LAW AND SUSTAINABILITY

PERSPECTIVES FOR LITHUANIA AND BEYOND

Editors:
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MRU
Mykolas Romeris University

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FOREWORD

As can be easily observed by simply browsing a newspaper, a legal journal, or a news website, there are two "magic" words in today's media: digitalization and sustainability. As legal scholars, one of our duties is to conjugate the principles and tools of classical legal tradition with the challenges of modern times. Both digitalization and – most importantly for us – sustainability are not only among such challenges, but are perhaps the most fascinating and hotly debated examples thereof.

As is better explained in the Introduction to this edited volume, in 2021 the Law School of Mykolas Romeris University (MRU) elaborated its 2022–2026 research program, which is devoted specifically to investigating the intersection between the Rule of Law, the concept of sustainability, and new technologies. This volume, among the early outcomes of the research program, marks an extremely promising start.

Together with dr. Dovilė Sagatienė we conceived the notion of structuring this book in the manner that I believe sustainability should be dealt with when more broadly applied to the legal field: by looking both at its intersections with different areas of law and at specific examples. Highly valuable work has gathered together thirty scholars – coming mainly, but not only, from Lithuania – to compose the 24 contributions that form the four parts of this edited volume.

As an area-by-area (national and international public law, private law, and criminal law) approach is already inherent in the structure of this volume, I am here proposing a few somewhat different ideas to consider when cross-reading it.

The first basic issue is the idea of sustainability itself. This book provides several points of view regarding what we should understand the word *sustainability* to mean, and this plurality enriches both the public and academic debate and the book itself. This is made very clear in the part on the concept of sustainability in national Constitutions, but many other contributions also focus on specific facets of either environmental (the parts on electric vehicles; on waste management; and on environmental crimes) or social sustainability (the contribution on the sustainable reduction of drug consumption, and that on sustainable work).

Another among the most significant topics of the present day is digitalization. Many contributions deal specifically with this issue, again from different perspectives, and they highlight the fact that we should see and pursue some kind of an alliance between digitalization and sustainability. This is certainly the message of the contribution on AI4SDG, but the paper on data processing is also closely related to digitalization – as are those on online voting in private companies, on the

protection of vulnerability reporters in the field of cybersecurity, and on the need for a combination between law, finance, and technology, with a view to a more consistent approach to sustainability.

A third trend might be in line with the idiom of "new wine in old wineskins" – i.e., how sustainability affects old issues that traditional legal studies have already considered, bringing in new possible solutions. This is certainly true of the contributions on subsidiarity in criminal law, on apparent authority in civil law, on quality product guarantees, and on sustainable spatial planning.

A further tendency naturally concerns the sustainable mobilization of wealth, with specific reference to the business environment. This is the case for many contributions in this volume: on international investment law; on sustainability clauses in commercial contractual relations; on shareholder activism in public companies; on the legal regulation of reorganization in Ukraine; and on green procurements, and thus the sustainable intersection between public and private entities.

A final possible trend is the widening of access to justice as a specific element of sustainability – not necessarily within its social dimension. The following contributions consider different profiles of this topic: on civil cases; on incapacitated persons and criminal justice; and on the role of legal professions in promoting sustainability.

Naturally, the grouping above is just one among the many possible ways of reading this volume. Nevertheless, it provides the opportunity to offer a few general remarks.

First: sustainability is a concept that is not to be relegated solely to its environmental dimension. The environment is hugely important, but it does not completely absorb the scope of sustainability, which must be seen as a holistic notion. In fact, the reader will derive a clear perception of this from the above trends in the contributions to this volume, besides the natural structure of the book itself.

Second: sustainability has to do, in different ways, with a lot – if not all – of the issues we usually face in dealing with traditional legal studies. Moreover, sustainability is not a precise object of law, but a concept that contributes to defining the soul of law. If we consider that dealing with sustainability is inevitable, then the most recent regulations should be sustainable by design, and older regulations should undergo sustainability-friendly reinterpretation. Sustainability is first of all, then, a criterion.

Third: even if this book is mainly focused on Lithuania, it contains the seeds for far broader expansion. This is made evident by the presence, among the authors, of several scholars from Ukraine that MRU has hosted. Scholars from Poland, Austria, Turkey and France are also present, and this is very promising for the possible fallout from this book, which is likely to germinate into further initiatives – both those hosted by MRU and by other institutions abroad.

Fourth, and perhaps most importantly: as some authors point out in their contributions, the key challenge for sustainability in the long term is also a matter of education. The fact that a university puts its efforts into collecting such a meaningful set of contributions in the field of sustainability signals that these papers are very likely to serve as the basis for research-led teaching in the field of sustainability, from the point of view of legal sciences. In order to have true sustainability in place, the players of the economy first need willingness; second, a policy; third, a framework; and, fourth, people who are able to serve to such a purpose. Aside from the first point – which, in the long run, still concerns education – universities are called to play a meaningful role in the remaining

three via research, public engagement, and teaching. MRU thus deserves praise for this volume, as do all of the colleagues involved in its creation, because it represents a profound step forward in the field of sustainability, both in Lithuania and globally.

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This book is the result of the development of the new legal field at Mykolas Romeris University Law School, which links law and the increasing role of sustainability in everyday life, especially, after COVID-19 pandemic. The 2022–2026 Research Program titled *Rule of Law, Sustainability, Technologies* and approved by MRU in 2021, identified five target interdisciplinary domains, including, "The Transformation of Human Rights," "Democracy and the Rule of Law," "The Relations Between Law, Sustainability and Technologies," "Effective Justice" and "Security Research." The aim of the domain "Relations Between Law, Sustainability and Technologies" is to explore how law and sustainability reflect global trends based on the Sustainable Development Goals agenda until 2030 and the European Green Course policy. For this task, 30 national and international legal scholars contributed to this edited volume.

INTRODUCTION

What is the role of sustainability in legal regulation?

Sustainable development provides a framework for humans to live and prosper in harmony. A paradigm for sustainable development enables people to coexist with the environment and thrive, rather than destroying it as we have done for millennia. Sustainability has many different definitions, but its essence was articulated by the Brundtland Commission, tasked by the UN in 1987 with formulating a global agenda for change: "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs." A more recent definition suggests that sustainability means "securing the social foundations with planetary boundaries" (Sjafjell and Bruner, *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*).

