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Foreword

It is with great pleasure that we present the thirteenth issue of the *SEE Law Journal*, a double-edition for the 2024, which brings together an insightful collection of papers addressing critical contemporary legal issues across the European Union and South East Europe.

One of the first papers discusses the delicate balance between state authority and individual freedoms in North Macedonia during the COVID-19 pandemic. The analysis of emergency measures offers an essential reflection on the division of powers and the legal constraints governments must observe in times of crisis.
Another noteworthy contribution examines the tension between transparency and personal privacy in Croatia's public registers. The increasing demand for open access to data is weighed against the pressing need to protect personal information, shedding light on the complexities of public policy in the digital age.
Turning to the consumer protection sphere, the journal features a comprehensive study of the European Union's response to planned obsolescence and its efforts to safeguard consumers' rights to repair. This research explores the evolving role of legislation in ensuring fair commercial practices and sustainable consumer rights within the EU.
The impact of EU Directive 2019/771 on the legislation of Bosnia and Herzegovina is also explored, offering a critical evaluation of how legal harmonization within the Union's internal market is being implemented in the region. This paper serves as an important resource for understanding the legal challenges and opportunities of aligning national legislation with EU standards.
In addition, a paper on the right to a trial within a reasonable time in Croatia highlights the ongoing challenges in ensuring fair access to justice. This analysis brings to the forefront the need for legal reforms aimed at improving the efficiency and effectiveness of judicial systems.
Finally, the journal examines the legal protections for women in the workplace, particularly regarding pregnancy, maternity, and work-life balance within EU labor law. The paper examines the harmonization of the labor legislation in the Republic of North Macedonia with EU standards, emphasizing the importance of gender equality and social protection in a rapidly evolving labor market.

These articles, and the collective body of work presented here, serve not only as academic research but as vital contributions to the ongoing development of legal systems that promote justice, fairness, and human rights. They challenge us to think critically about how law adapts to societal needs, technological advances, and global challenges.

We hope that this journal sparks further dialogue among scholars, practitioners, and policymakers and continues to inspire deeper reflections on the evolving role of law in a complex and interconnected world.

Sincerely,

Prof. Dr. sc. Neda Zdraveva
Editor-in-Chief

Aleksandar Lj. Spasov*

STATE OF EMERGENCY AND DIVISION OF POWERS: THE COVID-19 CASE IN NORTH MACEDONIA

Abstract
The outbreak of the COVID-19 pandemics in 2020 was not only a health issue and an extreme challenge for the health systems of the countries, but it had also a significant impact on the functioning of the institutions and legal systems. Many countries, including my own country, the Republic of North Macedonia, decided to introduce a state of emergency, a constitutional last resort in an extreme situation, in order to secure the functions of the state in the given circumstances. Beginning with the functioning of the health system, continuing with the functioning of the economy, providing social services and, last but not least, providing security for the citizens.
The state of emergency, in general, challenged the two main pillars of the democratic constitutional orders: division of powers and the protection of human rights and liberties. The main focus of the paper is on the constitutional and legal basis of the state of emergency, control mechanisms of the executive branch of state power during state of emergency and learned lessons from the last state of emergency. The paper, also, analyzes, the draft Law on State of Emergency prepared by the Working Group established by the Ministry of Justice of the Republic of North Macedonia.

Keywords: State of emergency, Covid-19, Division of powers, Rule of Law, Democracy, Human rights and freedoms, North Macedonia.

1. The emergence of the state of emergency

On 11.3. 2020 World Health Organization (*hereinafter:* WHO) Director-General's opening remarks on the media briefing dedicated to the already alarming situation regarding the spreading of a deadly new virus from the Corona family of viruses, named COVID-19 since it was initially identified in the end of 2019 in China[1], marked the beginning of a world-wide crisis, primarily in the health sphere, but also in many other areas of living such as the economy, transport, education, but also the functioning of the legal and political systems of the countries and, closely connected to that, the human rights and freedoms and the democracy. The remarks of the WHO Director-General, although given in the initial phase of

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[1] World Health Organization, Coronavirus, https://www.who.int/westernpacific/health-topics/detail/coronavirus.

the development of the pandemic, included a warning that the pandemic isn't solely a health issue, and that "political leadership" will be required to prepare the society for different consequences that will emerge following the outbreak of the pandemic. Namely, he recommended that "this is not just a public health crisis, it is a crisis that will touch every sector – so every sector and every individual must be involved in the fight" and that "…countries must take a whole-of-government, whole-of-society approach…"[2].

Many countries in the world were unprepared how to deal with an emergency situation on such a large scale. Especially vulnerable were countries which legal and political systems are based on the rule-of-law and the democratic principle of governance since it was obvious from the very beginning of the crisis that the situation will have huge impact on their systems by disrupting the principles on which democratic countries based on rule-of-law function. Most important consequence was the fact that many countries were forced by the situation to introduce the "state of emergency", an exceptional situation described in the constitutions of the countries, that creates new rules for functioning of the institutions, introduces new tools of governing replacing the laws adopted in a democratic procedure with decrees, shifts the balance of power defined by the principle of division of powers and affects even the basic human rights and freedoms as defined by the domestic and international conventions and treaties.

Although the "state of emergency" as a legal basis for limitation of human rights and freedoms is included in most national constitutions of the democratic countries and in the international conventions, such as the "Convention for Protection of Human Rights and Fundamental Freedoms" known as the "European Convention on Human Rights" *(hereinafter:* Convention) in article 15[3], still many countries due to the lack of previous recent experience in the practice faced shift from the democratic concept of sovereignty deriving from the will of the people and practiced through their representatives in the parliaments in a situation of almost complete domination of the executive branch (the governments and/or the heads of states) similarly to the controversial definition of sovereignty given by the authoritarian legal theorist Carl Schmitt that "sovereign is he who decides on exception"[4].

The primary focus of the article is the experience of North Macedonia during the pandemic of Covid-19 with the 'state of emergency" and the consequences it had on the constitutional principle of division of powers. Additionally, the article as a secondary focus has the limitations of the human rights and freedoms of the citizens, but only in the context of the changed institutional set-up following the introduced state of emergency. Finally, the article presents the most important principles of the draft Law on State of Emergency, prepared by a interdisciplinary Working Group, established by the Ministry of Justice of the Republic of North Macedonia after the state of emergency ended[5]. The Working Group had a task to implement the learned lessons from the first in history state of emergency in a law that will regulate different aspects including the division of powers in a systematic, coherent and detailed way. Unfortunately, up to the present day the draft Law hasn't been adopted by the Parliament which is a sign that the interest in this subject decreased as the time passed

[2] World Health Organization Director-General's opening remarks 2020, https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020.

[3] European Convention on Human Rights, https://www.echr.coe.int/documents/d/echr/convention_ENG.

[4] Schmitt, Carl,Political Theology, Four Chapters on the Concept of Sovereignty, Chicago: University of Chicago, 2005, p. 5.

[5] The author of the paper was member of the Working Group, representing the President of the Republic of North Macedonia as his Advisor on Constitutional Issues.

although the possibility of a new emergency that would require a state of emergency mustn't be underestimated in a "risk society" in which we are living, as defined by the famous German sociologist Ulrich Beck[6].

2. Legal and Political Context in North Macedonia in the first half of 2020

North Macedonia was in a complicated legal and political situation in the beginning of 2020. Namely, on 16.2.2020, the Parliament adopted a decision to dissolute itself[7] to trigger a snap election, as previously agreed by the leaders of the main political parties following the stalemate in the European integration of the country caused by the decision of France to veto the start of the accession talks for North Macedonia and Albania earlier in the autumn of 2019[8].

According to art. 63, par. 7 of the Constitution of the Republic of North Macedonia (*hereinafter*: Constitution) the Parliament can be dissolved only by its own decision adopted by a majority of all members of the Parliament. If such a decision, then the parliamentary elections should be held within 60 days following the day when the Parliament adopted a decision for self-dissolvement. In the same article is stated that the regular term for which the members of the Parliament are elected is 4 years and that "can be extended only in cases of state of war or state of emergency"[9].

Following the decision of the Parliament, the President of the Parliament issued a Decision that set the date for the parliamentary elections for 12.4.2020[10] which also initiated the procedures for organization of the elections for which the State Electoral Commission is responsible. The newly created situation meant that the country lost a functional parliament, and that the government was only in a technical mandate to perform the necessary tasks, but without full political legitimacy. In the described situation, the outbreak of the pandemic put the institutions in even harder situation. Beside the lack of medical recourses to deal with the health crisis, the country faced a situation of a dysfunctional parliament, government that lacked political legitimacy and the only institution that was in a full mandate was the President of the Republic. Having in mind that according to Chapter 3 of the Constitution "Organization of the State Authority"[11] North Macedonia is a parliamentary republic with a President of the Republic that has very limited executive powers, it can be concluded that in the beginning of the pandemic the entire state apparatus faced important legal obstacles, but also lacked full democratic legitimacy.

Once North Macedonia recorded the first cases of COVID-19 in early March 2020 and following the declaration of a pandemic by WHO, the question of the functioning of the state institutions

[6] Beck, Ulrich, Risk Society, Towards a New Modernity, London, Newbury Park, New Delhi: Sage Publications, 1992.

[7] Decision on Dissolution of the Assembly of the Republic of North Macedonia, Official Gazette of the Republic of North Macedonia, No.43 from 16.2.2024, p. 2, http://www.slvesnik.com.mk/Issues/14dfd5c2d1764a809ee97512c36e15f6.pdf.

[8] "France sinks EU hopes of North Macedonia, Albania", Balkan Insight from 18.10.2019, https://balkaninsight.com/2019/10/18/france-sinks-eu-hopes-of-north-macedonia-albania/.

[9] Constitution of the Republic of North Macedonia, https://www.sobranie.mk/content/Odluki%20USTAV/UstavSRSM.pdf.

[10] Decision on Early Elections for Deputies in the Assembly of the Republic of North Macedonia, Official Gazette of the Republic of North Macedonia, No.43 from 16.2.2024, p. 2, http://www.slvesnik.com.mk/Issues/14dfd5c2d1764a809ee97512c36e15f6.pdf.

[11] Constitution of the Republic of North Macedonia, https://www.sobranie.mk/content/Odluki%20USTAV/UstavSRSM.pdf.

had to be resolved in an emergency procedure. The legal framework for functioning in a state of emergency is described in only two articles 125 and 126 of the Constitution, but although envisioned in the Constitution, a special Law that will regulate in detail the functioning of the institutions in such situation wasn't adopted in the past three decades since the adoption of the Constitution in 1991. According to art. 125 of the Constitution "A state of emergency occurs when major natural disasters or epidemics occur. The existence of a state of emergency on the territory of the Republic of Macedonia or on a part of its territory part is decided by the Assembly at the proposal of the President of the Republic, the Government or at least 30 MPs. The decision determining the existence of a state of emergency shall be made by two-thirds majority of votes from the total number of deputies and is valid for 30 days. If the Assembly cannot meet, a decision on the existence of a state of emergency shall be enacted by the President of the Republic and submitted to the Assembly for confirmation as soon as it is in possibility to reconvene". According to art. 126 "In the event of a state of war or emergency, the Government in accordance with the Constitution and law enacts decrees with force of a law. The Government's authority to enact decrees with a force of a law lasts until the state of war or state of emergency is in force, which is decided by the Parliament"[12].

To prevent a complete shift of power from the legislative to the executive branch and the President of the Republic, the initial discussions by the expert community within the *ad hoc* working group convened by the President of the Republic[13] were in a direction that the Parliament shall reconvene following the described constitutional provisions for extension of the term in a situation of state of war or state of emergency. However, there wasn't clear consensus within the expert community, but also the President of the Parliament rejected the presented ideas claiming that the quoted provisions are possible only when the parliament is in a full mandate and not once the Parliament adopts a decision for self-dissolution. The interpretation of the Constitution by the President of the Parliament was later confirmed by the Constitutional Court since it was challenged by some civil organizations[14]

The complexity, but also the emergency of the situation forced the President of the Republic to declare a state of emergency on 18.3.2024 for the first time in the constitutional history of the country[15] Having in mind the legal consequences of the decision, the President of the Republic, the President of the Parliament and the President of the Government in absence of a special Law on State of Emergency decided to keep as much as possible to the constitutional "check and balances" stated in the principle of division of powers by dividing the roles that led to the decision. Namely, the proposal to introduce a state of emergency with the accompanying argumentation and justification was made by the Government and submitted to the Parliament. The President of the Parliament confirmed in a written statement that the Parliament isn't in position to convene due to constitutional obstacles and transferred the proposal to the President of the Republic. Finally, the President of the Republic enacted a

[12] Constitution of the Republic of North Macedonia, https://www.sobranie.mk/content/Odluki%20USTAV/UstavSRSM.pdf.

[13] "Experts in Constitutional law will "assist" for prolongation of the elections", 360 Degrees from 17.3.2020, https://360stepeni.mk/eksperti-po-ustavno-pravo-ke-asistiraat-za-odlozhuvane-na-izborite/.

[14] Decision, U No.40/2020, Constitutional Court of the Republic of North Macedonia, https://ustavensud.mk/archives/19015.

[15] Decision on Determining the Existence of a State of Emergency, Official Gazette of the Republic of North Macedonia, No.68 from 18.3.2020, p. 2, http://www.slvesnik.com.mk/Issues/4049500a3fc544da898402bee6a65758.pdf

decision to introduce a state of emergency[16]. The decision introduced a state of emergency for a duration of 30 days and enabled the government to adopt decrees with a force of a law. The state of emergency in North Macedonia lasted for 96 days and in total 5 decisions were enacted by the President of the Republic following the proposals by the Government. The first decision, as said, was enacted on 18.3.2020 for a period of 30 days[17], the second decision was enacted on 16.4.2020 for a period of 30 days[18], the third decision was enacted on 16.5.2023 for a period of 14 days[19], the fourth decision was enacted on 30.5.2024 for a period of 14 days[20] and the fifth decision was enacted on 15.6.2024 for a period of 8 days.[21]

3. Division of Powers during the State of Emergency in North Macedonia (Legal and Political Dilemmas)

The introduction of the state of emergency, especially in the described circumstances, as already stated, created numerous legal and political dilemmas, one of which was how to uphold to the principle of division of powers or how the check and balances between the different branches of the state authority can function in a situation that in its essence creates concentration of power. In the following section, the main legal and political dilemmas will be discussed.

One of the first decrees with force of a law adopted by the Government was to halt all procedures regarding the organization of the elections, initially scheduled for 12.4.2020. The decree stipulated that the procedures would continue, and the elections will be organized once the state of emergency is over[22]. This decree was necessary also having in mind the constitutional norm to organize the elections within 60 days after the dissolution of the Parliament. The Government by this decree, practically, "frizzed" the time since there isn't a constitutional possibility to amend the Constitution by decree with force of a law. However, the mentioned decree created the first dilemma and that is the fact the confirmation of the decisions of the President of the Republic on introduction of state of emergency could happen only after the new Parliament is constituted following the elections which made the confirmation mere formality, and in practice disabled any parliamentary control of the executive branch during the state of emergency.

[16] Personal notes of the author produced in hid capacity as Advisor to the President of the Republic of North Macedonia on Constitutional Issues.

[17] Decision on Determining the Existence of a State of Emergency, Official Gazette of the Republic of North Macedonia, No.68 from 18.3.2020, p. 2, http://www.slvesnik.com.mk/Issues/4049500a3fc544da898402bee6a65758.pdf.

[18] Decision on Determining the Existence of a State of Emergency, Official Gazette of the Republic of North Macedonia, No.104 from 17.4.2020, p. 2, http://www.slvesnik.com.mk/Issues/9e1c06c7e2474dd9bc49f8dd46e0f793.pdf.

[19] Decision on Determining the Existence of a State of Emergency, Official Gazette of the Republic of North Macedonia, No.127 from 17.5.2020, p. 2, http://www.slvesnik.com.mk/Issues/d6c92844ad5a4fe2bc47874b138e97fa.pdf.

[20] Decision on Determining the Existence of a State of Emergency, Official Gazette of the Republic of North Macedonia, No.142 from 31.5.2020, p. 2, http://www.slvesnik.com.mk/Issues/77051cc736f74b29be692142447b43a4.pdf.

[21] Decision on Determining the Existence of a State of Emergency, Official Gazette of the Republic of North Macedonia, No.159 from 15.6.2020, p. 2, http://www.slvesnik.com.mk/Issues/08b78c356ddb4deca2f171fe70aace21.pdf.

[22] Decree with a Force of a Law on Issues related to the Election Process, Official Gazette of the Republic of North Macedonia, No.72 from 21.3.2020, p. 5, http://www.slvesnik.com.mk/Issues/efd6cd84b37e40a19e3f75515b759d06.pdf.

Next dilemma was the interpretation of the constitutional provision limiting the duration of the decision on introduction of state of emergency to 30 days. Namely, the second decision of the President of the Republic to introduce a state of emergency for another 30 days was challenged by some civil organizations, political parties and citizens claiming that the total period of duration of the state of emergency for one "legal and factual situation" as the applicants claimed the pandemic of COVID-19 was, can't exceed 30 days. The Constitutional Court in its decision concluded that constitutional limitation of 30 days applies to a concrete decision and interpreted the norm in a direction that a state of emergency can't be introduced with a single decision for an indefinite period of time and the decision maker is obliged to reexamine the existence of the conditions for introduction of state of emergency as stated in the Constitution with each new decision while at the same time the number of decisions isn't limited as long as the constitutionally defined conditions for introduction of state of emergency exist[23]. This very important decision of the Constitutional Court clarified the division of power between the President of the Republic and the Government in a situation when the Parliament can't convene because of legal or factual obstacles.

Following the mentioned decision of the Constitutional Court and in absence of a specific Law, a procedure was introduced that practically applied the system of check and balance in the given circumstances. Namely, with each new proposal the Government was obliged to provide argumentation and justification for *de iure* enacting a new decision on introduction of state of emergency or *de facto* prolongation of the duration of the state of emergency. The President of the Republic using his constitutional powers re-evaluated the argumentation and justification submitted by the Government before enacting a new decision. The President of the Republic further legitimized the process by submitting the proposals to the Security Council of the Republic, a committee under presidency of the President of the Republic with constitutional task according to art. 86 of the Constitution to decide on issues of national security in the broadest meaning of that term[24].

The Constitutional Court also took an active role in the control of the constitutionality of the decrees with a force of law, a very important step in upholding to the principle of check and balances in a situation when both the legislative and executive power are vested in the Government and there isn't institutional political control of the work of the Government which is the essence of the principle of division of powers. According to the Court's statistics the Constitutional Court filed 142 initiatives for constitutionality check of the decrees with a force of a law, partially initiated by different entities or persons and partially on its own initiative (some of the initiatives addressed same decrees with a force of a law).

Finally, the Ministry of Justice of the Republic of North Macedonia fulfilled its obligation deriving from art. 15, par. 3 of the Convention[25] to inform the Secretary General of the Council of Europe on the reasons for derogation from the rights and freedoms guaranteed by the Convention, the taken measures, but also to inform the Secretary General when the measures ceased to operate and the provisions of the Convention were again fully executed. That approach of the Ministry of Justice was an important factor in upholding to the principle of check and balance of the power and bringing additional legitimacy in a situation of limitations

[23] Decision, U No.55/2020, Constitutional Court of the Republic of North Macedonia, https://ustavensud.mk/archives/19269.

[24] Constitution of the Republic of North Macedonia, https://www.sobranie.mk/content/Odluki%20USTAV/UstavSRSM.pdf.

[25] European Convention on Human Rights, https://www.echr.coe.int/documents/d/echr/convention_ENG.

of the human rights and freedoms by involving the Council of Europe, an international pan-European organization with focus on protection of human rights and freedoms.

4. Towards a Law on the State of Emergency – Lessons (not) Learned

As mentioned at the beginning of the article, the first ever in the constitutional history of North Macedonia state of emergency came as a legal and political shock both for the institutions and the officials in the institutions. Therefore, the Ministry of Justice decided to establish a multidisciplinary Working Group consisting of experts to prepare a draft Law on the State of Emergency that shall clarify the constitutional legal framework in articles 125 and 126 of the Constitution and establish a system of division of tasks and interoperability of institutions during the state of emergency. The Working Group prepared the draft Law which was submitted by the Ministry of Justice to the Venice Commission of the Council of Europe in July 2021[26]. In October 2021 the Venice Commission issued the Opinion on the draft Law[27]. In this section the most important proposals of the draft Law regarding the mentioned constitutional dilemmas will be briefly discussed. One of the most important tasks for the Working Group was to closely and more precisely define the circumstances when state of emergency as a consequence of great natural disasters and epidemics according to the Constitution, can be declared in order to avoid possible abuse of the legal institute "state of emergency" for other political reasons when the present circumstances don't fulfil the criteria to declare state of emergency. Therefore in art. 2 of the draft Law was proposed that "The decision for determining the existence of state of emergency on the territory of the Republic of North Macedonia or part thereof may be adopted when the risks and threats or consequences from great natural disasters or epidemics are of such scope and intensity that their occurrence or the consequences cannot be prevented or removed with the functioning of the established systems for crisis management and protection and rescue because of which, in order for them to be mitigated or removed, application of special measures and means with increased intensity and different mode of work shall be necessary". To have as precise as possible legal provisions the draft Law in art. 4 included a glossary that in details describes the necessary circumstances.

Next, the draft Law in art. 5 defines the main principles that should be respected during the state of emergency and during implementation of the provisions of the Law. The proposed principles are principle of priority and emergency, principle of integrated activity and intersectoral cooperation, principle of proportionality of limitation of human rights, principle of prohibition of discrimination, principle of participation of the citizens, principle of publicity and principle of limited duration. The mentioned principles are detailed in art. 6-12 in the draft Law to concretize them for the purposes of coherent implementation of the Law.

Having in mind the experience from the last state of emergency, the draft Law in detail regulates the procedure for declaration of state of emergency, the content of the proposal and the content of the decision to declare state of emergency. Regarding the content, the draft Law in article 15 requests detailed explanation of the reasons for the proposal, such as

[26] Draft Law on the State of Emergency, North Macedonia, European Commission for Democracy through Law (Venice Commission), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2021)072.

[27] Opinion on the Draft Law on the State of Emergency, North Macedonia, European Commission for Democracy through Law (Venice Commission), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)040-e.

"detailed insight of the state (threat estimation, consequences that occurred or may occur because of the natural disaster or epidemic and the mode of removing the danger or the state that occurred)".

Regarding the right of the President to declare a state of emergency when the Parliament can't meet the Venice Commission in its Opinion suggested to specify the constitutional norm in the draft Law in a direction that "the law should specify that the President may declare the state of emergency only if the Assembly is incapable of meeting *for objective reasons*. In all other cases the decision to declare the state of emergency should belong to the Assembly"[28]. If adopted, the recommended provision will limit the possibilities for legal uncertainty as it was the case in 2020.

It is also important to mention that the draft Law in art. 17 stipulates the right of the President to extent the state of emergency for a new period of maximum 30 days after re-examining the existence of the legally defined circumstances, but in the same time obliges the Parliament to re-examine the circumstances that prevent the Parliament to meet by placing the primary competence for prolongation of the state of emergency to the Parliament and giving the President that authority only if the Parliament is still unable to meet.

One of the important issues that arose from the state of emergency in 2020 was the issue of the legal consequences if the Parliament doesn't confirm the decision (s) of the President to declare state of emergency for, as an example, political reasons, having in mind that the newly constituted Parliament after the elections in 2020 didn't vote because of lack of qualified two-third majority to confirm the decisions of the President without stating the reason although they were submitted for confirmation according to the constitutional provisions and were subject of constitutionality check by the Constitutional Court. The draft Law in art. 18, par. 6 and 7 states that "If the Assembly shall not confirm the decision of the President of the Republic for determining the existence of state of emergency, then the validity of the decision shall terminate and the state of emergency shall cease", but also that "Not confirming the decision of the President of the Republic for determining the existence of state of emergency shall not influence the legal consequences occurred during the validity of the decision of the President of the Republic for determining the existence of state of emergency".

Reacting to the issue with the dissolution of the Parliament in 2020, the draft Law in art. 30, par. 4 stipulates that "If the Assembly is dissolved or shall adopt a decision for dissolution during the state of emergency, the decision for dissolution shall not be valid during the state of emergency and the act for calling of elections adopted by the President of the Assembly shall be void and all electoral activities shall be declared null and void, i.e. the President of the Assembly cannot adopt an act for calling of elections". The proposed provision offers a solution to the constitutional dilemma that arose in 2020. However, the Constitutional Court confirmed the interpretation of the then President of the Parliament that once parliament has been dissoluted it can't reconvene, so this provision if adopted may be subject to a further constitutionality check.

In art. 31 of the draft Law is regulated that during the state of emergency the Parliament exercises the political control over the work of the government although it can't initiate non-confidence vote.

The Law also regulates one of the most controversial issues and that is the rule by decrees. Addressing that issue the Venice Commission made important recommendations that if

[28] Opinion on the Draft Law on the State of Emergency, North Macedonia, European Commission for Democracy through Law (Venice Commission), p. 19, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)040-e.

adopted will limit the potential political voluntarism of the Government and tighten the space for decisions that aren't in conformity with the Constitution and, especially, will strengthen the guarantees for protection of the basic human rights and freedoms as regulated in the Constitution and in the international conventions and treaties ratified by North Macedonia. Namely, the Venice Commission recommends that "the power of the Government to adopt decree-laws has to be expressly limited in the law to issues directly related to the emergency situation. It should be specified that decree-laws can introduce temporary changes to the current legislation but cannot affect the law on the state of emergency itself and should not make changes to the legislation defining the system of checks and balances. Any systemic change should be left to the ordinary legislation" and that "all decree-laws issued by the Government during the state of emergency should be submitted to the Assembly which should consider them as soon as possible and either discontinue the emergency measures which are still in operation, or maintain their operation, or/and take necessary remedial action, if the measures introduced during the state of emergency are no longer in force"[29].
Unfortunately, the lesson not learned is that the preparations for a possibility of state of emergency in future shall start during regular circumstances. This task was only partially fulfilled by drafting a legislation proposal and inviting the Venice Commission to evaluate the draft Law. After 4 years since the draft Law was prepared it isn't adopted by the Parliament and the public interest and debate almost disappeared. We may conclude that the expert community and the public ignore very important issue that deals not only with handling the crisis in a state of emergency, but also with preserving the rule of law and the democratic political order when it is most vulnerable.

5. Conclusion remarks

The state of emergency introduced during the COVID-19 pandemic in North Macedonia was a unique experience for the citizens, for the institutions and for the officials. Although stipulated in the Constitution since 1991, the country never managed to adopt a specific Law on State of Emergency that will specify articles 125 and 126 that only in general regulate the issue. The initial shock caused by the health crisis worldwide and the legal and political specifics in the country in that period, especially the dysfunctional Parliament, had to be managed by *ad hoc* created procedures, significant level of awareness for the importance of preserving the rule of law, protection of the human rights and freedoms and the integrity of the democratic political order.
The disrupted constitutional principle of division of powers was compensated by a system of check and balances in which beside the Government, the President of the Republic and the Constitutional Court played essential roles. However, the initial enthusiasm to prepare the system for a possible future state of emergency that resulted in preparation a draft Law on State of Emergency very soon after the issue was largely forgotten by the public lost the strength and the process ended in a stalemate. North Macedonia must as soon as possible return to the issue and prepare the system for a possibility of new emergency especially having in mind the risks which we face in the contemporary world.

[29] Opinion on the Draft Law on the State of Emergency, North Macedonia, European Commission for Democracy through Law (Venice Commission), p. 19, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)040-e.

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HOW MUCH TRANSPARENCY IS TOO MUCH? OPEN ACCESS TO PUBLIC REGISTERS IN CROATIA AND PERSONAL DATA PROTECTION

Abstract
Public registers in Croatia are predominantly in the open-access regime. This raises issue of their compliance with the personal data protection law. This paper elaborates on some of the crucial criteria under personal data protection law that determine the legality of data processing in the context of public registers. While the focus is primarily on the operation of public registers in Croatia. Still, due to their similarity with systems in other countries, some of the arguments made here could also be applicable elsewhere. Authors argue that there are many risks to open access to public registers. Firstly, it is possible to use data for purposes unrelated to those for which it was made public. This is a serious problem, as recognised by the Court of Justice of the European Union, and it should lead to some serious rethinking about how public registers should function. More broadly, the authors consider that the crucial and more pressing issue is the possible massive scraping of data from public registers by private entities and its use for secondary purposes. If these practices happen in practice, it will lead to a serious loss of control over data and enable large-scale profiling of citizens. To reduce these risks, the authors advocate for dispensing with open and anonymous access and enabling access only to identified and authenticated users through national e-government infrastructure.

Keywords**:** GDPR; personal data; public registers; secondary use of data; transparency

1. Introduction

Public registers are found in any modern public administration. They serve essential public and private needs, such as publicising certain rights and enabling their acquisition (i.e., the land register), providing information about legal entities or organisations (registers of businesses, associations, foundations, political parties, religious organisations, etc.), supporting anticorruption measures (register of declarations of public officials' assets) or fight against money laundering or terrorist financing (beneficial ownership register), facilitate protection of interest of third parties in certain proceedings (insolvency register), etc. From

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the perspective of those interests, those needs are generally best achieved by the broad availability of data. This is, however, in sharp contrast with requirements of personal data protection law, which as a principle requires that processing of that data be brought to a minimum, that is, to that extent which is strictly necessary.

