Ct.H.R. and C.J.E.U. jurisprudence, and reinforce public trust in the integrity of criminal justice. At the same time, this interpretation maintains the necessary balance. While dismissals based on assessed merits activate *ne bis in idem*, those lacking such substantive evaluation (as in *Miraglia*) remain outside its scope. This ensures that the principle is applied coherently, without undermining prosecutorial flexibility in purely procedural or discretionary decisions.

3.5. THE RELATIONSHIP BETWEEN CRIMINAL AND CIVIL PROCEEDINGS

While the principle of *ne bis in idem* primarily governs the criminal sphere, its potential reach across other domains—such as civil proceedings—raises important questions of scope and applicability. Unlike misdemeanor or disciplinary cases, which may fall within the "criminal" sphere under Article 6 E.C.H.R. as interpreted through the *Engel* criteria, civil proceedings remain largely autonomous. The E.Ct.H.R. has consistently underlined that *ne bis in idem* under A4P7 applies only to proceedings of a "criminal nature".[231] Consequently, the coexistence of civil and criminal procedures stemming from the same factual background does not, in principle, trigger double jeopardy concerns, as the two branches of law serve distinct purposes—punitive versus compensatory.

[230] *See* STANKO BEJATOVIĆ ET AL., PRIRUČNIK ZA PRIMENU NAČELA OPORTUNITETA KRIVIČNOG GONJENJA [MANUAL FOR THE APPLICATION OF THE PRINCIPLE OF OPPORTUNITY FOR CRIMINAL PROSECUTION] (2019) (Serb.).
[231] Ravnsborg v. Sweden, App. No. 14220/88, 34 (Mar. 23, 1994), https://hudoc.echr.coe.int/eng?i=001-57871.

Serbian jurisprudence reflects this doctrinal separation. In its decision Kzl 23/2022 (High Court in Čačak, February 2, 2022),[232] the court addressed the legal implications of non-payment of alimony. The court clarified that a final civil judgment establishing the duty to pay alimony does not preclude criminal prosecution for the offense of non-payment of maintenance. The civil ruling imposes a duty of performance but does not itself create criminal liability. The subsequent criminal proceedings—where the court may impose a suspended sentence conditional upon repayment—address a distinct violation: the failure to fulfill the legal obligation in a manner defined as punishable under criminal law. Therefore, no violation of *ne bis in idem* occurs, as the proceedings concern different forms of legal responsibility.

Similarly, in *Rev 1091/2017* (Supreme Court of Cassation, 14 June 2017), the Court held that even an acquittal or dismissal of criminal charges does not bar civil courts from establishing civil liability and awarding damages for the same conduct. The Court emphasized that criminal trials determine guilt and impose punishment, while civil proceedings adjudicate private rights and compensation for harm. Thus, the existence of a final criminal judgment does not trigger res judicata effects in civil litigation.

These decisions confirm that the Serbian judiciary adheres to the standard developed in the case law of the E.Ct.H.R.: *ne bis in idem* is confined to the criminal sphere and does not create a universal procedural bar across legal domains. Civil proceedings pursue fundamentally different objectives—restitution and compensation—rather than penal sanction. The consistent separation between criminal and civil law in both E.Ct.H.R. and Serbian jurisprudence ensures that parallel proceedings may coexist without infringing on the prohibition of double jeopardy. This doctrinal clarity reinforces legal certainty, while also preserving courts' ability to address different aspects of liability—punitive and compensatory—through the appropriate legal forums.

[232]Art. 195 of the Nedavanje izdržavanja [Serbian Criminal Code] states: (1) Ko ne daje izdržavanje za lice koje je po zakonu dužan da izdržava, a ta dužnost je utvrđena izvršnom sudskom odlukom ili izvršnim poravnanjem pred sudom ili drugim nadležnim organom, u iznosu i na način kako je to odlukom odnosno poravnanjem utvrđeno, kazniće se novčanom kaznom ili zatvorom do dve godine. (2) Neće se kazniti učinilac dela iz stava 1. ovog člana, ako iz opravdanih razloga nije davao izdržavanje. (3) Ako su usled dela iz stava 1. ovog člana nastupile teške posledice za izdržavano lice, učinilac će se kazniti zatvorom od tri meseca do tri godine. (4) Ako izrekne uslovnu osudu, sud može odrediti obavezu učiniocu da izmiri dospele obaveze i da uredno daje izdržavanje. [(1) Whoever does not provide maintenance for a person whom he is obliged by law to support, and this duty is determined by an enforceable court decision or an enforceable settlement before a court or other competent authority, in the amount and in the manner determined by the decision or settlement, shall be punished by a fine or imprisonment for up to two years. (2) The perpetrator of the offense referred to in paragraph 1 of this article will not be punished if he did not provide maintenance for justified reasons. (3) If, as a result of the act referred to in paragraph 1 of this article, serious consequences have occurred for the dependent person, the perpetrator will be punished with imprisonment from three months to three years. (4) If it imposes a suspended sentence, the court may order the perpetrator to settle the due obligations and to properly provide maintenance.].

4. PRINCIPLE OF *NE BIS IN IDEM* DURING THE PANDEMIC CAUSED BY THE COVID-19 VIRUS

While the *ne bis in idem* principle is generally applied under stable legal conditions, extraordinary circumstances—such as public health emergencies—can challenge its scope and consistency. The COVID-19 pandemic offers a critical lens through which to examine how this principle operates under crisis-driven legal frameworks. The pandemic caused by the SARS-CoV-2 virus profoundly impacted every inhabitant of our planet on multiple levels. To address the rapidly changing global situation, it became necessary to adapt to new circumstances, which, first and foremost, required changes to legal regulations. These adjustments were crucial to regulating people's behavior and mitigating the spread of this infectious disease. In the Republic of Serbia, a state of emergency was declared four times, with the fourth being specifically due to the COVID-19 pandemic. On March 15, 2020, the President of the Republic, the President of the National Assembly, and the Prime Minister jointly adopted a decision declaring a state of emergency[233]. This state of emergency was later repealed by a Decision on the Abolition of the State of Emergency, adopted by the National Assembly.[234] It is important to note that during a state of emergency, certain human and minority rights guaranteed under the Constitution are temporarily suspended. This necessitates careful consideration when adopting new regulations, particularly given that some actions that would not typically be considered criminal offenses under normal circumstances may be classified as violations during an emergency. In this context, following the government's decision, and with the President's co-signature, the Decree on Measures during the State of Emergency[235] was issued. This decree was amended and modified several times to address the evolving needs of the situation.

Subsequently, the Decree on Offenses for Violating the Minister's Order on the Restriction and Prohibition of Movement[236] was also enacted. This followed the earlier

[233]Odluka o uvođenju vanrednog stanja [Decision on Declaring a State of Emergency], Official Gazette of the Republic of Serbia, No. 29/2020 (Serb.).

[234]Odluka o ukidanju vanrednog stanja [Decision on Suspending the State of Emergency], Official Gazette of the Republic of Serbia, No. 65/2020 (Serb.).

[235]Uredba o merama za vreme vanrednog stanja [Regulation on measures during a state of emergency], Official Gazette of the Republic of Serbia. Nos. 31/2020, 36/2020, 38/2020, 39/2020, 43/2020, 47/2020, 49/2020, 53/2020, 56/2020, 57/2020, 58/2020, 60/2020 & 126/2020 (Serb.).

[236]Uredba o prekršaju za kršenje Naredbe ministra unutrašnjih poslova o ograničenju i zabrani kretanja lica na teritoriji Republike Srbije [Decree on a Misdemeanor for Violation of the Order of the Minister of Internal Affairs on the Restriction and Prohibition of the Movement of Persons on the Territory of the Republic of Serbia], Official Gazette of the Republic of Serbia, Nos. 39/2020 & 126/2020 (Serb.).

issuance of the Order of the Minister of the Interior,[237] which, with the approval of the Minister of Health, imposed restrictions on movement throughout the country. Additionally, COVID-19 was officially classified as an infectious disease under the Law on the Protection of the Population from Infectious Diseases.[238] The regulatory framework during this crisis was not only aimed at controlling the spread of the virus but also raised important legal and constitutional questions about the balance between public health and individual freedoms.

During a state of emergency, certain human and minority rights are temporarily suspended, leading to restrictions on freedoms and rights in the Republic of Serbia.[239] These legal measures were necessary to address the public health crisis caused by the COVID-19 pandemic. In cases of non-compliance with the restrictions, individuals faced penalties, including misdemeanor or criminal proceedings. For example, from the onset of the state of emergency, violations of the Order on the Restriction and Prohibition of Movement became common, with numerous individuals being criminally liable in the early days of enforcement.[240] The Criminal Code further established penalties for non-compliance with health regulations during an epidemic. Specifically, Article 248 of the Criminal Code addresses failure to comply with prescribed health measures during an epidemic. It states: "Anyone who, during an epidemic of any dangerous infectious disease, fails to comply with regulations, decisions, or orders designed to control or prevent its spread, shall be punished by a fine or imprisonment for up to three years." This provision creates a blanket criminal offense, meaning it applies to violations of a wide range of legal rules set out in various public health regulations, including those introduced during the pandemic. The application of this legal framework, particularly the criminalization of violations of public health orders, represents a significant intersection of public health policies and individual rights, raising important discussions

[237]Naredba ministra unutrašnjih poslova o ograničenju i zabrani kretanja lica na teritoriji Republike Srbije [Order of the Minister of Internal Affairs on Restriction and Prohibition of the Movement of Persons on the Territory of the Republic of Serbia], Official Gazette of the Republic of Serbia, Nos. 34/2020 (Mar. 18, 2020), No. 39/2020 (Mar. 21, 2020), No. 40/2020 (Mar. 22, 2020), No. 46/2020 (Mar. 28, 2020), & No. 50/2020 (Apr. 3, 2020) (Serb.).

[238]Zakon o zaštiti stanovništva od zaraznih bolesti [Law on the Protection of the Population from Infectious Diseases], Official Gazette of the Republic of Serbia, Nos. 15/2016, 68/2020 & 136/2020 (Serb.).

[239]*See* Veljko Turanjanin, *Unforeseeability and Abuse of Criminal Law During the Covid-19 Pandemic in Serbia*, 5 EU & Compar. L. Issues & Challenges Series 223 (2021); Veljko Turanjanin, *Migrants and Safety in Serbia During and After Coronavirus Pandemic*, 6 EU & Compar. L. Issues & Challenges Series 410 (2022); Veljko Turanjanin, *Social Implications Caused by State Reaction on COVID-19 and Human Rights in Republic of Serbia*, Teme - Časopis za Društvene Nauke, 2021, at 1081.

[240]Veljko Turanjanin, Social implications Caused by State Reaction on COVID-19 and Human Rights in Republic of Serbia, 1081-96, (2021).

about the balance between public safety and individual freedoms during a health crisis.[241]

Several legal challenges were brought before the Constitutional Court of Serbia regarding the constitutionality and legality of certain provisions in the *Decree on Measures During the State of Emergency* and the *Decree on Misdemeanors for Violation of the Order of the Minister of Internal Affairs on the Restriction and Prohibition of the Movement of Persons on the Territory of the Republic of Serbia.* These challenges focused on the legality of specific articles in both decrees, particularly Articles 4d and 2. The Constitutional Court responded by adopting Decision *No. IUo-45/2020 on September 17, 2020*, maintaining that these provisions were consistent with the Constitution.

Article 4d of the *Regulation on Measures during a State of Emergency* was particularly controversial. It stated that individuals who violated certain prohibitions could be fined between 50,000 and 150,000 dinars. The provision also allowed for misdemeanor proceedings to be initiated even if criminal proceedings were ongoing against the individual for the same act, contradicting the principle of *ne bis in idem*, which prohibits double jeopardy or being tried twice for the same offense. Similarly, Article 2 of the *Regulation on Misdemeanors for Violation of the Minister's Order* allowed for misdemeanor

[241] Veljko Turanjanin & Darko Radulović, *Coronavirus (COVID-19) and Possibilities for Criminal Law Reaction in Europe*, 49 (suppl. 1) IRAN. J. PUB. HEALTH 4 (2020).

proceedings to be initiated even if a criminal case had already been filed for the same action, further violating this principle.[242]

This legal arrangement created a situation in which individuals could face multiple legal actions for the same conduct, raising concerns about legal certainty and fairness. The principle of *ne bis in idem* is a fundamental part of legal systems in democratic societies, and its violation under these decrees could be seen as contrary to the rule of law. These provisions drew significant criticism from legal experts, who argued that such dual legal proceedings undermine citizens' basic rights and could set a dangerous precedent for abuse of legal power.