Creating and ensuring sustainability (and the Sustainable Development Goals, SDGs) remains an essential task on a global scale (2015 – United Nations Sustainable Development Agenda 2030, Report on the implementation of the UN Agenda 2030 in Lithuania, 2018, National Sustainable Development Strategy, 2011). Lawyers and policymakers are now meeting the growing demand from clients in commercial, governmental, and nongovernmental groups for legal work that tackles the challenges of sustainable development.

Legal developments in the field of sustainability are also closely linked with the impact of new technologies, including legal technology, on legal systems, the legal profession and legal studies, as well as the effectiveness of research on the justice system in developing and expanding e-justice. Synergy between law and technology can ensure greater access to justice, the optimization and efficiency of legal processes, the digitization of legal services and the development of innovations in the field of law. It is predicted that a fundamental transformation of the legal profession will take place by 2025 due to the rapid development of technological changes, new work methods and the need to offer clients more value at lower costs (Deloitte, Developing legal talent. Stepping into the future law firm, 2016).

The impact of technology on public safety, the digitization of public sector processes, and the use of AI for personal and public safety are receiving an increasing amount of scientific research. The digital transformation of institutions and systems that ensure public safety is also accelerating due to the COVID-19 pandemic. Many technological systems introduced during the pandemic will

play a key role in ensuring public safety in the future, so legal research in this area is necessary, timely and reflects the needs of society and the State. The digitization of the activities of law enforcement institutions and the use of AI to ensure public safety are also extremely relevant areas. Law enforcement institutions around the world are either already using or seeking out opportunities to use artificial intelligence, analyzing the possibility of making decisions more easily, assessing risks, increasing preparedness for crises, and optimizing processes.

Still, despite the numerous environmental and natural resource regulations that are currently in place, sustainability does not yet have a sufficient or supportive legal base. Therefore, law that fosters sustainability is one of the fastest-developing and most challenging global legal disciplines. Since the 2010s, European legal scholars have been actively engaged in developing a new field of law: sustainability law. The pioneer in this research field is the University of Oslo, which has addressed various topics since 2010, including sustainable companies (2010–2014, Futuring Sustainable Nordic Business Models, Futuring Nordics, 2019–2023) as an integral part of sustainability law. The overarching theme of the Sustainability Law Research Group at the University of Oslo, led by professor Beate Sjåfjell, is to conduct interdisciplinary analyses of law with the aim of identifying normative solutions that contribute to global sustainability. The problem of sustainability in law on a global scale was recently addressed by Volker Mauerhofer, Daniela Rupo, and Lara Tarquinio in their volume *Sustainability and Law. General and Specific Aspects* (2020). Lithuanian legal scholars are also discovering this topic by exploring the link between law and management in the context of sustainability (*Sustainable development of law and management in the current world*. Scientific Monograph, KSU, 2021). However, the various topics of sustainability in law are still underrepresented in Lithuanian scholarship and beyond.

Research object. The main question addressed by this edited volume is closely related to the increased role of sustainability in every society after the COVID-19 pandemic, and how this alteration has affected legal regulation in Lithuania and beyond. The authors ask: What is the place of sustainability in national and international legal regulation? They also present the discourse of sustainability in law in Lithuania and beyond, including the legal regulation of sustainability, the sustainability of the legal profession and the transformation of law in the context of sustainability. This edited volume describes legal aspects of sustainable development in various legal fields, including consumer law, the rule of law, human rights, energy, etc. Moreover, the authors discuss the transformation of law in the context of sustainability in the areas of governance, climate change, technology, criminal jurisdiction, etc. Lawyers must create and put into practice laws and legal structures that either do not yet exist or exist in a very different manner if we are to significantly advance toward, much less attain, sustainability. Therefore, this edited volume addresses the subject of how law may and should be used to promote sustainability further.

Research aim and objectives. In general, "Law and Sustainability: Perspectives for Lithuania and Beyond" aims to analyze the ways in which law and the legal profession should change and contribute to sustainability. For this aim, the following research objectives were set:

1. To address the subjects of national and international public law and the establishment of conditions for sustainable development, including the issues of sustainable development and artificial intelligence, the concept of sustainability in national Constitutions, the efficiency of green public procurement regulation in Lithuania, new generation of international investment agreements, personal data processing and sustainable work.

2. To present the discourse of sustainability in private law in Lithuania and beyond, including the problem of sustainable agency, commercial contracts influenced by sustainability, product quality guarantees in promoting sustainable consumption, the problem of shareholder activism, remote participation of shareholders in the general meetings of private companies, the main directions in the sustainable development of legal regulation in the reorganization in Ukraine, and access to justice through mediation.
3. To disclose the transformation of criminal law in the context of sustainability, including environmental crimes, sustainable criminalization, the sustainable reduction of drug consumption, accessible and sustainable criminal justice and the protection of vulnerability reporters.
4. To describe examples and experiences of sustainability from the legal point of view, including the implementation of the sustainable development principle in zoning and planning regulations, the problem of the sustainable legal regulation of electric vehicle infrastructure, and the links between sustainability and electrification in the EU regulatory framework and Lithuania. Furthermore, to contribute to the sustainable development agenda by calculating and reducing greenhouse gas emissions from the waste management sector, as well as bridging gaps between law, finance, and technology and the sustainability of the legal profession.

Methodology of the research. The preparation of this edited volume was inspired by the 2022–2026 Research Program titled *Rule of Law, Sustainability, Technologies*, adopted by the Mykolas Romeris University in 2021, which identified new legal research field: exploring how law and sustainability reflect global trends based on the 2030 Agenda for Sustainable Development and the European Green Deal, the implementation of which is inseparable from law as it ensures regulation and its implementation, thereby creating conditions for the development of sustainability principles. Outlining this research direction as a priority will allow the consolidation of ongoing research in the field of sustainability (especially research into the cyclical economy, environmental protection, social business and other issues) and bring together researchers on an interdisciplinary basis. In this context, the focus of legal scholars at MRU since 2022 has shifted towards research on the legal regulation of the implementation of climate change management and climate neutralization, the implementation of the rights of individuals in the context of climate change (climate litigation), the improvement of the legal regulation of waste management systems, the direction of the green (circular) economy, and the practical operation of new business models.