Many of public registers have been established and functioning long before personal data protection laws started to appear (generally in Europe from the seventies or eighties of the last century,[1] and in Croatia since 2003). For instance, the history of land registration in Croatia goes back to the middle of the 19th century.[2] Therefore, it is understandable that the relationship between public registration systems and personal data protection law can often be uneasy. It is a fact that personal data protection law, as a relatively recent set of legal rules, is starting to significantly impact legal institutes that, for decades or even centuries, have pursued their own logic of development. But this is also a fact from which there is no escape. Personal data protection is now a fundamental human right in the European Union.[3] Some aspects of personal data protection have long been protected under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In the Republic of Croatia, personal data protection has been a constitutionally protected human right since 1990.[4] This right is nowadays also subject to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation, GDPR), which is directly applicable in EU Member States.

Therefore, personal data protection law is here to stay. It impacts all processing of personal data, and the ones in public registers are in no way an exception. This is being made clear also by the Court of Justice of the European Union (CJEU), which recently issued two decisions in which it drew some limits and provided guidance regarding the limits of processing of personal data by public registers, particularly in the context of transparency and open access.

Firstly, in August 2022, the CJEU published a decision in the case *OT*,[5] in which it found that national anticorruption legislation imposed disproportionate data processing obligations on public officials and members of their families. Next, in November 2022, the CJEU issued a judgement in the *WM* case, in which it declared invalid several provisions of EU directives on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, insofar as those provisions provided that Member States must ensure that information on the beneficial ownership of companies and of other legal entities incorporated within their territory is accessible in all cases to any member of the general public.[6] Those judgements shed additional light on the requirements which the personal data protection law imposes on public registers, specifically from the perspective of open access to those registers.

In this paper, we aim to elaborate on some of the crucial criteria under personal data protection law that determine the legality of data processing in the context of public registers. We focus primarily on the operation of public registers in Croatia. Still, due to their similarity

[1] Dragičević, D., Gumzej, N., Jurić, M., Katulić, T., & Lisičar, H. (2015). *Pravna informatika i pravo informacijskih tehnologija*. Narodne novine, p. 116.

[2] Klarić, P., Vedriš, M. (2008). *Građansko pravo*. Narodne novine, p. 305.

[3] Charter of Fundamental Rights of the EU, OJ C 326, 26.10.2012, p. 391–407, Article 8.

[4] Constitution of the Republic of Croatia, Official Journal nos. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14, Article 37.

[5] C-184/20 (*OT*), ECLI:EU:C:2022:601.

[6] C-37/20 and C-601/20 (*WM*), ECLI:EU:C:2022:912, para 92.

with systems in other countries, some of the arguments made here could also be applicable elsewhere.

2. A brief overview of selected public registers in Croatia

In Croatia, like in many other EU member states, multiple public registers are being operated for various purposes. The aim of this article is not to make extensive mapping of all public registers in Croatia, nor is it to analyse the development of those registers through time. Instead, our goal here is to present several widely used registers in Croatia and describe them in very brief terms, with the sole purpose of better contextualising discussion about applying personal data protection rules to local circumstances. In doing so, we will focus primarily on the scope of information available online, the method of accessing (whether user authentication is necessary or not), and relevant protective measures.

The Ministry of Justice and Public Administration of Croatia operates several registers, including those of **political parties**,[7] **councils, coordination of councils and representatives of national minorities**,[8] **associations,**[9] **foreign associations,**[10] **foundations,**[11] **foreign foundations**,[12] **religious communities**,[13] and **legal entities of the Catholic Church**[14]. These registers use similar interfaces and are publicly accessible online without user authentication. Registers are searchable by multiple criteria and provide access to the abovementioned organisations in Croatia, including their bodies, authorised representatives (in most cases), internal acts and contact details (where available). National personal identification numbers of authorised representatives are also accessible in some registers (political parties, associations, foundations). Regarding security measures, the CAPTCHA test must be performed for every access to detailed information about a particular organisation, which provides some protection against data scraping.

Next, the Ministry of Justice and Public Administration also operates an **insolvency register**,[15] which also serves as a national registrar under Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings. It contains information about persons subject to bankruptcy, extraordinary administration or consumer bankruptcy proceedings. Searchable (without authentication) based on, among other criteria, personal name or national identification number, and without any meaningful security measures (not even CAPTCHA), this register makes it extremely easy to access information about individual citizens subject to insolvency proceedings. For instance, the register enables searching using family or personal name only. For example, inputting any common personal name will display data about multiple individuals whose insolvency proceedings are pending or finished, often in the hundreds. Regarding the scope of publicly available data, the register will deliver the citizen's name, national personal identification number, home address and date of the opening of an insolvency proceeding. Moreover, it automatically links with the e-

[7] https://registri-npo-mpu.gov.hr/#!stranke (last accessed 15 December 2024).
[8] https://registri-npo-mpu.gov.hr/#!vijeca-manjina (last accessed 15 December 2024).
[9] https://registri-npo-mpu.gov.hr/#!udruge (last accessed 15 December 2024).
[10] https://registri.uprava.hr/#!strane-udruge (last accessed 15 December 2024).
[11] https://registri.uprava.hr/#!zaklade (last accessed 15 December 2024).
[12] https://registri.uprava.hr/#!strane-zaklade (last accessed 15 December 2024).
[13] https://registri.uprava.hr/#!vjerske-zajednice (last accessed 15 December 2024).
[14] https://registri-npo-mpu.gov.hr/#!pravneOsobeKC (last accessed 15 December 2024).
[15] https://nesolventnost.pravosudje.hr/registar (last accessed 15 December 2024).

Case system,[16] which is a portal that enables tracking the course and dynamics of court cases and displays further details about the stage of proceedings and actions taken.

Finally, the Ministry of Justice and Public Administration also operates **e-notice Boards** for courts and Financial Agency.[17] This portal, without any meaningful security measures, publishes notices issued by courts and the Financial Agency in cases envisaged by legislation on civil procedure, consumer bankruptcy and enforcement of judgements. These notices are frequently published in enforcement procedures against consumers, especially when the address of a person is unknown, or he or she cannot be notified otherwise. In terms of data published, it will typically include name, personal identification number, home address, and relevant case-specific documentation (from which it can easily be deduced the amount of debt subject to enforcement proceedings, to whom it is owed, for what goods or services, etc.). Unlike other registers, e-notice boards implement strict data removal policy in line with relevant legislation, and notices are generally removed after eight days (or longer in some cases).[18]

Conflict of Interest Commission controls a **register of public officials' assets**, which is also partially published online. Searchable (without authentication) by name and surname, it gives limited access to information from declarations made by public officials. Unlike registers mentioned above, it appears more privacy sensitive. It does not display the national identification number of officials, provides only limited information about family members (information about marital status and general information about whether the official has any children), and also partial information about the residence (there is data about the city, but not the address). On the other hand, it provides relatively detailed information about public officials and their spouse/partner's income, savings and other assets.[19] Protective measures such as CAPTCHA are not used.

Business register operates as a unified database of commercial courts' registries for businesses within their jurisdiction.[20] Accessible online since 1997, it was the first public register made available online in Croatia.[21] It enables open access, also without authentication, to a wide range of data about companies, including their identifying details, organisational structures and their membership, founders and members, authorised representatives, etc. For natural persons in the founders, members, or representatives' positions, it will generally provide their name, national identification number, and postal address. This register also does not utilise technical protective measures against data scraping.

Beneficial Ownership Register is operated by the Ministry of Finance and the Financial Agency.[22] It displays information about natural persons who are beneficial owners of legal entities (name, country of residence, date and year of birth, nationality, and the nature and extent of the beneficial ownership). However, unlike the abovementioned registers, the Beneficial Ownership Register cannot be accessed anonymously. Instead, it is available only with prior authentication through the e-Citizens portal.

[16] https://e-predmet.pravosudje.hr/ (last accessed 15 December 2024).
[17] https://e-oglasna.pravosudje.hr/ (last accessed 15 December 2024).
[18] https://e-oglasna.pravosudje.hr/politika-privatnosti (last accessed 15 December 2024).
[19] https://www.sukobinteresa.hr/hr/izvjesca-o-imovinskom-stanju (last accessed 15 December 2024).
[20] https://sudreg.pravosudje.hr/ (last accessed 15 December 2024).
[21] https://sudreg.pravosudje.hr/registar/f?p=150:120:12706460052520::NO::: (last accessed 15 December 2024).
[22] https://rsv.fina.hr/ (last accessed 15 December 2024).

Land registry and **cadastral plan** data are available online, without authentication, through the unified portal, which has advanced searching capabilities, including geolocation.[23] Information contained in these registers is not publicly searchable by name, surname or national identification number. Since these are land registration systems, the best starting point for the search is the address (place, street and street number). With access to this information, it is, in most cases, trivial to identify the cadastral parcel, which is also linked to land register data. Also, knowledge of specific cadastral or land registry identification data will lead to the same outcome. Once the relevant parcel is identified, the system will display relevant data about ownership of immovable property, burdens, mortgages, etc. Natural persons will ordinarily be identified by name, surname, national identification number, and residence address.

3. Impact of personal data protection rules on public registers

3.1. Processing of data in public registers is entirely within the scope of personal data protection law

Processing of personal data within public registers is in no way outside the scope of personal data protection law. Even though public registers are typically established by legislative acts and, therefore, processing of personal data within those registers is legitimised by law (either the European Union's or Member state's), those legislative acts in themselves have to comply with primary sources of EU law, national constitutional rules, Council of Europe's law, and EU personal data protection rules (GDPR). Therefore, legislation governing specific public registers can and must regulate the processing of personal data, but it must do so in compliance with all the abovementioned personal data protection rules and within boundaries established by them. What are those boundaries?

The Charter of Fundamental Rights of the EU (CFR) stipulates that the right to personal data protection is one of the fundamental human rights of the EU. Similar protection for personal data is also provided by many national constitutions (for instance, it is explicitly recognised as such in Article 37 of the Croatian Constitution). Finally, while the ECHR does not refer to personal data protection explicitly, it has been recognised by the ECtHR in numerous judgements that personal data can enjoy protection under Article 8 of the ECHR. Since the personal data of every citizen enjoy protection as part of their fundamental human right, any processing of personal data is seen as an interference with (limitation of) a fundamental right and can be lawful, from the human rights perspective, only under strict conditions under EU law (Article 52(1) of the CFR), national constitutional law (see i.e. Article 16 of the Croatian Constitution) or Article 8(2) of the ECHR. Since the focus of this Article is on EU law, we will analyse relevant conditions under the CFR, but similar requirements are also found in the ECHR and many national constitutions, including Croatian.

Under Article 52(1) of the CFR,

> "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

[23] https://oss.uredjenazemlja.hr/map (last accessed 15 December 2024).

Therefore, national and EU law can regulate personal data processing, but it must do so in a manner which (1) satisfies the principle of legality ("provided by law" element), (2) pursues legitimate aims ("objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others"), (3) protects the essence of the right to personal data protection, and (4) is necessary and genuinely meets legitimate aims it pursues.

If data processing is provided for by secondary EU law, failure to adhere to these requirements can render it invalid. Therefore, the CJEU was, for instance, able to declare invalid provisions of a directive which mandated disproportionate publication of personal data relating to beneficiaries of certain agricultural aids (*Volker and Markus Schecke*),[24] and of a directive which mandated providers of electronic communications to proactively store the communications metadata of all their users (*Digital Rights Ireland*),[25] Also, applying the same principles the CJEU concluded in *Tele2 and Watson*[26], *La Quadrature du Net*,[27] that Directive 95/46/EC and the GDPR, interpreted in the light of the CFR, preclude national law which imposes data processing obligations incompatible with Article 52(1) of the CFR (also cases regarding retention of communication metadata).

Moreover, and what is very important for the topic discussed in this article, the GDPR itself envisages the processing of personal data on the basis of national or EU law, but once again, only within certain boundaries. Therefore, Articles 6(1)(a) and (c) envisage processing of personal data which is necessary for compliance with a legal obligation to which the controller is subject or which is necessary for the performance of a task carried out in the public interest or the exercise of official authority vested in the controller. As per Article 6(3) of the GDPR, any of these lawful grounds for data processing can be laid down by EU law or MS law, but that law must meet an objective of public interest and be proportionate to the legitimate aim pursued.

Finally, while the EU and Member States can provide legal grounds for data processing through their legislative acts, that addresses only part of personal data protection issues. This is because in addition to legal grounds for data processing, data controllers (in this case, operators of public registers) must also comply with data protection principles (Article 5 of the GDPR), transparency obligations (Articles 13 and 14), other data subjects rights (Articles 15-22), specific regulatory obligations for data controllers and processors (Articles 24-43), rules on international transfers of data (Articles 44-50), etc. Among these, compliance with data processing principles will be the most critical. These issues are, among others, discussed further in this paper.

Before addressing some of these requirements in more detail, we shall briefly touch upon the concept of personal data and its relative unpredictability (3.2.), attempt to provide a framework for a better understanding of data processing operations happening within public registers (3.3.), and explain most severe risks of free and unfettered open access to public registers (3.4.).

3.2. Broad and sometimes unpredictable concept of personal data

The concept of "personal data" is central to the personal data protection law. Simply said, that law applies to "personal data". If data is not "personal", GDPR will not apply.

The notion of personal data is defined in Article 4(1) of the GDPR, which reads as follows:

[24] C-92/09 and C-93/09 (*Schecke*).

[25] C-293/12 and C-594/12 (*Digital Rights Ireland*), ECLI:EU:C:2014:238.

[26] C-203/15 and C-698/15 (*Tele 2 and Watson*), ECLI:EU:C:2016:970.

[27] Joined Cases C-511/18, C-512/18 and C-520/18 (*La Quadrature du Net*), ECLI:EU:C:2020:791.

> 'personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

The concept of personal data is generally best understood when it is considered that it refers to (1) any information which (2) relates to (3) identified or identifiable (4) a natural person. All these elements have been extensively analysed by regulatory bodies,[28] CJEU[29] and academics[30]Therefore, we will focus here only on those elements of this definition that are relevant to the operations of public registers and illustrate some risks and legal uncertainties. Firstly, personal data protection law can protect "any" data, provided it relates to a natural person. It does not matter whether data is sensitive in any way or not. Likewise, it does not matter whether data relates to facts of a purely private or professional nature.[31] Therefore, for instance, personal data contained in business registers are not inherently less worthy of protection just because they do not refer to purely private activities of individuals.

Secondly, the GDPR provides enhanced protection for specific categories of sensitive personal data, such as those about religion or health.[32] Those data are subject to additional rules regarding legal grounds for processing, stipulated in Article 9 of the GDPR. Therefore, for instance, processing of information about political party affiliation of a public official is legal only provided that the Conflict of Interest Commission can successfully prove that there is a legal ground for making that information publicly available (for instance, because there is a "substantial public interest" for such disclosure)[33]. Likewise, the Ministry of Justice and Public Administration should ensure that registers of religious communities, and legal entities of the Catholic Church, which it currently operates, also processes personal data in compliance with requirements under Article 9 of the GDPR. It is to be noted, as an example of the good policy of the ministry, that it limits the general public's access to some personal data from those registers.

One possible challenge with sensitive personal data is that it is not necessarily easy to identify. This was demonstrated very clearly in CJEU's *OT* case, which considered national anti-corruption legislation requiring natural persons working in the public service to declare their private interests and those of their partners, with those declarations being subsequently made accessible to the public. Although that legislation did not require persons in question to

[28] See Opinion Nº 4/2007 on the concept of personal data, by Article 29 Working party, accessible at https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2007/wp136_en.pdf (hereinafter: Opinion 4/2007).

[29] See among other judgements of the CJEU in C-582/14 (*Breyer*) ECLI:EU:C:2016:779, C-434/16 (*Nowak*) ECLI:EU:C:2017:994, C-398/15 (*Manni*) ECLI:EU:C:2017:197, C-184/20 (*OT*), ECLI:EU:C:2022:601, and most recently C-604/22 (*IAB*) ECLI:EU:C:2024:214.

[30] For an excellent discussion of the concept of personal data in EU law see Purtova, N. (2018). The law of everything. Broad concept of personal data and future of EU data protection law. *Law, Innovation and Technology*, *10*(1), 40–81. https://doi.org/10.1080/17579961.2018.1452176.

[31] See for instance judgements of the CJEU in C-92/09 and C-93/09 (*Schecke*), para 59; C-398/15 (*Manni*) ECLI:EU:C:2017:197, para 38; C-37/20 and C-601/20 (*WM*), ECLI:EU:C:2022:912, para 38.

[32] Article 9 of the GDPR. Sensitive personal data are those revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and also genetic data, biometric data when processed for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.

[33] Article 9(2)(g) of the GDPR.

reveal sensitive personal data, in this case, their sexual orientation, it did require them to state their name and the one of their partner. This, in turn, made it possible "to deduce from the name-specific data relating to the spouse, cohabitee or partner of the declarant certain information concerning the sex life or sexual orientation of the declarant and his or her spouse, cohabitee or partner".[34] Therefore, the CJEU was asked whether only data that directly reveals sensitive information should be protected under Article 9 of the GDPR or whether, on the contrary, Article 9 also protects data that are liable to indirectly disclose sensitive information. Considering (correctly, in our opinion) that any contrary interpretation would defeat the purpose of Article 9, the CJEU concluded that the publication of data which only indirectly reveals the sexual orientation of a natural person nevertheless constitutes the processing of special categories of personal data.

Applying this standard to the concept of sensitive personal data in general, it is easy to understand that controllers of public registers must make additional efforts to properly categorise data which are being processed. For instance, if a notice is published on the e-board during the enforcement procedure and contains details about unpaid service to a health clinic, is personal or sensitive personal data being processed there? We would argue that it is the latter, but in the context of automatic publishing of notices, it is not very likely that an issue such as this one will necessarily be recognised. This creates a significant compliance risk which needs to be adequately addressed.

Thirdly, data is personal if it "relates" to an individual (data subject). However, what the "relation" between an individual and his or her data actually means is subject to much uncertainty.[35] In the 2007 Opinion by Article 28 Working Party, it was concluded that data "relates" to an individual firstly if its content is "about" that person in rather a broad way.[36] In the alternative, and more broadly, data can also relate to an individual if the "purpose" element is present, meaning that "the data are used or are likely to be used, taking into account all the circumstances surrounding the precise case, with the purpose to evaluate, treat in a certain way or influence the status or behaviour of an individual".[37] Finally, provided that second criterion (purpose of processing) is also not fulfilled, data can also be personal if "a "result" element is present. Despite the absence of a "content" or "purpose" element, data can be considered to "relate" to an individual because their use is likely to have an impact on a certain person's rights and interests, taking into account all the circumstances surrounding the precise case. It should be noted that the potential impact doesn't have to be major. It is sufficient if the individual may be treated differently from other persons due to the processing of such data".[38]

It is important to note here that the CJEU uses the same criteria in its case law. As was explained in the *Nowak* judgement, data relates to data subject if it is linked to that person "by reason of its content, purpose or effect".[39]

Applying the abovementioned criteria leads to the conclusion that a broad scope of information must be treated as personal data. It is hard to see that any information published in a public register, which somehow refers to a natural person, would not be either:

[34] C-184/20 (*OT*), ECLI:EU:C:2022:601*,* para 119.

[35] See extensively in Purtova, N. (2018). The law of everything. Broad concept of personal data and future of EU data protection law. *Law, Innovation and Technology*, *10*(1), 40–81. https://doi.org/10.1080/17579961.2018.1452176.

[36] Opinion 4/2007, p. 10.

[37] *Ibid.*

[38] *Ibid*, p. 11.

[39] C-434/16 (*Nowak*) ECLI:EU:C:2017:994, para 34-35.

- about that person (for instance, name, surname, national identification number, address, telephone number, the fact that a person is subject to a consumer bankruptcy proceeding, the fact that a person is the owner of a real estate, has a stake in a business, is a president of an association, …), or
- processed to evaluate, treat in a certain way or influence a person's status or behaviour (for instance, notice by the Financial Agency calling for a party to an enforcement proceeding to notify its address), or
- resulting in an impact on a person's rights or interests (for instance, publication of certain notices by the courts, creating a legal presumption that a person has been notified about some legally relevant fact).

It also appears that operators of some registers sometimes underestimate the broadness of the concept of personal data. For instance, when it is stated in the privacy policy of e-Notice Boards that processing of personal data within that system encompasses name, surname, national identification number and address,[40] it shows that there is no proper understanding of the true scope of personal data, because all the other information in these notices is also personal data.

3.3. Public registers process personal data for multiple purposes and through multiple data processing operations

In our experience, one common thing which frequently complicates the proper application of data protection law is an overly simplistic view of data processing operations. For instance, when public registers are discussed, a debate, especially a less formal one, is frequently couched in relatively binary terms. Hence, some will argue that almost no data must be collected for a specific purpose, and others will use a maximalist approach. Similarly, when issues of access to data are in question, debate is very frequently between options of (1) no access and (2) fully open and in no way restricted access. For instance, someone will say that a specific category of data should not be available online on the e-Notice Board, and this will be countered by an argument that the unavailability of that information will have catastrophic consequences for the legal interests of third parties. But neither of these arguments doesn't have to be correct because a middle solution can also be possible. Perhaps access can be granted, but under specific modalities, conditions, and safeguards, thus making it more acceptable from the perspective of personal data protection law.

Therefore, when discussing data processing in the context of public registers, it is vital to be as precise as possible about the scope and purposes of data processing operations.

While there are, of course, some specific elements with every register, in our opinion, in the majority of public registers mentioned above (section 2), it is possible to recognise at least the following data processing processes:

1. Collection of data and its storage.
2. Usage of data for primarily envisaged purposes by its primary users.
3. Sharing data with other institutional data controllers for their (secondary) purposes.
4. Sharing data with private subjects (natural and legal persons), for their purposes.

For instance, in the case of declarations of public officials' assets, data are submitted by those officials through standardised forms to the Conflict of Interest Commission. The commission stores this data and uses it to perform its tasks as a public authority in charge of preventing conflicts of interest. We might broadly consider this as the first and second phases.

[40] https://e-oglasna.pravosudje.hr/politika-privatnosti (last accessed 15 December 2024).

In the third phase, the Commission might share that data systematically with other public authorities, if that would be necessary for the performance of tasks of those other authorities (for instance, some other institution dealing with ethical issues in the work of public officials)[41]In that case, for purposes of data protection law, such other authority will be the recipient of personal data initially collected by the Commission.[42]

Finally, in the fourth phase, some of the collected data are made available to the public. However, the decision on the scope of data that will be made accessible to the public does not impact the scope of data that might be collected and used in the first and second phases or shared with other authorities. Any of these phases is a standalone data processing operation with a different purpose, and it can be subject to its own data processing modalities, conditions, and safeguards.

Moreover, some operations can be further differentiated based on additional criteria. For instance, regarding access to case law, if access to a particular set of data is needed by the courts, public notaries, lawyers, law professors, law students, and other interested persons, but their needs are not necessarily the same, nor can they be equally entrusted to process data lawfully and in compliance with ethical standards, would it not be logical to consider providing access to these groups under different conditions?[43]

In our opinion, such differentiations are reasonable and necessary because personal data protection law does not operate on a general level, that is, the overall relationship between the data controller and the data subject and his/her data. Instead, it goes into depth of this relationship and considers the purposes of individual data processing operations.

The purpose of data processing is the aim that the controller seeks to achieve. It is described as the condition that data processing is to reach, the goal, or the reason for data processing.[44] It answers the question of "why" data processing is happening.[45]

Personal data protection law imposes multiple requirements regarding data processing purposes. The starting point for this is the purpose limitation principle, enshrined in Article 8(2) of the CFR, which stipulates that "…data must be processed fairly for specified purposes". It is further developed as a specific principle in Article 5(1)(b) of the GDPR, which mandates that personal data must be "collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes". Considering the central importance of this principle for personal data protection law, it has been subject to extensive guidance by the Article 29 Working party[46] in its Opinion 03/2013 on purpose limitation.[47]

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[41] This is a hypothetical example, because the authors are not aware of such data sharing obligation under Croatian law.

[42] Provided that data is shared systematically and not only for purposes of a particular inquiry in accordance with Union or Member State law. See the definition of a recipient (Article 4(9) of the GDPR). Such transfers are also subject to some personal data protection safeguards, but that issue is not discussed in this paper.

[43] Novak, N., & Jurić, M. (2023). Anonimizacija sudskih odluka. In *Zbornik radova 11. savjetovanja Novosti u upravnom pravu i upravnosudskoj praksi* (pp. 43–82). Organizator d.o.o.

[44] Roßnagel, A., & Richter, P. (2023). Article 5: Principles relating to processing of personal data. In S. Gen. D. Indra, V. Papakonstantinou, G. Hornung, & P. De Hert (Eds.), *General Data Protection Regulation GDPR): Article-by-Article Commentary*. Beck, p. 273.

[45] *Ibid*.

[46] Article 29 Working Party was set up under formerly valid Directive 95/46. It was an independent European advisory body on data protection and privacy. After Directive 95/46 was replaced with the GDPR its functions have been overtaken by the European Data Protection Board.

[47] Opinion 03/2013 on purpose limitation. Accessible at https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2013/wp203_en.pdf.

The purpose limitation principle impacts all data processing operations, and those happening within public registers are in no way an exception. In essence, it requires that (1) every data processing activity has a purpose and that the purpose in question is (2) specified, (3) explicit and (4) legitimate. Moreover, it sets (5) the limits of permissible use of personal data for secondary purposes, i.e., those not considered at the outset of data processing.

But this is only the beginning because the principle of purpose limitation is inextricably linked with the principle of necessity. As elaborated by *Roßnagel* and *Richter*, "the purpose of data processing is the reference point of the principle of necessity".[48] Hence, processing is permitted only if and to the extent necessary to achieve a specific purpose.[49] The requirement that processing is limited to what is necessary for a specific purpose stems from the fact that any data processing activity is an interference with a fundamental right protected under Article 8 of the CFR, which can consequently be legal only under conditions (which include necessity) stipulated in Article 52(1) of the CFR. It is also part of other data processing principles regulated in the GDPR, namely those which stipulate that personal data which are processed must be (1) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed[50] (data minimisation principle) and (2) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed (storage limitation principle)[51].

Finally, the necessity principle is associated with the lawfulness of data processing. Therefore, Article 6(1) of the GDRP requires that every data processing has a legal basis, but that legal basis can only authorise the processing of personal data necessary to achieve a specific purpose.

The purpose of this chapter is not to give a detailed elaboration of the purpose limitation principle in data protection law. Instead, we will now consider how rules regarding data processing purposes might be relevant to the operations of public registers.

3.3.1. Every data processing activity must have a purpose

On the most basic level, verifying that every data processing has a purpose is necessary. This is an obvious point, and it might seem that any data processing will always have some purpose because otherwise, the data controller would not be doing it. But in some cases, and especially when data processing systems and procedures were established before the enactment of personal data protection laws (in the case of Croatia, this was in 2003), data processing can continue to happen simply due to administrative inertia, even though any reason for it has ceased to exist. Therefore, if there is no clear answer as to why some personal data is being processed, such processing is illegal almost by default.

3.3.2. Data processing purposes should be determined with sufficient precision

Secondly, as mentioned above, it is crucial to emphasise that data processing of one set of data by one controller can happen for various reasons (that is, data processing purposes). For instance, a university might be processing students' grades as necessary records of the outcomes of studying, but also for quality assurance purposes. Or for example, assets declarations from public officials might be collected for the needs of competent authorities dealing with conflicts of interests, but also for informing the general public. From the

[48] Roßnagel, A., & Richter, P. (2023). Article 5: Principles relating to processing of personal data. In S. Gen. D. Indra, V. Papakonstantinou, G. Hornung, & P. De Hert (Eds.), *General Data Protection Regulation GDPR): Article-by-Article Commentary*. Beck, p. 272.

[49] *Ibid*.

[50] GDPR, Article 5(1)(c).

[51] GDPR, Article 5(1)(e).

perspective of personal data protection law, when there are different data processing purposes, it is necessary to treat them separately. Therefore, when multiple data processing operations happen for multiple purposes, legal grounds for personal data processing (Article 6 of the GDPR) must be determined separately for every such purpose. Likewise, data protection principles are applied in relation to the purposes of data processing. For instance, the storage limitation principle mandates that personal data are kept no longer than necessary for the purposes for which they were processed. However, the same data set can be kept for different periods. For instance, contract documentation might be kept until the contract is executed and can no longer be legally challenged, but if there is a dispute pending, the storage period can be extended. However, a precondition for all this is that separate data processing purposes are recognised as such.

As *Roßnagel* and *Richter* elaborate, "purposes may be formulated on different levels of hierarchy. The more precisely a purpose is formulated, the more means of achieving the purpose will be excluded; the more generally it is formulated, the more means of achieving the purpose it permits. The more concretely the purpose is formulated, the stronger it ties processing to the context of the collection, the more abstractly it is formulated, the farther away processing for achieving the purpose may move from the social context of data collection".[52]

However, there is no clear rule in the GDPR for determining whether some data processing operation has a sufficiently specific purpose so that it must be treated as separate or, on the contrary, it can be bundled with another related purpose into a more general one. Guidance from Article 29 Working party is also very general: "controllers should avoid identifying only one broad purpose in order to justify various further processing activities which are in fact only remotely related to the actual initial purpose", and "each separate purpose should be specified in enough detail to be able to assess whether collection of personal data for this purpose complies with the law, and to establish what data protection safeguards to apply ".[53]

In such circumstances, *Roßnagel* and *Richter* seem to be on point when they argue that the "purpose must be specified as precisely and concretely" while at the same time providing for the necessary flexibility of data processing.[54] The requirement that the purpose specification is as precise and concrete as possible is also supported by the purpose of this principle. As was mentioned above, it is (*among other things*) to provide a reference point for the principle of necessity. Hence, if different data processing activities can reasonably be subject to different conditions and safeguards (stemming from data processing principles and requirements for legal grounds for processing), treating them as having one overall purpose and consequently applying the same conditions and safeguards would reduce the effectiveness of the principle of necessity.