In its Decision, the Constitutional Court of Serbia addressed a critical issue regarding the potential violation of the *ne bis in idem* principle—i.e., the prohibition against double punishment for the same offense. The Court ruled that the provisions from the *Decree on Measures During the State of Emergency* and the *Decree on Misdemeanors for*

[242]*See* Art. 1 of the Uredba o prekršaju za kršenje Naredbe ministra unutrašnjih poslova o ograničenju i zabrani kretanja lica na teritoriji Republike Srbije [Regulation on misdemeanors for violating the Order of the Minister of Internal Affairs on the restriction and prohibition of the movement of persons on the territory of the Republic of Serbia] refers to the punishment of persons who violate Art. 1 and 2 of the Order on the restriction and prohibition of the movement of persons on the territory of the Republic of Serbia by in the event that they violate the aforementioned provisions, they will be fined for the offense in the amount of 50,000 to 150,000 dinars. Art. 1 and 2 of the Order on the Restriction and Prohibition of the Movement of Persons in the Territory of the Republic of Serbia stipulates that: Radi suzbijanja i sprečavanja širenja zarazne bolesti Covid-19 i zaštite stanovništva od te bolesti zabranjuje se kretanje na javnim mestima, odnosno van stanova, prostorija i objekata za stanovanje u stambenim zgradama i izvan domaćinstva (okućnica), i to: licima sa navršenih 65 i više godina života – u naseljenim mestima preko 5000 stanovnika; licima sa navršenih 70 i više godina života – u naseljenim mestima do 5000 stanovnika. Zabrana iz stava 1. ove tačke ne odnosi se na period nedeljom, od 03 do 08 časova. Zabranjuje se svim licima izlazak van stanova, prostorija i objekata za stanovanje u stambenim zgradama i izvan domaćinstva (okućnica), u vremenu od 17 do 05 časova, osim subotom kada zabrana traje od 17 do 03 časova. Izuzetno od stava 1. ove tačke, dozvoljeno je izvođenje kućnih ljubimaca u periodu od 20 do 21 čas, u trajanju od 20 minuta, najviše 200 m udaljenosti od mesta prebivališta, odnosno boravišta. Zabrana iz tač. 1. i 2. ove naredbe ne odnosi se ni na fizička lica kojima je neodložno potrebna zdravstvena pomoć i najviše dva lica u pratnji tog lica. Nepoštovanje zabrane iz tač. 1. i 2. ove naredbe kazniće se za krivično delo u skladu sa Krivičnim zakonikom, a za prekršaj u skladu sa Uredbom o prekršaju za kršenje Naredbe ministra unutrašnjih poslova o ograničenju i zabrani kretanja lica na teritoriji Republike Srbije. [1. In order to suppress and prevent the spread of the infectious disease Covid-19 and to protect the population from this disease, it is prohibited to move in public places, i.e. outside apartments, rooms and residential facilities in residential buildings and outside the household (household), namely: 1) persons aged 65 and over - in populated areas with more than 5,000 inhabitants; 2) persons aged 70 and over - in populated areas with up to 5,000 inhabitants. The ban from paragraph 1 of this point does not apply to the period on Saturdays, from 4 a.m. to 7 a.m. 2. It is forbidden for all persons to leave apartments, rooms and residential facilities in residential buildings and outside the household (household), between 5 pm and 5 am on weekdays, as well as from 1 pm on Saturdays until 5 am on Mondays. As an exception to paragraph 1 of this item, it is allowed to take pets out from 11 p.m. to 1 a.m. the next day, as well as on Sundays from 8 a.m. to 10 a.m., for a duration of 20 minutes, up to 200 m away from the place of residence. i.e. residence, starting from April 4, 2020. At the time when it is in accordance with paragraph 1 and 2 at this point, the exit of persons is allowed, it is forbidden for more than two persons to move together or stay in a public place in an open space. The prohibition from paragraph 3 of this point does not apply to parents with minor children. 2. It is prohibited to move in all parks and public areas intended for recreation and sports, starting from March 21, 2020, from 8 p.m.].

Violation of the Minister of Internal Affairs' Order could lead to a situation where a person might be punished twice for the same act. The Court emphasized that this was contrary to the constitutional protection of legal certainty outlined in Article 34, paragraph 4 of the Serbian Constitution, which prohibits double jeopardy, and aligns with international human rights standards. The Court noted that these decrees allowed for parallel misdemeanor and criminal proceedings for the same offense, and the possibility of multiple punishments for a single act. This approach, as the Court found, violated the *ne bis in idem* principle, which is a cornerstone of legal certainty in criminal law. This principle ensures that no individual should face multiple legal consequences for the same conduct, a protection also enshrined in the E.C.H.R, particularly in A4P7.

Crucially, the Court's reasoning echoed the established jurisprudence of the E.Ct.H.R., which has consistently underscored the centrality of *ne bis in idem* for legal certainty and fairness.[243] In line with Strasbourg, the Constitutional Court stressed that pandemic-related restrictions could not justify derogations from the *ne bis in idem* principle. This is reinforced by Article 4(3) of Protocol No. 7, which explicitly stipulates that "No derogation from this Article shall be made under Article 15 of the Convention". Unlike certain other rights, the prohibition of double jeopardy is therefore absolute and immune from suspension, even during a state of emergency.

Ultimately, the COVID-19 pandemic served as a constitutional stress test for the application of the *ne bis in idem* principle in Serbia. While emergency conditions demanded swift and robust public health responses, they also exposed the risks of legal overreach and normative ambiguity. The Constitutional Court's decision reaffirmed that even in times of crisis, fundamental rights such as protection against double jeopardy must remain intact. This episode highlights the importance of preserving legal certainty and proportionality in sanctioning mechanisms. It serves as a reminder that constitutional safeguards cannot be suspended without a clear and narrowly tailored justification.

CONCLUSION

The principle of *ne bis in idem* is a fundamental component of both international and domestic human rights law. It safeguards legal certainty and protects individuals from being tried or punished twice for the same offence. Its application, however, becomes

[243] Gradinger v. Austria, App. No. 15963/90, (Oct. 23, 1995), https://hudoc.echr.coe.int/eng?i=001-57958; Sergey Zolotukhin v. Russia [GC], App. No. 14939/03, (Feb. 10, 2009), https://hudoc.echr.coe.int/eng?i=001-91222.

particularly complex when multiple punishable acts arise from the same event committed by the same individual. In Serbia, misdemeanor proceedings often conclude more quickly than criminal ones, and an early decision in a misdemeanor case may acquire res judicata status. This raises the possibility that such a ruling could preclude a subsequent criminal trial, even where criminal prosecution might seem more appropriate.

Serbian criminal procedure law also confers res judicata effect on certain prosecutorial decisions, even in the absence of judicial adjudication. Whether this approach consistently advances justice remains to be tested in practice. A persistent issue in Serbian law is the overlap between criminal offences and misdemeanors, particularly in the fields of public order, taxation, and traffic violations. Ambiguous legal classifications increase the risk of inconsistent applications of the *ne bis in idem* principle. Legislative reform is therefore urgently needed to clarify the distinction between misdemeanors and crimes and to modernize outdated provisions on economic offences. Moreover, questions remain as to whether Serbian courts consistently align their reasoning with the jurisprudence of the E.Ct.H.R. and the C.J.E.U.

Although *ne bis in idem* offers robust protection, it is not absolute. Each case must be assessed against the Engel criteria and subsequent refinements developed in Strasbourg and Luxembourg jurisprudence, including *A and B v. Norway*, which introduced the concept of "sufficiently close connection in substance and in time." Serbian courts have made notable progress, particularly regarding the interplay between misdemeanor and criminal proceedings, but their reasoning is not always consistent. As illustrated in *Stamenković v. Serbia*, proceedings based on the same facts—even if temporally separated—may breach the principle where no meaningful distinction exists between the charges.

In the context of disciplinary proceedings, Serbian jurisprudence has emphasized its distinct legal character and objectives relative to criminal liability. Disciplinary measures, rooted in labour or professional law, do not generally trigger *ne bis in idem*. Similarly, civil proceedings remain outside the scope of the principle, as they pursue compensatory rather than punitive aims.

One of the most critical stress tests for the application of *ne bis in idem* in Serbia occurred during the COVID-19 pandemic. Certain emergency decrees permitted parallel misdemeanor and criminal proceedings for the same act, creating legal uncertainty and undermining constitutional safeguards. The Constitutional Court ultimately ruled that these provisions violated Article 34(4) of the Serbian Constitution and Article 4 (3) of Protocol No. 7 to the E.C.H.R. Importantly, Article 4(3) of Protocol No. 7 expressly

prohibits derogation, even in times of emergency under Article 15 E.C.H.R. The E.Ct.H.R.'s decision, therefore, reaffirmed that *ne bis in idem* remains fully applicable even under crisis conditions, underscoring that extraordinary circumstances cannot justify the erosion of fundamental guarantees.

In conclusion, the Serbian experience demonstrates that the application of *ne bis in idem* is both dynamic and evolving. While courts have progressively refined their scope, further legislative clarification and continued harmonization with E.Ct.H.R. and C.J.E.U. standards remain essential. Only through consistent jurisprudence, updated legislation, and adherence to international human rights law can *ne bis in idem* fulfil its foundational role in ensuring the integrity of the legal system and protecting individual rights.

CONTRIBUTORSHIP STATEMENT

This article has been jointly authored by Dr. Veljko Turanjanin and Ms. Milica Pavlović Turkalj. Dr. Turanjanin was responsible for authoring the Introduction, Part 1 (Legal Regulation of the *Ne Bis in Idem* in International Law), and Part 4 (Principle of *Ne Bis in Idem* During the Pandemic Caused by the COVID-19 Virus). Ms. Pavlović Turkalj contributed to Part 2 (*Ne Bis in Idem* Principle in Serbian Legal System - Legal Framework and Its Effects), Part 3 (The Application of the Principle of *Ne Bis in Idem* and Problems in Serbia), and the Conclusion. All sections were reviewed and revised collaboratively to ensure consistency and academic integrity across the manuscript.

FUNDING DETAILS

The authors declare that no funding was received for the research, authorship, and/or publication of this article.

DISCLOSURE STATEMENT

The authors report there are no competing interests to declare.

DATA AVAILABILITY STATEMENT

Data sharing is not applicable to this article as no new data were created or analysed in this study.

Volume 10 | Issue 2 | Articles & Essays

University of Bologna Law Review

https://doi.org/10.60923/issn.2531-6133/24304

Received: 22 Apr. 2025 | Reviewed: 24 Jan. 2026 | Accepted: 24 Jan. 2026 | Published: 04 Jun. 2026

Abuse of Rights and Corporate Mobility: (Re)Interpreting the Role of Companies in the European Social Market

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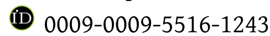
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ABSTRACT

Freedom of establishment of companies has always been a delicate area of European Union law. The challenge of achieving political consensus has delayed the harmonisation process and prompted creative adjudication. The Court of Justice of the European Union [hereinafter - C.J.E.U.], particularly in the *Polbud* case, just confirmed in *Edil Work*, has interpreted free movement broadly and allowed companies to relocate their registered offices to benefit from more favourable national laws, without relocating their economic activities. This approach raised doubts about the notion of establishment and complicated the national authorities' ability to prevent abusive moves aimed at circumventing stakeholders' protective legislation. Directive 2019/2121 provides a procedural framework for such a control, but lacks a definition of abuse, leaving national courts with interpretative challenges.
This study explores what distinguishes legitimate establishment from its abuse and aims to create a unified model for its identification. At a general level, it expresses the long-standing clash between E.U. economic and social legal integration.

KEYWORDS

Freedom of Establishment; Abuse of Rights; Cross-border Corporate Operations; Directive (EU) 2019/2121; C.J.E.U. Case Law

EDITORIAL NOTE
An earlier version of this article was made available by the Author as a preprint (Giulio Dipietro, Abuse of Rights and Corporate Mobility: (Re)Interpreting the Role of Companies in the European Social Market, Jean Monnet Working Paper No. 1/25, https://jeanmonnetprogram.org/paper/abuse-of-rights-and-corporate-mobility-reinterpreting-the-role-of-companies-in-the-european-social-market/). The present version is the peer-reviewed Version of Record.

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1. INTRODUCTION

The economic drive of European integration, manifested in the creation of an internal market, traditionally finds expression in the four "fundamental freedoms". The E.U. market is based on the free movement of goods, workers, services, and capital. The economic freedoms, regulated in Part Three of the Treaty on the Functioning of the European Union [hereinafter T.F.E.U. or Treaty], aim at the optimal allocation of resources in the E.U., facilitating the movement of production factors to the geographic area where they are most valued.[1]

Alongside economic integration, the E.U. constitutional system progressively embraced, within the perspective of a "social market economy",[2] a broader spectrum of non-market values. This has led to a different and more holistic conceptualisation of the internal market.[3] In other words, E.U. legal integration unfolds in a somewhat mixed manner between market and non-market values, in a dichotomous equilibrium that frequently entails collisions.

Returning to economic Europe, both for legal complexity and economic relevance, a major role in the functioning of the single market is reserved for companies. Companies represent the typical organisational structure for conducting business activities and thus play a crucial role in the realisation of the single market. Indeed, Article 49 T.F.E.U. attributes to companies, as well as to self-employed natural persons, the fundamental freedom known as freedom of establishment.

Article 54 T.F.E.U. provides for the freedom of establishment of companies. If a company is formed in accordance with the law of a Member State and has its registered office, central administration, or principal place of business somewhere in the E.U., it will accordingly benefit from the Treaty freedom. Moreover, the Treaty envisages two forms of establishment. Primary establishment consists of the right to set up and manage undertakings in a Member State other than the State of origin. In contrast, secondary establishment consists of setting up agencies, branches, or subsidiaries in another Member State.