This collective volume is the result of major efforts to bring together national and international scholars to contribute to the research of sustainability and law. Scholars from various legal fields were called to address the following questions in their contributions: Why is the question of sustainability and law relevant in your proposed research area? How could your area of proposed research be developed through the lens of sustainability, and/or how could the legal area in your proposed research contribute to sustainability? What changes related to sustainability have already impacted the development of the area/issue of law in your proposed research? What are the main barriers to sustainability in your field, and what are the ways to overcome them, if any?

Limitations. This edited volume is limited in geographical terms, as it mainly covers Lithuanian and European legal perspectives: some parts of the edited volume address Lithuanian issues within a European context (including Ukraine), some parts focus exclusively on the Lithuanian dimension, and some are outside the Lithuanian scope. The wide variety of topics covered by the authors

is essential in order to deliver broad perspectives for the development of sustainability in the Lithuanian legal field, as well as to indicate limitations and challenges both within the region and beyond.

The structure of the book. This book is divided into four parts, each of which address various aspects of the topic under study: sustainability in national and international public law, the links between sustainability and private law, the transformation of criminal law in the context of sustainability, also specific examples of sustainability in action from a legal perspective. Edited volume also includes conclusions and summary.

The first part of this edited volume – "National and international public law: The establishment of conditions for sustainable development" – covers the issues of: sustainable development and artificial intelligence; the concept of sustainability in national constitutions; the efficiency of green public procurement regulation in Lithuania; new generation of international investment agreements, personal data processing and sustainable work.

The second part – "Sustainability and private law" – focuses on the problem of sustainable agency, commercial contracts influenced by sustainability, product quality guarantees in promoting sustainable consumption, the problem of shareholder activism, remote participation of shareholders in the general meetings of private companies, the main directions in the sustainable development of legal regulation in the reorganization in Ukraine, and access to justice through mediation.

The third part of this edited volume focuses on the transformation of criminal law in the context of sustainability, including: environmental crimes; sustainable criminalization; sustainable reduction of drug consumption; accessible and sustainable criminal justice and the protection of vulnerability reporters. The last part of this edited volume presents examples and experiences of sustainability from the legal point of view, including: the implementation of the sustainable development principle in zoning and planning regulations; the problem of the sustainable legal regulation of electric vehicle infrastructure; the links between sustainability and electrification in the regulatory framework of the EU and Lithuania; contributing to the sustainable development agenda by calculating and reducing greenhouse gas emissions from the waste management sector; and bridging the gaps between law, finance, and technology and the sustainability of the legal profession.

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I. NATIONAL AND INTERNATIONAL PUBLIC LAW: THE ESTABLISHMENT OF CONDITIONS FOR A SUSTAINABLE DEVELOPMENT

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I.1. SUSTAINABLE DEVELOPMENT AND ARTIFICIAL INTELLIGENCE: IS AI4ESG A KEY DRIVER TO REACH THE OBJECTIVES OF UN AGENDA 2030?

Artificial intelligence towards sustainability in the global setting

Innovations are deceptively difficult answers to sustainability questions. Closely linked to the roots of the global sustainability crisis, they are also envisaged as sustainable development goals (SDGs) of the United Nations (UN). Uniform regulation of innovations and the compliance of stakeholders is crucial for this purpose. Here, the most influential state and non-state actors are the best target audience – they generate the largest impact on sustainability issues, and they have developed the most powerful innovative technologies. Sustainability standards built into their value chains, individually measured, and boosted with efficient enforcement are expected to accelerate necessary changes.

Not surprisingly, big data is related to sustainability targets, a variety of sustainability frameworks, and the global nature of sustainability. With the development of artificial intelligence (AI) technologies, essential challenges posed by big data – volume, velocity, and variety, now usually referred to as the 3 Vs of big data – are dealt with by artificial intelligence with surprising speed and efficiency. AI is deemed to help achieve the objectives of the 2030 UN Agenda for Sustainable Development (Resolution A/RES/70/1 2015) nearly perfectly: almost half of the UN social development goals and 4 of their 5 targets are estimated to attain accelerated progress via the use of AI (Sætra 2015, p. 7). In the future, AI may facilitate the emergence of new ESG (environmental, social, and governance) targets and new goals (such as the right to the internet). In the meantime, AI-based solutions developed specifically for ESG (often referred to as AI4ESG) are already in the market. Expectations that AI will automate ESG compliance at no cost are on the rise. At first sight, the actual impact of AI on human rights and the environment (Wynsberghe 2021, p. 1) seems to be well covered by the proposed legislation on AI. However, the pace of AI-driven sustainability is slow. Barriers to the operationalization of sustainability are explained by various reasons, including lack of competence and lack of incentives for businesses (Tse 2020, p. 21).

The acceleration of the achievement of sustainability goals with the help of artificial intelligence systems

The SDGs are a set of political objectives encompassed in the UN Agenda 2030 for Sustainable Development. Despite having the form of "soft law," they are described as revealing a subset of existing intergovernmental commitments, serving as a reflection of the fragmented nature of international law (Kim 2016, p. 16). The importance of sustainability objectives is undeniable. It is sometimes claimed that states have an *erga omnes* obligation to mitigate and manage climate change (Sciaccaluga 2020), or that environmental protection represents the early emergence of a jus cogens principle (Alarcon 2021).

AI as a new technology does not disrupt international human rights laws as a framework per se, only creates the necessity to reinvigorate and reinterpret them (Zamfir 2022, p. 3). The deployment of artificial intelligence for sustainable development requires a precautionary approach: first, states are required to refrain from taking actions that will result in human rights violations; and second, they must adhere to the duty to protect from arbitrary rights interference (Murray 2020, pp. 158–162).