For instance, under the Croatian Judiciary Act, open and unlimited access to judicial decisions serves the purpose of "openness and transparency of the work of courts, enabling continuous access to data about the work of courts and strengthening confidence in the judiciary".[55]

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[52] Roßnagel, A., & Richter, P. (2023). Article 5: Principles relating to processing of personal data. In S. Gen. D. Indra, V. Papakonstantinou, G. Hornung, & P. De Hert (Eds.), *General Data Protection Regulation GDPR): Article-by-Article Commentary*. Beck, p. 273.

[53] Opinion 03/2013 on purpose limitation (*op.cit*. n. 47), p. 16.

[54] Roßnagel, A., & Richter, P. (2023). Article 5: Principles relating to processing of personal data. In S. Gen. D. Indra, V. Papakonstantinou, G. Hornung, & P. De Hert (Eds.), *General Data Protection Regulation GDPR): Article-by-Article Commentary*. Beck, p. 273.

[55] The Judicary Act (*Zakon o sudovima*), Official Journal of the Republic of Croatia nos. 28/13, 33/15, 82/15, 82/16, 67/18, 126/19, 130/20, 21/22, 60/22, 16/23, 155/23, 36/24, Article 6.

While nothing is inherently wrong with this aim, the problem is that it is set so broadly that it can support a wide range of data processing activities. On the other hand, in the preparatory materials for the amendments introducing this provision, drafters contemplated aims of enabling access to judicial decisions to professional and general audiences, which got overlooked in the final text.[56] The point here is that if instead of aiming to ensure "transparency", which is a very vague and broad concept, one seeks to enable access to (1) professionals working in specific fields and (2) the general public, it can ensure much better compliance with personal data protection principles, for instance by enabling access to these categories of persons under different conditions and safeguards.

The main problem here is not necessarily that broad data processing purpose will *per se* render data processing illegal (although that is always a possibility). Indeed, the CJEU has, in several cases, accepted as legitimate aims relatively broad data processing purposes, such as preventing "money laundering and terrorist financing by creating, by means of increased transparency, an environment less likely to be used for those purposes",[57] or "preventing conflicts of interest and corruption, …increasing the accountability of public sector actors and… strengthening citizens' trust in their actions".[58]

Instead, setting purposes very broadly can make it easier to avoid complex discussions and choices about the scope of data processing. This is because the less one is clear about why one is doing something, the more difficult it becomes to conclude that some action is unnecessary to achieve that aim. Therefore, for instance, if a country operates a register of assets of natural persons working in the public service, it might seem reasonable to open access to that register to the general public for "transparency". But, making such a decision without considering the issue in depth might lead to a situation like in the *OT* case, where the CJEU was not satisfied that the legislature of a Member State did not examine "whether publication of those data on the internet without any restriction of access is strictly necessary or whether the objectives pursued by the Law … might be achieved just as effectively if the number of persons able to consult those data is limited".[59] In short, the real problem here is that vague data processing purposes are fertile ground for unnecessary data processing activities.

3.4. Risks and legal limits of open access to public registers

Let's now turn to specific problems of open access to public registers. Initially, it is essential to emphasise that we fully accept that many public registers have to support some level of open access. We do not argue against public access per se. Still, we consider that in many cases, what is now fully open could be replaced by access with additional conditions and safeguards.

3.4.1. Opening personal data in state registers to the general public through the Internet entails significant risks and is, therefore, a serious interference with the right to personal data protection

While opening public administration and sharing information held by public authorities is usually considered a positive development, it is not without risk when that information is citizens' personal data. This was also explicitly recognised by the CJEU. In the *WM* case, the CJEU considered that making information from a register of beneficial owners of companies

[56] See more extensively in Novak, N., & Jurić, M. (2023). Anonimizacija sudskih odluka. In *Zbornik radova 11. savjetovanja Novosti u upravnom pravu i upravnosudskoj praksi* (pp. 43–82). Organizator d.o.o.

[57] C-37/20 and C-601/20 (*WM*), ECLI:EU:C:2022:912, para 58.

[58] C-184/20 (*OT*), ECLI:EU:C:2022:601, para 83.

[59] C-184/20 (*OT*), ECLI:EU:C:2022:601, para 92.

available to the general public creates risks of (1) profiling, (2) using that data for purposes unrelated to those for which it was made public and (3) loss of control over data.[60]

The possibility of using data for purposes not envisaged by the legislation is a risk inherent to every public register. For instance, if one wants to better understand the material circumstances of their friends or neighbours, land and company registers in Croatia might, with some skill, time, and effort, provide valuable insights. If that person happens to be a public official, data from the declarations of assets will help paint an even more precise picture of his or her life. And if it had the misfortune of being subject to insolvency proceedings, details about the causes of that will also be accessible.[61]

Of course, all of this could be prevented by disabling open access and requiring a legitimate interest in accessing the data or by establishing some similar procedure that would subject access to conditions. But as Ernst and Josipović convincingly argue in relation to Croatia's land register, limiting access might lead to significant negative consequences, making such solutions inappropriate.[62] So, the trade-off seems reasonable: Citizens must accept and tolerate that certain information about them is public, as the public availability of that information is important for legal transactions, protection of rights, and other legitimate interests (their own and those of other persons).

The problem is that public access to information in public registers is not the same nowadays as it was several decades ago. The level of access might be the same in legal terms, but it is not so in technical terms.

Before registers were made accessible online, a person who wanted some data from it typically had to go to an institution controlling a register and ask to access that data. Some registers (i.e., the land register) were functioning on a territorial basis. Therefore, going to an institution in charge of a register might have meant travelling to another city where that institution (i.e., court) was situated (or seeking assistance from someone present there). Next, access was not anonymous. Even if the fact that data was retrieved was not recorded, the identity of the person who was requesting it was visible in one way or another. Moreover, retrieving the data meant that somebody had to search a register, which might have been in non-electronic form, so it would consume some time to find what was needed. While it was possible to make multiple data retrievals, there were also transactional costs (at least in time and effort) for every such action. There have also been gatekeepers, in the form of employees of the institution in charge of the register, who might object, if only informally, if someone was attempting to make multiple inquiries in the register without any genuine purpose. This is not to say that getting the data, even for such purposes, was impossible, far from it. However, the system was not designed to be overly friendly to casual surfing the database for curiosity or other non-essential purposes.

Also, accessing data might have meant different things – just consulting data by reading it and maybe taking some personal notes about it, or getting a copy. Getting a copy would frequently incur some fees for administrative costs of providing the information. And while fees are generally seen as a negative thing, in scenarios such as this one they might be supporting protection of personal data, because they disincentivise users from making unnecessary data access requests.

[60] C-37/20 and C-601/20 (*WM*), ECLI:EU:C:2022:912, paras. 41-43.

[61] Authors of this paper have been able to retrieve, from the insolvency register, data about consumer bankruptcies from seven years ago.

[62] Hano, E., & Josipović, T. (2024). Funkcije upisa u zemljišnu knjigu i zaštita osobnih podataka. *Zbornik Pravnog Fakulteta Sveučilišta u Rijeci*, *45*(1), 21–46.

Compared to this, the situation nowadays is fundamentally different. Whatever is displayed on a computer screen can easily be recorded, stored locally, and shared with others. In most cases, this is not prevented but, in fact, supported by the register's IT systems, which enable downloading of relevant excerpts from the registers in the form of individual documents. Therefore, as the CJEU elaborates in the *WM* case, "… once those data have been made available to the general public, they can not only be freely consulted, but also retained and disseminated and …, in the event of such successive processing, it becomes increasingly difficult, or even illusory, for those data subjects to defend themselves effectively against abuse".[63]

However, this can also be seen in terms of trade-offs. There are enormous benefits to the digitalisation of public registers. The fact that registers from different territorial jurisdictions can be consulted through a unified interface is immensely helpful. Possibility of downloading and sharing of excerpts from the register facilitates legal transactions. Reduced costs are a benefit to everyone.

The actual problem here is the possibility of a massive loss of control over data and the associated risks of profiling on an extensive scale. In the *WM* case, the CJEU identified the risk of "a profile to be drawn up concerning certain personal identifying data …, the state of the person's wealth and the economic sectors, countries and specific undertakings in which he or she has invested".[64] However, this risk, considered by the Court as significant, was found to exist already in the case of a single register. The reality of modern data processing can be much worse.

If we move further, we can consider a scenario in which some private party would retrieve all publicly available information from a particular register (through a process known as data scraping), store it within its own software and subject it to additional processing. And if this is possible for one register, it might also be possible for many others. Then, it might become possible to combine and cross-reference data from different registers and profile citizens in depth. Therefore, if we nowadays consider that there is a significant risk of profiling citizens in terms of their wealth and investments based on information from the register of beneficial ownership of companies, then there can be no denying that there is a much more significant risk of profiling citizens by combining information from multiple registers. If something like this is possible, we are talking about risks that cannot be easily offset by the potential benefits of open data for enhanced transparency, effectiveness of legal transactions, and legal certainty.

This problem is not a new one, as it was explicitly recognised by the German Federal Constitutional Court already in 1983 in the *Census* decision, where the Court described the issue as follows:

> Given the present and future realities of automatic data processing, [authority to, in principle, decide themselves whether and to what extent to disclose aspects of their personal life] conferred upon the individual merits special protection. Most notably, risks arise because decision-making processes that in the past required records and files to be compiled manually can now rely on automatic data processing. As a result, specific information concerning the personal or material circumstances of an identified or identifiable individual (i.e. personal data, cf. § 2(1) of the Federal Data Protection Act) can be stored indefinitely, from a technical perspective, and retrieved at any time within seconds, without distance being an issue. In addition, the data in question can

[63] C-37/20 and C-601/20 (*WM*), ECLI:EU:C:2022:912, para 43.
[64] C-37/20 and C-601/20 (*WM*), ECLI:EU:C:2022:912, para 41.

> be compared with data collected from other sources, especially by creating integrated information systems, and can be compiled into partial or practically complete personality profiles, leaving the person concerned without sufficient control over the accuracy or use of the data stored on them. This has expanded possibilities of gaining and influencing information to unprecedented levels, so that even the mere psychological pressure created by public perception may potentially impact individual behaviour.[65]

It is noteworthy that in the above case, the Constitutional Court was considering data processing and possible cross-referencing by state authorities, which are still bound by strict legislative and constitutional requirements. The reality of data processing by private entities can potentially be much worse.

So, is the abovementioned risk real in the context of public registers in Croatia? We think that it is for multiple reasons. As described in Section 2, almost all of the analysed registers in Croatia can now be consulted online, with minimum conditions and relatively few safeguards. Access is free of charge. There are no apparent limitations to the number of inquiries that can be made in a given timeframe (and even if there were some, this can be relatively easily defeated). User authentication is necessary for accessing just one register (of beneficial ownership). All the other ones are accessible anonymously. It is always possible to download data, store it locally, and subsequently share it with others at no additional costs.

Are there any safeguards, in the form of protective measures, against large-scale scraping of data from public registers? As described in Section 2, some registers do not use any protective measures against such practices, with the insolvency register being the most obvious example. A similar situation is with the business registry. E-notice boards are accessible without any protective measures, with the only safeguard being that data is removed relatively quickly after publication. And while such a measure is welcome, it would not shield against scraping operations that are running continuously or at several days' intervals.

In cases of other registers, essentially, the only protective measure is CAPTCHA, which is required to access individual records from most registers operated by the Ministry of Justice and Public Administration. This appears to provide some level of protection, but we are not convinced it is sufficient, especially since there are technical ways and methods of breaking such protective measures.

Finally, it might also be possible that additional security measures against large-scale scraping of data are implemented on some of these registers. But their existence and effectiveness cannot be presumed and would, therefore, have to be positively established. At least with some registers, it is evident that private law entities collect data from them systematically. As in other jurisdictions, in Croatia there are also providers of business intelligence data, whose products include information from the business register.

So, to answer our question, while we cannot conclude with certainty that the risks described in this section are imminent, there are many reasons to suspect that they are not at all unrealistic.

Having described the principal risks of open access to data, we now turn to legal requirements, which, properly implemented, would help to reduce it.

3.4.2. Open access is lawful only if and to the extent that it is strictly necessary

Personal data protection rules do not preclude some public registers from being in the fully open access regime. However, the method of access to be used must be considered in light of

[65] BVerfG, Order of the First Senate of 15 December 1983 - 1 BvR 209/83, para 145.

the principle of necessity. Therefore, access should not be open by default. Contrary to this, access to personal data should be restricted by default and allowed only as an exception, solely to the extent that it is strictly necessary.

Therefore, when deciding on the method and scope of access, operators of public registers should always consider the alternatives and opt for the technique which achieves the purposes of a specific register but does so in a way which interferes with personal data protection interests in the slightest way possible. As the CJEU mentioned in the *OT* case, the legislature should have examined "whether publication of … data on the internet without any restriction of access is strictly necessary or whether the objectives pursued … might be achieved just as effectively if the number of persons able to consult those data is limited".[66]

Moreover, such obligation follows directly from Article 25(2) of the GDPR, which regulates data protection by design and default. According to this Article,

> "The controller shall implement appropriate technical and organisational measures for ensuring that, by default, only personal data which are necessary for each specific purpose of the processing are processed. That obligation applies to the amount of personal data collected, the extent of their processing, the period of their storage and their accessibility. **In particular, such measures shall ensure that by default personal data are not made accessible without the individual's intervention to an indefinite number of natural persons**" (emphasis ours).

At this place, we wish to reiterate that the relevant legal standard is a strict necessity. Necessary means more than convenient or useful. Opening access to a public register to everybody, without any conditions, might be more convenient for data controllers and their users, but that does not make such an approach necessary. Therefore, the CJEU was not satisfied with explanations in the *WM* case that general open access "can contribute" to and "would help" to attain particular aims. What must be shown is necessity, not usefulness.

In doing so, the fact that specific measures are challenging to implement is not an excuse. As the Court elaborated in the same case, "the fact that it may be difficult to provide a detailed definition of the circumstances and conditions under which the public may access information on beneficial ownership [under legitimate interest standard] is no reason for the EU legislature to provide for the general public to access that information".[67]

Moreover, as the CJEU explained in the *WM*, "where there is a choice between several measures appropriate to meeting the legitimate objectives pursued, recourse must be had to the least onerous".[68] When considering which measure is less onerous, it is also necessary to consider which protective measures can be applied. Therefore, if we compare the option of setting up access to a particular register as (1) entirely unrestricted and anonymous or, on the contrary, with (2) requirements of authentication (like in the case of the beneficial ownership register in Croatia), and with measures against systematic scraping of data (such as with registers which implement CAPTCHA), and possibly some other meaningful safeguards, it is clear that the latter setup is less onerous from the personal data protection perspective.

Finally, the data controller must also be able to prove that it has undertaken this analysis and examined whether the chosen method of providing access is strictly necessary. This follows from the principle of accountability, defined in Article 5(2) of the GDPR, which stipulates that the data controller must demonstrate that it has complied with its obligations under the GDPR.

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[66] C-184/20 (*OT*), ECLI:EU:C:2022:601, para 92.

[67] C-37/20 and C-601/20 (*WM*), ECLI:EU:C:2022:912, para 72.

[68] C-37/20 and C-601/20 (*WM*), ECLI:EU:C:2022:912, para. 64.

3.5. Are there less onerous alternatives to the regime of open access to public registers?

As we have described in section 2 above, public registers in Croatia typically (and with few exceptions) enable anonymous access to any interested person, without any fees, with no limits regarding the quantity of data which can be consulted or downloaded, and with relatively weak protection against data scraping. Can a less onerous modality for processing personal data be envisaged? That, of course, depends on the specifics of every individual register. Still, we consider that some measures, which might be generally applicable to most registers, would reduce risks of personal data breaches and would create a more personal data protection-friendly regime within public registers.

In our opinion, providing access only to authenticated and identified users would be the baseline measure, which would support many others.

Croatia operates an advanced distributed e-government system, enabling its citizens to access and use over a hundred online services. Accessing those services is made possible through the National Identification and Authentication System (NIAS).[69] This system uses multiple (27 in total) private (mostly e-banking tokens) and public electronic identity systems to verify citizens' identities and authenticate them to use e-government services.[70] Further, it is interoperable with similar systems from other EU member states through the EU eIDAS network.[71] So, authenticated access would be possible not just for nationals but also for all EU citizens (as there are already other e-government online services in Croatia that are accessible through eIDAS using foreign identification systems).

Enabling access to public registers through a national identification and authentication system would significantly contribute to the protection of data in the registers. Such a solution has already been implemented with one of the registers (beneficial ownership) and functions without difficulties. Similarly, the land registry, which is currently operating without user authentication, provides more advanced features (i.e., downloading verifiable excerpts) upon user authentication. Consequently, there is no reason to think that similar solutions would also not function with other registers. Of course, some registers would have to be excluded from such a scheme. For instance, for the register of public officials' assets, it is vital that it can be accessed freely and anonymously, as authenticated access would probably lead citizens to consult it less frequently, especially when seeking information about public officials with more political power.

Once users of a register are correctly identified and authenticated, it becomes much easier to control their actions and implement additional security measures. For instance, access to some data in public registers is realistically needed only for specific purposes. And while requiring users to *prove* a legitimate interest in all such cases would almost certainly lead to excessive administration,[72] requiring them to simply *declare* what is the interest for accessing (without the necessity to have it confirmed or accepted by the register's operator), recording that declaration and making it available upon request to the person whose personal data have been disclosed would, in most cases not create a disproportionate burden, and probably would be at least some safeguard against data access requests made for reasons unrelated to

[69] https://nias.gov.hr/Authentication/Step2 (last accessed 15 December 2024).

[70] Novak, N., & Jurić, M. (2023). Anonimizacija sudskih odluka. In *Zbornik radova 11. savjetovanja Novosti u upravnom pravu i upravnosudskoj praksi* (pp. 43–82). Organizator d.o.o., p. 79.

[71] https://eidas.ec.europa.eu/efda/home (last accessed 15 December 2024).

[72] See for land registry in Hano, E., & Josipović, T. (2024). Funkcije upisa u zemljišnu knjigu i zaštita osobnih podataka. *Zbornik Pravnog Fakulteta Sveučilišta u Rijeci*, *45*(1), 21–46.

the objective pursued by publication of specific data in a register. This can be seen as transparency in reverse – if someone's personal data are made available to the public (for some vital policy reason), why would information about who consulted that person's personal data be available to him or her?

Next, as mentioned in the previous sections, we recognise the possibility of large-scale scraping of data from public registers, cross-referencing data from different registers, and profiling citizens in depth on the basis of such data, especially by private entities. Providing access to data upon identification and authentication of a user would protect against such practices to a considerable extent. While it would probably be impossible to completely prevent it, it would enable better ways to identify excessive data downloading and scraping and implement adequate countermeasures.

Finally, providing access to identified and authenticated users only would enable much better data control mechanisms and, in doing so, enhance the principle of data minimisation. If users are identified and authenticated, it is possible to better granulate levels of access by identifying different groups of users and providing access to data to every group according to their specific needs. In short, data that is necessary for one group might not be needed by others. Such differentiation is impossible if access is open and anonymous.

4. Conclusions

Public registers in Croatia are currently predominantly open-access. Other than with the register of beneficial ownership, identification and authentication of users are not required. This does not mean per se that all data from public registers is accessible online. On the contrary, most registers provide access to some, but not all, data online. Nevertheless, where there is online access, it can best be described as open and anonymous. Some registers operate some technical protective measures (CAPTCHA).

Considering the recent case law of the CJEU, authors also argue that there are many risks to open access to public registers. Firstly, it is possible to use data for purposes unrelated to those for which it was made public. This is a serious problem, as recognised by the CJEU, and it should lead to some serious rethinking about how public registers should function. But even more than that, authors consider that the crucial and more pressing issue is the possible massive scraping of data from public registers by private entities and its use for secondary purposes. If these practices happen in practice, it will lead to a serious loss of control over data and enable large-scale profiling of citizens.

To reduce these risks, the authors advocate for dispensing with open and anonymous access and enabling access only to identified and authenticated users through national e-government infrastructure.

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C-293/12 and C-594/12 (*Digital Rights Ireland*), ECLI:EU:C:2014:238.

C-37/20 and C-601/20 (*WM*), ECLI:EU:C:2022:912.

C-398/15 (*Manni*) ECLI:EU:C:2017:197.

C-434/16 (*Nowak*) ECLI:EU:C:2017:994.

C-511/18, C-512/18 and C-520/18 (*La Quadrature du Net*), ECLI:EU:C:2020:791.

C-582/14 (*Breyer*) ECLI:EU:C:2016:779.

C-604/22 (*IAB*) ECLI:EU:C:2024:214.

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Maja Proso*

PLANNED OBSOLESCENCE OF PRODUCTS AS A FORM OF UNFAIR COMMERCIAL PRACTICE AND THE RIGHT TO REPAIR - NEW MEANS OF PROTECTING CONSUMER RIGHTS IN THE EUROPEAN UNION

Abstract

Planned or premature obsolescence is strategy manufacturers use to force consumers to buy their products more frequently. Planned obsolescence of products on the market, as a newly enacted form of unfair (misleading) commercial practice, is interconnected with the consumer's right to repair as defined in the Directive (EU) 2024/1779 which was recently enacted. To be able to contribute to much-needed progress in the green transition to a circular economy, consumers should not be misled by deceptive business practices hindering them from making sustainable acquisition.

The paper provides definitions of the basic terms and analysis of the new EU legislation regarding the planned obsolescence of products as an unfair commercial practice that could mislead consumers, preventing them from making informed, sustainable consumption choices from Directive (EU) 2024/825. It also deals with the right to repair as a mechanism for strengthening the protection of consumer rights in the internal single market.

A brief overview of the development of consumer law in the EU and the Republic of Croatia is given, as well.

***Keywords*:** Consumer, EU internal market, planned obsolescence of products, the right to repair.

1. Introduction

The new EU Directive on empowering consumers[1] (hereinafter: Directive 2024/825) has a goal by supplementing the existing EU list of prohibited business practices to further protect consumers from deceptive business practices, such as planned obsolescence of products.

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[1] Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through b etter protection against unfair practices and through better information, Official Journal of the European Union, L 2024/825, 6.3.2024

Directive 2024/825 also amends Directives 2005/29/EC[2] and 2011/83/EU.[3] To be able to contribute to much-needed progress in the green transition to a circular economy, consumers should not be misled by deceptive business practices hindering them from making sustainable acquisition. That means that traders, simultaneously, are obliged liability to inform consumers clearly and credibly about relevant information. Directive 2024/825 introduces new rules to diminish the negative impact of unfair commercial practices on consumers, such as premature obsolescence of products, „greenwashing", deceptive claims about the social, environmental, or circular features like products' longevity, reparability or its reusability, In the research presented in this paper, the author focuses on an analysis of business practices of planned premature obsolescence of products as a manifestation of unfair commercial practice as regulated in Directive 2024/825.

Amended Directive 2005/29/EC addresses a few procedures connected with premature obsolescence of various goods, consisting of intentionally creating products in a way that causes products prematurely non-functional or outdated. Such procedures can cause pecuniary and non-pecuniary damage to consumers. Moreover, these practices cause harm to the environment because they create unnecessary amounts of refuse.[4]

Directive (EU) 2024/1779[5], also known as the Right to Repair Directive, was adopted on 13 June 2024. Directive is setting out European regulations advancing the repair of goods. It also introduces amendments to Regulation (EU) 2017/2394[6], Directive (EU) 2019/771[7] and Directive (EU) 2020/1828.[8] New provisions aim to reduce discarding of goods by enabling longer usage of different products. The Directive stipulates provisions for the products repair, both within and beyond the commercial guarantee period. As it will be discussed in the paper, the Directive allows consumers to ask for a reasonable repair from a chosen repairer and the obligation on the part of the repairer to repair certain categories of products for free or for a favourable price. A European Repair Information Form is introduced as well, which consumers will be able to request from any repairer, making it simpler to compare existing repair offers This, hopefully, will bring clarity to the terms of repair. Upon a brief overview of the development of consumer law in the EU and the Republic of Croatia, the author further

[2] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to consumer commercial practices in the internal market and amending Council Directive 84/450/ EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive), Official Journal of the European Union, L 149/22,11.06.2005.

[3] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, Official Journal of the European Union, L 304, 22.11.2011.

[4] Directive (EU) 2024/825, Recital (16).

[5] Directive (EU) 2024/1799 of the European Parliament and of the Council of 13 June 2024 on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394 and Directives (EU) 2019/771 and (EU) 2020/1828, Official Journal of the European Union, L 2024/1799, 10.7.2024.

[6] Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, Official Journal of the European Union. L 345, 27.12.2017.

[7] Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/E, Official Journal of the European Union, L 136, 22.5.2019.

[8] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, Official Journal of the European Union, OJ L 409, 4.12.2020.

presents and analyses terms of product durability and planned obsolescence, as a form of unfair and misleading commercial practice as regulated in Directive 2005/29/EC and Directive 2024/825. The central part of the article is dedicated to the right to repair as a medium of protection of consumer rights in the European Union.

2. Introductory remarks on consumer rights protection in the EU and the Republic of Croatia

Consumer protection is a wide-ranging concept encompassing both economic and legal issues. It covers broad matters of consumers wellbeing, such as, the health and nutrition habits of consumers.[9] The term "consumer protection" has been known for quite a long time. Its history is the result of consumers' need for protection. However, the form of such protection varied depending on the different social, political and economic conditions in each specific region and period.[10]

Within the EU, consumer protection has been developing for more than fifty years. At the beginning of the 1970s, stimulated by the recommendation at the Paris Summit of Heads of State and Government of the Market[11], consumer protection programs began developing strongly in Europe. The European Consumer Protection Charter was adopted in 1973.[12] The Resolution of the EU Council from 1975, based on the previous program of the European Economic Community for consumer protection and information policy, established and enumerated the basic rights of consumers.[13] In 1991, Maastricht Treaty included a special chapter concerning specifically the protection of consumers. Since then, consumer protection has been one of the most important politics in EU. The main goal is to ensure that all consumers in Member State have a similar level of protection. EU consumer protection policies stipulate a minimum of legal protection but allow Member States to provide a higher national level of consumer protection.[14]

Directive 2011/83/EU on Consumer Rights is a 'maximum harmonization' directive, meaning Member States cannot increase or reduce prescribed consumer protection. Directive 2011/83/EU provides new mechanisms of consumer protection that contains specifically prescribed information on rights and duties concerning e-commerce. The right of withdrawal

[9] Liha, Aida. „Zaštita potrošača u procesu proširenja Europske unije: izazovi za Hrvatsku“. In Pridruživanje Hrvatske Europskoj uniji: izazovi institucionalne prilagodbe, edited by Ott, Katarina, Zagreb: Institute of Public Finance, 2004., p. 192.

[10] Alharthi, Saud H. „The Historical Development of Consumer Protection“, International Journal of Computer Science and Network Security, 2022., p. 392.

[11] "Statement from the Paris Summit" Bulletin of the European Communities, October 1972, No 10. Luxembourg: Office for official publications of the European Communities, p.14-26. http://www.cvce.eu/obj/statement_from_the_paris_summit_19_to_21_october_1072-en-b1dd3d57-1-4796-85c3-cfd2210d6901.html Accessed 16.10.2024.

[12] „The European Consumer Protection Charter“, Accessed 16.10.2024 https://pace.coe.int/en/files/3532#trace-1.

[13] Baran, Nevenka and Orlić Zaninović, Senka. Zaštita potrošača- priručnik za polaznike/ce, Zagreb: Pravosudna akademija, 2019., p. 9.

[14] Plazibat, Ivana, Brajević, Slađana, Radić, Koraljka. „Consumer protection in the Republic of Croatia and in the European Union“, DIEM: Dubrovnik International Economic Meeting, 2013. p. 5.

is created to diminish disbalance of rights and duties and to protect consumers in distance contracts in situations of unintended or mistaken purchase.[15]

The Republic of Croatia, in 2001, signed the Stabilization and Association Agreement with the European Communities and their Member States.[16] One of the aims is to harmonize Croatian legislation with European guidelines and standards. The emphasis was given to alignment with key parts of the European acquis, including the area of consumer rights.[17] Before the adoption of the Consumers protection Act in 2003, consumer protection in Croatia was not regulated by a special law, but was regulated through specific regulations in different legal fields.

The Government of the Republic of Croatia, together with state bodies and institutions, developed and applied a consumer protection policy in order to regulate influence the behaviour of retailers towards consumers. This policy included preventive and corrective measures. In accordance with the policy of the European Union, Croatia harmonized its laws and guidelines in order to create a harmonized system of consumer protection at the EU level. Consumer protection in the European Union is an extremely dynamic area, which results in frequent amendments to existing regulations, as well as the adoption of new ones. With the adoption of the Consumers protection Act, the process of transposition of the acquis of the European Union in the field of consumer protection to the Croatian legal system began, whereby the European rules of behaviour on the market are implemented, both with regard to the protection of consumer rights and consumer education and information. This regulatory-administrative framework includes various laws, regulations and decisions that affect the rights and obligations of consumers in the country, with the Consumer Protection Act[18] being the key basis of this framework.[19] Also, the general contract law rules, through the Obligations Act from 1978[20], (hereinafter: ZOO) contained numerous provisions providing consumers with a high degree of protection.[21] While the 1978 Obligations Act did not incorporate specific provisions for consumer protection within the framework of contractual and other obligational legal relationships, it extended protections to consumers as a party to such agreements. This approach can be attributed to the underdeveloped state of consumer protection as a distinct legal discipline within the former SFRJ, as there was no comprehensive body of laws dedicated solely to protecting consumers rights. When Croatian ZOO came into force, in 2005.[22], certain EU consumer law directives were implemented in an expanded manner, while retaining some provisions applicable exclusively to consumer contracts. Thus,

[15] Markou, Christina. „Directive 2011/83/EU of the European Parliament and of the Council", In EU Regulation of E-commerce, edited by Lodder, Arno R. and Murray, Andrew D., Cheltenham: Edward Elgar Publishing 2022., p. 151.