While the harmonisation process of national company law provisions was delayed, the C.J.E.U. took an activist stance in interpreting fundamental freedom

[1] *See* Paul Craig & Gráinne De Búrca, EU Law: Text, Cases, and Materials 642 (7th ed. 2020) (U.K.).

[2] Consolidated Version of the Treaty on European Union art. 3(3), Oct. 26, 2012, 2012 O.J. (C 326) 13: "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance".

[3] *See* Craig & De Búrca, *supra* note 1, at 667.

extensively, swiftly transitioning from a non-discrimination approach to incentivising cross-border mobility and regulatory competition between national legal systems. This line of case law is highly complex and pertains to both substantive and conflict rules for determining the applicable company law (*lex societatis*). The scope of this paper is however much more circumscribed.

Among the numerous aspects that the Court has addressed since the establishment of the internal market, one of particular interest is corporate restructuring (specifically cross-border conversions, mergers, and divisions) for at least three reasons.

Firstly, the topic vouches for a dynamic institutional dialogue between the Court and the European Commission [hereinafter - Commission] amidst the economic/social market constitutional tension. The former, in the absence of harmonisation, has provided for an extensive interpretation of the freedom of establishment, encompassing companies' rights to reorganise their organisational structure across national borders. The latter has promptly elaborated and proposed to the legislator a legal common framework that resulted in Directive 2019/2121,[4] so as to prevent this right from being exercised in a regulatory *vacuum*, particularly after the seminal judgment in *Polbud*.[5] In doing so, the Commission has achieved, alongside a comprehensive harmonised framework for carrying out cross-border operations, the protection of various interests, which might be simplistically identified as stakeholders' interests. Specifically, the Commission highlighted that "corporate restructurings and transformations such as cross-border conversions, mergers, and divisions, are part of companies' life-cycle and represent a natural way for companies to grow, adapt to a changing environment, and explore opportunities in new markets. At the same time, they also entail consequences for companies' stakeholders, in particular for employees, creditors, and shareholders. Therefore, the protection of stakeholders must keep pace with the ever-growing transnationalization of the corporate world. However, today, the legal uncertainty, partial inadequacy, and the lack of rules governing certain cross-border operations of companies mean that there is no clear framework to ensure the effective protection of these stakeholders. In this situation, the protection offered to stakeholders may therefore be ineffective or insufficient. The cross-border operations of companies can also be facilitated by a legal environment that creates trust in the Single Market by

[4] Directive (EU) 2019/2121, of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, 2019 O.J. (L 321) 1.

[5] Case C-106/16, Proceedings brought by Polbud - Wykonawstwo sp. z o.o., ECLI:EU:C:2017:804 (Oct. 25, 2017).

providing safeguards against abuse.[6] Crucially, lying between the freedom of establishment of companies and the protection of stakeholders is the concept of abuse of freedom of establishment. As will be argued, this notion is fundamentally linked to the scope of the fundamental freedom in the Court's case law and now raises challenges as to how it should be adapted within the secondary-law framework, notably to Directive 2019/2121.

Secondly, in continuity with what has just been mentioned, the subject is extremely topical for E.U. law since Directive 2019/2121's transposition period elapsed on 31 January 2023, and, due to the complexity of the discipline, it is likely, the Court will soon start receiving preliminary references by national Courts regarding its interpretation.

Thirdly, a preliminary question from the Italian Supreme Court of Cassation related to a cross-border corporate conversion was just answered on 25 April 2024.[7] The case before the "Suprema Corte" (even if the main point is related not to a substantive company law provision, but rather to the Italian conflict rule for companies registered elsewhere but keeping their main activity in Italy)[8] brings back again the question of how to deal with companies that transferred registered office only to obtain the change of applicable law. The judgment confirms *Polbud* and reasserts the possibility of exercising free movement only as regards the registered office (*i.e.*, without transfer of the real seat and therefore of the economic activity).[9]

Corporate restructuring, in other words, is a complex yet fascinating example of the constitutional tension between a competitive and a fair market and entails many legal questions that remain unaddressed. In the interpretation of the constitutional legal framework and of the Directive lies the extremely delicate balance between an essential operation for the life of competitive companies and the relevant consequences for a plethora of concurring categories of stakeholders equally concerned and in need of protection.

This paper aims, first, to answer the following question: what distinguishes the legitimate exercise of companies' freedom of establishment from its abuse? Secondly, it seeks to develop a unitary framework for the category "abuse of freedom of establishment of companies", applying the C.J.E.U.'s main findings regarding the general

[6] *Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions*, COM (2018) 241 final (Apr. 25, 2018).

[7] Case C-276/22, Edil Work 2 Srl. and S.T. Srl v. STE Sàrl, ECLI:EU:C:2024:348 (Apr. 25, 2024).

[8] *See generally* Elisabetta Pederzini, Percorsi di diritto societario europeo [Studies in European Corporate Law] 23-25 (4th ed. 2020) (It.) (for the incompatibility of the rule before the case was brought before the C.J.E.U.).

[9] *See* discussion *infra* Section 3.4.

principle of abuse of rights to rulings on free movement, to provide an interpretative and coherent model, especially for the national courts that will be tasked to address this concept when applying the newly implemented national legislation on cross border operations.

The paper is structured as follows. Based on an overview of the relevant case law on the freedom of establishment of companies and how it has addressed the concept of abuse, it analyses the Polbud judgment, the most relevant and problematic ruling, to extrapolate a definition of abuse. Having explored the challenges and implications of *Polbud*, the analysis turns to Directive 2019/2121, which establishes the legislative framework for the harmonisation of cross-border corporate operations in the E.U. Some *interim* conclusions are then posed, such as what concept of abuse emerges from the fragmentary references in the case law and the general reference in the Directive. The final part of the paper is concerned with trying to put together the relevant findings of the C.J.E.U. as regards the doctrine of abuse of rights to develop a uniform notion and interpretative framework that the European Court could use to provide national judges with guidance, ruling for a well-founded application of national transposition rules on companies' cross-border transfers.

2. ON FREE MOVEMENT OF COMPANIES AND REGULATORY COMPETITION

It is essential to acknowledge that much of the complexity within the pertinent case law stems from the broad formulation of the Treaty.

Firstly, Article 54 T.F.E.U. remains neutral on the connecting factors that Member States should adopt in applying their own *lex societatis*. Traditionally, two legal approaches of private international law have been used. On the one hand, the incorporation theory mandates the application of the company law of the state in which the company is registered (offering a clear and straightforward approach). On the other hand, the real seat theory subjects the company to the law of the state where its business operations are practically managed (emphasising substance over form and aiming to prevent artificial arrangements and regulatory arbitrage among Member States). Additionally, the Treaty does not definitively clarify whether freedom of establishment includes a right to corporate mobility and, if so, the conditions under which it could be

exercised. The failure of the E.U. legislator (as well as Member States)[10] to enact proper rules to address this issue further intensifies the ambiguity. Thirdly, Member States have consistently expressed discomfort with company migration carried out for reasons perceived as illegitimate, such as relocating the registered office to circumvent unfavourable tax or social legislation (referred to as national "*law shopping*").[11]

In the absence of a Treaty choice and an institutional initiative, the Court has been tasked with appropriately delineating and specifying (if not essentially shaping) the legal framework. The E.U. judiciary have undertaken this task seriously, partly addressing the gap in secondary law and taking a stance on the conflict theories regarding applicable law. Consequently, the Court consecrated the right to corporate mobility with minimal restrictions while heightening concerns over "artificial transfers" of corporate seats.[12]

2.1. THE COURT IN A VACUUM AND EARLY CASE LAW

The Court ruled already in 1986 in *Segers*[13] that Article 54 T.F.E.U. "requires only that the companies be formed under the law of a Member State and have their registered office, central administration or principal place of business within the Community. Provided that those requirements are satisfied, the fact that the company conducts its business through an agency, branch, or subsidiary solely in another Member State is immaterial".[14]

The judgment went quite unnoticed because two years later the Court defended the real seat theory as a means of protection against regulatory competition[15] in *Daily Mail*,[16] considering that in the absence of common rules, "unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which

[10] Treaty establishing the European Economic Community, art. 220 originally mandated the Member States to negotiate secondary legislation in respect of "mutual recognition of companies (...), the maintenance of legal personality in cases where the registered office is transferred from one country to another and the possibility for companies subject to the national laws of different Member States to form mergers".

[11] *See* Sébastien Binard & Laurent Schummer, *The Case for Further Flexibility in Matters of Cross-Border Corporate Mobility*, 16 Eur. Co. L. 31, 31 (2019) (Neth.).

[12] *See Id.* at 32.

[13] Case 79/85, D. H. M. Segers v. Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen, 1986 E.C.R. I-02375.

[14] *Id. See also* the Case 79/85, D. H. M. Segers v. Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen, Opinion of Mr Advocate General Darmon, 6 1986 E.C.R. I-02375.

[15] *See* Martin Gelter, *Centros, the Freedom of Establishment for Companies and the Court's Accidental Vision for Corporate Law*, *in* EU Law Stories: Contextual and Critical Histories of European Jurisprudence 309, 324 (Fernanda Nicola & Bill Davies eds., 2017) (U.K.).

[16] Case 81/87, The Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc, 1988 E.C.R. 05483.

determines their incorporation and functioning".[17] In other words, the Member State of origin retains the power to determine under what conditions a company can obtain and maintain the status of a company incorporated under its national law.[18]

2.2. STRETCHING FREEDOM OF ESTABLISHMENT, NARROWING ABUSE

Centros[19] indeed marks a radical shift in perspective and, coupled with *Überseering* and *Inspire Art* (which essentially upheld its core principle), truly "heralded a new era",[20] allowing free choice of incorporation and consequently of company law inside the E.U. The case concerned a company carrying out its entire business in Denmark through a branch but incorporated in Britain to escape the Danish minimum share capital requirement. The Court, rejecting the claim of the Danish authorities that had refused to register the branch, held that that operation was covered by freedom of establishment as long as a company registered in a Member State wanted to set up a branch in another, being "immaterial that the company was formed in the first Member State only to establish itself in the second, where its main, or indeed entire, business is to be conducted".[21] In contrast, such an arrangement is precisely what freedom of establishment of companies is meant to allow, which excludes its qualification as "in itself, (...) an abuse of the right of establishment".[22] Interestingly the Court engages with the concept of abuse and adds that even if the host Member State cannot refuse the registration of a branch, it is nonetheless not precluded from adopting any appropriate measure to prevent circumvention of national law (in that case protecting creditors in the Member State of origin).[23] Refusal to registration was simply not proportionate to

[17] *Id.* 19.

[18] It must be remarked that, even if the Court did not delve into the possible abuse of freedom of establishment, A.G. Darmon explicitly confronted this possibility in para. 10 and 11 of his Opinion in The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc, Opinion of Mr Advocate General Darmon, E.C.R. 1988 -05483, claiming that "the fact that the essential activities of a company take place on the territory of a Member State other than that to which it intends to transfer its central management may not be ignored. Such circumstances may, in certain cases, constitute an indication that what is involved is not genuine establishment, in particular when the effect of the transfer of the central management is to cause the company to cease to be subject to legislation which would otherwise apply to it. (...) As a general rule it appears that the national court may assess whether, in a specific case and having regard to the circumstances, there is a suggestion of abuse of a right or circumvention of the law and whether it should decide not to apply Community law.

[19] Case C-212/97, Centros Ltd v. Erhvervs- og Selskabsstyrelsen, E.C.R. 1999 I-01459.

[20] Gelter, *supra* note 15, at 309.

[21] Case C-212/97, Centros Ltd v. Erhvervs- og Selskabsstyrelsen, 17 E.C.R. 1999 I-01459.

[22] *Id.* 26-27.

[23] *Id.* 38.

the purpose of creditors' protection.[24] As a consequence of the "*Centros* triad", one may naturally question the protective measures that remain at the disposal of national legislators to effectively combat claims of real and substantive abuse.[25] That is to say, under what kind of circumstances might the host state impose legitimate restrictions on corporate mobility?

In *Cadbury Schweppes,*[26] the C.J.E.U. seemed to suggest that, generally speaking, artificial arrangements were less likely to be excused in the context of tax law.[27] The ruling also engages in a discussion of the doctrine of abuse of E.U. law in relation to the freedom of establishment of companies, leaning on the judgment (occurring one year after *Centros*) in *Emsland-Stärke*,[28] where the core of the abuse test was established. *Cadbury Schweppes* was a U.K. company that had set up two subsidiaries in Ireland to benefit from the more favourable Irish tax regime. U.K. fiscal authorities taxed the subsidiaries' profits under legislation on controlled foreign subsidiaries. Vested in the question, the C.J.E.U. held that national law cannot establish a general presumption of tax evasion hindering the exercise of freedom of establishment. Nevertheless, it also added that "a national measure restricting freedom of establishment may be justified where it specifically relates to wholly artificial arrangements aimed at circumventing the application of the legislation of the Member State concerned".[29] The Court clearly held in this case that the freedom of companies "presupposes actual establishment (…) in the host Member State and the pursuit of genuine economic activity there".[30]

In sum, the exercise of free movement by companies to benefit from a more favourable fiscal or company law regime is entirely legitimate and does not constitute abuse. However, taking improper advantage of E.U. law is not permitted; a national measure that catches wholly artificial arrangements aimed at circumventing national legislation is justified. The narrow conceptualisation of abuse in the context of free movement is consistent with the objectives of the internal market. Firstly, economic integration necessarily entails some degree of deregulation. In addition, regulatory

[24] *See also* C-212/97, Centros Ltd v Erhvervs- og Selskabsstyrelsen, Opinion of Mr Advocate General La Pergola, E.C.R. 1999 I-01459 and C-167/01, Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd, E.C.R. I-10195, clearly establishing that abuse must be established on a case-by-case basis.