The importance of sustainability may indicate a pressing need to use the best possible measures at states' disposal. Current data shows that developed states demonstrate the best sustainability results; they can efficiently use their potential in limiting conditions (Grochová & Litzman 2021, p. 718). However, if all states continue with their current strategies, only five of them are expected to reach the Agenda 2030 goals on-time (p. 709). Stronger efficiency is needed in this regard. AI deployed for automating human work perfectly fits this purpose and facilitates good governance. AI may support the core of good governance by performing tasks of detection, prediction, and data-driven decision-making (Margetts 2022, p. 361).

The feasibility of artificial intelligence solutions for sustainability (AI4ESG)

AI requires large and varied datasets of information to produce the best results. High-quality data is crucial for measuring, rethinking, and improving sustainability.

The public sector owns a unique data pool that is extremely valuable for ESG compliance as it collects, produces, reproduces, and disseminates a wide range of information in many areas of activity. In parallel, companies, media, and individuals generate a vast amount of digital data daily; in estimation, only 0.007% of the world's information is on paper now (Herbert & López 2011, p. 332). Despite the maturity of a data-driven society and the presence of AI4ESG solutions, the "triple bottom line" (business' care for profit, people, and the planet) is not a mainstream practice among companies (Tse 2021). That, in turn, poses a question: what underlying issues may be hindering the implementation of UN Agenda 2030?

The first problem stems from the uneven development of the technological environment, as only slightly over 60% of the global population has access to the internet in 2022 (International Telecommunication Union 2020). The AI-powered world cannot exist without first resolving the

issues of digitization, digital literacy, advanced infrastructure, and the ecosystem of innovators in developing countries (Francesc *et al.* 2019, p. 1). AI may be used universally for the reasons of ESG compliance, with the condition of the equal footing of states. However, the priority of the empowerment of AI over other pressing needs of developing countries is unsettled in Agenda 2030. As a result, the granularity of sustainability actions and results is unavoidable, giving a first-mover advantage to developed states.

There is a second related challenge: uneven development of the regulatory landscape. Regulation of AI, open data, and big data is not well-established, consistent, or stable. AI-related normative initiatives are emerging in only half of the independent states (OECD [Organization for Economic Co-operation and Development] 2021). No global regulatory framework is present. Regulation, when existent, varies in purpose, scope, policy choices, and enforcement from state to state. Regarding this, the OECD (2019) calls for a more sustainable, long-term approach, requiring a proper governance framework, competence, high-level political commitment, and the recognition of the crucial role of the data ecosystem. In this context, AI4ESG is directly dependent on the particularities of different AI and data access regimes and the flow of data. The dynamics of regulatory initiatives may push the market towards reduced or uneven use of AI4ESG, fostering further imbalance between developed and developing states.

Consequently, a lack of internal synergy is noted across all regulatory policies concerning sustainability, AI, open data, big data, and related areas. Regulatory initiatives for open data do not line up and concentrate at two poles: widening the scope of exclusive rights towards data, and facilitating data availability and access (Martens 2018, p. 20). The extensive space between these opposites leads to self-regulation, where codes of conduct and bilateral agreements on data access shape the rules and create a grey zone for the "open washing" of governments. A similar trend containing conceptual gaps is noted in sustainability at the company level. A universal sustainability standard is not set. Instead, there are many, among which four are distinguished as the most significant: the UN SDGs, the Global Reporting Initiative Standards, the Task Force on Climate-Related Financial Disclosures, and the Sustainability Accounting Board Standards. A variety of sustainability frameworks and standards, a so-called "alphabet soup," establishes different benchmarks. In such circumstances, AI technology is not efficient enough to provide global comparability of ESG progress in states, with new side-effects such as ignoring "greenwashing."

At this point, the problem of imbalance due to dual standards may occur. For instance, it is suggested that the European Union (EU) is willing to adhere to minimum ESG standards when concluding international agreements with third states. At the same time, the EU sets higher ESG standards for companies in the internal market (Bronckers 2022). The justification of different standards can be explained, inter alia, by responsibility for non-conformance. The responsibility of states does not require fault (the violation of an international obligation and the attribution requirement is necessary), while fault-based liability is usually preferred in the case of companies. However, as Gentian Zyberi noted, "due diligence standard requires States to set their national climate mitigation targets at the level of their highest possible ambition and to pursue effective domestic mitigation measures to achieve those targets" (Feria-Tinta 2022). The non-uniform drafting of sustainability clauses and dual standards may end in inconsistent results of AI4ESG, may contradict legal certainty, and may raise the question of unfair treatment. Broad

sustainability goals with loose enforcement clauses in interstate treaties may indicate a declarative value of sustainability.

There is no hierarchy among UN SDGs: on the contrary, goal indivisibility and integration are emphasized in Agenda 2030. However, they are regularly criticized for lacking coherence (Kim 2016, p. 16). A trend that some goals are more important for states is confirmed in a real-world setting. Countries' priorities from 4 years of reporting show that SDG 17 on global partnership and SDG 13 on climate change have received the most attention, while SDG 10 on inequality has received the least (UN Committee for Development Policy 2019).

Due to the nature of machine learning, AI4ESG is capable of reinforcing this trend of disparity. Even if the capabilities of AI to train on any data – whether environmental, social, or governance – are the same, the quality of data is different in various sectors. Environmental data, such as waste, transport, energy consumption, and others, are typically numerical. Social and governance data may come from unstructured texts that are complicated, but that are reduced to "yes" or "no" decisions. In other words, environmental AI produces *quantified values*, and social and governance AI produces *approximations*, with a vague margin between true and false.

It is argued that when SDGs are implemented individually, they pose the risk of unintended consequences (Griggs *et al.* 2014, p. 49). When states lack a determinate rulebook to balance different SDGs, so does an artificial intelligence system, which might favor recurring state behavior over declared values. The usage of AI may then affect the rights of vulnerable groups by, for example, creating the aura of a falsely good stance on human rights. No technology, including AI, should lower the current protection of human rights, so additional safeguards must be implemented for the proper functioning of social and corporate governance-related AI systems. The individual human review of AI-generated results is necessary, as well as impact assessments that check for compatibility and compliance with human rights standards.