[16] Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part, Official Journal of the European Union, L 26, 28.1.2005.

[17] Babić, Marko. Zaštita prava potrošača i izvori trgovačkog prava, Zagreb: Poslovna izvrsnost 2015., p. 75.

[18] Consumer Protection Act, Official Gazette no.19/22, 59/23.

[19] Dunković, Dario. Zaštita potrošača i poslovno upravljanje, Zagreb: Ekonomski fakultet, 2016., p. 188.

[20] Obligations Act from 1978, (Službeni list Socijalističke Federativne republike Jugoslavije, br. 29/78, 39/85, 46/85, 45/89, 57/89), was derogated by the Law on taking over the Obligations Act, Official Gazette no. 53/91. Its provisions cease upon the entry into force the provisions of the Obligations Act from 2005.

[21] Josipović,Tatjana. „Rekodifizierung des Privatrechts in Kroatien", In Kodifikation, Europaisierung und Harmonisierung des Privatrechts, edited by Blaho, Peter and Svidron, Jan. Bratislava: IURA Edition, 2005., p. 209. Obligations Act, Official Gazette no. 53/91., 73/91., 111/93., 3/94., 107/95., 7/96., 91/96., 112/99., 88/01. Obligations Act from 1978, (Službeni list Socijalističke Federativne Republike Jugoslavije, br. 29/78, 39/85, 46/85, 45/89, 57/89), was derogated by the Law on taking over the Obligations Act, Official Gazette no. 53/91. Its provisions cease upon the entry into force the provisions of the Obligations Act from 2005.

[22] Obligations Act, Official Gazette no. 35/05, 41/08, 125/11, 78/15, 29/18, 126/21, 114/22, 156/22, 155/23.

the new ZOO from 2005. became the second most important law in the Croatian legal order dedicated to consumer protection.[23]

3. Planned obsolesce of products as a form of unfair commercial practice

The European Green Deal[24] a leading initiative of the European Union, emphasizes the importance of enabling consumers to make informed choices and participate actively in the ecological transition to a circular, sustainable economy in the EU. Consequently, this also means that traders should take part in the responsibility for providing clear, relevant and reliable information on the sustainability of the products or services offered. Therefore, as will be explained further, the new Directive 2024/825 amends two key directives Directive 2005/29/EC on unfair commercial practices and Directive 2011/83/EU on consumer rights. Directive 2005/29/EC on unfair commercial practices has been amended to address unfair commercial practices that mislead consumers like premature obsolescence of goods, false environmental claims, and unauthentic sustainability labels. Below we analyse the concepts of durability and planned obsolescence of products as well as unfair and misleading commercial practices as regulated by the provisions of Directive 2005/29/EC and its amendments from newly enacted Directive (EU) 2024/825.

3.1. Product durability and planned obsolescence

The notions of 'product lifetime' and 'product durability' are inextricably connected and interchangeable. Durability can be defined as a product capability to work at the envisioned performance level over a predicted period of time under previously anticipated conditions of usage.[25] Product obsolescence is an inevitable fact because the product is consumed due to its physical and chemical structure. However, that obsolescence should not be planned so that the product artificially lasts less than it is allowed by a set of its components and other features design.[26] Planned obsolescence is a often practice in business consisting of a intentional plan of making a product outdated, by building into a product certain characteristics to shorten its life span. „This strategy aims to encourage consumers to purchase new products by making the existing ones unfashionable or no longer usable."[27] A Circular Economy is a concept according to which the value of products can be increased by prolonging their durability, and decreasing amounts of waste that pollute the Earth.[28]

[23]Miščenić, Emilija. „Usklađivanje prava zaštite potrošača u Republici Hrvatskoj", Godišnjak Akademije pravnih znanosti Hrvatske, 2013., p. 148.

[24] The European Green Deal is the EU's strategy containing package of policy initiatives, which aims to set the EU on the path to a green transition, with the ultimate goal of reaching climate neutrality by 2050. See: „The European Green Deal" (COM(2019)640.) Accessed 18.10.2024. https://www.consilium.europa.eu/en/policies/green-deal/

[25]European Commission, The Durability of Products: Final Report, 2015. p.4. Accessed 17.10.2024. https://op.europa.eu/en/publication-detail/-/publication/6c325b55-7352-11e5-86db-01aa75ed71a1/language-en

[26] Zoričić, Marko. „Planirano zastarijevanje i pravo na popravak -EU staje u zaštitu potrošača", Pravo i porezi, br. 1/21, 2021., p. 67.

[27] Kramer, Laurin K., User Experience in the Age of Sustainability, A Practitioner's Blueprint, Amsterdam: Elsevier, 2012. p. 69.

[28] Sierra, Fontalvo Lesly et al. „A deep dive into addressing obsolescence in product design: A review", Heliyon, 2023, p. 2. Accessed 16.10.2024. https://doi.org/10.1016/j.heliyon.2023.e21856

3.2. Unfair commercial practices as regulated in Directive 2005/29/EC and Directive 2024/825

Directive 2005/29/EC encompasses regulations targeting both misleading practices and omissions, which are applicable to environmental assertions in consumer-oriented transactions, particularly when they influence consumer decisions adversely. This Directive mandates consumer protection agencies within Member States, on an individual basis, to evaluate such practices, employing a transactional decision test for assessment. Furthermore, it delineates a set of commercial practices deemed inherently unfair, outlined in a blacklist, which is subject to unequivocal condemnation without necessitating case-specific scrutiny.[29] Directive 2005/29/EC has the aim of approximation the laws of the Member States on unfair commercial practices, such as unfair advertising, which directly harm consumers economic interests. Article 5 of Directive 2005/29/EC stipulates that unfair commercial practices are prohibited under certain conditions, for example when they are opposite to professional diligence. Commercial practices are considered unfair, particularly, if they are misleading or aggressive.[30] Annex I of Directive 2005/29/EC contains the list of those commercial practices which are in all circumstances regarded as unfair. According to the provision of Article 6 (1), a commercial practice is regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even in the event of the information being factually correct, and in either case, causes or is likely to cause him to take a transactional decision that he would not have taken otherwise. Aforementioned Article 6 (1) Directive 2005/29/EC, is amended by Directive 2024/825 by adding certain characteristics of products in respect of which a trader's practices may be considered misleading. This way Directive 2024/825 specifically addresses the issue of early obsolescence of products by expanding the list of prohibited unfair commercial practices. In conclusion, Directive 2024/825 does not enforce prohibition on early obsolescence of products by itself but represented a legal deterrent by prohibiting the promotion of products containing characteristics that may reduce product longevity.[31]

4. The right to repair as the mechanism of protecting consumer rights in the EU

One of the aims of the concept of Circular Economy is to prolong the durability of products and by achieving that reduce the amount of waste in nature. Enabling consumers to repair defective product might be just the right mean to achieve aforementioned goals.[32] In addition, recycling a product implies that it has to go through a secondary production stage to bring it back into a reusable form, thus requiring more material consumption than reuse.[33] In the past, it was common for consumers to independently perform simpler repairs of the

[29] Horak, Hana. „Na putu prema zelenoj tranziciji i zaštiti potrošača“, Acta Economica et Turistica, 2024, p. 39.

[30] Directive 2005/29/EC Article 8. reads: “ A commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer’s freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.“

[31] See, for example, Directive 2024/825 Annex (4) points 23f. and 23g.

[32] Terryn, Evelyne. „A Right to Repair? Towards Sustainable Remedies in Consumer Law“, European Review of Private Law, 2019, p. 853.

[33] McCollough, John. „The disappearing repair trades, factors impacting the demand for repair services of household products“ International Journal of Consumer Studies, 2009. p. 620 Accessed 19.10.2024. https://doi.org/10.1111/j.1470-6431.2009.00793

devices they use, and to hire independent repairers for more complicated malfunctions. Today that has changed since modern technical goods, as a rule, function with the help of built-in electronics, which is why the repair requires specialist knowledge. In addition, electronics develop much faster than other technical goods, which is why electronic goods become obsolete faster, and new, improved models appear on the market in a relatively short time. Finally, electronic features of the product become defective faster than other components of technical goods, so electronics are necessarily repaired more often.[34] Authors point to the fact that manufacturers of technical goods have consciously adopted special product design and developed strategies that make repair impossible, with the aim of convincing consumers that the device is not worth the repair.[35] Moreover, manufacturers of technical goods worsen the position for independent service providers, as an alternative authorized services for the repair of consumer electronics, by incorporating software into products to which they claim intellectual property rights. That is the reason why the repair, legally, can only be done by the manufacturer or in its authorized services.[36] These statements are often illustrated with examples from mobile phones sales practice.[37] Today, manufacturers advertise durability of the products much less in order to attract customers attention to modern design and performances of new, advanced models. This marketing practice also confirms that traders no longer have an interest in producing goods that will last. Simultaneously, their income no longer rests on repairs of defective goods, but on sale of new models. It is believed that the shorter lifespan of electronics is not accidental, but rather encouraged by manufacturers with built in, planned obsolete components.[38]

The new European Directive (EU) 2024/1799 on the right to repair forms part of the European Green Deal and the Circular Economy Action Plan[39] and complements the objective pursued by Directive (EU) 2019/771. According to the European Commission, the premature disposal of consumer goods produces 261 million tons of CO2-equivalent emissions, consumes 30 million tonnes of resources, and generates 35 million tonnes of waste in the EU annually. Consumers also lose about €12 billion yearly by replacing goods rather than repairing them. Additionally, the new rules are expected to bring €4.8 billion in growth and investment within

[34] Jovičić, Katarina. „Direktiva EU o pravu na popravku iz juna 2024. godine, zašto nam je potrebna zaštita ovog prava imperativnim normama“, Revija za europsko pravo, 2024. p. 105.

[35] Perzanowski, Aron. „Consumer Perceptions of the Right to Repair,“ Indiana Law Journal, 2021. p. 361.

[36] Gomulkiewicz, Robert W. „Considering a Right to Repair Software“, Berkeley Technology Law Journal, 2022. p. 949.

[37] Mirr, Nicholas N. „Defending the Right to Repair: An Argument for Federal Legislation Guaranteeing the Right to Repair“, Iowa Law Review, 2020. p. 2395.

[38] Buseman, Nicole A. „Second-Generation Solution to Electronic Waste: The New York Approach“, Columbia Journal of Environmental Law, 2012, pp. 145-146.

[39] The European Commission adopted the new circular economy action plan (CEAP) in March 2020. It is one of the main building blocks of the European Green Deal, Europe's new agenda for sustainable growth. The EU's transition to a circular economy will reduce pressure on natural resources and will create sustainable growth and jobs. It is also a prerequisite to achieve the EU's 2050 climate neutrality target and to halt biodiversity loss.The new action plan announces initiatives along the entire life cycle of products. It targets how products are designed, promotes circular economy processes, encourages sustainable consumption, and aims to ensure that waste is prevented and the resources used are kept in the EU economy for as long as possible.It introduces legislative and non-legislative measures targeting areas where action at the EU level brings real added value.See: „Circular economy action plan“, Accessed 18.10.2024. https://environment.ec.europa.eu/strategy/circular-economy-action-plan_en

the EU. The directive complements new EU rules on Ecodesign[40] and on Directive (EU) 2024/825.[41] The Directive promotes sustainable consumption and environmental protection by promoting a longer product life cycle, which includes reuse, repair and refurbishment. At the same time, a benefit for consumers is achieved by avoiding the costs associated with a new purchase in the short term, which can indirectly result in a reduction of the presence of products with built-in planned obsolescence on the market.

The provision of Article 3 of Directive (EU) 2024/1799 foresees the highest level of harmonization of the rules in the member states, prescribing that the member states may not maintain or introduce into national regulations either stricter or more lenient rules than those provided for in Directive (EU) 2024/1799 (the so-called maximum harmonization Directive). Directive (EU) 2024/1799 scope is the repair of goods purchased by consumers, in the event of a defect in the goods that appears or becomes apparent outside the seller's liability period, in accordance with Article 10 of Directive (EU) 2019/771.[42] Directive (EU) 2024/1799 focuses on the newly introduced duty of manufacturers to repair the products they market outside the commercial guarantee provisions under sales law Regulated by Directive (EU) 2019/771. Directive (EU) 2024/1799 follows the definition of consumer as defined in Article 2(2), Directive (EU) 2019/771 as natural person who, in relation to contracts is acting for purposes which are outside that person's trade, business, craft or profession. The repairer is defined as any natural or legal person who, related to that person's trade, business, craft or profession, provides a repair service, including manufacturers and sellers that provide repair services and repair service providers whether independent or affiliated with such manufacturers or sellers. Pursuant provisions of Article 5 Directive (EU) 2024/1799 the manufacturer has the main obligation upon the consumer's request, to repair goods for which, and to the extent that, repairability requirements are provided for by Union legal acts. The above category represents a set of prerequisites that must be met beforehand. Unlike the existing sectoral regulation, which seeks to ease the prerequisites for the repair of certain products, Directive (EU) 2024/1799 introduces a specific obligation for manufacturers to repair products. But, sectoral legislation has a limiting effect on the manufacturers' obligation in a way of conditions imposed by a certain sectoral act (for example, the availability of spare parts during a certain period). The directive prescribes a further obligation for producers from third countries to appoint an economic operator with a place of business within the European Union before appearing on the European single market, who takes responsibility for fulfilling the obligation to repair the defective product. In case of failure to appoint such a person, the importer or distributor of the product will be held responsible. The repair is carried out by the manufacturer, free of charge or for a reasonable price. It should be completed within a reasonable period from the moment the manufacturer has physical possession of the good, has received the good or has been given access to the good by the consumer. In cases where the repair is impossible, the manufacturer may offer the consumer a refurbished good. The manufacturer may lend a consumer a good as a substitute for the duration of the repair free

[40] Regulation (EU) 2024/1781 of the European Parliament and of the Council of 13 June 2024 establishing a framework for the setting of ecodesign requirements for sustainable products, amending Directive (EU) 2020/1828 and Regulation (EU) 2023/1542 and repealing Directive 2009/125/EC, Official Journal of the European Union L, 2024/1781, 28.6.2024.

[41] „Right to repair: Making repair easier and more appealing to consumers", Accessed 19.10.2024. https://www.europarl.europa.eu/news/en/press-room/20240419IPR20590/right-to-repair-making-repair-easier-and-more-appealing-to-consumers

[42] Directive (EU) 2019/771, Article 10 stipulates that the seller is liable to the consumer for any non-conformity that exists at the time of delivery of the goods and that becomes apparent within two years from that moment.

of charge or for a reasonable fee. Consumers are free to seek repair from any repairer of their choice. Manufacturers, on the other hand, or, where applicable, authorised representatives, importers or distributors (who have an obligation to repair) must ensure that consumers can access, via a free access website, information on the indicative prices that are charged for the typical repair of goods covered by Union legal acts. The manufacturer or, the authorized representative, importer or distributor, pursuant to Article 6 of Directive (EU) 2024/1799 must make available free of charge, at least for the entire duration of their obligation to repair, information on their repair services in an easily accessible, clear and comprehensible manner. Pursuant to Article 16(2) of Directive(EU) 2024/1799, Article 10 of Directive (EU) 2019/771 that regulates duration of the legal guarantee in which the seller is held liable to the consumer for any lack of conformity which exists at the time when the goods were delivered and which becomes apparent within two years of that time, is amended. The added paragraph stipulates that the liability period can be prolonged by 12 months. Directive (EU) 2024/1799 stipulates the manufacturers' duty to repair and, also, enables consumers to seek repair from different repairers, of consumer's choice. The manufacturers, the sellers and independent repairers have the obligation, upon a consumer's request, to supply consumer with the European Repair Information Form on a durable medium, within a reasonable deadline.[43] Consumers can, also, obtain the European Repair Information Form from an online repair platform. This will provide consumer with the opportunity to compare repair prices and to choose the most favourable.[44] Repairers may (but are not obliged to) provide the consumer with the European Repair Information Form. Directive (EU) 2024/1799 also establishes a European Online Platform for Repair The European online platform, once established, will provide consumers with links to the online platforms in the Member States.[45] National repair contact points will offer consumers a direct link with repairers and open the possibility of comparing different repair services. Member States are required to implement at least one measure designed by Directive (EU) 2024/1799 to incentivise consumers to opt for repair.

5. Conclusion

To achieve a sustainable economy in the EU, similar to Raworth's alternative 'doughnut' economic model,[46] it is necessary to raise consumers' awareness about the importance of their role in realizing more sustainable business and living models is necessary. Consumers should act as citizens, thinking about the ecological future of the planet, as well, and not just about their economic interests in trade.[47] Repairing things is more favourable for the consumer than buying new item, especially when it comes to more expensive and technically advanced products such as mobile phones, computers, home appliances etc. However, consumers' right to repair has been brought into question by certain unfair commercial practices that could mislead consumers regarding relevant circumstances when making sustainable purchase choices. One example of such misleading unfair commercial practice is the early obsolescence of products which Directive 2024/825 added to the list of prohibited

[43] Article 4 (1) Directive(EU) 2024/1799.
[44] Directive (EU) 2024/1799, Recital (23)
[45] Article 7 Directive (EU) 2024/1799.
[46] Raworth, Kate. Donought Economics. Seven Ways to Think Like a 21st Century Economist, London: Random House 2017, p. 373.
[47] Lewis, Justin Matthew W. et al. Citizens or Consumers? What the Media Tell Us About Political Participation, London: Open University Press, 2005. p. 99.

unfair commercial practices. The new rules are, for now, limited to goods purchased by consumers and to products already covered by existing rules of repair. Directive (EU) 2024/1799 introduces the European online platform, to increase the visibility of repair services and to simplify the search for suitable services by providing lists of repair solutions in Member States with harmonized cost estimations. Even though we believe this to be an excellent general idea, to be effective and consumer friendly, an adequate repair infrastructure should also be made visible on the platform. Further, we find the provision of Directive (EU) 2024/1799 Article 5(4), establishing the obligation for spare parts and tools-making manufacturers to offer them at a reasonable price, to be rather vague. Cited rule do not provide needed criteria for determination of a “reasonable” price. In the absence of legally binding guidelines provided by EU legislator, the national courts must establish standards. Directive (EU) 2024/1799 already entered into force, but Member States must bring national laws in force by 31. July 2026., at the latest. True effect of the new rules regarding planned obsolesce of goods and consumers’ right to repair and their impact on the level of consumer protection iu EU remain to be seen with the beginning of implementation in Member states.

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ISSUES RELATED TO IMPLEMENTATION OF THE DIRECTIVE (EU) 2019/771 IN THE LEGISLATION OF BOSNIA AND HERZEGOVINA

Abstract

The rules on the conformity of goods with the contract within the framework of the consumer sale contract in the EU law were reformed in 2019 with the adoption of Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC[1] (hereinafter: Directive 2019/771), and Directive (EU) 2019/770 of the European Parliament and the Council on certain aspects concerning contracts for the supply of digital content and digital services[2] (hereinafter: Directive 2019/770). Both these Directives entered force on 1 January 2022, and were adopted for the purpose of harmonizing the normative framework with current trends of digitalization of contractual relations i.e. electronic trade, which has long since meant not only electronic conclusion of a contract, but also fulfilment of the obligations electronically. Both harmonization instruments are expected to contribute to creating a functional single digital market. [3] Even though these Directives should complement each other[4], and are called the *twin directives*, this paper discusses only the rules from Directive 2019/771, which defines the liability for nonconformity with respect to goods that have inbuilt digital contents or digital services or are connected to them.

In this context, the first part of the paper briefly draws attention to the novelties introduced by the Directive 2019/771 into the earlier regulation, and its second part discusses transposition of this directive into the Bosnian and Herzegovinian legislation. A fair, and at the same time clear and easily understandable transposition of the solutions from the Directive 2019/771 will not be an easy task, primarily because this is a regulation that goes into the very core of contract law, and which is also very demanding in terms of legal formulation. Certainly, we must not forget the fact that in Bosnia and Herzegovina, harmonization with EU standards and norms in the field of consumer protection has been unacceptably delayed from what is expected from a candidate country at this time due to prevailingly political reasons. This fact will, most certainly, make the harmonization with the Directive 2019/771 an even greater challenge.

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[1] DIRECTIVE (EU) 2019/771 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, *OJ L 136, 22.5.2019, p. 28–50.*

[2] DIRECTIVE (EU) 2019/770 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, *OJ L 136, 22.5.2019, p. 1–27.*

[3] Commission, Strategy for a digital single market for Europe (Communication) COM(2015) 192 final.

[4] Point 13 of Preamble of the Directive 2019/771.

Keywords: Directive (EU) 2019/771, liability for nonconformity with the contract, consumer sales contract, consumer sales

1. Introduction

After the matter of liability for nonconformity of goods with the consumer sales contract[5] had been harmonized for two decades on the basis of the Directive 1999/44/EC[6], the Directive 2019/771 was adopted in 2019 introducing some new rules in this area, and replacing the Directive 1999/44/EC. [7] One of the most important reasons for this reform was the attempt to facilitate operation of the internal market in the conditions of technological development, which, among other things, includes e-trade with goods containing digital elements. Similarly to the Directive 1999/44/EC, the Directive 2019/771 remains a directive of partial harmonization because it only harmonizes the rules on the conformity of goods with the contract, remedies in the event of a lack of such conformity, the modalities for the exercise of those remedies, and on commercial guarantees.

As opposed to the Directive 1999/44/EC, the Directive 2019/771 is, however, a directive of maximum harmonization. This is clearly seen under Article 4 of the Directive 2019/771, according to which Member States may not retain or adopt rules in their national law that depart from the solutions in the Directive, except where the Directive itself provides otherwise.[8] Since, in line with the principle of partial harmonization, the Directive 2019/771

[5] Liability for nonconformity of goods with the contract is a category recognized in European consumer protection law. Instead of this term, the national legislation discusses the liability for material defects. However, in order to remain linguistically consistent with the provisions contained in the Directive 2019/771, part of this paper that discusses the solutions provided in this directive will use the term liability for nonconformity, while the part that discusses harmonization of national legislation with the *acquis* will use the term liability for material defects.

[6] Directive 1999/44/EC of the European Parliament and of the council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, *OJ L 171, 7.7.1999, p. 12-16*.

[7] Text of the Directive 1999/44/EZ remained almost unchanged until its revocation. Only one minor amendment was made after the adoption of the Consumer Rights Directive, whereby Article 33 was included in the Directive 1999/44/EC. This Article requires from the Member States to notify the Commission on adoption of any new or stricter rules in terms of legislation that places consumer protection at a level above the level established by the Directive 1999/44/EC as a minimum harmonization directive. Geraint, Howells, Christian Twigg-Flesner and Thomas Wilhelmsson. Rethinking EU Consumer Law. London and New York: Routledge, 2018.

[8] A lot has been written about the shortcomings of the maximum harmonisation concept. See, for example, Smits, Jan M. "Full Harmonization of Consumer Law? A Critique of the Draft Directive on Consumer Rights", European Review of Private Law 1 (2010): 5-14; Micklitz, Hans-Wolfgang "The Targeted Full Harmonisation Approach: Looking Behind the Curtain". In Modernising and Harmonising Consumer Contract Law, edited by Geraint Howells and Rainer Schulze, 47-86. Munich: Sellier, 2009; Rott, Peter "Minimum Harmonisation for the Completion of the Internal Market? The Example of Consumer Sales Law." Common Market Law Review 40(5) (2003): 1107-1135. Specifically, maximum harmonisation under the contract on consumer sale is often considered an inappropriate harmonisation concept. An example that illustrates particularly well the inadequacy of such approach is the general category of conformity with the contract. This conformity, as a rule, imply negotiations between the contracting parties and their agreement regarding the elements of the contract they are concluding. However, the fact is that actual negotiations and the agreement on the content of the contract between the seller and the consumer today is just a fiction. In reality, in most cases, the seller defines the conditions of the contract in advance and without the buyer's involvement. In doing so, they are restricted by different provisions of the law; however, this does not change the fact that the buyer has hardly any influence

does not define anything except the mentioned issues related to the conformity requirements, rights in the case of nonconformity, and main ways to exercise such rights, only those matters have to be harmonized to a maximum. [9]

2. What novelties are introduced by the Directive 2019/771?

2.1. Scope of applicability

The differences compared to the Directive 1999/44/EC may be observed already with regards to the actual application of the Directive 2019/771, since for the first time, it contains an explicit definition of a sales contract. Such definition corresponds with the definition of the sales contract in member states, and implies transfer or obligation to transfer ownership of the goods from the seller to the consumer, and payment or obligation to pay the price by the consumer to the seller.[10] The notion of "goods"[11] has been broadened to also include the movable objects with integrated digital content or digital service, or are closely linked to digital content or digital service so that the absence of such digital content or service would make the operation of such goods impossible (goods with digital elements).[12] The goods with digital elements, as a rule, include smart products, such as smart phones, television sets or watches[13], but not movable things that are used exclusively as the carrier of digital content, for example an USB[14].

Directive 2019/771 regulates the relationship between the seller and consumer, where the terms used to describe both contracting parties correspond with the definitions generally accepted in the consumer *aquis*.[15] The member states are certainly allowed to extend the term of consumer to also include physical or legal persons who are not consumers as defined

on the content of the future contract. Twig-Flesner, Christian "Conformity of goods and digital content/digital services". In El Derecho privado en el mevo paradigm digital El Derecho privado en el mevo paradigma digital, edited by Esther Arroyo Amayuelas and Sergio Camara Lapuente, 49-79. Barcelona-Madrid: Marcial Pons, 2020.

[9] More details on the issues that are not covered by the principle of maximum harmonization, for example, in Morais-Carvalho, Jorge "Sale of Goods and Supply of Digital Content and Digital Services: Overview of Directives 2019/770 and 2019/771". EuCML. 8 (2019): 194-201, and in Kåre Lilleholt "A Half-built House? The New Consumer Sales Directive Assessed as Contract Law." Juridica 28 (2019): 3-8, accessed May 8, 2024, doi: https://doi.org/10.12697/JI.2019.28.01.

[10] The perceived problem here is that the area of substantive application of the Directive 2019/771 does not include contracts where a particular item is placed at disposal temporarily, such as, for example, in leasing. Such omission appears particularly odd in view of the fact that a significant part of contemporary business dealings relies on business models that imply sharing of commodities, thus supporting circular economy.

[11] About the terminology used to designate the object of a sales contract in the official languages of EU see in: Nikšić, Saša "Odgovornost za nedostatke kod ugovora o kupoprodaji stvari s digitalnim elementima." Annals of the Faculty of Law in Belgrade 70(5) (2022): 505-533.

[12] See more about whether the Directive 2019/771 or Directive 2019/770 should be applied to goods with digital elements in: Karin Sein "Goods With Digital Elements and the Interplay With Directive 2019/771 on the Sale of Goods", 2020, accessed May 8, 2024, doi: http://dx.doi.org/10.2139/ssrn.3600137.

[13] Points 14 and 15 of Preamble to the Directive 2019/771.

[14] Art. 3 point 4 (a) of Directive 2019/771.

[15] The Directive 2019/771 also advocates narrow, traditional understanding of the contracting parties in the sales contract for sales via Internet platforms. Pursuant to Point 23 of the Preamble to this Directive, Internet platforms are considered sellers if they act as the consumer's direct contracting party. Attempts have been made to somewhat mitigate such strict position by allowing the member states to extend the application of the Directive 2019/771 also to the platforms that do not meet the said conditions. For more about this, please see: Twig-Flesner, Christian "Conformity of goods and digital content/digital services". In El Derecho privado en el mevo paradigma digital El Derecho privado en el mevo paradigma digital, edited by Esther Arroyo Amayuelas and Sergio Camara Lapuente, 49-79. Barcelona-Madrid: Marcial Pons, 2020.

in Directive 2019/771, such as non-governmental organisations, start-ups, or small and medium size enterprises. In addition, the member states are free, in case of dual contract, to decide whether and under what conditions a person who uses a certain object for both private purpose and professionally, would be considered and protected as a consumer.[16]

2.2. Conditions of liability for nonconformity

2.2.1. Subjective and objective assumptions of conformity

A novelty introduced by the Directive 2019/771, which concerns the criteria that a good must fulfil to be considered conform, is the clear division of the criteria into subjective and objective, and their significantly more detailed definition. Subjective criteria stem from the contracts the seller concludes with the consumer; i.e. they are taken into consideration where they are agreed. In contrast, objective criteria are the criteria that any good that is object of a contract must always meet, what means that this also includes the situations where the contracting parties had not agreed anything in particular.

Several of more subjective criteria listed in Art. 6 of Directive 2019/771 had also been recognized in the Directive 1999/440/EC, such as, for example, that the goods need to conform with description of the goods provided in the contract, and be suitable for a particular purpose the consumer needs it for, and about which the consumer had informed the seller. [17] Others, such as type[18], quantity[19], quality[20], functionality, compatibility and interoperability from Art. 6 (a), accessories and instructions from Art. 6 (c), and supply with appropriate updates from Art. 6 (d), are new.