[25] *See* Pederzini, *supra* note 8, at 116.

[26] Case C-196/04, Cadbury Schweppes plc & Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue, 2006 E.C.R. I-07995.

[27] *See* Takis Tridimas, *Abuse of Rights in EU Law: Some Reflections with Particular Reference to Financial Law, in* PROHIBITION OF ABUSE OF LAW: A NEW GENERAL PRINCIPLE OF EU LAW? 169, 178 (Rita de la Feria & Stefan Vogenauer eds., 2011).

[28] Case C-110/99, Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas, 2000 E.C.R. I-11569.

[29] *See* Case C-196/04, Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue, 51 2006 E.C.R. I-07995.

[30] *Id.* 54.

competition is part of the Treaty project and leads to some economic advantages and legal experimentation, while risks associated with a race to the bottom seem not to have materialised.[31] *Polbud* potentially compromises this overall coherent solution.

2.3. CROSS-BORDER OPERATIONS

In *SEVIC Systems*,[32] *Cartesio*,[33] and *VALE Építési*,[34] the Court finally had the chance to rule on cross-border operations.

The first judgment interpreted freedom of establishment as encompassing inbound cross-border mergers, ruling that a Member State cannot impede the registration of a company resulting from the merger of one constituted according to its national law and another E.U. company. Moving from the assumption that "the right of establishment covers all measures which permit or even merely facilitate access to another Member State and the pursuit of an economic activity in that State by allowing the persons concerned to participate in the economic life of the country effectively and under the same conditions as national operators",[35] the Court concludes that "cross-border merger operations, like other company transformation operations (...) constitute particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market".[36]

The second ruling, relating to an outbound cross-border conversion, maintains (in continuity with *Daily Mail*) that a Member State can impede a company intending to transfer its real seat in another Member State while retaining the status of company under its national law. However, in an *obiter,* the Court adds that if the conversion had implied the company being subject to the national law of the destination state (in conformity with its legislation), the state of origin would not have disposed of any means to impede it, since the company would be converted into a form governed by the law of the Member State to which it has moved.[37]

The third judgment concerned an inbound cross-border conversion from the point of view of the destination state, and clarifies that it also represents a legitimate exercise of freedom of establishment, the Member State cannot impede cross-border conversions if it allows them internally (*i.e.*, between companies constituted according to

[31] *See* Tridimas, *supra* note 27, at 174-175.
[32] Case C-411/03, Request for a preliminary ruling from Landgericht Koblenz, 2005 E.C.R. I-10805.
[33] Case C-210/06, CARTESIO Oktató és Szolgáltató bt., 2008 E.C.R. I-09641.
[34] Case C-378/10, VALE Építési kft., ECLI:EU:C:2012:440 (July 12, 2012).
[35] Case C-411/03, Request for a preliminary ruling from Landgericht Koblenz, 18 2005 E.C.R. I-10805.
[36] *Id.* 19.
[37] *Id.* 110-111.

national law).[38] This ruling is also relevant because it reaffirms the principle set in *Cadbury Schweppes* according to which the concept of establishment "presupposes actual establishment of the company concerned in that State and the pursuit of genuine economic activity there" beyond the case of national tax legislation.[39]

3. POLBUD AND ITS IMPLICATIONS, OR THE TRIUMPH OF FREE MOVEMENT OF COMPANIES

3.1. FACTUAL BACKGROUND

Polbud was a limited company incorporated under Polish law and established in Poland that decided to carry out a cross-border conversion and transform into a company subject to Luxembourgian law. Having obtained registration in Luxembourg, it applied for its removal from the Polish register. The application was refused because the company had failed to provide certain documents evidencing its liquidation and winding up, which Polish national rules required for de-registration. The action against the refusal reached the Polish Supreme Court, which referred three questions for a preliminary ruling to the Court essentially regarding the scope of freedom of establishment (does it cover cross-border conversions without transfer of head office?), its compatibility with the national requirement of previous liquidation for the removal from the register and the possible justification of the national measure.

3.2. THE OPINION OF ADVOCATE GENERAL KOKOTT

Regarding the scope of freedom of establishment, the A.G. claimed that, in the case of a cross-border conversion not entailing the actual establishment in the host Member State, freedom of establishment did not apply, since the pursuit of a genuine economic activity is inherent in that freedom. This conclusion is supported by the reference to settled case law that interpreted establishment as "the right to participate, on a stable and continuous basis, in the economic life of another Member State and to profit

[38] *See* Case C-378/10, VALE Építési kft., 33 ECLI:EU:C:2012:440 (July 12, 2012): ("national legislation which enables national companies to convert, but does not allow companies governed by the law of another Member State to do so, falls within the scope of Articles 49 T.F.E.U. and 54 T.F.E.U.").

[39] *Id.* 34.

therefrom".[40] More recently, the Court had moreover required "actual establishment" and the pursuit of "genuine economic activity".[41] Explicitly, A.G. Kokott concludes, as for the question of the scope of the freedom, that "although that freedom gives economic operators in the European Union the right to choose the location of their economic activity, it does not give them the right to choose the law applicable to them." A cross-border conversion, not coupled with actual establishment, would just not be covered by the Treaty. Verifying the actual establishment in Luxembourg was a task for the national Court. The question of the abuse of E.U. law, just mentioned by the A.G., was of little relevance because the freedom was just deemed inapplicable in the case at hand.[42]

If, by contrast, Polbud were established in Luxembourg, according to the A.G., the requirement of liquidation would restrict its freedom of establishment, and, as regards the last question, the restriction would not be proportionate. Even if the protection of creditors, minority shareholders, and employees is an overriding reason in the public interest, capable of justifying a restriction on the fundamental freedom, the obligation to liquidate a company does not constitute an appropriate means to those ends.[43]

3.3. JUDGMENT

The Grand Chamber of the European Court of Justice did not follow its A.G. as regards the scope of freedom of establishment, affirming for the first time that cross-border operations are covered by that freedom even if they involve only the transfer of the registered office and are ultimately motivated by the purpose of changing the legal national framework.

To begin with, the Court reminded the national Court that the transfer of the real seat is not a condition for the exercise of freedom of establishment according to Article 49 and 54 T.F.E.U. As for the judgment in *Daily Mail*, it is just necessary to satisfy the requirements of the destination state to determine the connection of the company with

[40] Case C-106/16, Proceedings brought by Polbud - Wykonawstwo sp. z o.o., Opinion of Mrs Advocate General Kokott, 33 ECLI:EU:C:2017:804 (Oct. 25, 2017) (referring to Case 2-74, Jean Reyners v. Belgian State, 21 1974 E.C.R. I-00631 and to Case C-55/94, Gebhard, 25 1995 E.C.R. I-4186).

[41] *Id.* 34 (referring to Case C-196/04, Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue, 54 2006 E.C.R. I-07995 and Case C-378/10, VALE Építési kft., 34 ECLI:EU:C:2012:440 (July 12, 2012) and the Case C-201/15, Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v. Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis, ECLI:EU:C:2016:972, 51 (Dec. 21, 2016)).

[42] *Id.* 53-55.

[43] *Id.* 66.

the national legal order.[44] By analogy with *Centros*, where a company was incorporated in a Member State for the sole purpose of setting up a branch in a second Member State and conducting all its business, "a situation in which a company formed in accordance with the legislation of one Member State wants to convert itself into a company under the law of another Member State, with due regard to the [requirements of] the second Member State (...) falls within the scope of freedom of establishment, even though that company conducts its main, if not entire, business in the first Member State".[45] Equally, Polbud's operation wouldn't constitute abuse. Member States can always adopt measures to prevent abuse of E.U. law aimed at evading domestic legislation, but the fact that a company establishes its registered office or its head office in another Member State to benefit from its legislation cannot in itself be regarded as abusive.[46]

As to the restriction of freedom of establishment, the requirement to liquidate the company essentially prevents the possibility of cross-border conversion and therefore constitutes such a restriction.[47]

Finally, and following the A.G. (as for the second question), the Court held that such a restriction would be admissible only if justified by overriding reasons in the public interest, that the protection of creditors, minority shareholders, and employees did constitute such reasons, but that the measure (mandatory liquidation) went beyond what was necessary to achieve their protection.[48]

3.4. LAST DEVELOPMENTS

The Third Chamber of the C.J.E.U. just confirmed the approach in Polbud on 25 April 2024 in *Edil Work*.[49] The case regarded an Italian company that transferred its registered office to Luxembourg while continuing its economic activities in Italy; it must be stressed, for the sake of completeness, that this case differs from *Polbud* insofar as it concerns the application of Italian company law to a company (Edil Work) registered in Luxembourg, thus involving entry barriers, rather than exit barriers, as in *Polbud.* What the two cases share, as will be argued, is their conception of the scope of freedom of establishment and the notion of abuse of that freedom. The main point on which the Suprema Corte sought

[44] *See* Case C-106/16, Proceedings brought by Polbud - Wykonawstwo sp. z o.o., ECLI:EU:C:2017:804, 34-35 (Oct. 25, 2017).
[45] *Id.* 38.
[46] *Id.* 39-40; *see also Centros*, *supra* note 19, 27.
[47] Case C-106/16, Proceedings brought by Polbud - Wykonawstwo sp. z o.o., ECLI:EU:C:2017:804, 51 (Oct. 25, 2017).
[48] *Id.* 54-58.
[49] Case C-276/22, Edil Work 2 Srl. and S.T. Srl v. STE Sàrl, ECLI:EU:C:2024:348 (Apr. 25, 2024).

interpretative guidance concerns the legality of management decisions under a conflict rule that imposed the application of Italian law to a company registered elsewhere but primarily operating in Italy. The Court considered such legislation in breach of freedom of establishment.[50] Firstly, regarding *Polbud*, it found that the situation at issue falls under freedom of establishment. Furthermore, despite overriding reasons for creditors, minority shareholders, and employees, the C.J.E.U. found the restriction disproportionate. Finally, the Court dealt with the argument raised by the Italian Government according to which the Italian rule was intended to combat abusive practices by preventing wholly artificial arrangements that do not reflect economic reality. Confirming again its case law (and particularly *Polbud*), the C.J.E.U. ruled that free movement aimed to benefit from more favourable legislation does not constitute in itself abuse[51] and that Member States, although formally free to adopt legislation against abuse, cannot legitimately establish general presumptions.[52] The Italian rule at issue, applying systematically to any act of a company established elsewhere but carrying out its business in Italy, amounted to a general presumption of abuse and was therefore disproportionate and in breach of Articles 49 and 54 T.F.E.U.

The ruling confirms the disconnection between establishment and genuine economic activity. If *Polbud*, on the point, could have been considered not fully coherent with systematic analysis, the last ruling in April undoubtedly consolidates how the Court now conceptualises the freedom of establishment of companies.

3.5. IMPLICATIONS OF POLBUD

The judgment received several comments from national law and E.U. law jurists,[53] thus this paper will essentially focus on the aspects concerning abuse of rights.

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[50] *Id.* 28.
[51] *Id.* 47.
[52] *Id.* 48.
[53] *See generally* Marc Fallon & Edouard-Jean Navez, *La transformation transfrontalière d'une société par transfert du siège statutaire après l'arrêt Polbud* [*The cross-border transformation of a company through the transfer of its registered office after the Polbud judgment*], 2018 Revue pratique des sociétés - Tijdschrift voor rechtspersoon en vennootschap 349 (Belg.); Iris Barsan, *Que reste-t-il du critère du siège social réel après l'arrêt Polbud?* [*What Remains of the Real Seat Doctrine After the Polbud Ruling?*], Europe: Actualité du droit de l'Union Européenne, Mar. 2018, at 6 (Fr.); Johan Meeusen, *Freedom of Establishment, Conflict of Laws and the Transfer of a Company's Registered Office: Towards Full Cross-border Corporate Mobility in the Internal Market?*, 13 J. Priv. Int'l L. 294 (2017) (U.K.); Carsten Gerner-Beuerle et al., *Cross-border Reincorporations in the European Union: The Case for Comprehensive Harmonisation*, 18 J. Corp. L. Stud. 1 (2018) (U.K.).

3.5.1. POLBUD AND CENTROS

Firstly, and foremost, the judgment clarified the scope of the freedom and its applicability to "isolated cross-border conversions", *i.e.*, those conversions that do not entail the transfer of the real seat or economic activity. Before *Polbud*, *Cartesio* and especially *VALE* had suggested, contrarily, that only "physical cross-border conversions" were covered.