Artificial intelligence towards sustainability in the European Union setting

Sustainability as a competitive advantage of the European Union

It seems that the variety of ESG standards and the horizontal alignment of legislation all over the world does not help much in contributing to the achievement on time of the sustainability objectives set in Agenda 2030. As one of the major legislators, however, the EU has the privilege of applying a top-to-bottom approach to Member States and demonstrates ambitious plans to set global standards of sustainability. The feasibility of these plans depends, among other things, on the internal coherence of EU legislation.

After a long history of non-interventionism (Conac 2022), the European Commission (EC) has launched solid interrelated regulatory initiatives to address emerging global challenges. One of them is the 2019 European Green Deal (EC Communication COM/2019/640), a new growth strategy that aims to transform the EU's economy into a sustainable one and to turn climate and environ-

mental challenges into opportunities across all policy areas within 30 years. This strategy includes plans to roll out re-usable data services to assist with large volumes of data relevant for compliance, establish data space for smart supply chain applications, develop digital product passports and map resources, track waste shipments, and so on (EC Communication COM(2020)66).

Another initiative is Europe's Digital Decade, launched in 2020. Europe's Digital Decade 2030 aims to empower businesses and people towards a human-centric, sustainable, and more prosperous digital future. One of the targets includes the aim of having 75% of EU companies using Cloud/AI/Big Data. Digital regulation packages have an objective to "provide Europe with a leading role in setting the global gold standard" (EC 2022).

Does the EU Commission understand sustainability as a long-term goal of the global competitiveness of the EU? It would seem so. After Brexit, the EC has been introducing ambitious changes that might earlier have been opposed by the United Kingdom. The temporary inactivity of the United States presented a chance to be the first in setting "Sustainability in the European way" as global compliance standards (Conac 2022). However, did the EU prepare adequately in terms of making sustainability compliance actionable and not only existent on paper? Are regulatory initiatives consistent and realistic enough to produce the expected results?

The following major regulation packages and proposals, and others, must be coherent: the Artificial Intelligence Act (EC Proposal COM/2021/206, hereinafter also referred to as AI Act); the Artificial Intelligence Liability Directive (EC Proposal 2022/0303(COD), hereinafter also referred to as AI liability Directive); the Corporate Sustainability Due Diligence Directive (EC Proposal COM/2022/71, hereinafter also referred to as CSDD); the Corporate Sustainability Reporting Directive (EC Proposal COM/2021/189, hereinafter also referred to as CSRD); the Revised Product Liability Directive (EC Proposal COM(2022)495); the Data Governance Act (EC Proposal COM(2020)767); the Digital Markets Act (Regulation 2022/1925); and the Digital Services Act (Regulation 2022/2065). Member States must be in consensus regarding them all, as a missing link may make the situation worse than it was before regulation.

One thing is clear: unified sustainability standards and streamlined and harmonized legislation are necessary for unleashing the full potential of artificial intelligence for the ESG. Attempts to introduce standards of such quality in Europe exist. The European Sustainability Reporting Standards (ESRS) distinguish themselves in terms of their target audience, priorities, enforcement, and dual disclosure requirements. EU sustainability standards are built on EU legislation, its sustainability taxonomy, and investor disclosure agreements, while international sustainability standards (as of the International Sustainability Standards Board, or ISSB) point to all jurisdictions and are voluntary (Howitt 2022). The EU sustainability standards set in the EU Corporate Sustainability Reporting Directive are criticized for their insufficient alignment with existing due diligence standards (such as the OECD-UNGP Impact Standards for Financing Sustainable Development) (Stibbe 2022). The mapping process of EU sustainability standards with alternatives (GRI, TFCD, and others), i.e., establishing convergence, has already begun (Howitt 2022). The contextualization of standards and the communication lines between them is necessary for better comparability of ESG results and efficient AI usage.

Alternatively, EU sustainability standards may be exported outside the EU market and become global. The extra-territorial application of newly introduced EU legislation, sometimes referred to

as the "Brussels effect," backs this idea. Nonetheless, corporate sustainability governance proposed by the EU imposes stricter standards than elsewhere. This governance also does not stem from the practice of EU Member States. It is argued that it may not be easy to repeat the success story of GDPR when private entities have the option of jurisdiction shopping (Conac 2022). However, legal certainty due to clear rules and lower competition in the EU market may outweigh the expected burden of compliance.

The sustainable adoption of artificial intelligence in the European Union

The largest jurisdictions, with the EU and China leading the way, draft rules to address regulatory issues of AI. Attitudes to AI are different and are based on regional values and objectives. EU regulation dedicated to protecting human rights is based on precaution and prevention: it ascribes risk levels to AI systems, requires pre-market assessment for high-risk AI systems, and expands the functions of oversight and supervision. China follows a different ideology and targets *BigTech* market regulation (Edwards 2022, p. 6). The notification of AI being used in interactions with humans is necessary, especially for AI recommendation systems that impact user opinion. However, AI-related risks are to be resolved after product release, not before it. This technical approach favors the quick development of technology but also means that AI experiments with real users at their own risk (Keane 2022).

The EU AI Act is criticized by businesses for not being innovation-friendly enough (Bertuzzi 2021), for the unrealistic expectation that AI systems will be error-free, and for its vague legal obligations (Bertuzzi 2021). Generally, innovation-friendliness, as seen from the example of China's approach, is often achieved on the account of human rights. Staying within the current regulatory vacuum (that is very innovation-friendly) was not an option for the EC, and artificial intelligence became too important to ignore. Adopting stringent AI rules and closing the European market was not an option either. A logical step was to select the least intervening approach, with mandatory rules in areas where feasible and appropriate, that pays attention to some of the particularities of the industry.

AI systems may raise a variety of ethical and legal challenges. The risk-based regulatory approach in the EU AI Act supports different risk levels of AI systems, ranging from minimal to unacceptable risk. It is estimated that 5%–15% of AI systems within the EU would be categorized as high risk and bear the cost of compliance, starting from €30,000 (Johnson 2021). Most AI systems pose minimal risks (for example, those intended to find grammar errors in documents or optimize resources).