[16] Of course, such solutions contribute neither to achieving real harmonisation of legal provision, nor to adequate consumer protection in the single market. Morais-Carvalho, Jorge and Martim Farinha. "Goods with Digital Elements, Digital Contents and Digital Services in Directives 2019/770 and 2019/771." Revista de Direito e Tecnologia Vol. 2 (2020): 257-270.

[17] Some of the dilemmas that had existed with respect to the subjective criteria prior to adoption of the Directive 2019/771 continued to exist after its adoption. So, for example, the question still stands as to whether the description of goods should be understood to relate only to general characteristics of goods and by doing so prevent the consumer to invoke any, even the smallest nonconformity that may well rely on expressions that would be hard to consider description of features of the goods. In most cases, this question is answered affirmatively. Certainly, it is emphasized that the expressions that do not describe characteristics of the goods must not be understood as a description. So, the statements like: "the same car is driven by a famous football player", or that "several dozens of buyers in Sarajevo have bought that very same bicycle". Also, the dilemma remains as to in how many details the consumer should explain the specific purpose they are buying the item for. It is generally accepted that the explanation should be as detailed as its intended purpose is unusual.

[18] Lack of conformity also includes the delivery of an item that is not of the same type as the owed one. In legal theory, one may come across the question how else to understand the type as subjective conformity criteria except to understand it as a characteristic that is different from the description. This question is well justified if we take into consideration that some authors underline that the type of goods is an integral part of its description. If the type is truly part of description as subjective conformity criteria, why is it being separated as a special criterion? More in: Twig-Flesner, Christian "Conformity of goods and digital content/digital services". In El Derecho privado en el mevo paradigma digital El Derecho privado en el mevo paradigma digital, edited by Esther Arroyo Amayuelas and Sergio Camara Lapuente, 49-79. Barcelona-Madrid: Marcial Pons, 2020 and Morais-Carvalho, Jorge "Sale of Goods and Supply of Digital Content and Digital Services: Overview of Directives 2019/770 and 2019/771". *EuCML*. 8 (2019): 194-201.

[19] The consumer who receives less or more than specified in the contract has the right to request from the seller to add to the delivered quantity or take back the surplus quantity, while they have the right to termination of contract only when the deviation in quantity is not negligible.

[20] When talking about the quality of goods, one must keep in mind that the quality is not defined solely by the contract; it is also an objective criterion. In this context, the quality specified in the contract is only relevant where it exceeds the objectively expected quality.

Identification of criteria of functionality, compatibility and interoperability as criteria of conformity relies on the fact that the goods sold nowadays are often in interactive relation with various other goods. Compatibility implies the ability of the goods to operate with hardware or software that the goods of specific type are typically used with, functionality is the ability of the goods to perform their function in view of their purpose, while interoperability is the ability of the goods to work with hardware or software that is different from those that serve the use of the goods of that particular type. In the text of the Directive 2019/771, these criteria have been identified as subjective, and this should be understood as subjective criteria in the context of particular purpose of goods as specified in the contract, considering that both functionality and compatibility are at the same time also the criteria of objective nature.

According to Art. 7(1) of the Directive 2019/771 that specify objective requirements for conformity, the goods must be fit for the purposes for which goods of the same type would normally be, match the sample or model, and delivered with accessories, including packaging and installation instructions, and be of such quality and with such characteristics that are normal for goods of the same type and which the consumer may reasonably expect. Some of the stated criteria, for example, conformity of goods with the sample or model, remained the same as provided in the Directive 1999/44/EC, while others have been changed in a lesser or greater degree. Thus, the Directive 2019/771 amends the requirement that the goods should be fit for the purposes for which goods of the same type would normally be used with the stipulation that this should be done taking into account, where applicable, any existing EU and national laws, technical standards or, in the absence of such technical standards, applicable sector-specific industry codes of conduct.[21] A combination of the old and the new in the text of the Directive 2019/771 is seen in the rule on the obligation to provide the goods with accessories, including packaging, installation instructions, etc. Nonetheless, the awkward linguistic formulation, which apparently suggest that packaging and installation instructions are to be considered accessories, should have been avoided.

Particularly broadly listed objective compliance criteria are to be found in provision under Art. 7 (1)(d) of Directive 2019/771 according to which the goods, for the purpose of conformity, must be of the quantity and possess the qualities and other features, including in relation to durability, functionality, compatibility and security normal for goods of the same type and which the consumer may reasonably expect given the nature of the goods and taking into account any public statement made by the seller, or other persons (advertising and labelling) in previous links of the chain of transactions.[22] There are several things that need to be pointed out with respect to this rule.

Firstly, putting forward quantity as an objective criterion is problematic since quantity is a parameter that is typically contracted, not determined according to what is normal for the

[21] The rule stipulated in this way draws our attention to the fact that the interests of the sellers have been taken into account when formulating it. See more in: Twig-Flesner, Christian "Conformity of goods and digital content/digital services". In El Derecho privado en el mevo paradigma digital El Derecho privado en el mevo paradigma digital, edited by Esther Arroyo Amayuelas and Sergio Camara Lapuente, 49-79. Barcelona-Madrid: Marcial Pons, 2020.

[22] The fact is that the subjective conformity criteria from Art. 6(a) and objective conformity criteria from Art 7 (d) of Directive 2019/771 do not correspond, meaning that Art. 6(a) mentions interoperability, which is missing in Art. 7(d), while Art. 7(d) talks about durability and security, which cannot be found in Art. 6(a). Still, this should not be seen as a problem because these are non-exclusive lists the items of which should be understood as examples. See more in: Van Gool, Elias and Anaïs Michael "The New Consumer Sales Directive 2019/771 and Sustainable Consumption." Journal of European Consumer and Market Law 4 (2021): 136-147.

goods of specific type or to what the consumer may reasonably expect. Furthermore, the criteria listed in provision under Art. 7(1)(d) are listed as *exempli causa,* or in other words, the list is not final. Therefore, it can be accepted that already mentioned criteria of functionality and compatibility are stated as conformity criteria, but, for example, interoperability is not. A whole new conformity criterion that is mentioned here along with other criteria is durability as the ability of the goods to retain its function and characteristics during normal use. This criterion strives to achieve more sustainable consumption patterns and a circular economy.[23]
A new objective criterion of conformity introduced by the Directive 2019/771 are the updates that should enable conformity of the goods with digital elements. Taking into consideration this objective criterion is completely understandable since uninterrupted and secure operation of goods containing digital elements typically depends on the updating of digital content or digital services. In this context, according to Art. 7(3) the seller of goods with digital elements is obliged to ensure that the consumer is informed and supplied with updates that are necessary to keep the goods in conformity. Such obligation of the seller exists over a period of time that the consumer may reasonably expect given the type and purpose of the goods and the digital elements. If the contract provides for a continuous supply of the digital content or digital service over a period of time, the seller shall be liable to provide the updates for a period of two years from the moment of delivering the good with digital elements. Where the continuous supply is foreseen for a longer period of time, the seller shall be liable for lack of conformity throughout the period during which the digital content or service are to be supplied. It needs to be said that the seller's liability is limited to making sure that the consumer has been provided with appropriate updates, not to install the updates themselves; the obligation to install the updates lies with the consumer, as is clear from Art. 7(4) of the Directive 2019/771, which stipulates that the seller's liability shall be limited in cases where the consumer fails to install the updates. The seller's liability is excluded under the condition that 1) the seller informed the consumer about the availability of the update; and that 2) the lack of conformity that has appeared on the goods results solely from the lack of the relevant update.
In a sense, a novelty in comparison to the Directive 1999/44/EC is the rule found in Directive 2019/771 under Art. 8(b), which concerns the lack of conformity resulting from the incorrect installation. Namely, the Directive 2019/771 now additionally regulates the situation where the lack of conformity of the goods with digital elements results from the incorrect installation, where the incorrect installation was due to deficiencies in the installation instructions provided by the seller or provider of the digital content or digital service.[24]

2.2.2. Lack of conformity at the time of delivering the goods to the consumer

Pursuant to Art. 10(1) of the Directive 2019/771, the seller is liable to the consumer for any lack of conformity which exists at the time when the goods were delivered, and which becomes apparent within two years of that time. Where the digital content is delivered or digital service provided continuously over a period of time, the seller shall, according to Art. 10(2), also be liable for any lack of conformity of the digital content or digital service that occurs or becomes apparent within two years of the time when the goods with digital elements were delivered. Where the contract provides for a continuous supply for more than

[23] Point 32 of Preamble of the Directive 2019/771.
[24] The Directive 1999/44/EZ does not, and neither does the Directive 2019/771, include definition of installation (mounting). The installation is to be understood broadly to also include assembling the item that is made of several pieces, and installing, connecting or linking the object of the contract with other things that belong to the buyer/consumer.

two years, the seller shall be liable for any lack of conformity of the digital content or digital service that occurs or becomes apparent within the period of time during which the digital content or digital service is to be supplied. Directive 2019/771 does not define delivery, so the definition of the term "delivery" must be sought in national legislation. However, when doing so, one must not lose sight of the fact that the term of delivery is defined under Art.18(1) of the Consumer Rights Directive[25] as transfer to the consumer of physical possession or control of the goods. According to Art. 10(3) of the Directive 2019/771, the Member States may maintain or introduce longer time limits than those.

Also important is the rule from Art. 11(1), according to which any lack of conformity which becomes apparent within one year of the time when the goods, including here the goods with digital elements, were delivered shall be presumed to have existed at the time when the goods were delivered, unless proved otherwise or unless this presumption is incompatible with the nature of the goods or with the nature of the lack of conformity. Member States may maintain or introduce a period of two years from the time when the goods were delivered.

2.2.3. Conscientious consumers and exclusion of seller's liability

In line with one of general rules of sales law, the seller is liable to the buyer for those deficiencies of the object of the contract that the buyer was not aware of. This rule is, in a sense, also accepted under Art. 7(5) of the Directive 2019/771, which discusses the exclusion of the seller's liability. So, the seller shall not be liable to the consumer if, at the time of the conclusion of the sales contract, the consumer was specifically informed that a particular characteristic of the goods was deviating from the objective requirements for conformity and the consumer expressly accepted that deviation when concluding the sales contract. This rule, as defined here, is somewhat narrower than the rule of exclusion of the seller's liability provided under Directive 1999/44/EC. According to the Directive 1999/44/EC, the seller was not liable to the consumer for lack of conformity if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware, of the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer.[26] This means that, according to solutions provided in the Directive 1999/44/EC, the seller's liability was excluded not only where they had drawn the consumer's attention to the deviation, but also where the consumer became aware of the deviation in a different way, for example, by examining the goods. This rule has, obviously, not been carried over to the Directive 2019/771. Exemption of the seller from liability for lack of conformity has now become possible with cumulative fulfilment of two assumptions. The first is related to the seller's liability to inform the consumer about the deviation, and the second is about the consumer expressly and separately accepting the deviation. Separate consumer's acceptance would in this case mean, possibly, signing a written statement accepting the deviation. Still, this is not considered necessary; it would suffice that the consumer has been informed about the deviation, and that they expressly state that they still want to buy the goods even with such deviation.[27]

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[25] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, *OJ L 304, 22.11.2011, p. 64–88.*

[26] The mentioned rule was included in Art. 2 (3) of Directive 1999/44/EZ.

[27] Certainly, this solution raises the question whether the seller will be held accountable for lack of conformity the consumer becomes aware of through the inspection in a way that they are informed on a defect not by the seller but somebody else. Considering that this rule from Directive 2019/771 is understood in the literature as the rule on exemption of liability that is narrower than the one stipulated in the Directive 1999/44/EC, and that

2.2.4. Notification of the lack of conformity

When it comes to the consumer's liability to inform the seller on the discovered lack of conformity, there has been no change to the solutions recognized in the Directive 1999/44/EC. This means that the Directive 2019/771 also contains the rule according to which the member states may retain or introduce provisions imposing onto the consumer, in order to exercise their rights, the obligation to inform the seller on any discovered lack of conformity within the timeframe that may not be shorter than two months from the moment of discovering it.

2.3. Consumer's rights in case of nonconformity

The rights the consumer may seek in case of lack of conformity of goods are, also according to the Directive 2019/771, to have the goods brought into conformity by repair or replacement, right to have the price reduced, and right to terminate the contract.

The novelty introduced by the Directive 2019/771, with respect to the buyer's right to demand the goods being brought into conformity by repair or replacement is explicit definition of the consumer's right to choose between repair and replacement, and 2) the seller's right to refuse to bring the goods into conformity if repair and replacement are impossible or would impose costs on the seller that would be disproportionate, taking into account all circumstances of the case.[28] Also according to the Directive 2019/771, the repair or replacement are to be carried out free of charge and without any significant inconvenience to the consumer, with the new provision that the consumer has the right to repair or replacement within a reasonable period of time from the moment the seller was informed about the lack of conformity.[29]

The right to the price reduction and the right to terminate the contract still remain secondary rights of the consumer, which they may exercise in those situations when they cannot exercise the right to repair or replacement. The number of situations where, according to solutions contained in the Directive 2019/771, the right to reduce the price or the right to terminate the contract may be exercised is greater than the number of situations where the price reduction or termination of the contract had been possible under the Directive 1999/44/EC. Now the right to price reduction or termination of the contract may be sought in cases where: a) the seller has not completed the repair or replacement, or has not completed them in accordance with Art. 14(2) and (3) of the Directive 2019/771; b) the lack of conformity persists in spite of the attempt to bring the goods to conformity; c) lack of conformity is so serious to justify immediate price reduction or termination of the contract; and d) the seller states, or the circumstances warrant, that the lack of conformity will not be remedied within a

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it is said that the consumer's learning of the defect in any way except by notification by the seller, is not relevant any more, it might be concluded that the seller is not liable to the buyer only for those defects that they had notified the consumer themselves, and the consumer had explicitly accepted such defect. For any other defects, for example, those the consumer becomes aware of after having heard about them from third persons, the seller remains liable. Twig-Flesner, Christian "Conformity of goods and digital content/digital services". In El Derecho privado en el mevo paradigma digital El Derecho privado en el mevo paradigma digital, edited by Esther Arroyo Amayuelas and Sergio Camara Lapuente, 49-79. Barcelona-Madrid: Marcial Pons, 2020.

[28] The circumstances that have to be taken into consideration are, first, value of the item without defects, the importance of the defect, and the question whether the repair or replacement can be done without significant inconvenience for the buyer.

[29] Reasonable time according to Point 55 of the Preamble of the Directive 2019/771 is the shortest possible time required to complete the repair or replacement. Such time is determined objectively, taking into consideration the nature and complexity of the goods, nature and seriousness of the defect, and the effort required to complete the repair or replacement.

reasonable period of time or without any significant inconvenience for the consumer. The consumer still does not have the right to terminate the contract where the lack of conformity is negligible. In situations where the consumer buys several pieces of goods, and the lack of conformity exists only in part of the delivered goods, the consumer should have the right to terminate the contract also in relation to any other goods which the consumer acquired together with the non-conforming goods if the consumer cannot reasonably be expected to accept to keep only the conforming goods. The consumer exercises their right to terminate the contract by declaration of will, and the cost of return of the goods is borne by the seller.

3. Transposition of the Directive 2019/771 in legislation of Bosnia and Herzegovina

3.1. Introduction

The matter of liability for material defects in sales contracts is regulated in Bosnia and Herzegovina by the Law on Obligations of the Federation of Bosnia and Herzegovina[30], the Law on Obligations of the Republika Srpska[31], and the Law on Obligations of the Brcko District[32]. Since the rules provided in these different laws are the same, in this paper we will refer to them jointly as the Law on Obligations (hereinafter also: LOO).

The LOO contains the rules of liability for material defects in sales contract that apply to all kinds of contracts, including the commercial contracts[33], and partly the consumer sales contracts. These rules are considered general rules on liability for material defects, meaning that they are applied to all other legal transactions involving payments.[34] Solutions provided in the LOO regarding liability for material defects have not been harmonized with the European norms in the field of consumer protection due to the original decision to align the domestic legislation with the consumer *aquis* in a special, systemic law. This was the Law on Consumer Protection in Bosnia and Herzegovina, which was adopted in 2006[35] (hereinafter also: LCPB&H), which undertook to harmonise the provisions with a number of consumer right directives in their contemporary context.

This harmonisation, in most part, has not been implemented correctly; so, in the field of liability for material defects a significant number of deviations from the solutions provided under the Directive 1999/44/EC has been observed although the national legislation should have been aligned with this Directive according to the principle of minimal harmonisation. Improper harmonisation with the solutions from the Directive 1999/44/EC is related to two kinds of omissions made by the national legislator. The first kind of omissions concerns the fact that LCPB&H does not at all cover all issues regulated by the Directive 1999/44/EC. The thing is, the text of LCPB&H is lacking a number of rules that would regulate certain issues in the field of liability for material defects. So, the LCPB&H contains a single article whose provisions regulate two issues of the seller's liability for material defects in the consumer sales contract. This is Art. 18, which obliges the consumer to notify the seller on the discovered

[30] Law on Obligations of FB&H ("Official Gazette of SFRY" no. 29/1978, 39/1985, 45/1989 – Decision USJ I 57/1989, "Official Gazette of RB&H", no. 2/1992, 13/1993 and 13/1994 and "Official Gazette of FB&H", no. 29/2003 and 42/2011.

[31] Law on Obligations of RS ("Official Gazette of SFRY" no. 29/1978, 39/1985, 45/1989 – Decision USJ I 57/1989, "Official Gazette of RS", no. 17/1993, 3/1996 and 37/2001, 39/2003, 74/2004).

[32] In Brcko District, the Law on Obligations is implemented in the original text as taken over from former Yugoslavia.

[33] Art. 25 par. 1. LOO.

[34] Art. 121 par. 3 LOO.

[35] Law on Consumer Protection in Bosnia and Herzegovina ("Official Gazette of B&H" no. 25/06 and 88/2015).

material defect and enumerates the rights the consumer shall have in case they purchase the goods with material defects. The second kind of omissions concern the fact that not even all the issues regulated under the LCPB&H are properly aligned with the Directive 1999/44/EC, meaning that the harmonisation was done in a way that the regulations have lowered the level of consumer protection in Bosnia and Herzegovina below the minimal level of protection, what is unacceptable. Specifically, a consumer, as a buyer of nonconforming goods, is entitled to demand proper fulfilment of the contract in the form of repair or replacement of the goods, and the right to receive back the purchase price. This solution shows that the consumer has no right to reduction of price, and their right to termination of the contract is limited to refund of the paid purchase price as one of the consequences of contract termination.

All other matters that are related to seller's liability for material defects, which are not regulated under the LCPB&H, are subject to application of the LOO. It appears that this had been the intention of the national legislator all along, in view of the rule from Art. LCPB&H according to which relevant provisions of the LOO are to be applied to all matters not regulated by the Law on Consumer Protection. The legislator's stated decision to define the matter of consumer protection by a special, systemic law has obviously been only declaratory in this case, as most of the issues related to liability for material defects in the sales contract remained regulated by the laws on obligations.

A special problem that concerns legislative framework for consumer protection in Bosnia and Herzegovina has to do with clearly expressed lack of readiness to update this law as a national law. This is clearly discernible from the fact that the Republika Srpska adopted the Entity Law on Consumer Protection[36] (hereinafter also: LCPRS) in 2012, which inherited most of the weaknesses of the LCPB&H. After that moment, it became clear that harmonisation of the LCPB&H with the current EU legislation in the field of consumer protection would not be possible anymore, and the harmonisation with the consumer *acquis* is now being done under special entity level laws. Concretely, this means that the solutions that have existed since 2006 in the LCPB&H in the field of consumer protection in the contract on consumer sale have not been updated any more until adoption of the Directive 2019/771.

3.2. Existing legislative framework of consumer protection within the framework of contract on consumer sale, and the most important expected changes and amendments

At this time, as stated above, a combination of rules provided in the LOO and in the laws on consumer protection apply on seller's liability for material defects in Bosnia and Herzegovina. Specifically, according to the rule *lex specialis derogat legi generalis*, the provisions of the law on consumer protection should apply to consumer relations. However, as these solutions are incomplete, in case of a legal vacuum, the solutions provided under the LOO must be used. In addition, where both LOO and LCPB&H regulate the same issues in different ways, the legislation that provides higher level of protection to the consumer shall apply. The issue of collision between the solutions from LOO and from LCPRS has not been resolved explicitly.

This combination of solutions deviates from European norms in the area of seller's liability for conformity of goods, where the deviations are noticeable both in the part that concerns the conditions of liability and in the part that concern the rights the consumer has when the liability conditions are met.

[36] Law on Consumer Protection ("Official Gazette of RS", no. 6/2012, 63/2014, 18/2017 and 90/2021).

The most serious deviation, when it comes to conditions of liability, exists with respect to when the goods are to be considered as having a material defect. This matter has been defined only under LOO, while the LCPB&H and LCPRS do not define it. According to provision of Art. 479 of LOO, responding to the question as to when an item of goods is considered to be deficient, it is considered that an item is deficient when: 1) the item does not possess the features necessary for its regular use or for sale; 2) the item does not possess features for special purpose for which the buyer is buying it, which was known or should have been known to the seller; 3) the item does not possess features or characteristics that have been explicitly or implicitly agreed or prescribed; and 4) when the seller has surrendered an item that does not correspond to the sample or model, except when the sample or model had been shown only for informative purposes. It is clear that the stated criteria must be supplemented with new criteria of compliance that are presented in the Directive 2019/771, such as, for example, subjective criteria of functionality, compatibility, interoperability or delivery with appropriate updates as agreed by the contracting parties, as well as with objective criteria of durability, functionality, compatibility, security etc. that are usual for the goods of a specific kind, and that the consumer may reasonably expect in consideration of the nature of the goods, and public statements by the seller and other entities in the transaction chain.

Lack of harmonisation, in a part, also exists with respect to regulation that defines the time frame in which the seller is liable to the consumer after having sold them the goods. Namely, according to the provisions of Art. 478 (1) and (2) of LOO, the seller is responsible for defects that have existed at the time of transfer of risk, and for the defects that reveal themselves after the moment of transfer of risk if they are caused by reasons that had existed prior to the transfer of risk, for the period of time which, according to Art. 18 (3) of LCPB&H/Art. 26 (5) of LCPRS, may not exceed 2 years from taking over the item. This solution does not take into consideration the situations where continuous delivery of digital contents is contracted for a period exceeding two years, where the seller's liability extends to the whole period during which the service is to be provided; therefore, appropriate harmonisation is required with respect to this matter.

In the Bosnian and Herzegovinian law, the seller is not considered liable for material defects on the sold item where the consumer was aware or should have been aware of such defect. The formulation "should have known" is connected to the consumer's liability to examine the item that is the subject of the contract. Still, this rule provided for in the LOO does not apply to consumer contract because neither LCPB&H nor LCPRS talk about the consumer's obligation to examine the goods. The rule according to which the seller may be exempted from liability only if they had informed the consumer on the deficiency and the consumer had accepted it already exists in Art. 486 (2) of LOO, stating that the provision of the contract regarding limitation or exclusion of liability for defects on the item is void if the defect had been known to the seller, and they had not informed the buyer thereabout, as well as when the seller had imposed such provision using their special monopolistic position.

According to domestic law, the consumer has to notify the seller on the defect within two months[37] or 60 days[38] from discovering the it.

The buyer of the item with material defect, according to Art. 488 of LOO, may request from the seller to remedy the defects, deliver another item free of defects, reduce the price, terminate the contract and, cumulatively with any of the listed rights, they may also demand compensation of damages. The buyer does not have full freedom to choose any of the listed

[37] Art. 18 par. 3 LCPB&H.

[38] Art. 26 par. 5. LCPRS.

rights, as can be seen from the rule that the consumer has the right to terminate the contract only if they had previously given the seller a subsequent appropriate deadline to comply with the contract[39]; without this subsequent deadline, the contract may be terminated when the seller says, upon receiving the notification of defects, that they shall not fulfil the contract, or it is clear from the circumstances of the particular case that the contract cannot be fulfilled.[40] According to the rules provided in the LOO, upon expiry of the additional time given to the seller to fulfil the contract, the contract is terminated *ex lege,* what means that specific statement of the consumer that they are terminating the contract is not required.

The range of rights the buyer as consumer has under LCPB&H is somewhat different; here, in accordance with Art. 18 LCPB&H, the consumer is entitled to chose whether to have the goods replaced by compliant goods, or to have the goods repaired, or receive the refund of the paid amount[41], while according to the LCPRS, the consumer has the right to choose replacement by another goods free of defects, or remedying the defects, or reduce the price, or receive refund of the paid price.[42] Clearly, there is a difference between the solutions provided in the LOO and those that exist in the LCPB&H and LCPRS. The solutions from the LOO and the LCPB&H are different since according to the LCPB&H the consumer has the right to freely choose the right they want to exercise; however, they may not choose to have the price reduced because the LCPB&H does not provide for this right. The difference between the LOO and the LCPRS are in that according to LCPRS the consumer may freely choose one of the rights they are entitled to according to law. Since neither the LCPB&H nor the LCPRS do not contain provisions that would describe into more details the right to terminate the contract, this right is exercised by the consumer in accordance with the solutions that we find in the LOO. This, among other things, means that the contract, save in exceptional cases, may only be terminated after the successless lapse of subsequently specified time, and at that point it is terminated *ex lege*, without the consumer having to specifically declare that they terminate the contract.

Having in mind the above, and with respect to the rights the consumer has in case they had bought non-compliant goods, it is not easy to decide whether the application of the LOO or the LCPB&H is more favourable for the consumer. Therefore, it is not surprising that the courts in Bosnia and Herzegovina frequently decide not to apply the LCPB&H and apply the solutions provided for in LOO instead, typically because the LOO has been applied in Bosnia and Herzegovina for almost five decades, during which time the courts have developed substantive case law. Collision between solutions from LOO and LCPRS cannot be resolved by applying the solution that favours the consumer simply because, as stated above, the LCPRS does not contain the rule that would give the power to the court to apply the solution that would provide higher level of consumer protection. Still, it is certain that when deciding on the consumer's right as the buyer of non-compliant goods in RS, it would be reasonable to apply provisions of LCPRS.

Having in mind the above, harmonisation with the Directive 2019/771 in the part that concerns the consumer rights would imply adoption of a piece of legislation that would identify the range of rights including right to replacement, repair, price reduction or

[39] Art. 490 par. 1 LOO.

[40] Art. 490 par. 2 LOO.

[41] Zlatan Meškić et al., Transposition of the individual directives – Consumer Sales Directive (99/44). In Civil Law Forum for South East Europe-Collection of studies and analyses, First Regional Conference, Volume III, 518-551. Cavtat: Centar SEELS-a, 2010.

[42] Art. 26 LCPRS.

termination of the contract, along with transposition rules from the Directive 2019/771 that limit the consumer's power to freely choose the right they want to exercise. This, first of all, means exclusion of the consumer's right to free choice between replacement and repair, and provision of the seller's right to refuse to replace the goods or repair the defects where the repair or replacement would be impossible or would impose disproportionate costs on the seller, having in mind all circumstances. In addition, the consumer's freedom of choice among various rights provided in Directive 2019/771 need to be limited also in the context of transposition of the Art. 13(4) of the Directive 2019/771. According to this Article, the consumer is entitled to price reduction or termination of the contract in the following cases: a) in relation to any other goods which the consumer acquired together with the nonconforming goods if the consumer cannot reasonably be expected to accept to keep only the conforming goods (acceptance of nonconforming goods at the cost of the seller or deinstallation of nonconforming goods and reinstallation on the cost of the seller); b) a lack of conformity appears despite the seller having attempted to bring the goods into conformity; and c) the lack of conformity is of such a serious nature as to justify an immediate price reduction or termination of the sales contract. It is, therefore, clear that the reform of the existing solutions must include clear distinction between primary rights (right to repair and right to replacement) and secondary rights (right to reduced price and right to termination of contract). In any case, it is necessary to provide a solution according to which the contract on consumer sale is terminated by unilateral declaration of will on the part of the consumer.

4. Instead of conclusion: How to transpose the Directive 2019/771 in legislation of Bosnia and Herzegovina?

At this point, it is certain that harmonisation of national legislation with the solutions provided in Directive 2019/771 will be done at the entity level, meaning it will be done separately in the Federation of Bosnia and Herzegovina and the Republika Srpska. This fact opens up the issue whether the harmonisation would be done under the entity laws on obligations, or under the entity laws on consumer rights. As of now, the RS has their entity Law on Consumer Protection, while the Federation of Bosnia and Herzegovina applies the national Law on Consumer Protection; however, adoption of the entity level Law on Consumer Protection of the Federation of Bosnia and Herzegovina is expected to take place in future.

It appears that it would be very difficult to find reasons that would speak in favour of transposition of solutions from the Directive 2019/771 into the laws on obligations. The only reason that could be recognized would be the attempt to preserve the monistic system of regulating the seller's liability for material defects, in the sense that this important topic, which goes into the very core of contractual law, is regulated in one place, within the LOO.