This conclusion may not be entirely consistent with previous case law, and authors here tend to diverge. *Prima facie*, it seems reasonable to assert that, if anything, the conclusion in *Polbud* logically builds upon the foundation posed by *Centros*. If a company can establish itself in a state and conduct its business entirely in another state where a branch has been opened, a pre-existing company should be equally entitled to benefit from more favourable legislation through a cross-border conversion.[54] Following this line of reasoning, *Polbud* does not surpass *Centros* but rather broadens its implications from secondary to primary establishments, envisaging an equal regime for both ways of exercising economic freedom. This argument is correct, but it only partially addresses the issue. Looking back to the circumstances of the cases, there is a significant distinction that the Court seems to have overlooked. In *Centros* (where a branch registration of a U.K. company was denied in Denmark), the company sought to establish its entire economic activity in the host state (Denmark). Thus, the refusal by national authorities truly hindered the company from establishing a genuine economic activity across borders. Conversely, in *Polbud*, the Polish company did not aim to transfer its economic activities to Luxembourg, but simply to change applicable legislation (in other words, with legal, rather than economic consequences).[55] *Centros* and *Polbud* might be assimilated as both companies aimed to benefit from more favourable company law, but while the former intended to actually establish in a different Member State, this is not the case for the latter. Hence, what is the notion, and what are the limits of freedom of establishment? What purpose does the economic freedom serve in the constitutional design of the internal market?[56] Moreover, the cases differ from the point of view of stakeholders. *Centros* was a newly established company, and as the C.J.E.U. itself observed, the protection of potential creditors (and other stakeholders) might have been

[54] *See* Marek Szydlo, *Cross-border Conversion of Companies Under Freedom of Establishment: Polbud and Beyond*, 55 Common Mkt. L. Rev. 1549, 1560 (2018) (Neth.).

[55] *See* Ariel Mucha & Krzysztof Oplustil, *Redefining the Freedom of Establishment Under EU Law as the Freedom to Choose the Applicable Company Law: A Discussion After the Judgment of the Court of Justice (Grand Chamber) of 25 October 2017 in Case C-106/16, Polbud*, 15 Eur. Co. & Fin. L. Rev. 270 (2018)(Ger.).

[56] *See* discussion *infra* Section 3.5.4.

ensured with proper disclosure of its foreign origin and applicable company law.[57] By contrast, Polbud already had creditors and employees in the Member State of origin and in need of protection, as the company law governing their legal position would have changed after the contractual obligation had arisen.[58]

3.5.2. POLBUD, VALE, AND CADBURY

Reconciling *Polbud* with *VALE* and *Cadbury Schweppes* might also pose some difficulties. As regards *VALE*, as also claimed by the A.G., that judgment (together with *AGET Iraklis* and the others mentioned by A.G. Kokott) explicitly implies the actual pursuit of economic activity as a precondition for the establishment itself to be identified. The argument according to which in force of the conversion the home state becomes, suddenly, the host state and vice versa, is not convincing.[59] The identification of the home and host states must be linked to the company's relocation, which is indeed subject to legal assessment by the European Court, rather than to the desired destination of the company's business projects. As regards *Cadbury Schweppes*, a narrower or wider extension of the notion of abuse and of "wholly artificial arrangements" could in this respect be justified in the light of the different areas of national law concerned. *Centros*/*Polbud* regard the evasion of national company law, while *Cadbury Schweppes* entails a possible circumvention of national fiscal measures. It has been argued that the risk of harm is higher in the latter case potentially involving a wider set of persons and interests, or that this jurisprudence reflects the legislative position. The legislator, by the time, had not adopted any provision to combat letterbox companies aimed at circumventing national company law, but had more seriously engaged in the fight to tax evasion.[60] One could add that, traditionally, fiscal measures lie at the heart of national competence, and therefore the Court has conceptualised abuse in a broader fashion to guarantee a broader space for the protection of Member States' interests. Despite the national sovereignty considerations, this argument cannot be accepted from a strictly legal perspective, as the notion of abuse of freedom of establishment depends on the

[57] *But see* Tridimas, *supra* note 27, at 177 (highlighting that to facilitate free movement, the judgment transfers greater risk to creditors).
[58] *See* Mucha & Oplustil, *supra* note 55, at 297.
[59] As it seems to suggest, if the reading of the author is correct, M. Szydlo, *supra* note 54, at 1559, claiming that "a company conducting an isolated cross-border conversion, like Polbud, seeks to pursue – and indeed does pursue – a genuine and permanent economic activity on a stable basis in the host Member State. The point is that after its conversion, the host Member State becomes its previous home Member State (here, Poland)".
[60] *See* Szydlo, *supra* note 54, at 1568.

limits of the E.U. right abused, rather than on the area of national legislation that is supposedly evaded.[61]

3.5.3. POLBUD AND THE INTERNAL MARKET FRAMEWORK OF ANALYSIS

Subsequently, the C.J.E.U. considered the restriction of the "fundamental" freedom. In this respect, it suffices to consider that the judgment is harmonious with the orthodox approach. Any measure prohibiting, impeding, or rendering less attractive the exercise of the economic freedom must be considered a restriction.[62]

The same degree of legal orthodoxy is shown at the justification stage, particularly in the use of the principle of proportionality. The measure at hand, establishing a blanket obligation to liquidate the company, could not pass the test as less restrictive measures could have been envisaged.[63]

3.5.4. THE DILEMMA: GENUINE ECONOMIC ACTIVITY

The truth is that the main point of dispute lies in the definition of freedom of establishment. As A.G. Kokott has pointed out, settled case law indicates that establishment entails the right to participate on a stable and continuous basis in the economic life of another Member State and to profit therefrom. Such participation must consist in the actual pursuit of an economic activity in the destination Member State. According to this perspective, whenever a cross-border operation is not aimed at relocating to a Member State for the genuine exercise of economic activity (and thus resulting in the creation of a wholly artificial arrangement), it is not protected by the Treaty and can constitute abuse, as established in *Cadbury*. Nonetheless, this interpretation conflicts with the one in *Polbud* (confirmed in *Edil Work*), where the C.J.E.U. explicitly states that the company can rely on the freedom despite the operation only seeks to the transfer of the registered office. Furthermore, even applying the orthodox framework (restriction to access to the market/justification), preventing only the transfer of the registered office to benefit from more favourable legislation does not "prohibit, impede or render less attractive the exercise of freedom of establishment" if establishment corresponds to a genuine economic activity (as held by A.G. Kokott).

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[61] *See* discussion *infra* Section 6.2.1.
[62] *See* Case C-106/16, Polbud - Wykonawstwo sp. z o.o., ECLI:EU:C:2017:804, 46 (Oct. 25, 2017).
[63] *See* Szydlo, *supra* note 54, at 1566.

In conclusion, three points can be made. Primarily, the conclusion that establishment is independent of a genuine economic activity does not align with the economic spirit of the T.F.E.U. and the overall economic objectives of the E.U. project. This argument is supported, as explained above, by the very notion of establishment as the exercise of an economic activity, which implies a degree of involvement in the economic life of the Member State to which the company is relocated, as well as by the case law discussed so far. In this respect, despite the apparent coherence in the C.J.E.U.'s reasoning, a conceptual distinction must be drawn between *Polbud* and the cases *Centros* (where a genuine intention to relocate the economic activity existed), *VALE* (where the actual pursuit of an economic activity is indicated as a precondition for establishment), and *Cadbury Schweppes* (which explicitly excludes wholly artificial arrangements from the legitimate exercise of the freedom of establishment, namely relocations not accompanied by the establishment of an economic activity in another Member State). Secondly, the fact that the interpretation inaugurated by *Polbud* has been reaffirmed in *Edil Work* suggests that the judgments affirming the inextricable connection between establishment and economic activity have been implicitly and (according to the author) incorrectly overruled.

Thirdly, the new approach favours the creation of letterbox companies, showing little regard for the protection of the counter-interests of creditors, minority shareholders, and employees and even posing the risk of companies being used for criminal purposes. From a company law perspective, allowing a company to establish itself in a Member State and subsequently change its legal form effectively evades its home company law, effectively separates the benefit of limited liability from the corresponding obligations that the home State regards as its natural counterpart. It is not clear how this can be considered as promoting the internal market. This solution appears excessively market-oriented, and while it would have been reasonable in the context of completing market integration, it seems less so in a legal system that has progressively assimilated non-market values and the compelling need to protect fundamental rights.

It was evident from the outset that *Polbud* would have paved the way for more regulatory competition, law shopping, and increased risks to the protection of stakeholders, particularly in Member States lacking specific rules on cross-border conversions. This made legislative intervention imperative. At least, *Polbud* had clarified that cross-border corporate conversions fell within the scope of freedom of establishment, indirectly implying E.U. competence under Article 50 T.F.E.U. The judgment is explicitly referenced by the Commission in the Directive proposal, beyond

the clarification of the scope of the freedom, "the C.J.E.U., being a judiciary organ, may not create any procedure for making such conversions possible or set out the related substantive conditions".[64] The Court, in other words, had provided the input for the legislator to act, counterbalancing the effects of uncontrolled corporate transfers resulting from the rulings with guarantees and limitations inspired by a social view of the European market.

4. LEGISLATIVE INTERVENTION, OR SOME RESTORED PROTECTION OF STAKEHOLDERS

The Explanatory Memorandum adds that, according to the judgment, in the absence of E.U. harmonisation of cross-border conversions, national legislators may adopt measures to protect minority shareholders, creditors, and workers, but it would still be necessary to assess, on a case-by-case basis, the compliance of these rules with freedom of establishment. This outcome was unsatisfactory in terms of legal certainty and has repercussions on companies, stakeholders, and national authorities. At the same time, as mentioned above, the Memorandum acknowledges that *Polbud* could lead to an increased use of letterbox companies for fraudulent or even criminal purposes. Not secondarily, as stemming from the 8th principle of the Pillar of European Social Rights,[65] workers' information and consultation in good time on matters related to corporate mobility represents an indefeasible feature of the E.U. social construction. Shortly, the Directive aims at a two-fold objective: enabling companies to restructure efficiently and effectively while protecting stakeholders.[66] The same logic applies to cross-border divisions, which also lacked a harmonised legal framework, and to cross-border mergers, already harmonised with Directive 2005/56, whose shortcomings are addressed by the current Proposal. Cross-border operations are now coherently systematised in one legislative instrument. After an overview of the procedural mechanism established by the Directive, this paper will focus on how the E.U. legislator deals (for the first time at the secondary law level) with the category of abuse.

[64] *See Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions*, at 3, COM (2018) 241 final (Apr. 25, 2018).

[65] THE EUROPEAN PILLAR OF SOCIAL RIGHTS IN 20 PRINCIPLES, https://ec.europa.eu/social/main.jsp?catId=1606&lan (last visited Apr. 25, 2024).

[66] *See supra* note 64, at 3.

4.1. DIRECTIVE (EU) 2019/2121: AN OVERVIEW

Directive 2019/2121 amends Directive 2017/1132 (originally regulating only cross-border mergers) as regards cross-border conversions, mergers, and divisions of limited liability companies. It provides a detailed, common procedural framework for relocations and establishes mechanisms to protect stakeholders.

To begin with, at the beginning of the procedure, the company is supposed to draw up and disclose the draft terms for the proposed operation, with a minimal informative content. In addition, it must prepare a report with specific information for members (shareholders) and employees, explain the legal and economic aspects of the operation, and outline its implications for employees and the company's future business. An independent expert will then examine the draft terms.

Subsequently, the draft terms and the reports are transmitted to the general meeting of the company's members for approval by a solid majority. Member States must establish specific normative guarantees for stakeholders: rights to exit and cash compensation at least for shareholders who voted against the approval of the draft terms; for creditors, a two-year protection period for filing a claim in the departure Member State and a declaration of solvency by the company under the personal liability of the board for its accuracy; for employees, rights to be informed and consulted and specific procedural guarantees if the company had implemented an employee participation system to preserve the exercise of the rights of participation.

The next step is an *ex-ante* public control of the operation, consisting in the competent authority issuing a "pre-operation certificate", a necessary condition for the destination state to approve the operation. The authority designated by the Member State of origin issues the certificate after scrutinizing the legality of the operation and assessing compliance with all relevant conditions, procedures, and formalities. The decision must be taken within three months, unless the competent authority has serious doubts that the operation is set up for abusive purposes, leading to the circumvention of Union or national law, in accordance with the criteria specified by the Directive. In that case, the authorization is subject to additional investigations. At this stage, the authority shall be provided with the possibility to recur to an independent expert.

If the certificate is issued, it is to the destination Member State's competent authorities to verify that their legal requirements for registration are fulfilled and, if so, proceed with the registration of the company. The information contained in the pre-operation certificate cannot be disputed. With registration in the destination state, the operation is perfected and cannot be declared null and void. However, such effects

are without prejudice to Member States' powers, concerning sensitive matters, to adopt measures and penalties against abusive or criminal operations, especially in case of new substantive information. Finally, and in line with the overarching principle of effective judicial protection, Recital (40) of the Directive requires Member States to ensure the possibility of reviewing the decisions of the competent authorities in proceedings concerning cross-border operations. The reviewability of authorities' assessment is particularly relevant in the context of the denial of pre-operation certificate. In that case, the conditions set up to authorize the operation will be subject to judicial control.

4.2. THE NOTION OF ABUSE

The Directive identifies two stages of the procedure for Member States to address potential abuses. The first and most relevant is undoubtedly the assessment of the authority of the departure Member State responsible for issuing the pre-operation certificate. The second is residual and operates as a last resort, enabling the authorities of the destination Member State to adopt appropriate measures in response to specific risks on the basis of new information. This last clause is phrased in general terms, while much more legislative guidance is given for the pre-operation assessment. The legislators, therefore, entrust the state authority with the main responsibility for preventing abuse.