The scope of unacceptable and high-risk AI systems is disputed as too narrow, thus posing threats to the protection of fundamental human rights. Suggestions from non-governmental organizations include the prohibition of: all social scoring systems; all remote biometric identification in publicly accessible spaces; all emotion recognition systems; all discriminatory biometric categorization; all AI physiognomy; all systems used to predict future criminal activity; and all systems to profile and risk-assess in a migration context (Lomas 2021).

Unacceptable and high-risk AI lists did not emerge without the consideration of AI's impact on human rights and its effect on global competition. The EC drew up lists of unacceptable risk

and high-risk AI systems based on impact assessments. Unacceptable risk, as noted in AI Act, is related to grave contraventions of EU values and fundamental rights and freedoms. High risk is described as having a significant harmful impact on the health and safety or fundamental rights of persons in the EU that has materialized or is likely to materialize in the near future, when such a limitation will minimize any potential restriction on international trade.

Likelihood of risk and impact, balance tests, and other uses of AI systems are important when deciding if a certain AI system should be classified as "unacceptable" or "high risk." For now, it seems that the post-ante evaluation of risks, or learning from mistakes, is preferred over the theoretical consideration of potential risks. The suggestions of civil society, presented above, may materialize in case of the occurrence of very likely and significant harm in some AI systems. After the adoption of the AI Act, ex-ante assessments of the impact on human rights would play a greater role. Transparency duty – the obligation to publish annual impact assessments of high-risk systems – would complement the accountability of AI providers or AI users and legal certainty within the EU.

There are more vague spots in the EU AI regulation that are not aligned with sustainable development and may act as barriers.

The scope of AI regulation directly depends on the choice of how broadly or narrowly AI is defined. The EU AI Act expands the OECD concept of an AI system (OECD Recommendation C(2019)34 2019) and defines it as "software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with." Differing from the OECD definition, an AI system is defined as software and not a system. Accordingly, the AI system covers situations where it is a component of another product. Software is to be delineated from related infrastructure, thus shrinking the scope of liability. The list of appropriate techniques and approaches in Annex 1 is broad. For example, the inclusion of statistical approaches to the concept allows it to grasp the experimental trials of AI beginners, but also blurs the line between algorithms and statistics. A rather broad scope of AI implies a dissonance between slow amendment procedures in the EU and the fast development of technology.

Speaking about requirements for data, in Article 10(2(e)) the AI Act demands that "training, validation and testing datasets shall be relevant, representative, free of errors and complete" in high-risk AI systems. Systemic reading of the AI act shows that some actions to satisfy the requirements set in Article 10(2(e)) are provided (routine audits, checks, etc.). There is no legal certainty, though, that all necessary measures for data quality are listed. To make things more complicated, open-ended terms are used ("appropriate data governance and management practices").

Following a formalistic attitude, these requirements for datasets are impossible to meet in a real-life setting, as an error in data is also data in a technical sense. Paired with AI liability rules, these requirements are not feasible. Textual data may be error-free but have hidden discriminatory practices that will become visible later, after a series of updates and improvements. The application of AI is a chain of experiments until the best match of the model is found. "Estimated quantity" is of indefinite value ("a prior assessment of the availability, *quantity*, and suitability of the data sets that are needed") (Liza 2022, p. 7). Some claim that "statistical, mathematical, and computational learning theory is not advanced enough to give evaluation metrics for those criteria" (Liza 2022, p. 7). Pro-

cedures to ensure the following quality and mitigate risks are crucial to the idea of trustworthy and explainable AI, but they cannot guarantee zero-error situations in the real world. The chance of error in AI systems resembles rare side-effects of medicine, but it is even more likely due to the unpredictability of machine learning. Therefore, guidelines on applicable technical standards, explanatory memoranda, and methodologies are essential before the AI Act enters into force, as high-risk AI systems require pre-market assessment.

Legal obligations fall on all AI system operators: providers, users, importers, and distributors. The way that they are set resonates with a vertical product safety regime, i.e., a scheme that doubtfully fits a complex AI environment (Edwards 2022, p. 7). Interaction between the duties of high-risk AI system providers and AI users is most important. In some cases, the AI user is converted into an AI provider. For example, general-purpose AI, like GPT-3, falls into the category of regular AI, but its user applications may fall into the category of high-risk AI, depending on specific use. Alternatively, when users modify the AI system, they are converted to providers and bear the responsibility for the modified version.

Both AI providers and users are assumed to act professionally and have due diligence duties. The provider (the developer or owner of the AI system) and the AI user share the responsibility for AI performance to different degrees. One of the duties set in Art. 29 of the AI Act requires AI users to monitor the operation of the high-risk AI system based on instructions for use. If AI users suspect risks, they must inform the AI provider or distributor and suspend the use of the system. AI liability on the provider is disputable in this case, as the provider does not have access to the operational data of the user. Due diligence if multiple parties are involved, such as in the case of third parties' datasets or open-source AI systems, is complicated.

The obligations of the end-users of the system are not regulated by the AI Act: if their behavior using the AI system violates human rights, it is subject to other laws. The motive not to re-invent existing legal rules is justified, but the effect of AI on morphing human behavior is overlooked. For example, consider a case of algorithmic pricing. An AI system routinely makes suggestions to raise prices for tenants instead of suggesting the option of higher occupancy. Most of these suggestions are accepted by end-users (landlords) (Cassin 2022). Here, several legal issues raise concerns. First, a recurring habit to rely on machine suggestions is formed, with AI below the threshold of manipulation or subliminal techniques. Second, suggestions are based on confidential price-sharing information, so shaping a group's behavior may amount to cartel behavior (Cassin 2022). Third, even if the decision to raise the price is being made by a human, not an AI, questions such as "what is the decision?" "was it independent?" and "is it ethical to influence such decisions?" remain unresolved, along with liability issues.

The "Black box effect," or AI opacity, is minimized by the transparency duties of high-risk AI providers. Under Art. 13, transparency "by design and default" of AI systems is required: users can interpret the system's output and use it appropriately. Second, instructions given to users must, inter alia, specify known or foreseeable risks, covering "reasonably foreseeable misuse." Third, the AI Liability Directive (Proposal 2022/0303(COD)) establishes a disclosure duty for providers, where disclosed information includes datasets, technical documentation, logs, records of the quality management system and so on. Failing to provide information implies the fault of the provider. Fourth, during (potential) litigation, a claimant may request such information, and circumvent the "black

box effect" because the rebuttable presumption of causality requires basic facts to be proved. Under the AI liability directive, it is not necessary to prove fault if: the AI system's output or failure was reasonably likely to have caused the damage; that damage or harm was caused by some human conduct influencing the AI system's output; and the conduct did not meet a duty of care under EU or national law that was directly intended to protect against the damage that occurred (Gesser *et al.* 2022).