One might, however, assume that this option would also mean incorporation in the LOO of the rules that are significantly more detailed than the current solutions, and it is certain that the text of LOO should distinguish between those regulations that apply to consumer contracts and those regulations that apply to P2P and B2B contracts. How great is the challenge of harmonisation of national legislation with the Directive 2019/771 is seen in the example of Croatia. Harmonisation of Croatian legislation with the Directive 2019/771 was done by transposing its provisions into the text of the Croatian Law on Obligations.[43] Although

[43] Except for Croatia, which transposed the Directive 2019/771 in the LOO of RC, the remaining countries in the region have harmonised, or will achieve this harmonisation in national laws on consumer protection.

this has, to an extent, preserved the monism of the system of liability for material defects in sales contracts[44], finding one's way in the new solutions is not easy, because the solutions that were provided after the harmonisation vary depending on who are the contracting parties in the sales contracts (merchants, consumers, etc.)[45] Besides, although the drafters looked up to the German legislators, the Croatian legislators have done something somewhat different: both Directive 2019/771 and Directive 2019/770 are transposed into the German Civil Law, while in Croatia, the Directive 2019/771 has been transposed into the Law on Obligations, while the harmonisation with the Directive 2019/770 was done in the form of a special law.[46] Regarding the possible transposition of Directive 2019/771 into the LOO, one must take into consideration the fact that courts in Bosnia and Herzegovina look at any significant reform of LOO with extreme cautiousness. Such caution is justified by the fact that over almost 50 years of application of this law in Bosnia and Herzegovina, some clear positions have been taken in terms of its interpretation, and the case law is well developed and harmonised. In this sense, it is believed that reform of different solutions is definitely justified and desirable; however, integration of many special consumer related provisions in the framework of the LOO would not necessarily be the best way to align national legislation with the consumer *acquis*. Besides, one should not lose sight of the fact that in addition to the Directive 2019/771, the Directive 2019/770 will also have to be transposed in the domestic legislation, and any harmonisation within the LOO would imply transposition of both said directives into this law. Clearly, the domestic courts will have to get used to frequent changes of laws in the process of meeting requirements for EU accession, and also to take into consideration already now, when applying the harmonised legislation, the case law of the European Court of Justice, to interpret and further develop the European law. Still, some thoughts should be given to whether the appropriate application of transposed consumer rights related legislation could be better achieved by transposing them into the LOO, or in, for example, entity level consumer laws.

Harmonisation with the Directive 2019/771 and 2019/770 has already been undertaken in the laws on consumer protection of Slovenia (Zakon o varstvu potrošnikov (Consumer Protection Act), Uradni list RS (Official Gazette of the Republic of Slovenia), No. 130/2022) and Macedonia (Службен весник на Република Северна Македонија бр. 236/22), while this is yet to be done in Serbia and Montenegro. In Serbia, Law on Consumer Protection ("Official Gazette of RS", no. 88/2021) has been harmonised with the Directive 1999/44/EC, while the harmonisation with the Directive 2019/771 is yet to be done. The same situation exists in Montenegro, where Law on Consumer Protection ("Official Gazette of Montenegro", no. 2/2014, 6/2014, 43/2015, 70/2017 and 67/2019) is harmonized with the Directive 1999/44/EC and has yet to be harmonized with the Directive 2019/771. More about harmonisation with Directive 2019/771 in the countries in the Region see in: Dabović Anastasovska, Jadranka. "Implementacija novina potrošačkog prava Europske Unije potrošačke zakone zemalja regije." Zbornik Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse" (eng. *Compendium of Current Development in Civil and Commercial Law and Legal Practice*), 20 (2023): 7-35; Dudas, Atilla I. "The Hierarchy of consumer rights in the event of a lack of conformity of the goods in Slovenian, Croatian and Serbian law." Zbornik radova Pravnog fakulteta Novi Sad, 57 1 (2023): 209-234.

[44] Interesting example is that, in order to preserve the monistic approach, the transposition of Directive 2019/771 in Croatian LOO meant, among other things, the necessity to align the terminology used in the taken over solutions with the terminology that had previously existed in LOO of Republic of Croatia. This, first of all, means that instead of categories "goods" and "compliance with the contract" used were the categories "thing" and "responsibility for material defects".

[45] Slakoper, Zvonimir and Saša Nikšić. "Novo uređenje odgovornosti za materijalne nedostatke u hrvatskom obveznom pravu." Compendium of the Faculty of Law of the University in Rijeka, 43 3 (2022): 531-558.

[46] Contrary to Croatia, which opted for the described, somewhat unusual way of harmonisation with the solutions from the Directive 2019/771 and Directive 2019/779, Slovenia achieved the harmonisation with the Directive 2019/771 under the Slovenian Law on Consumer Protection, and it appears that Serbia will follow their suit; the latter has not started the process of this harmonisation, but is certain that they will do it under the Serbian Law on Consumer Protection.

One should also keep in mind that the Directive 2019/771 is a directive that aims to achieve maximum harmonisation. A member state that needs to transpose this directive in its legislation may, at least at first instance, look at this characteristic as a sort of a mitigating circumstance, meaning that all those solutions in the Directive 2019/771 that represent the norms of maximum harmonisation need to be transposed unchanged into the national law. This, however, should not be understood in a way that national legislator may use the *copy-paste* method, and simply copy the solutions provided in the Directive 2019/771. Quite the contrary, these solutions should be truly integrated in national legislation and national legislator should think thoroughly about the essence of appropriate or similar solutions that already exist in the national legislation and, if need be, adjust those so that they regulate certain right in accordance with provisions of the Directive 2019/771.[47]

[47] See more about the necessity of actual integration of norms from European Law in national legislation of member countries in: Mišćenić, Emilija. "The constant change of EU consumer law: the real deal or just an illusion?" Annals Belgrade Law Review, 70 3 (2022): 699-730.

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TRIAL WITHIN A REASONABLE TIME IN THE REPUBLIC OF CROATIA

Abstract
The topic of this paper[•] is the right to a trial within a reasonable time, a fundamental human and procedural right that ensures legal certainty and the efficiency of the judicial system, as part of the broader right to a fair trial. The paper examines the development of this right in the Republic of Croatia, including its alignment with international standards, as well as significant reforms and the introduction of new models to safeguard this right. In conclusion, while progress in aligning with European standards is noted, the need for further adjustments in the judicial system is emphasised to ensure the effective protection of human rights.

Keywords: trial within a reasonable time, European Court of Human Rights, fair trial, Republic of Croatia

1. Introduction

In a modern society, where legal certainty and trust in the judicial system play a crucial role, the efficiency of court proceedings is essential for preserving fundamental human rights and the stability of the legal order. Efficient and effective judicial processes strengthen citizens' trust in justice, promote social stability, and uphold the reputation of judicial institutions. The efficiency of judicial proceedings is primarily ensured through the procedural guarantee of a trial within a reasonable time. A reasonable time is interpreted as the period determined by the complexity of the case and the behaviour of the parties involved, the shortest possible time for consideration and resolution, sufficient to ensure timely judicial protection (without unjustified delays) of violated rights, freedoms, and interests in public law relations.
[1] The concept of a trial within a reasonable time is essentially a legal standard that has been incorporated into numerous laws as a conventional and constitutional principle. However, it is often not clearly defined, nor are precise timeframes established for the duration or

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[1] Tatsiy, Leonid, "Category "reasonable time" in administrative proceedings: concept and legal nature", Public Law. 1,13 (2014): 36-41.

substantive conclusion of court proceedings. Instead, its content is generally assessed by the courts on a case-by-case basis, using a casuistic approach, taking into account various circumstances and criteria.[2] Some of these criteria include the type and complexity of the dispute, as well as the factual and legal circumstances of the case in question; the behaviour of the applicant, particularly their potential contribution to the unnecessary prolongation of the proceedings; the conduct of the court and other state authorities involved in the process; the significance of the case for the applicant (with special attention given to cases of exceptional importance or urgency for the parties, such as those involving personal liberties, family relationships, or existential matters); and the overall length of the proceedings, measured from the filing of the request to the enforcement of the decision.[3]

The right to a trial within a reasonable time is guaranteed by Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention).[4] Due to its role in the interpretation of the Convention, the European Court of Human Rights (hereinafter: ECtHR) has gained significant reputation and authority. Its jurisprudence plays a key role in shaping modern standards of human rights protection across European countries. The Court issues judgments that influence the legislation and practices of member states, providing guidelines on how individuals' rights should be interpreted and applied.[5]

The standards and criteria used by the ECtHR in its case law to assess whether there has been a violation of the right to a trial within a reasonable time are often applied by the Court of Justice of the European Union (hereinafter: CJEU) as well. By employing similar criteria, such as the complexity of the case, the conduct of the competent authorities, and the importance of the case for the parties, the CJEU ensures that legal practice aligns with established international standards. However, in practice, it is observed that the CJEU often does not explicitly reference ECtHR jurisprudence, even though it applies similar standards. This can lead to inconsistencies in the approach and understanding of these rights between the two courts.[6] An example of such an approach can be found in cases like ***Kendrion***[7] and ***Gascogne Sack***,[8] where the same criteria for determining a violation of the right to a trial within a reasonable time were applied as in the ECtHR's case law, but without directly citing these precedents. This raises questions about the consistency and coherence of the interpretation of these rights within the EU framework.[9] Moreover, the CJEU plays an important role in addressing violations of the right to a trial within a reasonable time that has been committed by its own courts, as seen in several cases related to competition law. Cases like ***T-40/15 ASPLA*** and ***T-673/15 Guardian***[10] illustrate that the EU can be held liable for damages resulting

[2] Maganić, Aleksandra, „Pravna sredstva protiv neučinkovitog suca“, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 30, 1 (2009): 515-550.; Ljubanović, Boris, „Pošteno suđenje kao temelj sudačke etike,“ Zbornik radova Pravnog fakulteta u Splitu, 49, 3 (2012): 449.-457.

[3] Bodul, Dejan, „Treba li propisati rokove za završetak sudskog postupka?“, Informator, 6724 (2022): 18-21.

[4] European Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette – IT, no. 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10.

[5] Šarin, Duška, „Konvencija za zaštitu ljudskih prava i temeljnih sloboda kroz odnos Europskog suda za ljudska prava i Ustavnog suda Republike Hrvatske na primjeru zaštite ljudskog prava na pristup sudu“, Pravni vjesnik, 30, 3-4 (2014): 77-100.

[6] For more see: Petrašević, Tunjica, Poretti, Paula, „Pravo na suđenje u razumnom roku – postoji li (nova) praksa Suda Europske unije?“, Harmonius, 7 (2018): 187-201.

[7] T-479/14 Kendrion, 1 February 2017.

[8] T-577/14 Gascogne Sack, 10 January 2017.

[9] *Op.cit.* Petrašević, T., Poretti, P.

[10] T-673/15 Guardian, 7 June 2017.

from the excessive duration of proceedings before its courts, which further emphasises the importance of effective protection of this right.[11]

The judgments of the ECtHR must be respected by national courts, to ensure that domestic decisions comply with the rights established at the Convention level. According to the 2022 Report of the President of the Supreme Court of the Republic of Croatia,[12] a significant number of court proceedings last ten years or more. Additionally, a statistical analysis of ECtHR decisions reveals that complaints against the Republic of Croatia concerning violations of the right to a fair trial[13] constitute nearly half of the total cases before the Court (49.22%).[14]

There are three main systems for the protection of the right to a trial within a reasonable time: the preventive system, the compensatory system, and the mixed system of protection. The preventive system establishes legal remedies to expedite ongoing proceedings. This system focuses on measures that prevent excessive duration of court proceedings and act before the right to a trial within a reasonable time is violated. Its goal is to accelerate and optimise judicial proceedings through preventive interventions and monitoring mechanisms. The compensatory systems provide compensation to parties after the right to a trial within a reasonable time has been violated. In this system, a party that believes they have suffered harm due to the excessive duration of the proceedings can file a request for compensation, and the courts or other competent institutions decide on the payment of compensation. The biggest drawback of this system is that it offers protection only after the violation has already occurred, rather than attempting to prevent it during the proceedings. The mixed system, adopted by the Republic of Croatia,[15] combines preventive and compensatory measures to ensure more comprehensive protection of the right to a trial within a reasonable time. The protection of this right in the Republic of Croatia is primarily reflected through the request for the protection of the right to a trial within a reasonable time, which allows parties to file a complaint about the excessive length of the proceedings and request acceleration during the process, but it also provides them with the opportunity to seek compensation if preventive or accelerating measures fail to prevent a violation. However, legal doctrine points out that if preventive action is viewed through the lens of measures aimed at preventing a specific consequence, it is clear that filing a request for the protection of the right to a trial within a reasonable time does not possess such a characteristic. Namely, the request is

[11] *Op.cit.* Petrašević, T., Poretti, P.

[12] Report of the President of the Supreme Court of the Republic of Croatia for 2022., p. V-XVI., accessed October 7, 2024, https://www.vsrh.hr/EasyEdit/UserFiles/izvjestaji/2023/izvjesce-predsjednika-vsrh-o-stanju-sudbene-vlasti-za-2022.pdf

[13] The right to a fair trial is a cornerstone of the rule of law and a crucial element in the protection of human rights, as it ensures citizens' trust in the judicial system, strengthens the rule of law, and contributes to social stability and legal certainty. Among the fundamental aspects of the right to a fair trial, guaranteed by Article 6 of the European Convention on Human Rights and Fundamental Freedoms, are the right of access to court, the right to legal aid, the right to equality of arms, the right to a hearing, the right to evidence, the right to public disclosure of judgments, the right to a tribunal established by law, the right to independence and impartiality in proceedings, the right to legal certainty, the right to effective enforcement of judgments, and the right to a trial within a reasonable time. For more see: Uzelac, Alan, „Pravo na pošteno suđenje: opći i građanskopravni aspekti čl. 6. st. 1. Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda". In Usklađenost hrvatskih zakona i prakse sa standardima Europske konvencije za zaštitu ljudskih prava i temeljnih Sloboda, edited by Radačić, I., 88-125. Zagreb: Centre for Peace Studies, 2011.

[14] The European Court of Human Right and Croatia Facts&figures, accessed October 5, 2024, https://www.echr.coe.int/documents/d/echr/Facts_Figures_Croatia_ENG

[15] Knol Radoja, Katarina, „Kada ćemo imati učinkovito suđenje u razumnom roku?", Informator, 6797 – 6798, (2023): 11.-14.

accepted only when it is determined that the proceedings were not conducted in a manner that meets the criteria of reasonable time, that is, when a violation of the right has already occurred. Consequently, this mechanism cannot be considered in the context of a preventive effect.[16]

Therefore, although we cannot fully speak of the preventive-compensatory nature of the request for the protection of the right to a trial within a reasonable time, we can agree that this system offers a more comprehensive approach, as it ensures legal protection at different stages of the proceedings, both during the proceedings and after a violation has occurred. As a result, this system often has a stronger preventive effect because parties know they can request an acceleration of the proceedings, and institutions are motivated to avoid paying compensation.

As previously mentioned, by combining preventive, accelerating, and compensatory methods of protection, the Republic of Croatia adheres to a mixed system. The following section will discuss how this system has developed over the years.

2. Protection of the Right to a Trial within a Reasonable Time in the Republic of Croatia

The right to a trial within a reasonable time was introduced into the Croatian legal system with the ratification of the European Convention on November 5, 1997. At the European Union level, this procedural right is defined by Article 47 of the Charter of Fundamental Rights of the European Union,[17] and in the Republic of Croatia, by Article 29 of the Constitution of the Republic of Croatia,[18] which guarantees every citizen the right to have their case heard by an independent and impartial court within a reasonable time. The constitutional foundation of this right is further elaborated through various legal regulations aimed at protecting citizens' legal security and ensuring the efficiency of court proceedings.

The Constitutional Act on the Constitutional Court of the Republic of Croatia[19] is especially important, because it provides for the possibility of filing a constitutional complaint due to the violation of the right to a trial within a reasonable time. This law has also undergone significant amendments concerning this institute. Based on this law, in cases where it determines that the right to a trial within a reasonable time has been violated, the Constitutional Court can issue decisions to expedite proceedings or award compensation for damages.

The issue of a trial within a reasonable time is also regulated by the Courts Act.[20] This law has been frequently amended, all with the aim of improving the system for the protection of this fundamental human right. However, as we will see later in this paper, there is still room for improvement in the appropriate mechanisms for expediting proceedings. The provisions of the Courts Act that regulate the right to a trial within a reasonable time are set out in Articles 63-70. This law allows parties in a proceeding to submit a request for the protection of the

[16] Radobuljac, Silvano, „Učinkovitost zahtjeva za suđenje u razumnom roku u kaznenom postupku u stadiju rasprave.“, Zagrebačka pravna revija, 9, 1 (2020): 29.

[17] The Charter of Fundamental Rights of the European Union, 2012/C 326/02, Official Journal C 326 as of 26 October 2012, 391–407

[18] Constitution of the Republic of Croatia, Official Gazette no. 56/90, 135/97, 8/98,113/00, 124/00, 28/01, 41/01, 76/10, 85/10, 5/14

[19] Constitutional Act on the Constitutional Court of the Republic of Croatia, Official Gazette no. 99/99, 29/02, 49/02.

[20] Courts Act, Official Gazette no. 28/13, 33/15, 82/15, 82/16, 67/18, 126/19, 130/20, 21/22, 60/22, 16/23, 155/23, 36/24).

right to a trial within a reasonable time if they believe the proceedings are taking too long. If a higher court finds that the request is justified, it may set a deadline by which the lower court must render a decision and award appropriate compensation for the delay and the violation of the right to a trial within a reasonable time. The combination of these two remedies (accelerating and compensatory) is considered the most favourable form of protection, although certain shortcomings still exist, which will be addressed later in the paper.

In the Republic of Croatia, the reasons for violations of the right to a trial within a reasonable time often stem from institutional and organisational problems in the judiciary, the frequent practice of annulments and remands for retrial (so-called "ping-pong" or "yo-yo" practice), and prolonged periods of inactivity or adjournment. These issues arise from difficulties in the delivery of documents, outdated work methods, courts' inability to adapt to modern technological standards, poor communication between courts and other state bodies, slow movement of case files between courts, lack of resources, insufficient specialisation and continuous education of judges, changes in court composition, or decisions on requests for the exemption of judges, among other factors.[21] Researchers analysed the judicial systems of several countries, including Serbia, Croatia, Norway, and others, and concluded that the complexity of the system, the number of judges, and other institutional features are not directly linked to the efficiency of the judiciary. In fact, simpler judicial systems like Norway's, with fewer judges and staff, achieve better results in upholding the rule of law than more complex systems with a larger number of judges, such as those in Serbia and Croatia.[22]

In hopes of expediting civil proceedings and thereby ensuring the right to a trial within a reasonable time, new amendments and regulations are frequently introduced in Croatia. As part of these efforts, the *National Recovery and Resilience Plan 2021-2026*[23] was developed, which envisages civil procedure reform through the digitalisation of the judiciary and the strengthening and introduction of procedural mechanisms aimed at speeding up civil proceedings. Similar reforms are also outlined in the *National Development Plan for the Judicial System 2022-2027*, drafted by the Ministry of Justice and Administration.[24]

For these reasons, the basic procedural civil law, the Civil Procedure Act (*Zakon o parničnom postupku*, hereinafter: ZPP),[25] has been amended several times. The amendments to the ZPP aim to reduce the number of unresolved cases, shorten the duration of civil proceedings, and contribute to more transparent and efficient management of the judiciary.[26] Article 10 of the ZPP stipulates that proceedings must be conducted within a reasonable period. This is a fundamental provision that ensures the right of parties to have their case resolved without

[21] *Op. cit.* Uzelac, Alan, „Pravo na pošteno suđenje", 117-118.; Novosel, Dragan (ed.), Priručnik za rad državnih odvjetnika, Zagreb: Državno odvjetništvo Republike Hrvatske, 2011.; Dikov, Grigory, Vitkauskas Dovydas. Zaštita prava na pravično suđenje prema Europskoj konvenciji o ljudskim pravima. Strasbourg: Vijeće Europe, 2018., 123.

[22] Spaic, Bojan, Dordevic, Mila, „Less is more? On the number of judges and judicial efficiency", Pravni Zapisi, 13, 2 (2022): 421-445.

[23] *National Recovery and Resilience Plan 2021-2026,* accessed October 10, 2024, http://vlada.gov.hr/UserDocsImages/Vijesti/2021/srpanj/29%20srpnja/Plan%20oporavka%20i%20otpornosti%2C%20srpanj%202021..pdf

[24] *National Development Plan for the Judicial System 2022-2027,* accessed October 10, 2024, tps://mpudt.gov.hr/UserDocsImages/dokumenti/Strategije,%20planovi,%20izvješća/Nacionalni%20plan%20razvoja%20pravosudnog%20sustava%20za%20razdoblje%202022_2027.pdf

[25] Civil Procedure Act, Official Gazette no. 53/91., 91/92., 112/99., 129/00., 88/01., 117/03., 88/05., 2/07., 96/08., 84/08., 123/08., 57/11., 25/13., 89/14., 70/19., 80/22., 114/22.

[26] The final proposal of the law on amendments to the Civil Procedure Act from 9. 6. 2022., accessed October 10, 2024, https://www.sabor.hr/sites/default/files/uploads/sabor/2022-06-09/165907/PZE_264.pdf.

unnecessary delays and imposes this obligation not only on the courts but also on all participants in the proceedings.

In the 2022 amendments,[27] the established practice was codified, stating that court proceedings should be definitively concluded within three years (Article 185 of the ZPP). Frequent adjournments of hearings have been recognised as one of the causes of delays in proceedings. The amendments limit the number of postponements for the preparatory hearing to once (Article 291/2 of the ZPP), and the number of postponements due to a party's absence is also limited to once (Article 295/5 of the ZPP).

In addition to amendments to the Civil Procedure Act (ZPP), the desire to reduce the burden on courts and accelerate judicial proceedings led Croatian lawmakers in 2003 to adopt the Mediation Act,[28] which was later replaced by a new Mediation Act[29] and, more recently, by the Act on Peaceful Dispute Resolution.[30] Besides the ZPP and the Mediation Act, or the Act on Peaceful Dispute Resolution as general regulations, some specific procedures (e.g., labour and family law) also foresee some form of voluntary or mandatory attempt at amicable dispute resolution, primarily to prevent violations of the right to a trial within a reasonable time. Namely, these procedures allow disputes to be resolved outside courtrooms, thereby relieving the courts and reducing the number of pending cases.[31]

The Enforcement Act (*Ovršni zakon*) [32] also plays a significant role in ensuring the right to a trial within a reasonable time, as it applies to cases of forced execution of court decisions and mandates urgency in enforcement and security proceedings. The principle of urgency directs judges to handle the enforcement of final judgments without delay and to apply the principle of a trial within a reasonable time. The Enforcement Act is also undergoing amendments aimed at speeding up proceedings and reducing delays in enforcement cases.

Regarding enforcement, the ECtHR has established in several cases that enforcement proceedings are considered an integral part of the trial under Article 6 of the Convention,[33] meaning that the time taken for enforcement is included in the legally relevant duration of the trial. This leads to the conclusion that a violation of the right to a trial within a reasonable time may be found even if the court proceedings before enforcement (if viewed separately) were concluded within a reasonable time.[34]

In addition to the aforementioned laws, many other laws in the legal system of the Republic of Croatia contain provisions on urgency,[35] especially when dealing with matters of significant public interest, the protection of fundamental rights, or situations that require swift and efficient action. Despite numerous legislative amendments and efforts to speed up the judicial system, the problem of unreasonably long trials persists. In the following section, we will focus on the development of the protection of the right to a trial within a reasonable time in Croatia and the impact of the European Court of Human Rights case law on this

[27] Law on amendments to the Civil Procedure Act, Official Gazette no. 80/22.

[28] Mediation Act, Official Gazette no. 163/03.

[29] Mediation Act, Official Gazette no. 18/11.

[30] Act on Peaceful Dispute Resolution, Official Gazette no. 67/23.

[31] For more see: Knol Radoja, Katarina; Dautović, Darija, „On the necessity to amend the framework standards for the workload of judges in favour of cases resolved through mediation in the Republic of Croatia“, SEE Law Journal, 12, 1 (2024): 162-177.

[32] Enforcement Act, Official Gazette no. 112/12, 25/13, 93/14, 55/16, 73/17, 131/20, 114/22, 6/24.

[33] For ex. see case Cvijetić v Croatia, 71549/01, judgement from 26 February 2004.

[34] Uzelac, Alan, „O razvoju pravnih sredstava za zaštitu prava na suđenje u razumnom roku. Afirmacija ili kapitulacija u borbi za djelotvorno pravosuđe?“, Zbornik Pravnog fakulteta u Zagrebu, 62, 1-2 (2012): 359-396.

[35] *Op. cit.* Bodul, 19-20.

development. Additionally, the need for further legislative and structural changes to make the judicial system more efficient will be highlighted.

2.1. Model of Protection Before 2005

Starting in 1999, the issue of the right to a trial within a reasonable time was initially resolved before the Constitutional Court in accordance with Article 59, paragraph 4 of the Constitutional Act on the Constitutional Court of the Republic of Croatia.[36] This article allowed the Constitutional Court to exceptionally initiate proceedings based on a constitutional complaint, even before all legal remedies had been exhausted, if it determined that it was evident that the contested act, or the failure to issue a decision within a reasonable time, severely violated constitutional rights or freedoms, and that the failure to initiate proceedings could result in serious and irreparable harm.

However, this provision proved ineffective in practice, leading to amendments in 2002.[37] Specifically, in the cases of *Rajak v. Croatia*[38] and *Horvat v. Croatia*,[39] the ECtHR addressed for the first time the effectiveness of the constitutional complaint under Article 59, paragraph 4 of the Constitutional Act in relation to the length of proceedings before national courts.

In the *Rajak v. Croatia* ruling, the ECtHR found that the constitutional complaint under Article 59, paragraph 4 could not be considered an effective remedy in the circumstances of that particular case, concluding that there had been a violation of the right to a trial within a reasonable time. Similarly, in *Horvat v. Croatia*, the ECtHR stated that the Republic of Croatia lacked a legal remedy that would allow citizens to exercise their right to a trial within a reasonable time. In that judgment, the Court thoroughly analysed the initiation of proceedings under Article 59, paragraph 4, concluding that the decision to initiate such proceedings was at the discretion of the Constitutional Court.

Moreover, the ECtHR determined that two cumulative conditions were required for a party to file a constitutional complaint: first, a serious violation of constitutional rights and freedoms, and second, the risk of serious and irreparable consequences for the complainant. Due to the discretionary power of the Constitutional Court to allow or deny a constitutional complaint, the vague and broad criteria for admissibility, and the lack of established case law by the Constitutional Court on this matter, the ECtHR concluded that this remedy was ineffective.[40]

These rulings prompted amendments and revisions of the regulations in Croatia. In November 2000, the Constitution of the Republic of Croatia was amended.[41] The new paragraph 1 of Article 29[42] became more closely aligned with the European Convention on Human Rights and no longer referring exclusively to criminal proceedings. Additionally, the Constitution placed "fair trial" on equal footing with "trial within a reasonable time." This amendment has been

[36] Constitutional Act on the Constitutional Court of the Republic of Croatia, Official Gazette no. 99/99.

[37] Law on Amendments and Supplements to the Constitutional Act on the Constitutional Court of the Republic of Croatia, Official Gazette no. 29/02.

[38] Rajak v Croatia, judgement no. 49706/99 from 28 June 2001.

[39] Horvat v Croatia, judgement no. 51585/99, 26. July 2001.

[40] On the ineffectiveness of Croatian courts and proposals for improvement in that period, see: Potočnjak, Željko, „Zaštita prava na suđenje u razumnom roku - neki prijedlozi za unapređenje hrvatskog sustava na temelju stranih iskustava“, Hrvatska pravna revija, 5 (2005): 4.

[41] Constitution of the Republic of Croatia, Official Gazette no. 113/00., 124/00.

[42] “Everyone has the right to have their rights and obligations, or a suspicion or charge of a criminal offense, decided fairly and within a reasonable time by an independent and impartial tribunal established by law.”

highlighted in legal doctrine as highly significant, as it reflects the view that courts and other state bodies' decisions must be both fair and efficient.[43]

The amendment to the Constitutional Act in 2002 made significant changes to the legal protection mechanism against violations of the right to a trial within a reasonable time.[44] Since 2002, a party has been able to raise an objection regarding the unreasonable length of ongoing court proceedings by directly submitting a constitutional complaint based on the new Article 63 of the Constitutional Act on the Constitutional Court of the Republic of Croatia. The amendments to the Constitutional Act on the Constitutional Court in 2002 significantly changed the rules regarding constitutional complaints, particularly Article 63, which abolished the discretionary power of the Constitutional Court and introduced a new mechanism for the protection of the right to a trial within a reasonable time. If the proceedings have been concluded, under Article 62 of this Act, parties may object to the unreasonable length of the proceedings by submitting a constitutional complaint, under the condition that all legal remedies have been exhausted. The initiation of proceedings before exhausting legal remedies is enabled by the new Article 63, which introduces a combination of legal remedies for expediting the proceedings and monetary compensation in cases where a violation of rights is established. According to this article, the Constitutional Court is authorised to expedite the proceedings by setting a deadline for the court before which the proceedings are being conducted to render a decision and to award compensation for damages. The legal innovation that combines expediting and compensatory functions has not only provided parties with the opportunity to protect their rights but has also had broader implications for the legal system, setting standards for other countries facing similar challenges in ensuring fair trials within a reasonable time. The response from the European Court of Human Rights was prompt and affirmative. In the judgment of *Slaviček v. Croatia*,[45] the European Court established that the new constitutional regulation is a completely effective legal remedy. Thus, the Croatian approach has become a model of good practice in Europe, highlighted as an example that successfully combines legal security with the efficiency of the judicial system.[46]

Although positive changes have been noted, some issues have been identified, such as in cases *Šoć v. Croatia*[47] and *Debelić v. Croatia*.[48] In these cases, the European Court of Human Rights determined that the Constitutional Court often rejects constitutional complaints if the proceedings that prompted the complaint were concluded before a decision on the constitutional complaint was made. As a result, the applicants of these constitutional complaints were left without an effective legal remedy to protect their rights. Consequently, the Constitutional Court altered its approach and began to examine constitutional complaints on the merits, even if the courts had issued final decisions in the meantime. However,

[43] Radolović, Aldo, „Zaštita prava na suđenje u razumnom roku - realna mogućnost, (pre)skupa avantura ili utopija?". Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 29, 1 (2008): 277-315.