Article 86m (for pre-conversion certificate, and articles 127 and 160m *verbatim* for pre-merger and pre-division certificates) provides:

(8) Member States shall ensure that the competent authority does not issue the pre-conversion certificate where it is determined *in compliance with national law* that a cross-border conversion is set up for *abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of Union or national law*, or for criminal purposes. (emphasis added)

(9) Where the competent authority, during the scrutiny referred to in Paragraph 1, has serious doubts indicating that the cross-border conversion is set up for abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of Union or national law, or for criminal purposes, *it shall take into consideration relevant facts and circumstances*, such as, where relevant and not considered in isolation, indicative factors of which the competent authority has become aware, in the course of the scrutiny referred to in paragraph 1, including through consultation of relevant authorities. The assessment for the purposes of this paragraph shall be conducted on a *case-by-case basis*, through a *procedure governed by national law*. (emphasis added)

Interpretative support can be found in the Preamble. Recital (35) emphasises the importance of counteracting "shell" or "front" companies set up for evading, circumventing, or infringing Union or national law. Recital (36) provides useful guidance for the assessment of abuse by national authorities, requiring considering all relevant facts and circumstances and providing for indicative factors.[67] As mentioned above, it is always guaranteed, in light of the general principle recalled by Recital (40) the recourse to a judge. If the company is denied the certificate on the ground of alleged abusive purposes, it will be for the judge to examine the allegations.

In conclusion, E.U. law now appropriately addresses the abuse of corporate mobility and freedom of establishment by placing responsibility on the departure Member State, which is perceived as the jurisdiction more vulnerable to potential abuse, being the country from which the company is relocating. However, despite the interpretative guidance provided in the Preamble, the Directive lacks a definition of abuse and therefore a uniform notion for legislators and national courts to rely on. The ambiguity of the anti-abuse clause introduces legal uncertainty and grants very broad discretion to national authorities, raising concerns regarding the potential abuse of the anti-abuse clause itself and, even more importantly, the concrete possibility of diverging practices in the Member States.[68] Such ambiguities are very likely to result in preliminary ruling proceedings before the European Court of Justice. Furthermore, the possibility of an in-depth assessment poses the risk of prolonging procedures and increasing the workload of the national authorities. Specifically, regarding the anti-abuse clause, questions arise as to whether the solution is in itself reasonable and proportionate, given the very comprehensive tools in place for the protection of stakeholders.[69] Another critique regards the suitability of company law for achieving anti-abuse objectives, which might arguably be better addressed through specific sectoral instruments (tax, financial, and competition law).[70]

[67] *See* discussion *infra* Section 6.2.1.

[68] *See* Jessica Schmidt, *The Mobility Aspects of the EU Commission's Company Law Package: Or – 'The Good, the Bad and the Ugly*, 16 ECL JRNL, no. 1, 2019, at 13, 15.

[69] *See id.*

[70] *See* Steef M. Bartman, *The Adopted Proposal for an EU Directive on Cross-Border Operations: A Realistic Compromise*, 16 ECL JRNL, no. 5, 2019, at 140, 141.

5. INTERIM CONCLUSIONS

The ruling in *Polbud*, in essence, extends the deregulatory rationale of *Centros* to primary establishment, particularly concerning cross-border conversions. It represents the culmination of a jurisprudence rooted in a market-oriented logic, aimed at fostering corporate mobility within the internal market. E.U. primary law (that is, the T.F.E.U. as interpreted by the Court) thus grants companies the freedom to pursue favourable legislation, whether through cross-border operation or establishing branches in different Member States. Following *Polbud*, this pursuit is disconnected from genuine establishment, as conducting actual economic activity in the destination state is no longer a prerequisite for the legitimate exercise of the economic freedom. However, while the case law has generally acknowledged Member States' authority to prevent abusive operations, a general presumption of abuse is not admitted. The C.J.E.U. typically deals with the prevention of abuse of E.U. law at the justification stage, where national measures aimed at preventing the abuse of the freedom of establishment are assessed through the lens of proportionality on a case-by-case basis. Nonetheless, as the case law stands, there remains legal uncertainty regarding which measures will be deemed legitimate in preventing abuse of freedom, and the Directive on cross-border operations lacks a precise definition of such abuse.

To sum up, Member States retain two avenues to restrict companies' freedom of establishment. The first entails the enduring power of the destination state to freely determine the connecting factor for a company's incorporation and consequent subjection to its laws, as established in *Daily Mail*. The second is the doctrine of abuse of E.U. law.

As national authorities and courts begin or will soon start to interpret national transposition measures, they will all be confronted with the question of how to define abuse of corporate mobility and may refer interpretative questions to the C.J.E.U. Therefore, it is appropriate to conceptualise the category of abuse of freedom of establishment to address the forthcoming complexities that Directive 2019/2121 will present in national jurisdictions. Methodologically, a premise is necessary. The Directive, as noted earlier, establishes a procedural framework for cross-border operations but lacks a definition of abuse. In this regard, secondary law must be regarded as exercising a signalling function, without adding substantive content. Despite criticism, this outcome is not necessarily undesirable. Ultimately, general clauses address the need for flexibility in a legal system, and their potential would not be fully accomplished if they were crystalized by secondary law. Institutionally, one precise

function of the judiciary is to interpret general clauses, aligning them harmoniously with the constitutional framework. Therefore, coherent delineation of the category must be grounded on primary law. Such a conceptualisation would address an aspect that the Court has never dealt with and would serve as guidance for national authorities and courts interpreting and applying the transposition measures of the Directive.

6. TOWARDS A UNIFORM DOCTRINE OF ABUSE OF ESTABLISHMENT OF COMPANIES

6.1. THE GENERAL PRINCIPLE OF ABUSE IN E.U. LAW: OVERVIEW

The general principle of abuse of law[71] is a newcomer to E.U. law. General principles were developed by the Court to fill gaps in the Treaty, in accordance with the rule of law, to protect individuals from public power. The principle of abuse in this sense is a peculiar one because it stems from private continental law and is intended to prevent a person from deriving a benefit from a rule that pursues ends lying beyond its objectives, even though it formally complies with it. It is a principle against the circumvention of the law, relatively new to the E.U. legal system because, at an early stage, in the context of the internal market, the Court opted for a very broad definition of the fundamental freedoms. However, a more mature E.U. legal order, the proliferation of E.U. rights and legislation, and litigants seeking to stretch the scope of economic freedoms to the maximum made the doctrine evolve. To establish that a right is being abused, is firstly necessary to determine its boundaries, inquiring into the objectives of the relative provision, and determining what interests are thereby given protection.[72]

In *Emsland-Stärke*[73] the Court developed a general test to find abuse that is still good law. The test requires first a combination of ”objective circumstances in which, despite formal observance of the conditions laid down by the rules, the purpose of those rules has not been achieved“. That is an analysis of the purpose of the potentially abused E.U. rights and its genuine achievement. Secondly, there must be a “subjective element consisting in the intention to obtain an advantage from the rules by creating artificially the conditions laid down for obtaining it”. This second element underscores the

[71] *See generally* Tridimas, *supra* note 27; *See* Raluca N. Ionescu, L'Abus de Droit En Droit de l'Union Européenne (Bruxelles: Bruylant, 2012).
[72] *See* Tridimas, *supra* note 27, at 164-167.
[73] Case C-110/99, Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas, 2000 E.C.R. I-11569.

individual's intent to rely on E.U. law. Even if, according to the case law, motives for exercising free movement are irrelevant,[74] in the context of abuse they are part of the appraisal.

In *Kofoed,*[75] the C.J.E.U. confirmed that the prohibition of abuse of rights is a general principle of E.U. law. In *Cussens*,[76] the C.J.E.U. established that it "displays the general, comprehensive character which is naturally inherent in general principles of E.U. law", This statement was then consecrated by the three judgments of the Grand Chamber in *Altun*,[77] *T Danmark*,[78] and *N Luxembourg 1.*[79]

As for the articulation of the test, the general framework of *Emsland-Stärke* is not always respected. In some free movement cases, the C.J.E.U. has found a restriction and then assessed whether the restriction was justified by the objective of preventing abuse, focusing after on whether the national measure is aimed at wholly artificial arrangements and on its proportionality.[80] This is also the approach prevalently used for the establishment of companies.[81] There is however a close similarity in the wholly artificial arrangement test and the two-fold examination of *Emsland-Stärke*,[82] as exemplified by *Cadbury*, where the C.J.E.U. claims that "in order to find that there is such an arrangement there must be, in addition to a *subjective element* consisting in the intention to obtain a tax advantage, *objective circumstances* showing that, despite formal observance of the conditions laid down by [E.U.] law, the objective pursued by freedom of establishment (...) has not been achieved" (emphasis added).[83]

Lastly, the general principle, as such, even though mostly developed in the area of free movement, applies to all areas of E.U. law. It could be also considered reflected in the "misuse of powers" ground of review of Article 263 T.F.E.U. and the *Foglia/Novello* doctrine[84] according to which the C.J.E.U. can refuse to give preliminary rulings where

[74] *See generally* Case C-200/02, Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department, 2004 E.C.R. I-09925.

[75] Case C-321/05, Hans Markus Kofoed v. Skatteministeriet, 38 2007 E.C.R. I-5818.

[76] Case C-251/16, Edward Cussens and Others v. T. G. Brosman, ECLI:EU:C:2017:881 (Nov. 22, 2017).

[77] Case C-359/16, Criminal proceedings against Ömer Altun and Others, ECLI:EU:C:2018:63 (Feb. 6, 2018).

[78] Joined Cases C-116/16 and C-117/16, Skatteministeriet v. T Danmark and Y Denmark Aps, ECLI:EU:C:2019:135 (Feb. 26, 2019).

[79] Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, N Luxembourg 1 and Others v. Skatteministeriet, ECLI:EU:C:2019:134 (Feb. 26, 2019).

[80] *See* Graham Butler & Karsten Engsig Sørensen, *The Prohibition of Abuse of EU Law: A Special General Principle*, *in* RESEARCH HANDBOOK ON GENERAL PRINCIPLES IN EU LAW 401, 409 (Katja S. Ziegler et al. eds., 2022).

[81] *See supra*, §2.

[82] *See* Butler & Sørensen , *supra* note 80, at 409.

[83] Case C-196/04, Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue, 51 2006 E.C.R. I-07995.

[84] Case 104/79, Pasquale Foglia v. Mariella Novello, 1980 E.C.R. -00745; Case 244/80, Pasquale Foglia v. Mariella Novello, 1981 E.C.R. -03045.

the question essentially corresponds to a misuse of the institution because the controversy was artificially established.

Given this short overview, applying the case law on the general principle of prohibition of E.U. law to the fragmentary references made to it in the case law of freedom of establishment of companies can constitute a useful tool to shed light on this notion, and an interpretative guidance for the application of Directive 2019/2121 in national legal systems. This approach is consistent with the inherent function of general principles: filling gaps and providing interpretative consistency. In doing so, one might identify three kinds of issues worth analyzing: substantive, procedural, and operative.

6.2. THE GENERAL PRINCIPLE OF ABUSE AND CORPORATE MOBILITY: SUBSTANTIVE ISSUES

6.2.1. THE OBJECTIVE ELEMENT

When assessing if a case of corporate transfer constitutes an abuse of freedom of establishment one might first consider whether the purpose of Articles 49 and 54 T.F.E.U., despite formal observance, has been veritably achieved. The question looks back at the debate on the purpose of freedom of establishment. The approach that ties freedom with the exercise of a genuine economic activity appears to align more closely with established case law and the overarching framework of the Treaties and the E.U. integration project.

Building upon this perspective, whenever a cross-border operation is not intended to relocate to a Member State for the genuine purpose of conducting economic activity (thus resulting in the creation of a wholly artificial arrangement), the objective element of the abuse test would be satisfied. The Court provided some guidance in *Cadbury*, indicating this finding had to be grounded on objective factors, ascertainable by third parties, concerning the extent to which the company physically existed in terms of premises, staff, and equipment; if from those factors the company was found to be a fictitious establishment, not carrying out any genuine economic activity in the destination country, the cross-border operation should have been regarded as an artificial arrangement.[85]

However, in the light of *Polbud* and *Edil Work*, the opposite solution is now deemed preferable by the Court: freedom of establishment is independent of the

[85] *See* Case C-196/04, Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue, 67-68 2006 E.C.R. I-07995.

economic activity. In other words, the freedom would safeguard the pursuit of more favourable legislation even in the presence of an economic link, necessitating a different articulation of the *Emsland test*. To meet the objective test for abuse, the operation would need to be conducted specifically to circumvent national laws protecting creditors, minority shareholders, and employees, or to violate national criminal law. This significantly narrows the margins for identifying abuse of E.U. law.