In the long run, it might be necessary to elaborate or expand on transparency measures. For example, it is now unclear what falls within the scope of "reasonably foreseeable misuse" or "reasonably likely" causal link, or "appropriate human-machine interface" for human oversight in a tech environment. Is such reasonability or foreseeability characteristic of an average AI user (that may switch roles to become a provider if they substantially alter the AI system)? How professional should natural persons dedicated to human oversight (Art. 14) be – is a baseline competence to identify the main limitations and shortcomings under the requirements of Art. 14 satisfactory? Would it be a good idea to borrow the concept of the average consumer from consumer law? Within the meaning of the AI act, the user is defined not as a regular end-user of the AI system, but as a natural or legal person, public authority, agency, or other body under *whose authority* the AI system is operated, except where use occurs during a *personal non-professional activity*. In the AI liability directive, the related concept of an injured person or claimant, but not an AI system user, better matches the concept of "average consumer."

Under Art. 12 of the AI Act, record-keeping is required to ensure a level of traceability of the AI system's functioning throughout its lifecycle that is appropriate for the intended purpose of the system. Limits for the record-keeping of technical documentation are set to 10 years after the AI system was launched in the market. It is required, among other things, to log operations and events, input data, and the identification of persons that verified the result. In practice, this means the unsustainable practice of storing vast amounts of data and a potential conflict with GDPR provisions (in the sense of duration and personal data categories). On the one hand, a flexible approach regarding duration is more fit for various applications of AI. However, it also opens the gates to storing data longer than is necessary in terms of GDPR (the effect of the AI Act complementing GDPR is envisioned in the preamble) and influences sustainability (the storage of records in data centers). The dilemma of privacy vs. AI explainability would arise in the case of a federated AI, which is based on learning from small-sized decentralized data and does not log it.

The sustainability of the adoption of artificial intelligence also requires an appropriate balance between the ex-ante and ex-post compliance measures of supervisory authorities, as well as ongoing compliance checks (as AI systems may evolve). A focus on the guided implementation of requirements for AI systems and soft law (such as technical guidelines, consultations, and recommendations) would prevent potential infringements of regulation and minimize the necessity for complicated ex-post enforcement.

To sum up, diverse standards for artificial intelligence systems may create a global dichotomy between trustworthy and dangerous technologies. The artificial intelligence framework in the EU provides balanced rules for AI technologies and could set a good example for others. The general value of these rules should not be denied based on the critical remarks that they have received. The regulation of such an extremely complicated area as artificial intelligence is inevitably associated

with further clarification, reassurance, and amendments. The protection of human rights may be improved by revising lists of banned and high-risk AI practices. This innovation ecosystem would enjoy more favorable conditions and would thrive in the EU if overlooked technological complexities were duly addressed. Both citizens and businesses would benefit from clear rules on unacceptable risks, transparency, and risk management in high-risk AI systems, which would entail a liberal view of the development of regular AI systems.

Are large corporations able to push the objectives of sustainable development out of stagnation?

Peter Drucker once wrote that culture eats strategy for breakfast. Corporations may assist states in accelerating sustainable development if they become major stakeholders in the compliance process. The scope of compliance and enforcement measures, especially penalties, motivates businesses to commence sustainable changes.

The scope of obliged entities is different in the legislative instruments of corporate social responsibility and artificial intelligence. It is characteristic that the largest segments (not all) are targeted towards having the highest impact. As for artificial intelligence, due to its extraterritorial application (GDPR-like), non-EU companies are also targeted. Having in mind that only 4 European companies feature in the top 100 AI startup locations (Ipek 2022), the effect of this would be mostly non-European. The potential effect of the AI Act depends on how global European AI standards will become, and how appealing the EU market is for non-EU companies.

The proposal for corporate sustainability due diligence was criticized for covering only large companies, fearing that the non-inclusion of listed and high-risk SMEs will have too little impact on sustainability objectives (Stibbe 2022). In the Commission's estimation, 13,000 EU companies (1%) and 4,000 non-EU companies will now fall under its scope. This includes companies with >500 employees on average and with a net worldwide turnover of more than €150 million in the last year, or companies in the high-risk sector with more than 250 employees on average and a net worldwide turnover of more than €40 million, provided that half of their turnover stems from the high-risk sector. For non-EU companies, only the turnover in the EU criterium is applied.

Companies must take care of sustainability compliance within their value chain, which includes not only subsidiaries but also contractors with whom an established business relationship exists. The scope of this is very wide, since it covers indirect business relationships with proof or the expectation of their lasting nature. Therefore, it seems that a considerable proportion of businesses will be covered, with large corporations acting as internal supervisors for companies within their value chain.

Under the requirements of the proposed EU Corporate Sustainability Reporting Directive (EC Proposal COM/2021/189), large companies would need to publicly disclose information on the way they function and manage social and environmental risks. They would also be responsible for evaluating information from their subsidiaries. The scope of this has been expanded more than four times, with 50,000 companies to be directly subject to reporting on sustainability issues. This scope includes all large companies, whether they are listed or not, and listed SMEs. In addition to

this, CSRD disclosure rules may be applied to non-EU companies that have securities listed on the EU market.

The deterrent effect of sanctions for non-compliance is high. The EU is not exceptional in this area – for example, penalties for the violation of China's Personal information protection law can amount to up to 5% of total revenue (Yin *et al.* 2022). Sanctions for the violation of the AI Act are higher than those of the GDPR, but are similar to those of the Digital Services Act. The maximum fine is €30 million, or, in the case of companies, up to 6% of total worldwide annual turnover, whichever is higher. However, compared to sanctions for the violation of the Digital Markets Act, which regulates large actors in the same digital business but is related to competition law, they look moderate: for the latter, these sanctions can amount to up to 10% of the company's total worldwide annual turnover, or 20% in the event of repeated infringements, and periodic penalty payments of up to 5% of the company's total worldwide daily turnover. Private enforcement (civil liability) supplements the prevention of violations. In the Proposal for product liability directive (liability for defective AI products), the lower threshold and upper ceiling for compensation are removed.