[44] Šikić Marko, „Utjecaj prakse (presuda) Europskog suda za zaštitu ljudskih prava na upravno sudovanje u Republici Hrvatskoj". Zbornik radova Pravnog fakulteta u Splitu, 50, 2 (2013): 457.- 471.

[45] Slaviček v. Croatia, judgement no. 20862/02, 4. July 2002.

[46] Uzelac, Alan, „O razvoju pravnih sredstava za zaštitu prava na suđenje u razumnom roku Afirmacija ili kapitulacija u borbi za djelotvorno pravosuđe?", Zbornik Pravnog fakulteta u Zagrebu, 62, 1-2 (2012): 359-395.; Crnić, Jadranko, "Zaštita ljudskih prava i temeljnih sloboda - podnošenje ustavne tužbe prije iscrpljenog pravnog puta", Aktualnosti hrvatskog zakonodavstva i pravne prakse, građansko, trgovačko, radno i procesno pravo u praksi, godišnjak 9-2002, Zagreb: Organizator, 2002.

[47] Soć v. Croatia, judgement no. 47863/99, 9 May 2003.

[48] Debelić v. Croatia, judgement no. 2448/03, 26 May 2005.

constitutional complaints related to proceedings concluded before the submission of the constitutional complaint continued to be dismissed.[49] This means that, despite the positive changes, applicants whose proceedings were concluded before the submission of the complaint could not seek protection before the Constitutional Court, leaving a gap in the protection of their rights.

2.2. Period from 2005 to 2013

Due to the continuous influx of a large number of constitutional complaints related to the violation of the right to a trial within a reasonable time, the Constitutional Court faced an overload[50] and an inability to resolve cases within appropriate timeframes. This led to the initiation of amendments to the Courts Act. After the new Courts Act of 2005[51] came into force, some of the Constitutional Court's powers were transferred to regular courts and the Constitutional Court ceased to have first-instance jurisdiction.[52] This Act introduced a new legal remedy for the protection of the right to a trial within a reasonable time, called the „request for the protection of the right to a trial within a reasonable time." Parties, in accordance with Articles 27 and 28 of the Courts Act of 2005, could challenge the unreasonable length of ongoing judicial proceedings by submitting a request for the protection of the right to a trial within a reasonable time to a higher court. Based on these provisions, the higher court could set a deadline for the lower court to make a decision and could award damages. This reform reflects the effort to address existing problems in the judiciary, particularly regarding the protection of the right to a trial within a reasonable time. Allowing regular courts to first consider complaints helps alleviate the burden on the Constitutional Court and enables faster case resolution. However, in the subsequent judgments against the Republic of Croatia, such as in the cases of *Oreb*,[53] *Krnić*,[54] *Plazonić*,[55] *Kaić*,[56] or *Vidas*,[57] a consistent emphasis on the problem of prolonged proceedings can be observed. One of the main issues was that the law did not precisely define the criteria for assessing the reasonableness of the timeframes, leading to inconsistent practices among the courts. Additionally, there was no provision specifying the timeframe within which the higher court must decide on the request, which in some cases resulted in delays in the proceedings regarding the request for the protection of the right to a trial within a reasonable time. With

[49] Uzelac, Alan, „In the quest for the Holy Grail of effectiveness. The right to trial within a reasonable time and short-term reform of the European Court of Human Rights“, Ljubljana: Council of Europe, 2009., 41-70.

[50] For example, the number of U-IIIA cases (constitutional complaints due to violations of the right to a trial within a reasonable time) increased from 64 in the year 2000 to as many as 1,433 in 2005. This surge in case numbers made it impossible for the Constitutional Court to resolve other cases within its jurisdiction in an appropriate and timely manner. Therefore, it became clear that a new solution was needed to alleviate the burden on the Constitutional Court and ensure more effective protection of the right to a trial within a reasonable time. For more see: Potočnjak, Željko, „Zaštita prava na suđenje u razumnom roku nakon stupanja na snagu novog Zakona o sudovima“, Hrvatska pravna revija, 6, 4 (2006): 27.

[51] Courts Act, Official Gazette no. 150/05.

[52] For more about the constitutional complaint as a subsidiary legal remedy see: Šarin, Duška, Šeparović, Viktorija, „Ustavna tužba kao posebno (supsidijarno) sredstvo zaštite ljudskih prava i temeljnih sloboda“, FIP - Financije i pravo, Zagreb, 9, 1 (2021): 21.-52.

[53] Oreb v. Croatia, judgement no. 9951/06, 23 October 2008.

[54] Krnić v. Croatia, judgement no. 8854/04, 31 July 2008

[55] Plazonić v. Croatia, judgement no. 26455/04, 6 March 2008.

[56] Kaić v. Croatia, judgement no. 22014/04, 17 July 2008.

[57] Vidas v. Croatia, judgement no. 40383/04, 3 July 2008.

the amendment to the Courts Act of the Republic of Croatia in 2009,[58] an additional level of protection for the right to a trial within a reasonable time was introduced—a complaint to a three-member panel of the Supreme Court. Following this, the Constitutional Court took the view that the protection of the constitutional right to a trial within a reasonable time is ensured before it through the regular procedure initiated by a constitutional complaint based on Article 62 of the Constitutional Act. This constitutional complaint can be filed against an individual act that has made a substantive decision regarding rights and obligations or concerning suspicion or accusation of a criminal offence, and it can be submitted after the allowed legal remedies for protection have been exhausted. Based on Article 63 of the Constitutional Act, the Constitutional Court still retains jurisdiction to decide on violations of the constitutional right to a trial within a reasonable time in cases where the Supreme Court—before which the proceedings are conducted as the final instance deciding on the rights and obligations of the party or concerning suspicion or accusation of a criminal offence—fails to make a decision on the party's legal remedy within a reasonable timeframe.[59]

2.3. Protection of the Right to a Trial within a Reasonable Time after 2013

Significant changes occurred in 2013 when a new Courts Act[60] was enacted. This Act encompasses two legal remedies: the request for the protection of the right to a trial within a reasonable time and the claim for the payment of appropriate compensation for the violation of the right to a trial within a reasonable time. According to the 2013 Courts Act, a party that considers that the proceeding is taking too long has the right to file an expedited legal remedy—a request for the protection of the right to a trial within a reasonable time—and to ask the president of the same court to expedite the process by setting a deadline of no more than six months within which the judge handling the case must make a decision (Articles 65 to 67 of the 2013 Courts Act). The supplementary legal remedy, the claim for the payment of appropriate compensation (known as the indemnity legal remedy) from Article 68 of that Act, is available only in cases where the judge fails to make a decision within the timeframe set by the president of the court. In that case, a claim for the payment of appropriate compensation can be submitted to a higher court within an additional period of six months. In its decision, the higher court will set a new deadline within which the court handling the case must resolve the matter and will also determine the amount of compensation, which cannot exceed 35,000 kunas (equivalent to 4,650 euros) (Articles 68 and 69 of the 2013 Courts Act).

In July 2020, the ECtHR delivered three new judgments against the Republic of Croatia (*Marić v. Croatia*,[61] *Glavinić and Marković v. Croatia*,[62] and *Kirinčić and Others v. Croatia*[63]) in which it reaffirmed violations of the right to a trial within a reasonable time guaranteed by Article 6/1 of the Convention, as well as violations of the right to an effective legal remedy for the protection of that right, in accordance with Article 13 of the Convention. In the case of *Marić v. Croatia*, the Government of the Republic of Croatia argued that the applicant had not exhausted domestic remedies because she had not utilised the request for the protection of

[58] Law on amendments to the Courts Act, Official Gazette no. 153/09.

[59] Šeparović, Viktorija, Šarin, Duška, „Ustavnosudska zaštita ustavnog i konvencijskog prava na suđenje u razumnom roku“, FIP - Financije i pravo, 10, 1 (2022): 59-60.

[60] Courts Act, Official Gazette no. 150/05., 16/07., 113/08., 153/09., 34/10., 116/10., 122/10., 27/11., 57/11., 130/11., 28/13.

[61] Marić v. Croatia, judgement no. 9849/15., 30 July 2020.

[62] Glavinić and Marković v. Croatia, judgement no. 11388/15 i 25605/15, 30 July 2020.

[63] Kirinčić and others v. Croatia, judgement no. 31386/17, 30 July 2020.

the right to a trial within a reasonable time, while the applicant contended that this remedy was ineffective. Therefore, the question arises as to whether there is an obligation for the applicant to submit a request for a trial within a reasonable time before turning to the ECtHR. Relying on its opinion in the case of *Cocchiarella v. Italy*,[64] which stated that an expedited remedy in proceedings that have already lasted unreasonably long is ineffective if it is not accompanied by a compensatory legal remedy—something that, according to the 2013 Courts Act, is only possible in cases where the judge fails to meet the deadline set by the court president for concluding the case—the ECtHR assessed that the possibility of using a mixed expedited-compensatory remedy in the Croatian legal system is limited to such an extent that it relieves applicants of the obligation to seek protection of the right to a trial within a reasonable time under Article 64/1 of the Courts Act before approaching the ECtHR. For the same reasons, it concluded that such a remedy cannot be considered effective within the meaning of Article 13 of the Convention. This opinion was reiterated in the judgments of *Glavinić and Marković v. Croatia* and *Kirinčić v. Croatia*. The ECtHR also reaffirmed this stance in February 2023 in the judgment of *Balicki v. Croatia*.[65] Referring to the aforementioned judgments, the Constitutional Court of the Republic of Croatia issued rulings[66] that bypass the subsidiarity of the constitutional complaint for a trial within a reasonable time. Namely, one of the prerequisites for accepting a constitutional complaint for a trial within a reasonable time based on the Constitutional Act is the prior use of legal remedies before regular courts, in accordance with the Courts Act. However, this is not a decisive condition, as a constitutional complaint can also be submitted without having exhausted legal remedies in regular courts if the proceedings have been unreasonably lengthy *a priori* in regular courts up to the date of filing the constitutional complaint. Therefore, the Constitutional Court, considering the ECtHR's determination that the prescribed legislative model is not in accordance with Article 13 of the Convention, took the view that the use of an available legal remedy against unreasonable length of proceedings will not be required from the applicant before filing a constitutional complaint when the Constitutional Court determines that the proceedings, at the time of filing the constitutional complaint, have been unreasonably lengthy *a priori*, which is precisely what occurred in the relevant judgments.

Following the aforementioned judgments of the European Court of Human Rights in 2020, on February 23, 2021, the Constitutional Court of the Republic of Croatia submitted a Report to the Croatian Parliament on the protection of the right to a trial within a reasonable time as regulated by Articles 63 to 70 of the Courts Act.[67] In the report, the Constitutional Court states that the existing legal remedies for the protection of the right to a trial within a reasonable time are ineffective because the party does not have access to a compensatory legal remedy. This remedy is ineffective as it can only be used in situations where the judge fails to make a decision within the timeframe prescribed for him. Therefore, the Constitutional Court emphasises that the current legislative model does not fulfil its purpose and needs to be revised. However, after 2013, these provisions, despite several amendments to the Courts Act, did not undergo significant changes. Furthermore, even after an extensive revision in February 2022,[68] the provisions regarding the protection of the right to a trial within a

[64] Cocchiarella v. Italy, judgement no. 64886/01, 29 March 2006., para. 74. – 76.
[65] Balicki v. Croatia, judgement no. 71300/16, 9 February 2023.
[66] See U-IIIA-7473/2022 from 27 June 2023. and U-IIIA-281/2024. and U-III-4949/2023. from 21 March 2024.
[67] Ustavni sud Republike Hrvatske, Izvješće o zaštiti prava na suđenje u razumnom roku uređenoj člancima 63. - 70. Zakona o sudovima, (Official Gazette no. 28/13., 33/15., 82/15. i 67/18.), Official Gazette no. 21/21.
[68] Law on amendments to the Courts Act, Official Gazette no. 21/22.

reasonable time remained unchanged. Consequently, the Republic of Croatia found itself in a situation where, despite numerous legal amendments and warnings from both the ECtHR and the Constitutional Court of the Republic of Croatia, it still lacked an effective compensatory legal remedy. Namely, the existing legal remedies for the protection of the right to a trial within a reasonable time are effective for addressing situations in which a judge who has been instructed to make a decision has failed to do so. However, in cases where the judge has made a decision within the timeframe set for him, the party will not have access to a compensatory legal remedy, even if they have suffered a violation of their rights that has been established. Significant new amendments to the Courts Act were made only in 2024.

2.4. Amendments to the Courts Act 2024

Before the amendments to the Courts Act in March 2024, the procedure was initiated by submitting a request to the court before which the proceedings were conducted. The president of the court decided on the request, having a deadline of 60 days to make a decision. If the request was justified, he would set a deadline for the conclusion of the proceedings. After the amendments, new articles from 63 to 70[69] stipulate that the procedure is initiated by submitting a request to the president of the higher court. If the request is related to proceedings before the Supreme Court, it is decided by a panel of three judges of that court. The president of the higher court or the panel of the Supreme Court has a period of 15 days to request a report on the duration of the proceedings and an opinion on the deadline for its resolution. The deadline for resolving the request is 60 days. If the judge does not resolve the case within the specified time, they must submit a report explaining the reasons for the delay. In addition, if the president of the higher court or the panel of the Supreme Court determines that the request is justified, they will set a deadline by which the case must be resolved, typically not exceeding six months, unless the circumstances of the case require a longer period. They will also determine an appropriate compensation owed to the party for the violation of the right to a trial within a reasonable time. This increases the accountability of the courts, as judges are now required to take deadlines more seriously, which should ultimately improve the efficiency of the judicial system. Most importantly, parties in cases where the right has already been violated can now not only request the acceleration of the proceedings but also receive appropriate monetary compensation if they have suffered harm due to the prolonged process. Previously, such compensation was typically awarded only after the conclusion of Constitutional Court proceedings and only exceptionally, in proceedings in accordance with the Courts Act. Compared to the previous arrangement, under the new solution, there is no longer a separate request for determining appropriate monetary compensation for the violation of the right to a trial within a reasonable time. In other words, the only legal remedy now is the request for a violation of the right to a trial within a reasonable time, which aims to expedite the proceedings and compensate the injured party with an appropriate monetary award. However, a shortcoming in regulating the payment of this compensation is that no deadline has been set for the ministry responsible for justice to pay the compensation to the injured party. Due to this oversight, the payment could potentially be delayed indefinitely. Until this inconsistency is corrected, the deadline established by the Constitutional Court's practice should be applied,

[69] Law on amendments to the Courts Act, Official Gazette no. 36/24.

where compensation was paid within three months from the submission of the payment request to the Ministry of Justice and Administration of the Republic of Croatia.[70]
Furthermore, the new provisions of the Law still maintain a limited amount of compensation, set at 4,650 euros, which is the equivalent of the former 35,000 kunas. We consider this solution overly restrictive, as it fails to take into account the specific circumstances of each individual case. For example, in Germany, under Article 198 of the *Gerichtsverfassungsgesetz*[71] compensation amounts to at least 1,200 euros for each year of unjustified delay, with no maximum limit. Similarly, in **Austria**, according to the ***Amtshaftungsgesetz***,[72] and in **France**, under the ***Code de l'organisation judiciaire***,[73] the amount of compensation is not predefined but depends on the particular circumstances, duration of the delay, and the impact on the party involved. In **Italy**, compensation is governed by ***Legge Pinto*** (Law No. 89/2001),[74] which also does not specify fixed amounts for compensation. Instead, the courts consider the specifics of each case to determine the amount, such as the length of the delay and the harm suffered by the party. This flexibility allows courts to tailor compensation based on the complexity and impact of each case, whereas the Croatian system is more rigid with its capped amount.

3. Conclusion

Problems such as court overload, inefficient procedures, long delays in hearings, and the lack of effective legal remedies have contributed to violations of the right to a trial within a reasonable time in many cases before the European Court of Human Rights (ECtHR). Following numerous judgments against it, Croatia was prompted to reform its judicial system to reduce these violations. One of the more effective measures is the introduction of stricter time limits for the completion of court proceedings. This preventive measure has already been partially implemented through amendments to the Civil Procedure Act (ZPP) from 2022, which stipulates that court proceedings should be concluded within three years. However, these deadlines need to be tightened further and sanctions for non-compliance should be introduced, including the possibility of financial penalties for overly prolonged cases. The abuse of procedural rights, such as frequent postponements of hearings by lawyers or parties, also contributes to the prolongation of proceedings. It is necessary to introduce stricter rules that would limit the number of postponements, especially for reasons that are not objectively justified. The amendments to the Civil Procedure Act (ZPP) from 2022 have already taken steps in this direction, but further tightening of provisions that prevent delays could further expedite proceedings. For instance, through mechanisms of internal control within the courts

[70] Jelušić, Damir, „Unapređenje normativnog okvira za zaštitu prava na suđenje u razumnom roku“, Novi informator, 6836 (2024).

[71] Gerichtsverfassungsgesetz, accessed October 10, 2024, https://www.gesetze-im-internet.de/gvg/BJNR005130950.html

[72] While the *Amtshaftungsgesetz* does not specify fixed amounts for damages, it states in **§ 1(1)** that compensation is due if a public authority causes harm through unlawful conduct. The actual compensation amount is determined based on the specifics of the case, including the extent of the damage caused and other relevant factors (*Amtshaftungsgesetz***,** https://www.ris.bka.gv.at/geltendefassung/bundesnormen/10000227/ahg,%20fassung%20vom%2026.08.2021.pdf**,** accessed October 11, 2024.).

[73] Code de l'organisation judiciaire**,** accessed October 11, 2024., https://codes.droit.org/PDF/Code%20de%20l%27organisation%20judiciaire.pdf

[74] *Legge Pinto* (Law No. 89/2001), Article **2(2),** accessed October 10, 2024, https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2001-03-24;89!vig=

to prevent prolonged durations of proceedings. By introducing internal procedures to monitor the duration of cases in each court, adherence to deadlines could be better tracked, and prompt intervention could occur in cases of delays. There have also been recommendations to allow parties to file supervisory complaints against judges, which could lead to disciplinary sanctions.[75] In the doctrine, it is often stated that the digitalisation of the courts would increase productivity, reduce processing time, and speed up proceedings, thereby unequivocally contributing to the efficiency of the courts.[76]

Furthermore, one of the significant measures to reduce the burden on the courts is the broader use of peaceful methods of dispute resolution. These processes allow disputes to be resolved outside the courtroom, thereby alleviating the pressure on courts and reducing the number of unresolved cases. The Act on Peaceful Dispute Resolution should be further improved to encourage more frequent use of mediation in disputes where the parties are open to agreement.[77]

The development of legal protection for the right to a trial within a reasonable time in the Republic of Croatia, when a violation of that right has usually already occurred, can be divided into four periods. The first period is the protection model until 2005, which is based on constitutional complaints. After that, from 2005 to 2013, the primary form of protection was the request for the protection of the right to a trial within a reasonable time. In the period from 2013, the request for the protection of the right to a trial within a reasonable time was divided into two legal remedies: the request for the protection of the right to a trial within a reasonable time and the request for the payment of appropriate compensation due to the violation of the right to a trial within a reasonable time. The latest amendments to the Courts Act, enacted in March 2024, have paved the way for a new period in which we can speculate about their effectiveness and consequences. While the new provisions introduce a mixed or combined expedited-compensatory request for the protection of the right to a trial within a reasonable time—similar to those established in 2005—they also reflect significant advancements. This new normative solution, shaped by the extensive practice of the European Court of Human Rights, offers enhanced mechanisms for safeguarding the right to a timely trial compared to the framework from 2005. The Courts Act from 2024 regulates this issue in Articles 63 to 70, while the Act from 2005 addresses it in Articles 27 and 28, clearly indicating a greater level of detail in the regulation of this right in the new legislative framework. First and foremost, the Act from 2024 explicitly outlines the criteria for assessing the validity of the submitted request for the protection of the right to a trial within a reasonable time in Article 65, paragraph 5 (as well as the criteria for evaluating the validity of the amount of appropriate monetary compensation). This contributes to the unification of judicial practice and a higher level of legal certainty. This provision is grounded in the case law of the European Court of Human Rights and the Constitutional Court of the Republic of Croatia. According to it, when deciding on the submitted request, particular attention must be paid to the type of case, its factual and legal complexity, the behaviour of the parties, and

[75] *Op. cit.* Maganić, A.

[76] Castelliano, Caio, Grajzl, Peter, Watanabe, Eduardo, „Does electronic case-processing enhance court efficacy?“ New quantitative evidence. Government Information Quarterly, 40, 4 (2023): 101861; Ljubanović, Boris, Britvić Vetma, Bosiljka, „Sustav eSpis u funkciji efikasnog djelovanja upravnih i sudskih tijela“, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 41, 1 (2020): 313-328.; *op.cit.* Dikov, G., Vitkauskas D.

[77] Uzelac, Alan, Brozović, Juraj, „Zakon o mirnom rješavanju sporova: Korak unaprijed ili još jedna propuštena prilika?“, 2023., IUS info., accessed October 7, 2024, https://www.iusinfo.hr/strucni-clanci/zakon-o-mirnom-rjesavanju-sporova-korak-unaprijed-ili-jos-jedna-propustena-prilika; also see: Knol Radoja Katarina. (Obvezno) mirno rješavanje sporova u Republici Hrvatskoj, Zagreb: Narodne novine, 2024.

the conduct of the court. Changes in the procedure for protecting the right to a trial within a reasonable time, especially concerning the right to appropriate compensation, represent a significant step forward. This change provides additional protection to the parties by granting them the right to financial compensation for the damages suffered. Furthermore, stricter deadlines and additional steps, such as requesting reports on the duration of proceedings, are defined, aiming to improve the efficiency of the judicial system. Stricter deadlines can encourage faster decision-making and reduce delays, ensuring timely justice. On the other hand, these additional steps can offer better insights into the causes of delays and stimulate the identification of problems for the improvement of practices. However, these changes may also create additional pressure on the courts and participants in the proceedings, requiring extra resources for implementation. Ultimately, time will tell how these changes will affect the practices of the judicial system and the process of protecting the right to a trial within a reasonable time.

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SPECIAL PROTECTION OF WOMEN IN CASES OF PREGNANCY, CHILDBIRTH, AND MATERNITY AND WORK-LIFE BALANCE IN EU LABOUR LAW: IS THE MACEDONIAN LABOUR LEGISLATION HARMONIZED WITH EU LABOUR LAW STANDARDS?

Abstract
EU labour legislation provides special protection of women in cases of pregnancy, childbirth, and maternity and rights for the purpose of ensuring and improving work-life balance. This article analyses three groups of women's employment relationship rights arising from special protection in cases of pregnancy, childbirth, and maternity: "classic" employment relationship rights (leaves from work); rights to protect the safety and health of the pregnant worker and the child and the right to special dismissal protection. This article also elaborates the women's employment relationship rights for the purpose of ensuring and improving work-life balance: the right to parental leave; the right to carers' leave and the right to request a flexible working arrangement for caring purposes of a child. In addition, the right to protection against discrimination and dismissal in the context of work-life balance is analyzed. Hence, this article is aimed at determining whether the Macedonian labour legislation is harmonized with EU labour legislation.

Keywords**:** carers' leave, flexible working arrangement, maternity leave, parental leave, protection against discrimination and dismissal, safety and health.

1. Introduction

The regulation of the issue of special protection of a woman is conditional on the need to enable her to perform her work functions as easy as possible; while also responding to the obligations that in view of her psychophysical and biological constitution, nature predetermined her as a mother. The regulation of the special protection of a woman in the employment relationship should also take into account the far-reaching results that protection has not only for the woman, but also for her family members. The need for the existence of special protection of a woman, that is, the worker, in no case should be understood as the protection of some weaker and less valuable being. On the contrary, it is precisely because of her psychophysical and biological constitution that a woman is characterized by special possibilities and abilities, which entail a special attitude towards her. It is precisely in the

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aforementioned that the right to special protection of a woman at work finds its justification and appropriateness[1].

Such protection of women must not be equated with protection where women would have an inferior position. On the contrary, the often-mentioned dual role of women in relation to family responsibilities, as well as labour market activities imposes the interest of the legislations on their special protection.[2] Thus, the Macedonian Labour Relations Law[3] determines the protection of workers on the following grounds: pregnancy and parenthood. There are an entitlement to special employment protection of workers and an obligation of the employer to make it possible for workers to find a way in which their family and work responsibilities can be more easily combined.[4] The special protection guaranteed in the labour legislation for certain categories of workers is not considered discrimination. In order to be permissible, special protection must be justified.[5]

At European Union level, in general, the so-called family-friendly policies include: 1) protection on the following grounds: pregnancy, childbirth and motherhood; 2) work and family life reconciliation and 3) childcare and care for other dependents. From a gender perspective, it is emphasized that the notion of work-family balance is more acceptable than the notion of work-life balance.[6] The change in terminology (overcoming the concept of 'work and family life conciliation' to move on to 'co-responsibility' or 'sharing of responsibilities') would clearly imply a paradigm shift and promote radical social changes.[7]

2. Women's Employment Relationship Rights Arising from Special Protection in Cases of Pregnancy, Childbirth and Maternity

Under the secondary legislation of the European (Economic) Community/European Union, the rights provided for by Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have

[1] Гзиме Старова, *Трудово право* (Скопје: Просветно дело АД Скопје, 2009), 284–285.

[2] Тодор Каламатиев, Живко Митревски, Александар Ристовски, *Прирачник за правата од работен однос на жените и младите во Република Македонија* (Скопје: Фондација „Фридрих Еберт" – Канцеларија во Скопје, 2011), 57.

[3] Labour Relations Law – consolidated text (Official Gazette of the Republic of Macedonia No. 62/2005, 3/2006, 44/2006, 66/2006, 16/2007, 57/2007, 77/2007, 106/2008, 161/2008, 63/2009, 114/2009, 130/2009, 149/2009, 10/2010, 50/2010, 52/2010, 58/2010, 124/2010, 132/2010, 47/2011, 11/2012, 39/2012, 13/2013, 25/2013, 170/2013, 187/2013, 106/2014, 113/2014, 20/2015, 33/2015, 72/2015, 129/2015, 27/2016, 134/2016 and 120/2018 and Official Gazette of the Republic of North Macedonia No. 110/2019, 267/2020, 151/2021, 288/2021 and 111/2023). Accessed May 30, 2024. https://trudovopravo.mk/propisi/zakoni/.

[4] See: Labour Relations Law, Article 161, paragraphs 1–2.

[5] Љубинка Ковачевић, *Правна субординација у радном односу и њене границе* (Београд: Универзитет у Београду, Правни факултет, 2013), 407.

[6] See: Mario Vinković, "Leading or Breeding; Looking Ahead: Gender Segregation in the Labour Market and the Equal Distribution of Family Responsibilities" in *Gender Perspectives in Private Law*, edited by Gabriele Carapezza Figlia, Ljubinka Kovačević, and Eleonor Kristoffersson (Cham, Switzerland: Springer Nature Switzerland AG, 2023), 15, 133.

[7] See: Thais Guerrero Padrón, Ljubinka Kovacevic, Mª Isabel Ribes Moreno, "Labour Law and Gender" in *Gender-Competent Legal Education*, edited by Dragica Vujadinović, Mareike Fröhlich, Thomas Giegerich (Cham, Switzerland: Springer Nature Switzerland AG, 2023), 609.

recently given birth or are breastfeeding[8] (the so-called Pregnant Workers Directive[9], hereinafter: Directive 92/85) can be grouped into three groups of women's employment relationship rights in the context of special protection due to pregnancy, childbirth and maternity, namely: 1) "classic" employment relationship rights (leaves from work)[10]; 2) rights to protect the safety and health of the pregnant worker and the child[11] and 3) the right to special dismissal protection. The first group of rights includes: a) the right to leave due to prenatal examinations and b) the right to maternity leave. The second group includes the following rights: a) the right to temporary measures for the purpose of protecting the safety and health of workers during pregnancy and breastfeeding and b) the right to protection against performing night work. In the third group, on the other hand, is the right to special dismissal protection. A relevant aspect in determination of the terms: 'pregnant worker'; 'worker who has recently given birth' and 'worker who is breastfeeding' in Directive 92/85 is that the employer must be informed about her particular maternity by the worker and it makes no difference what stage she is in.[12]

2.1. "Classic" employment relationship rights (leaves from work)

A number of rights to leave from work fall under the so-called "Classic" employment relationship rights. They are as follows:

2.1.1. Right to leave due to prenatal examinations

Directive 92/85 provides for the right to paid leave from work for the purpose of attending prenatal examinations enjoyed by pregnant workers if such examinations have to take place during working hours, in accordance with national legislation and/or practice.[13] The Macedonian Labour Relations Law does not regulate this right.

2.1.2. Right to maternity leave

The objective of this right is to protect a woman's biological condition during and after pregnancy, her physical recovery and protection of the special relationship between her and the child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment.[14] Directive 92/85 contains minimum standards (14 weeks of maternity leave), i.e. it is not intended to reduce the possible higher level of protection that already exist in the Member States. Thus, in the Boyle case (C-411/96), the European Court of Justice took the position that this Directive does not restrict freedom of contract, that is, that the employment contract may contain a clause for the approval of additional leave (for a childcare) by the employer.[15] The Directive stipulates that Member States shall ensure that pregnant workers are entitled to a continuous period of maternity leave of at least fourteen weeks allocated before and/or after confinement in accordance with

[8] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), Official Journal – *OJ L 348*, 28.11.1992, p. 1–7. Accessed May 30, 2024. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31992L0085.