Regardless of the approach, the test remains somewhat abstract. An enhancement to the objective element of abuse would be the identification of indicative factors to assist national Courts in determining that the objectives of the Treaty freedom are being circumvented. The Court has already provided such guidance (in the context of tax law) in *T. Danmark* and *N. Luxembourg 1*, two landmark cases regarding multi-tiered group structures and coordinated financing arrangements supposedly aimed at tax avoidance. The Danish tax authorities disputed the grant of a fiscal exemption on the grounds that the foreign entities legally entitled in force of Directive 2003/49 were conduit companies. Addressing the doctrine of abuse and the *Emsland test*, the Grand Chamber considered that an examination of all the relevant facts and circumstances is needed to establish whether the operators carried out "purely formal or artificial transactions devoid of any economic and commercial justification, with the essential aim of benefitting from an improper advantage".[86] While it is indeed the responsibility of the national court to evaluate the pertinent facts in the main proceedings, the C.J.E.U. has provided certain indicators or criteria: a general assessment of the "absence of actual economic activity, *in the light of the specific features of the economic activity in question*" (emphasis added) is required, rooted on "an analysis of all the relevant factors relating, in particular, to the management of the company, to its balance sheet, to the structure of its costs and to expenditure actually incurred, to the staff that it employs and to the premises and equipment that it has".[87]

These cases can contribute to the evolution of the abuse doctrine within the realm of company establishment, but directly transposing the indicative factors developed therein is not practicable. The call for a "spill-over effect" of these judgments onto the domain of companies is not accurate, as the definition of abuse is contingent upon the scope of the right under consideration. Therefore, a distinct right would entail a different definition of abuse. As also claimed by AG Bobek in *Cussens*, the principle is not monolithic and it's subject to adaptations to the specific field of E.U. law to which it

[86] Joined Cases C-116/16 & C-117/16, Skatteministeriet v. T Danmark and Y Denmark ApS, 98 ECLI:EU:C:2019:135 (Feb. 26, 2019).

[87] Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, N Luxembourg 1 and Others v. Skatteministeriet, 131 ECLI:EU:C:2019:134 (Feb. 26, 2019) and *supra* note 86, at 104.

is applied.[88] However, at the methodological level, this approach clarifies the criteria for identifying the objective element of abuse and is extremely welcome in terms of legal certainty. Building on this methodology, and in some way complementing *Cadbury*, the C.J.E.U., if and when called upon, could similarly offer indicative factors for abusive establishment, in a guidance case.[89] The legislator has conveniently elaborated some in Directive 2019/2121, particularly in Recital 36,[90] which refers to the characteristics of the establishment pursued through the operation, including the intention of the operator, the sector, the investment, the net turnover and profit or loss, the number of employees, the composition of the balance sheet, the tax residence, the assets and their location, equipment, the beneficial owners of the company, the habitual place of work of the employees, the place where social contributions are due, the number of posted employees or employees working simultaneously in more than one Member State, and the commercial risks assumed by the company or the companies before and after the cross-border operation. Eventually, if the cross-border operation was to result in the company having effective management or economic activity in the Member State in which the company is to be registered after, "that would be an indication of an absence of circumstances leading to abuse or fraud". This last part is particularly interesting, as it sets up a rebuttable presumption of a non-abusive arrangement whenever there is an actual economic link with the destination Member State, in formal compliance with *Polbud*, but subject to an aversion to letterbox companies. The legislative position, even if strangely relegated to the Preamble alone, makes the solution taken by the Court in *Polbud* even more questionable and probably worth reconsidering.

6.2.2. THE SUBJECTIVE ELEMENT

Regarding the second element of the abuse test, the focus is on the intention of the individual invoking E.U. law. Despite the case law on free movement that has traditionally deemed motives irrelevant, when applying the general principle intentions matter. However, generally, the Court focuses on objective evidence (for which, before

[88] Case C-251/16, Edward Cussens and Others v. T. G. Brosman, Opinion of Mr Advocate General Bobek 28–29 ECLI:EU:C:2017:881 (Nov. 22, 2017); even though this was clear at least since C-367/96 Alexandros Kefalas and Others v. Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE), Opinion of Mr Advocate General Tesauro, ¶ 25 1998 E.C.R I-02843 and C-212/97, Centros Ltd v. Erhvervs- og Selskabsstyrelsen, Opinion of Mr Advocate General La Pergola, 20 1999 E.C.R. 1999 I-01459.

[89] *See generally* Takis Tridimas, *Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction*, 9 INT'L J. CONST. L. 737 (2011) (for the distinction between C.J.E.U. ruling based on their degree of specificity).

[90] It is noteworthy that this provision, which formed part of the text of the Directive in the Commission's proposal, was moved to the recitals as a result of the legislative process.

the C.J.E.U. , the burden falls on the Member State) and particularly on the existence of artificial arrangements.[91] This qualification of the original test has probably its roots in the Opinion of AG Maduro in *Halifax*,[92] and is correct as it focuses on the objective elements of artificiality rather than purely volatile motives. The analysis, in other words, would be preferably grounded on the abovementioned objective indicators of circumvention and artificiality.

6.3. THE GENERAL PRINCIPLE OF ABUSE AND CORPORATE MOBILITY: PROCEDURAL ISSUES

The C.J.E.U. has also developed a procedural dimension of the principle of abuse. In *Cadbury*, for instance, it clarified that the undertaking must be given the opportunity to produce evidence of real establishment (linked to a genuine activity) and that in assessing such evidence national authorities may resort to collaboration procedures with other Member States' administrations.[93] *Kratzer* made clear that the national court verifies the objective and subjective elements in accordance with the rules of evidence of national law, provided that the effectiveness of E.U. law is not undermined. If it appears objectively that despite formal compliance the objectives pursued by E.U. law have not been achieved, it must be considered that reliance on the protection of E.U. rights is abusive.[94] In *Altun*, a case regarding social security schemes, the Grand Chamber furthermore ruled that findings of abuse must be based on a consistent body of evidence, that in case of exchange of information, the national authority has the duty to review such evidence in the light of the principle of cooperation and in a reasonable time, and that in any case, it must be possible for that evidence to be relied on in judicial proceedings. This last finding reflects the right to effective judicial protection under Article 47 of the Charter of Fundamental Rights, even if the C.J.E.U. does not explicitly refer to it. Essentially, individuals allegedly abusing E.U. law must be afforded the opportunity to challenge the evidence, while upholding the safeguards inherent in the right to a fair trial.[95] As for the burden of proof of abuse, the case law on freedom of

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[91] *See* Butler & Engsig Sørensen, *supra* note 80, at 410.

[92] Case C-255/02, Halifax v. Commissioners of Customs & Excise, Opinion of Mr Advocate General Maduro 2006 E.C.R I-01609.

[93] *See* Case C-196/04, Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue, 70-71 2006 E.C.R. I-07995.

[94] *See* Case C-423/15, Nils-Johannes Kratzer v. R+V Allgemeine Versicherung AG, ECLI:EU:C:2016:604, 42-43 (July 28, 2016).

[95] *See* Case C-359/16, Criminal proceedings against Ömer Altun and Others, 50 & 54–56 ECLI:EU:C:2018:63 (Feb. 6, 2018).

establishment has not explicitly dealt with the question.[96] However, the Directive on Cross-Border Operations expresses the precise choice of the legislator to leave the matter to national procedural law, as Articles 86m(9), 127(9), and 169(9) regarding pre-operations certificates provide: "The assessment for the purposes of this paragraph shall be conducted on a case by case basis, *through a procedure governed by national law*". Naturally, national procedural autonomy is subject to the principles of equivalence and effectiveness.[97]

6.4. THE GENERAL PRINCIPLE OF ABUSE AND CORPORATE MOBILITY: OPERATIONAL ISSUES

At the operational level, preliminary rulings for a clarification of the notion of abuse of freedom of establishment might reach the C.J.E.U. via two different routes. The first case regards operations covered by the Directive and would require the Court to interpret the Directive in light of primary law, namely the fundamental freedom and the general principle of abuse of law.

The same framework remains valuable outside the scope of application of the Directive as well. Even if it regulates the main cross-border operations, the Directive does not cover other operations such as divisions by acquisition. Additionally, it applies only to limited liability companies, whereas freedom of establishment (and corporate mobility) is enjoyed by all legal entities within the meaning of Article 54 T.F.E.U., including partnerships. In both cases, the "existence of a real practical and economic need can hardly be denied".[98] The scenario of corporate mobility not regulated by the Directive is therefore still possible and needs to be addressed, for the sake of the proposed solution unity. The C.J.E.U. will deal with the latter case through the orthodox framework for assessing the compatibility of national measures with the economic freedoms: broad definition of restriction, justification, proportionality.

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[96] *See* João Nogueira, Abuse, *Proportionality and the Burden of Proof in CJEU's Case Law on Direct Taxation*, *in* TAXES CROSSING BORDERS (AND TAX PROFESSORS TOO): LIBER AMICORUM PROF. DR R.G. PROKISCH 225 (Jasper Korving et al. eds., 2022) (Neth.) (for direct taxation).

[97] *See generally* Craig & De Búrca, *supra* note 1, at 276-288; F. MARTUCCI, *Droit de l'Union Européenne*, 2d ed. (Paris: Dalloz, 2019), at 690-693. (Fr.).

[98] Schmidt, *supra* note 68, at 13.

6.4.1. INTERPRETING THE DIRECTIVE THROUGH THE GENERAL PRINCIPLE

Secondary law can either fully harmonise the notion of abuse in a given field, or require, or allow Member States to introduce anti-abuse provisions.[99] In the case of cross-border operations, Member States were required to do so. The adoption of secondary legislation by no means makes the general principle and its interpretative gap-filling function superfluous, especially if, as in the case at stake, secondary legislation just refers generally to the concept of abuse. On the contrary, a sample examination of the implementing measures shows that national legislators have often limited themselves to replicating almost *verbatim* the anti-abuse clause of the Directive.[100]

As previously mentioned, it is thus confirmed that national courts will need to recur to E.U. law for reviewing the abuse appraisal carried out in the context of the pre-operation certificate assessment, as it is still true that the C.J.E.U. has yet failed to pronounce a clear and well-founded doctrine of abuse of law in the context of freedom of establishment of legal entities. The proposed conceptualisation, combining relevant case law on freedom of establishment of companies with the distinct features of the general principle of abuse in E.U. law, addresses gaps in secondary law. Ideally, the C.J.E.U. could establish it in a guidance ruling addressed to national commercial courts called to the application of the transposition measures.

To sum up, the model proposed might develop according to the following hypothesis. A company willing to convert, merge or divide cross border applies for the pre-operation certificate to the national competent authority. The latter, left without decisive interpretative aid by national legislation, refuses to issue the certificate on the ground that the operation is abusive. The company brings the matter to a national court that, faced with no guidance for the definition of abuse, will most likely refer the

[99] *See* Butler et Engsig Sørensen, *supra* note 80, at 417-418.

[100] *See* among the other transposition measures of the Directive, Decreto legislativo [legislative decree] 2 marzo 2023, n. 19, Art. 29, para. 3, lit. g (It.) ("that, based on the information and documents received or acquired, the [operation] is not carried out for manifestly abusive or fraudulent purposes, from which the violation or circumvention of a mandatory rule of Union law or Italian law results, and that it is not aimed at the commission of crimes under Italian law") (author's translation); *see also* Code de Commerce, Article L236-42(2°) (Fr.) ("De vérifier que l'opération n'est pas réalisée à des fins abusives ou frauduleuses menant ou visant à se soustraire au droit de l'Union européenne ou au droit français ou à le contourner, ou à des fins criminelles"); Umwandlungsgesetz [transformations act], § 316(3) and § 343(3) (Ger.) ("if there are indications that the cross-border [operation] is being carried out for abusive or fraudulent purposes which result or are intended to result in the evasion or avoidance of Union or national law, or for criminal purposes. If such purposes exist, the registration shall be refused") (author's translation); Real Decreto-ley [royal legislative decree] 5/2023, Art. 91 (Sp.) ("if, as a result of the documentation and information submitted, the Commercial Registrar has reasonable grounds to suspect that the transaction submitted is being carried out for abusive or fraudulent purposes, that its purpose or effect is to circumvent Union or Spanish law, or that it serves criminal purposes") (author's translation).

question to the C.J.E.U. At this stage, the C.J.E.U. will probably need to define, once and for all, the extent of the doctrine of abuse in relation to companies' mobility, given that secondary legislation has meanwhile been enacted. The C.J.E.U. could indicate the following steps. The national court, aside from the motives of the operations, must first focus its analysis on a factual inquiry based on objective elements to determine whether the company is carrying out purely formal or artificial transactions (lacking any economic and commercial justification, essentially to benefit from an undue advantage). For this purpose, it will consider the characteristics of the establishment pursued, the sector, the investment, the number of employees, the composition of the balance sheet, the tax residence, the assets and their location, the habitual place of work of the employees, the place where social contributions are due, the number of posted employees or employees working simultaneously in more than one Member State, and the commercial risks assumed by the company or the companies before and after the cross-border operation. Most importantly, if the operation was to result in the company having effective management or economic activity in the Member State in which the company is to be registered after, it is presumed that abuse is absent. This implies that national authorities must give highly consistent evidence to substantiate any claims of abuse. This presumption is relative, as highlighted by the Directive, and it falls upon the national authority that declined to issue the pre-operation certificate to rebut it. If the relative presumption does not apply, the company should be permitted to present evidence regarding the genuine nature of the operation, in accordance with national procedural regulations.

6.4.2. RESIDUAL HYPOTHESIS: THE ORTHODOX APPROACH REVISITED

The second hypothesis concerns operations not covered by the Directive, either because they are not objectively contemplated therein or because they are carried out by legal entities other than limited liability companies. The C.J.E.U should deal with that case within the orthodox framework of analysis.

In the early case law, the question of abuse was mostly raised in the context of whether the Treaty freedom was applicable at all.[101] In this sense, the principle was operationalized as a form of pre-emption. Over time, the emphasis has increasingly shifted to the justification step, whereby imperative requirements in the general interest

[101]*See* Vanessa Edwards & Paul Farmer, *The Concept of Abuse in the Freedom of Establishment of Companies: A Case of Double Standards?*, **in** Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs 205, 208 (Anthony Arnull et al. eds., 2008).

must justify a national measure aimed at preventing abuse. Such a measure must be deemed suitable for achieving that objective and must not exceed what is necessary to attain it.[102] This approach allowed the Court, both in *Polbud* and *Edil Work*, to subject the national anti-abuse measure to the principle of proportionality and crush down general presumptions of abuse. In addition, applying the principle at this stage could make it possible to weigh and somehow combine it, if the case, with the protection of fundamental rights, by now clearly considered as a possible ground of justification for restricting economic freedoms.[103]

In *Polbud*, the C.J.E.U. has explicitly recognised that overriding reasons of public interests include the protection of the interest of workers, minority shareholders, and creditors.[104] The same interests are at the core of the guarantees established by Directive 2019/2121. The abuse of E.U. law is prevented precisely for guaranteeing the protection of such interests.[105] Moreover, it is settled case law that the exercise of free movement might be restricted for the overarching need of protecting fundamental rights.[106] It seems therefore possible also to combine the application of the general principle with the imperative of the protection of fundamental rights as an additional ground of derogation. This solution guarantees the protection of workers' rights, pursuant to articles 27, 28, 30, and 31 of the Charter.[107] The Charter, furthermore, reflects the general principle of prohibition of abuse of law in Article 54. This could constitute a decisive interpretative counterweight to the recent tendencies of the case law to protect freedom of establishment beyond its mere quality of economic freedom and in connection with the fundamental right to conduct a business enshrined in Article 16 of the Charter.[108] Article 54, apart from signaling the existence of such a general principle,

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[102]*See id.* at 215.

[103]*See generally*, Craig & De Búrca, *supra* note 1, at 744; Pieter Van Cleynenbreugel, Droit matériel de l'Union européenne: Libertés de circulation et marché intérieur [Substantive Law of the European Union: Free Movement and the Internal Market] 190-91, 338-39, 372-73 (2d ed. 2023).

[104]Case C-106/16, *Polbud - Wykonawstwo sp. z o.o.*, ECLI:EU:C:2017:804, 54 (Oct. 25, 2017).

[105]*See* Case C-212/97, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen,* 38 E.C.R. 1999 I-01459 and Case C-106/16, Proceedings brought by Polbud - Wykonawstwo sp. z o.o., ECLI:EU:C:2017:804, 60 (Oct. 25, 2017). In *Polbud* they are addressed as two separate plausible grounds of derogation, while in *Centros*, probably more correctly, they are used together, *i.e.*, the restriction is based on the prevention of abuse of E.U. law for circumvention of national provisions that protect creditors, workers, etc.

[106]*See* Stephen Weatherill, *Fundamental Rights and National Identity in the Internal Market*, **in** The Internal Market as a Legal Concept 135, 137 (Stephen Weatherill ed., 2017).

[107]As provided by article 51(1) of the Charter and confirmed by the C.J.E.U. in Case C-617/10, Åklagaren v. Hans Åkerberg Fransson, 19-21 ECLI:EU:C:2013:105 (Feb. 26, 2013), Member States are bound to the Charter when implementing Union law, as it would happen in the context of applying the transposition measures of the Directive on cross-border corporate operations.

[108]*See* Case C-201/15, Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v. Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis, C-201/15, ECLI:EU:C:2016:972, 90 (Dec. 21 2016).

indeed provides that no right (in our hypothesis, freedom to conduct a business) shall be abused at the expense of any other (in the same hypothesis, social rights).

A final and decisive advantage of the envisaged approach would be the possibility of benefitting from the principle of proportionality when assessing the anti-abuse measure. Proportionality is an instrument of judicial methodology and the main balancing tool in all areas of E.U. law. It allows the Court to assess the suitability and the necessity of the national (anti-abuse) measures. As a methodological tool, it provides a framework for analysis that can benefit from the application of the principle of abuse. Firstly, it enables the judge to take into account the importance of the right and the public interest that the restriction seeks to pursue. Secondly, it incorporates different degrees of scrutiny. Thirdly, in the context of the preliminary reference procedure, the assessment of the compatibility of national measures with Union law rests on a form of shared judicial review: the C.J.E.U. provides interpretative guidance to the national court, while the latter retains responsibility for the final evaluation of the measure at issue.[109] This last aspect is decisive, because ultimately it is for the national court to assess the compatibility of E.U. law, as interpreted by the C.J.E.U., with the national measure.

Nevertheless, the doctrine of abuse is potentially disruptive to the uniform application and effectiveness of E.U. law, especially if its application is demanded of national courts, which could thus prevent the application of the fundamental freedom invoking the general principle. It also raises concerns about legal certainty. While providing a clear guideline as how to apply the principle, the Luxembourg Court could orientate the proportionality assessment of national judges and therefore provide an indefeasible counter-balancing device.

Ultimately, the concept of abuse of right underlines the same reasonableness rationale of proportionality, as claimed by AG La Pergola in *Centros.*[110] They both carry an idea of excess: the right ceases to be protected where exercised in a disproportionate manner.[111] Yet, in E.U. law, the doctrine of abuse seizes private conduct, while proportionality is a form of control over public power.

Returning to the potentially disruptive nature of the doctrine of abuse, the C.J.E.U. has traditionally required a case-by-case assessment of national anti-abuse measures to

[109] *See* Takis Tridimas, *The General Principles of Law: Who Needs Them?*, 52 Les Cahiers de Droit 419, 435 (2015).

[110] C-212/97, Centros Ltd v Erhvervs- og Selskabsstyrelsen, Opinion of Mr Advocate General La Pergola, ¶ 20 1999 E.C.R. 1999 I-01459.

[111] *See* L. Neville Brown, *Is There a General Principle of Abuse of Rights in European Community Law?*, in 2 Institutional Dynamics of European Integration: Essays in Honour of Henry G. Schermers 511, 515 (Deirdre Curtin & Ton Heukels eds., 1994), *quoted in* C-212/97, Centros Ltd v Erhvervs- og Selskabsstyrelsen, Opinion of Mr Advocate General La Pergola, ¶ 20 1999 E.C.R. 1999 I-01459.

ensure that E.U. law is not incorrectly applied. This was recently made clear for instance in *SEGRO*,[112] a case concerned with the free movement of capital, where the C.J.E.U. held that, to comply with the principle of proportionality, a national anti-abuse measure should enable the national court to carry out a case-by-case examination, having regard to the particular features of each case and taking objective elements as a basis of the assessment.

CONCLUSIONS

Since *Centros*, through Treaty amendments, proliferation of Union competences, and the entry into force of the Charter, the E.U. has transcended its initial role as a project of mere market integration. Accordingly, there is a need for a shift in the interpretation of market freedoms, coupled with greater awareness of the role of companies in the European "social market". While it remains true that many national measures brought before the Court were undoubtedly disproportionate and detrimental to the market, the disconnection of establishment from the pursuit of genuine economic activity, as determined in *Polbud* and confirmed in *Edil Work*, is not entirely comprehensible. Essentially, it raises valid concerns regarding the type of economic integration this approach would foster. *A fortiori*, it poses problems from the standpoint of a fair and socially conscious market, particularly considering that corporate relocations entail significant consequences for stakeholders, notably workers, and impact the prevention of tax avoidance and criminal behaviour.

If the Court perceives itself as having transitioned from a supernational trade judge to a truly constitutional(ised) jurisdiction, it must take charge of this role even in economic law matters, tempering the inclination to prioritize the individual rights of economic actors and providing the E.U. legal system with a serious component of social consideration. The protection of a various spectrum of fundamental rights is precisely the original rationale of European democratic constitutionalism.

Focusing on freedom of establishment, this constitutional aspiration seems to be frustrated, for instance, when the Court interprets the economic freedom and the fundamental right to conduct a business as legitimizing collective dismissals of employees for economic reasons. Outcomes of this kind seem to express, at the opposite, the trend to a Court that, perceiving itself as a rampart of all trade courts, appears more

[112] Joined Cases C-52/16 & C-113/16, 'SEGRO' Kft. v. Vas Megyei Kormányhivatal Sárvári Járási Földhivatala and Günther Horváth v. Vas Megyei Kormányhivatal, ECLI:EU:C:2018:157 (Mar. 6, 2018).

concerned with stretching the freedom of economic actors and little else. Despite the legislative intervention to restore stakeholders' protection, illustrating the notion of abuse of corporate mobility in a unitary fashion seemed desirable for addressing the interpretative ambiguities that national courts will soon be expected to resolve. This conceptualisation built on the case law on the general principle of abuse to propose an open and dynamic solution to the C.J.E.U. and national courts: a complex factual and objective assessment for detecting artificial relocation arrangements.

In fact, the doctrine of abuse has mostly been developed and conceptualised in the realm of taxation, a field central to the interests of Member States and therefore granted wider margins for the containment of E.U. rights through the general principle. The massive presence of E.U. secondary legislation on tax matters, unlike corporate conversions, has also provided more opportunities for adjudication by the C.J.E.U.

Besides the exception of the tax field, there is a concurrent reason for judicial circumspection regarding abuse. Abuse truly is a "special general principle", with a private rather than a public law origin and aimed at denying rights to individuals. When viewed within the context of the interaction between national and Union legal systems, the application of this general principle, preventing individuals from unduly benefiting from E.U. rights, constitutes a deviation from the structural principles of primacy and *effet utile.*[113] Even in such technical matters, if one considers, for instance, the need of protection of workers in companies' relocation, constitutional tensions between structural principles (defining the functional blueprint and the E.U. legal system) and rule of law principles (concerned with the protection of individuals) seem to emerge.[114] Looking back to the freedom of establishment, the question revolves around reconciling the employment of the doctrine of abuse with its potential effects on primacy and effectiveness of E.U. law. In this regard, there are two options. The first entails accepting the derogation to primacy and effectiveness through a clearly structured general E.U. principle defined by the Court in a guidance case. The potential risks associated with abuse would then be addressed through the C.J.E.U.'s prudent application of proportionality and, through the latter's orientation, by national courts. The second possibility involves further internalisation of stakeholder protection in E.U. law,

[113] *See, e.g.*, Case C-367/96, Alexandros Kefalas and Others v Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE), 22 1998 E.C.R. 1998 I-02843; Case C-441/93, Panagis Pafitis and others v. Trapeza Kentrikis Ellados A.E. and others, 68 1996 E.C.R. I-01347; Case C-441/93, Panagis Pafitis and others v. Trapeza Kentrikis Ellados A.E. and others, Opinion of Mr Advocate General Tesauro, 27 1996 E.C.R I-01347 ("[W]hat is at stake is the primacy of Community law over domestic law and the effectiveness of the preliminary rulings given by the Court.").

[114] *See* Takis Tridimas, *The General Principles of EU Law and the Europeanisation of National Laws*, REV. EUR. ADMIN. L., July 2020, at 5, 9.

particularly social rights, thereby reducing the relevance of the abuse doctrine as a tool to prevent the unjust invocation of E.U. law in favour of national law. In this scenario, the balancing operation will become more horizontal, with the C.J.E.U. interpreting secondary law by balancing economic freedom with strengthened social protection at the Union level. After all, 60 years of economic integration have made business activities so transnational that initiatives against abuse at the national level are increasingly ineffective.

As for another structural principle, the unitary framework for abuse of establishment of companies would undoubtedly benefit the uniformity of E.U. law. Currently, at the sectoral level, national authorities are empowered to deny relocation on the grounds of a broad concept of abuse. Allowing national authorities flexibility in interpreting this general clause will lead to varying standards of legitimacy for such operations across the Union, and ultimately frustrate the very purpose of harmonisation.

Despite the systematic complexities, the E.U. needs a well-established principle of abuse of rights, particularly in the field of corporate mobility, as "any legal order which aspires to achieve a minimum level of completion must contain self-protection measures, so to speak, to ensure that the rights it confers are not exercised in a manner which is abusive, excessive or distorted".[115] Its judicious application by national courts, under the guidance of the C.J.E.U., coupled with the principle of proportionality as the primary balancing tool in adjudication, will preserve fairness and consideration of a wider set of interests within the unique European model of a social market economy.

[115]C-367/96 Alexandros Kefalas and Others v. Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE), Opinion of Mr Advocate General Tesauro, ¶ 24 1998 E.C.R I-02843.

FUNDING DETAILS

The author declares that no funding was received for the research, authorship, and/or publication of this article.

DISCLOSURE STATEMENT

The author reports there are no competing interests to declare.

DATA AVAILABILITY STATEMENT

Data sharing is not applicable to this article as no new data were created or analysed in this study.

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