[9] Catherine Barnard, *EU Employment Law* (4th edition, Oxford: Oxford University Press, 2012), 403.

[10] 'Employment' rights. The Directive provides specific forms of 'employment' protection. See: *Ibid*., 411.

[11] 'Health and safety protection'. See: *Ibid*., 414.

[12] See: Padrón, Kovačević, Ribes Moreno, "Labour Law and Gender", 604; Directive 92/85, Article 2.

[13] Branko A. Lubarda, *Evropsko radno pravo* (Podgorica: CID, 2004), 256; see: Directive 92/85, Article 9.

[14] Padrón, Kovačević, Ribes Moreno, "Labour Law and Gender", 609–610.

[15] Lubarda, *Evropsko radno pravo*, 254–255.

national legislation and/or practice[16]. This leave must include compulsory maternity leave of at least two weeks allocated before and/or after confinement,[17] i.e. it shall begin no later than two weeks before the (expected) confinement.[18] During the leave, the worker has the right to allowance at least equivalent to that which she would receive in the event of a sick leave.[19] The exercise of this right may not be conditional on the previous duration of the employment relationship longer than 12 months prior to the presumed date of confinement.[20]

In the Macedonian labour legislation, maternity leave is used under the term 'leave from work due to pregnancy, childbirth and parenting'. As its name indicates, 'leave from work due to pregnancy, childbirth and parenting' in Macedonia contains two special periods of leave: leave for the protection of 'maternity' (which includes the period of pregnancy and childbirth) and leave due to 'parenting' (which is added to leave due to pregnancy and childbirth).[21] It should be noted that in cases of special protection of a woman in relation to pregnancy and childbirth, it is not only about protecting women, but also about the need to nurture and protect children. In this regard, we can speak of the protection of parenting. Therefore, in certain cases, some rights related to the special protection of a woman may also be exercised by men as parents or adoptive parents, breadwinners or guardians of a child.[22]

An essential part of the maternity leave is the right of a woman to return to her previous job or to a suitable job with the same wage after the end of her maternity leave.[23] Assigning a female worker to a lower or less paid job after returning from maternity leave is one of the most common forms of discrimination against women in the labour market.[24]

2.2. Rights to protect the safety and health of the pregnant worker and the child

The set of rights to protect the safety and health of the pregnant worker and the child includes:

2.2.1. Right to temporary measures for the purpose of protecting the safety and health of workers during pregnancy and breastfeeding.

Once the employer has carried out a risk assessment, is obliged to make temporary adjustments to the working conditions and/or the working hours of the worker concerned, and if such adjustment is not technically and/or objectively feasible, the employer is obliged to temporarily move the worker to another (suitable) job. If the temporary moving her to

[16] *Ibid*., 256; Directive 92/85, Article 8 (1).
[17] See: Directive 92/85, Article 8 (2).
[18] Lubarda, *Evropsko radno pravo*, 256.
[19] *Ibid*.; see: Directive 92/85, Article 11 (2)–(3).
[20] *Ibid*.; see: Directive 92/85, Article 11 (4). Regarding the regulation of this right in international labour standards, compared to the previous International Labour Organization (ILO) Conventions that treated this area and laid down the right to maternity leave up to 12 weeks, Convention No. 183 extends the right to maternity leave to at least 14 weeks, of which at least six weeks are mandatory to be used after the worker gives birth. The ILO Recommendation No. 191, on the other hand, proposes determining extension of the period of maternity leave to at least 18 weeks. See: Александар Ристовски, *Права на младите на работното место во македонски контекст: пристојна работа за младите луѓе* (Скопје: Канцеларија на Меѓународната организација на трудот во Република Македонија, 2018), 112.
[21] Ристовски, *Права на младите*..., 113.
[22] Предраг П. Јовановић, „Посебна радноправна заштита појединих категорија радника" *Zbornik radova Pravnog fakulteta, Novi Sad* XLIX 4 (2015): 1464.
[23] Ристовски, *Права на младите*..., 112.
[24] Љубинка Ковачевић, *Ваљани разлози за отказ уговора о раду* (Београд: Универзитет у Београду, Правни факултет, 2016), 504.

another job (i.e. 'functional mobility'[25]) is not technically and/or objectively feasible, the worker concerned shall be granted leave in accordance with national legislation and/or national practice for the whole of the period necessary to protect her safety or health.[26] The worker is entitled to the maintenance of a payment, i.e. an adequate allowance.[27] The exercise of this right may not be conditional on the previous duration of the employment relationship longer than 12 months prior to the presumed date of confinement.[28] In order for the employer to be able to fulfil these obligations, it is necessary for the worker to notify him of her pregnancy or the beginning of breastfeeding.[29]

However, unlike the labour law standards of the European Union, the current text of the Labour Relations Law states that if a risk identified cannot be otherwise avoided, the employer shall be obliged to change the working conditions or hours, or offer suitable alternative work[30] (although not laid down what is implied as 'suitable alternative work'). If that is not possible, the female worker should be exempted from normal duties for as long as necessary to protect her health and safety and those of her child.[31] However, it is not explicitly laid down what is meant by 'exemption' and how it is carried out, nor is there an obligation for the employer to approve paid leave from work for the necessary time.

If the female worker performs work tasks that during her pregnancy may have harmful effects on her health and safety, or to the health of her child, the employer may also unilaterally change the worker's employment contract as an exception to the rule according to which, amending the employment contract would also require the consent of the pregnant worker/mother. *Vice versa*, the employer would have an obligation to make a unilateral amendment even at the request of the pregnant worker.[32] According to the Croation Labour Law, however, the employer is obliged to offer the worker an addition to the employment contract by which other equivalent work shall be contracted for a certain period of time.[33] In fact, the Macedonian Labour Relations Law makes an exception to this rule when it comes to temporarily moving the worker to another job at the employer, i.e. performing other suitable job for the sole purpose of health and safety protection.[34] The wage for the work at the workplace to which the worker is assigned would be at least equivalent to the wage that the employee received at the previous workplace,[35] that is, the employer shall be obliged to provide her with another suitable equivalent work and wage, as if she was performing her own work, provided this is more favourable for her.[36]

Furthermore, considering that in any dispute between the employer and the female worker, the opinion of the physician, i.e. medical panel shall be decisive,[37] it follows that the physician, i.e. the panel, decides on the suitability of the temporary measure – assigning to another suitable job, i.e. the suitability of the work. Thus, according to the Croatian labour legislation,

[25] Padrón, Kovačević, Ribes Moreno, "Labour Law and Gender", 604.
[26] Lubarda, *Evropsko radno pravo*, 255; see: Directive 92/85, Article 5.
[27] *Ibid*.; see: Directive 92/85, Article 11 (1).
[28] *Ibid*.; see: Directive 92/85, Article 11 (4).
[29] *Ibid*.; see: Directive 92/85, Article 5 (4).
[30] See: Labour Relations Law, Article 162, paragraph 7.
[31] See: Labour Relations Law, Article 162, paragraph 7.
[32] Каламатиев, Митревски, Ристовски, *Прирачник за правата*..., 63.
[33] See: Labour Law of the Republic of Croatia (Narodne Novine, No. 93/14, 127/17, 98/19, 151/22, 64/23), Article 31, paragraph 1. Accessed May 30, 2024. https://www.zakon.hr/z/307/Zakon-o-radu.
[34] Каламатиев, Митревски, Ристовски, *Прирачник за правата*..., 63.
[35] *Ibid*., 64.
[36] Labour Relations Law, Article 163, paragraph 2.
[37] Labour Relations Law, Article 163, paragraph 3.

in such a dispute, only an occupational health physician is competent to assess whether the tasks to which the worker is assigned are suitable or not.[38]

2.2.2. Right to protection against performing night work.

On the one hand, according to Directive 92/85, not only during pregnancy, but also for a certain period following childbirth, workers are not obliged to perform night work, under the condition of a medical certificate stating that this is necessary to protect the health or safety of the worker concerned[39] (pregnant worker, worker who has recently given birth and a worker who is breastfeeding).[40] It is a relative protection against performing night work, since such protection depends on the finding and opinion by the competent physician.[41] The employer is obliged in such cases to transfer the worker to daytime work, and if such a transfer is not technically and/or objectively feasible, the employer is obliged to ensure leave from work or extension of maternity leave in accordance with national legislation and/or practice.[42] However, it is of interest to note that night work is not prohibited during pregnancy. A worker who wishes to continue to work at night during pregnancy and whilst breastfeeding is therefore free to so do.[43]

According to Macedonian labour legislation, a female worker who is pregnant or nursing a child under the age of one year shall not work at night or overtime. So, she has the so-called absolute ban on overtime and night work.[44] This means that even with her consent, she cannot (must not) be engaged overtime and at night by the employer. By contrast, the so-called relative ban on overtime and night work applies to persons who are allowed to work overtime and at night only according to previously declared consent.[45] Thus, the employer may assign a female worker to work overtime or at night solely with prior consent in writing of: 1) a female worker with a child of one to three years of age[46] and 2) a worker (as one of the workers – parents) with a child under seven years of age, a severely ill child or a child with physical or mental disabilities and who is a single parent providing care for the child.[47] Hence, compared to the European Union's labour law standards, it is noted that the Macedonian legislator connects relative protection against performing night work solely with the prior written consent of the worker, and not with the finding and opinion of the competent physician.

2.3. Right to special dismissal protection

There is an obligation of the Member States to take the needed measures in order to prohibit the dismissal of female workers not only during pregnancy (from the beginning of their gestation), but also during the maternity leave (to the end of the maternity leave), save in exceptional circumstances that are not related to their condition, in which the dismissal can be valid only provided that the competent authority (for example, the state labour

[38] See: Labour Law of the Republic of Croatia, Article 31, paragraph 2.
[39] Lubarda, *Evropsko radno pravo*, 255; see: Directive 92/85, Article 7 (1).
[40] See: Directive 92/85, Article 2.
[41] Предраг П. Јовановић, „Посебна радноправна заштита...", 1464.
[42] Lubarda, *Evropsko radno pravo*, 255–256; see: Directive 92/85, Article 7 (2).
[43] Evelyn Ellis, Philippa Watson, *EU Anti-Discrimination Law* (2nd edition, Oxford: Oxford University Press, 2012), 339.
[44] Каламатиев, Митревски, Ристовски, *Прирачник за правата*..., 20–22; see: Labour Relations Law, Article 164, paragraph 1.
[45] *Ibid*., 21–22; 26–27.
[46] See: Labour Relations Law, Article 164, paragraph 2.
[47] See: Labour Relations Law, Article 164, paragraph 4.

inspectorate) has given its consent. In addition, there is an obligation of the employer to state a justified reason for dismissal in writing (i.e. must justify the grounds for her dismissal in writing).[48] However, Directive 92/85 contains no exceptions to such a prohibition, nor does it impose on Member States any obligation to prepare a particular list of such exceptional reasons for dismissal.[49] For example, such a just cause may arise in the event of a collective dismissal which is necessary for economic (financial), technological, organizational or production reasons.[50]

The Labour Relations Law, on the other hand, lays down a ban of dismissal due to pregnancy, childbirth and parenthood.[51] The provision establishing such a prohibition refers to a prohibition of dismissal for any reason (personal reasons, fault reasons, business reasons).[52] It is about the so-called special women worker's dismissal protection on the basis of pregnancy, childbirth and maternity as a category that is often abused.[53] In addition, the special dismissal protection of these categories of employees entail mandatory co-determination of the trade union/competent labour inspector, i.e. limitation of the freedom of employer to terminate the employment contract of such employees by requiring the employer to obtain prior consent for the dismissal.[54]

3. Women's Employment Relationship Rights for the Purpose of Ensuring and Improving Work-Life Balance

Directive (EU) 2019/1158 of the European Parliament and of the Council on work-life balance for parents and carers[55] (so-called Work-Life Balance Directive[56], hereinafter: Directive 2019/1158) sets out minimum standards for addressing family related-leaves, such as paternity, parental and carers' leave and also for addressing extra rights, such as the right to request a flexible working arrangement, which are aimed at making it easier for people to develop their careers and family life without having to give up either.[57] Hence, the Directive provides rights that do not belong only to working women. In the context of women's employment relationship rights for the purpose of ensuring and improving work-life balance it has laid down: 1) the right to parental leave; 2) the right to carers' leave and 3) the right to request a flexible working arrangement for both working parents and working carers for caring purposes of a child. In addition, the right to protection against discrimination and dismissal is particularly separate.[58]

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[48] Lubarda, *Evropsko radno pravo*, 256; see: Directive 92/85, Art. 10.
[49] Ellis, Watson, *EU Anti-Discrimination Law*, 349.
[50] Lubarda, *Evropsko radno pravo*, 256–257; Ellis, Watson, *EU Anti-Discrimination Law*, 349.
[51] See: Labour Relations Law, Article 101.
[52] Каламатиев, Митревски, Ристовски, *Прирачник за правата*..., 62.
[53] See: Сенад Јашаревић, „Заштита од отказа у Србији у светлу међународних стандарда и упоредне праксе" *Радно и социјално право: часопис за теорију и праксу радног и социјалног права* XXII 1 (2018): 76.
[54] Todor Kalamatiev and Aleksandar Ristovski, §23. North Macedonia in *Restatement of Labour Law in Europe, Volume III: Dismissal Protection*, edited by Bernd Waas (München: C.H.Beck, 2023), 851.
[55] Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (OJ L 188, *12.7.2019, p. 79–93*). Accessed May 30, 2024. https://eur-lex.europa.eu/eli/dir/2019/1158/oj.
[56] Vinković, "Leading or Breeding...", 32.
[57] See: European Commission, *New rights to improve work-life balance in the EU enter into application today*. Press Release, August 2, 2022. Accessed May 31, 2024. https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4785.
[58] See: Directive 2019/1158, Article 1 (a)–(b), Articles 11–12.

3.1. Right to parental leave

The right to parental leave is defined as an individual right, taking into consideration that each parent (working mother and working father) is entitled to take it up in the event of childbirth or adoption of a child (i.e. biological and adoptive mothers and fathers) with the aim of looking after that child before the child reaches a specified age as laid down in national legal systems, up to the age of eight.[59] Hence, workers who are holders of the right to parental leave are biological parents as well as adoptive parents. The objective of setting the age limit up to the age of eight is to make space for both mother and father to take up the leave. It should not be set so low that *de facto* the leave would be available only to women who would first take a potentially long maternity leave and then continue to take parental leave. Consequently, by the time a mother had taken up both types of leave, the father would no longer have the possibility to take parental leave. The age should be determined in such a way to ensure that each parent could exercise the right to parental leave effectively and equally. There is an obligation for the Member States to establish a reasonable period of notice which is to be given by workers to employers where they exercise this right. It should be noted that they should take into consideration the needs of both the employers and the workers and should also ensure that the worker's request for parental leave states clearly the planned beginning and end of the period of leave.[60]

Despite the fact that the duration of parental leave at four months individually attributed is maintained, partial non-transferability of parental leave has been increased to two months.[61] It is stipulated that only two of the four months of parental leave must be non-transferrable, i.e. each parent must take at least two months of leave. If each parent does not take at least two months, he/she will lose the right. One of the main reasons is to encourage fathers to take up this leave. For example, there are cultural and financial pressures, so a father could transfer two months of this entitlement to the mother. The possibility of transferrable parental leave has been identified as a key factor undermining fathers' participation in family care because of the disparity in its duration between men and women. For the purpose of minimizing the pressure that many women might feel to take up their male partner's share of transferrable parental leave, both women and men should have equal entitlements that are non-transferable and as large as possible. Considering that the Directive sets minimum standards, distinctions at national level would still be possible although the Commission proposal would have at least ensured that all four months of leave be non-transferrable.[62]

Criticisms of non-transferability of this leave relates to interfering in the choice within the family and it could be a problem if the leave is not (adequately) remunerated, particularly when the salary of one parent differs significantly. For example, the household cannot afford the loss of income which would result if the higher-earning parent (more likely a man) were to take this leave. Moreover, this case could particularly cause difficulties for lower-income

[59] See: Padrón, Kovacevic, Ribes Moreno, "Labour Law and Gender", 613; Miguel De la Corte-Rodríguez, *The transposition of the Work-Life Balance Directive in EU Member States: A long way ahead* (Luxembourg: Publications Office of the European Union 2022), 11. Accessed May 31, 2024. https://op.europa.eu/en/publication-detail/-/publication/31ebf9e1-e75c-11ee-9ea8-01aa75ed71a1/language-en; see: Directive 2019/1158, Article 3, paragraph 1 (b) and Article 5 (1).

[60] See: De la Corte-Rodríguez, *The transposition of the*..., 46; Directive 2019/1158, Article 5 (1), Article 5 (3).

[61] See: Padrón, Kovačević, Ribes Moreno, "Labour Law and Gender", 613; Directive 2019/1158, Article 3 (1)-(2).

[62] See: Kalina Arabadjieva, *Reshaping the Work-Life Balance Directive with Covid-19 lessons in mind* (Brussels: European Trade Union Institute (ETUI), 2022), 23–24. Accessed May 31, 2024. https://www.etui.org/publications/reshaping-work-life-balance-directive-covid-19-lessons-mind.

households. This is the main reason to ensure that leave is properly remunerated. Other measures which can be taken in order to increase uptake by fathers, in addition to pay and transferability of leave, can include, for example, the possibility of taking it in flexible manners, which workers can request under the Directive.[63]

Only two of the four months of parental leave should be paid. Setting the level of payment should be defined in the national legal system by the Member State or the social partners. The amount of pay 'shall be set in such a way as to facilitate the take-up of parental leave by both parents', but this formulation is ambiguous.[64] Determination of payment at an 'adequate level', as defined by the Directive, is determining whether it is enough for enabling both parents (also fathers, who are likely to earn more than mothers) to take parental leave.[65] The level of payment proposed by the Commission was at least at the level of allowance in case of sick leave and for the whole duration of all kinds of leave.[66]

Member States may establish the circumstances in which an employer is entitled to delay the granting of this leave, but only for a reasonable period of time, if its uptake at the time requested will seriously disturb the good functioning of the employer. The employer is entitled to delay the leave due to circumstances related to production, but in this case the employer should justify such a postponement in writing.[67] If those circumstances are established, when employers consider requests for full-time parental leave, they are obliged to offer, to the extent possible, flexible ways of taking it prior to any postponement. It should be noted that the worker's request for parental leave cannot be refused by the employer, which means that workers will always be able to exercise this right and that it is an absolute right.[68]

Workers are entitled to request a flexible uptake of parental leave in accordance with Directive 2019/1158. In this regard, Member States should take the needed measures for the purpose of ensuring that workers have the right to flexible uptake request, i.e. taking parental leave in flexible ways. In this context, workers should have a right to request granting of parental leave, firstly, as a part-time take-up (for example, eight months at 50 %), secondly, in alternating periods, such as for a number of consecutive weeks of leave separated by periods of work or in different blocks (for example, two months at 100 % this year and two months at 100 % next year) or thirdly, in other flexible manners (if laid down at national level). The employer should consider and respond to these requests, taking into consideration the needs of both the employer and the worker. If the request cannot be accepted, the employer should justify a refusal in a written form within a reasonable period after the request. It should be noted that, in fact, workers are always entitled to take parental leave on a full-time basis (four months at 100 %), because this request cannot be refused, but only potentially delayed by the employer.[69]

It should be possible for the workers to take parental leave in flexible ways and to request a flexible working arrangement simultaneously, because the right to request a flexible working arrangement could be exercised independently. For example, a worker can take parental leave on a part-time basis (for example, leave at 50 % and work at 50 %) and could combined it with a flexible work schedule or telework (as a flexible working arrangement) during the 50

[63] See: *Ibid*., 24–25.
[64] See: *Ibid*., 22; Directive 2019/1158, Article 8 (3).
[65] See: De la Corte-Rodríguez, *The transposition of the*..., 48.
[66] See: Arabadjieva, *Reshaping the Work-Life*..., 22.
[67] See: Padrón, Kovačević, Ribes Moreno, "Labour Law and Gender", 613; Directive 2019/1158, Article 3 (5).
[68] See: De la Corte-Rodríguez, *The transposition of the*..., 47.
[69] See: *Ibid*.

% of hours of work or if parental leave is interrupted by a period of work, it should be also possible for the worker to request a flexible work schedule or telework during the period of work.[70]

3.2. Right to carers' leave

Carers' leave is a new instrument[71] for workers in order to provide personal care or support to a relative (a worker's son, daughter, mother, father, spouse), or to a person who lives in the same household as the worker (carer), and who is in need of significant care or support for a serious medical reason.[72] Taking into consideration the definitions of the notions of carers' leave and carers, it is interesting to note that there are two types of beneficiaries of this leave. The first one refers to relatives, despite they live in the same household as the worker or not, and the second one refers to persons who live in the same household as the worker, irrespective they are worker's relatives or not.[73]

The duration of carers' leave of each worker is five working days per year. This is the so-called 'by default' system, because the duration of carers' leave is typically at least five working days per year per worker. Member States have the possibility to allocate carers' leave on the basis of a different period, i.e. "reference period other than a year, per person in need of care or support, or per case". In this regard, there are three alternative ways of regulating this leave in national legal systems. Firstly, it can be allocated on the basis of a period other than a year (for example, 25 working days every five years), secondly, it can be designed by reference to the beneficiary, i.e. person in need of care or support (for example, two working days per relative in need of care or support), or thirdly, per case (for example, two working days per case or episode of need or support). In the context of generosity of these alternative systems *vis-à-vis* 'by default' system, it should be possible for workers to take the leave at least three times per year, i.e. a total of six working days per year (for example, in the case of two working days per episode of need or support) although it is not expressly mentioned in the Directive.[74] Directive 2019/1158 contains no provision on pay or an allowance for carers from the beginning to the end of carers' leave. However, for the purpose of taking up this right effectively by carers, in particular by men, Member States should be encouraged to introduce such a payment or an allowance. The Work–Life Balance Directive is subject to criticism because it does not mention "the need to ensure greater recognition of the contribution of unpaid care work", in particular performed by women, to society, but "it does not mean that such work does not have an economic value". It is noted that "a starting point for reshaping of this Directive should be promoting gender equality".[75]

3.3. Right to request a flexible working arrangement for caring purposes of a child

The right to request a flexible working arrangement for caring purposes of a child (so-called family-friendly working arrangement)[76] is a right which is guaranteed to workers (parents)

[70] See: *Ibid*.
[71] Padrón, Kovačević, Ribes Moreno, "Labour Law and Gender", 613.
[72] See: Directive 2019/1158, Article 3, paragraph 1 (c)–(e).
[73] See: De la Corte-Rodríguez, *The transposition of the*..., 48.
[74] See: *Ibid.*; Directive 2019/1158, Article 6 (1)-(2).
[75] *Ibid.*, 49; Arabadjieva, *Reshaping the Work-Life*..., 10, 18–19.
[76] International Labour Organization, *Empowering Women at Work – Government Laws and Policies for Gender Equity* (Geneva: International Labour Office, 2021), 49. Accessed June 1, 2024. https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_emp/@emp_ent/@multi/documents/publication/wcms_773233.pdf.

with children up to at least eight years and carers. There is an obligation for employers to consider and respond to such a request. If the employer cannot approve it, the employer is obliged to adequately justify the refusal or postponement of it. For example, such a justification of the employer could be an impossibility of teleworking because of the nature of the work).[77] Namely, Directive 2019/1158 provides for a relative right, not an absolute right,[78] since the approval of the worker's request to use a flexible working arrangement also depends on the needs of the employer's work process.

This right is an independent right, i.e. a free-standing right, which is having no connection to other types of family-related leaves, such as maternity or parental leave. It should be noted that the right to request in Directive 2010/18 is in a very serious way stronger than before. It was, actually, a limited right, because it was intended only for parents after their returning to work from parental leave. Now, it is a completely developed right, i.e. an autonomous right intended not only for parents, but also for carers.[79] The Directive provides for two types of flexibility (workplace flexibility and flexibility of working hours). Thus, there is a broad scope of options, such as "the use of remote working arrangements, flexible working schedules, or reduced working hours."[80] The worker should be entitled to return to his/her original working pattern at the end of the agreed period if a flexible working arrangement is limited in its duration. The worker should also be entitled to request an early return to the original working pattern if it is justified on the basis of a change of circumstances. The employer should consider and respond to such a request, taking into account both his and the worker's needs.[81]

3.4. Right to protection against discrimination and dismissal

Directive 2019/1158 provides that Member States should take the needed measures to prohibit less favourable treatment and dismissal (as well as all preparations for the dismissal) of workers if they have applied for or have exercised any family-friendly leave or a family-friendly working arrangement. Preparations for dismissal could include, for example, looking for and finding someone who would permanently replace the dismissed worker. The employer should be requested to justify the dismissal in writing by workers who think about a possibility of having been dismissed if they have applied for or have exercised any family-friendly leave or a family-friendly working arrangement.[82]

4. Conclusion

Part of the labour law standards of the European Union for special protection of women in cases of pregnancy, childbirth, and maternity are contained in Directive 92/85. "Classic" employment relationship rights (leaves from work) are: the right to leave due to prenatal examinations, which is not yet regulated in Macedonian labour legislation and the right to maternity leave, which in Macedonian labour legislation is used under the term 'leave from work due to pregnancy, childbirth and parenting' although it contains two special periods of leave: leave for the protection of 'maternity' (which includes the period of pregnancy and

[77] See: Padrón, Kovacevic, Ribes Moreno, "Labour Law and Gender", 614; Directive 2019/1158, Article 9 (1); De la Corte-Rodríguez, *The transposition of the*..., 51.
[78] See: De la Corte-Rodríguez, *The transposition of the*..., 15.
[79] See: *Ibid*., 9; Padrón, Kovačević, Ribes Moreno, "Labour Law and Gender", 614.
[80] Padrón, Kovacevic, Ribes Moreno, "Labour Law and Gender", 615.
[81] See: Directive 2019/1158, Article 9 (3).
[82] See: Directive 2019/1158, Article 11, Article 12 (1)-(2).

childbirth) and leave due to 'parenting' (which is added to leave due to pregnancy and childbirth).

The rights to protect the safety and health of the pregnant worker and the child include: the right to temporary measures for the purpose of protecting the safety and health of workers during pregnancy and breastfeeding (which ultimately means an obligation for the employer to grant a paid worker's leave throughout the necessary period – which Macedonian legislation does not regulate, but sets out 'exemption' of the worker) and the right to protection against performing night work (which implies relative protection as it depends on the finding and opinion of the competent physician, not only on the prior worker's consent in a written form, as laid down in the Macedonian Labour Relations Law).

The special dismissal protection of female workers, however, concerns not only the cases – pregnancy, childbirth and maternity, but also the limitation of the freedom of employer to terminate the employment contract by requiring the employer to obtain prior consent for the dismissal as a condition of its validity in exceptional cases.

The labour law standards of the European Union for work-life balance are contained in Directive 2019/1158. Holders of the right to parental leave are: biological parents and adoptive parents, up to the age of eight of the child for the purpose of ensuring that each parent could exercise the right to parental leave effectively and equally. The main characteristics of parental leave are: 1) partial non-transferability; 2) payment or allowance at an 'adequate level'; 3) absoluteity of the right, i.e. the possibility for Member States to establish circumstances under which this leave may be postponed, but not refused, and 4) the possibility of flexible uptake request, i.e. taking parental leave in flexible ways (as a part-time take-up, in alternating periods or in different blocks, or in other flexible manners if laid down at national level), which is independent of the right to request a flexible working arrangement for caring purposes of a child.

The right to carers' leave is a new right for workers at European Union level for personal care or support of a family member (son, daughter, mother, father, spouse of the worker), despite he/she lives in the worker's (carer's) household or not, or a person who lives in the worker's (carer's) household, despite he/she is a member of family of the worker, due to serious medical reason. The duration of carers' leave of each worker is five working days per year. Member States have the possibility to allocate carers' leave on the basis of a different period, i.e. "reference period other than a year, per person in need of care or support, or per case". The Directive 2019/1158 has been criticized mainly for containing no provision on pay or an allowance for carers from the beginning to the end of carers' leave and not mentioning "the need to ensure greater recognition of the contribution of unpaid care work".

The holders of the right to request a flexible working arrangement for caring purposes of a child are: workers (parents) with children up to at least eight years and carers. Characteristics of this right are: 1) independence and autonomy (because it is having no connection to other types of family-related leaves, such as maternity or parental leave and it is no longer available only to parents after their returning to work from parental leave, but to parents and carers and); 2) relativity (since the approval of the worker's request to use a flexible working arrangement also depends on the needs of the employer's work process); 3) two types of flexibility (workplace flexibility and flexibility of working hours), which implies different possibilities such as: "remote working arrangements, flexible working schedules, or reduced working hours" and 4) the entitlement of the worker to request an early return to the original working pattern if it is justified on the basis of a change of circumstances. Such "a new approach to the right to a work-life balance contributes to keeping carers and family members,

usually women, in the workplace. Thereby strengthening their position in the labour market".[83]

The right to protection against discrimination and dismissal, however, implies a prohibition on less favourable treatment and dismissal (as well as all preparations for the dismissal) of workers if they have applied for or have exercised any family-friendly leave or a family-friendly working arrangement.

[83] Padrón, Kovačević, Ribes Moreno, "Labour Law and Gender", 615.

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