The enforcement of sustainability due diligence obligations is focused on two pillars: public enforcement by regular administrative supervision (and sanctions regulated by the national law of Member States), and private enforcement with civil (fault) liability (or compensation for damages). Fines are based on the company's turnover, with a requirement to be effective, persuasive, and proportionate. Non-compliance with directors' sustainability duty of care is not within the scope of the directive. The burden of proof is also missing in the regulation, and is estimated to be crucial for the efficient application of legal requirements.

The legislative initiatives of sustainability and digital compliance in the EU demonstrate that the scope of obliged entities is to be significantly increased. This scope is not limited to EU-established entities, with a clear strategy to set global standards of compliance. Sanctions for non-compliance with artificial intelligence requirements (and other digital business) are clearly defined and raise the bar in relation to the GDPR. The enforcement of sustainability due diligence and reporting obligations, however, does not go so far. A strategy of tightening compliance in the sectors where large corporations operate may prove to be more efficient than seeking a consensus on sustainability across Member States.

Conclusions

States act much slower than planned to achieve SDGs: if they continue with current practices, sustainable progress will be delayed. AI can contribute to the acceleration of achieving SDGs on time. The feasibility and scope of the positive impact of AI for sustainable development largely depend on the consistency and integrity of the regulatory framework. Systemic flaws and major regulatory barriers to the sustainable adoption of AI must be identified and duly addressed.

A fragmented approach to sustainability frameworks and standards, uneven state development and priorities, and a lack of global rules regarding sustainability and AI inhibit the potential of AI to be unleashed for this purpose. Global efforts towards sustainability are at risk of not producing a meaningful impact on the objectives set out in the UN Agenda 2030.

The EU may become the world's flagbearer in sustainability, globalizing European standards on compliance and artificial intelligence. The standards of artificial intelligence need some elaboration regarding the better protection of individuals and clarification of the status of AI providers and users. These standards are nevertheless best-in-class regarding their balance with the protection of fundamental human rights.

Different standards for AI systems may create a global dichotomy between trustworthy and dangerous technologies. Large corporations, as targets in the major regulatory initiatives of the EU, may assist in mitigating this risk by becoming compliance stakeholders in sustainability and interrelated initiatives.

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I.2. THE CONCEPT OF SUSTAINABILITY IN NATIONAL CONSTITUTIONS: INSIGHTS FROM CONSTITUTIONAL JURISPRUDENCE

Challenges in contemporary societies are also related to the element of sustainability. The content of sustainability and sustainable development which, compared with the rule of law, human rights, and democracy, are treated as relatively new constitutional key concepts (Jakab 2021), still attract attention in various constitutional debates from different legal perspectives – for example, concerning the sustainability of democracy, human rights, and environmental sustainability (the International Conference "Sustainability as a Constitutional Value: Future Challenges" took place on 15–16 September 2022 in Riga). The debates affirm that these concepts of sustainability and sustainable development as broad notions of the rule of law, human rights, and democracy encompass a bouquet of interrelated aspects.

This chapter aims to shed light on the complex concept of sustainability and its aspects from the perspectives of national constitutional regulation and constitutional jurisprudence, formed by constitutional justice institutions. Such perspectives in the scientific literature are rarer than perspectives from the points of view of the international or European Union levels (Kozień 2021). This is understandable because, in the legal framework, sustainable development as a concept was first used and elaborated upon in international law, and this concept has generally been treated as a matter of soft law by international instruments (Boyar 2021). As constitutions also interact with the broader environment of ideas and institutions outside a nation's borders (Ginsburg *et al.* 2019), this interaction also means exchanging experiences among different countries while seeking the best solutions in their practice.

The author of this chapter tries to confirm the assumption that national constitutions, including the Constitution of the Republic of Lithuania, and constitutional justice institutions, including the Constitutional Court of the Republic of Lithuania, which protect constitutional values, could be seen as strong protectors of such a constitutional value as sustainability. The analysis of national constitutions and the jurisprudence of constitutional justice institutions is of much relevance for achieving the aim of this chapter. According to most constitutions, constitutional courts around the world, while implementing their power of constitutional review, are also bodies with the authority to interpret constitutions (Ginsburg & Elkins 2008), including the interpretation of constitutional provisions reflecting the concept of sustainability. The author of this research focuses not only on

a comprehensive case study – the case law of the Constitutional Court of the Republic of Lithuania – but also on examples from the selected case law of other constitutional justice institutions from Europe, and compares it with Lithuanian constitutional experience. These constitutions and the constitutional jurisprudence based on them are a source of national and international constitutional law, and they could be borrowed as an inspiration for solving future constitutional justice cases.

Lithuanian constitutional law lacks scientific papers or research dedicated to the issue of sustainability. Professor Juozas Žilys, the first president of the Constitutional Court of the Republic of Lithuania, treats the Constitution of the Republic of Lithuania of 1992 as the solid democratic foundation for further development of the statehood of Lithuania, which constitutes a long-term program aimed at the progress of society and the state, striving for an open, just and harmonious civil society and a state under the rule of law (Žilys 2012). Thus, from Professor Žilys' point of view, the sustainability of the Constitution means its stability, durability, and future endurance. Moreover, in this context, Professor Žilys also noted that the stability of the Constitution relates to the principle of the supremacy of the Constitution, as the sustainability of the constitutional regulation is one of the most important constitutional values (Žilys 2017).

The mentioned aspects of constitutional stability and endurance are crucial for the sustainability of the national constitution; however, there are also other separate yet interrelated aspects of sustainability enshrined in the Constitution of the Republic of Lithuania which could be elaborated in more detail. A further reason for this detailed elaboration is the abstract meaning of the word *sustainable* in the Dictionary of the Current Lithuanian Language (n.d.): the meaning of this word is related not only to *durable* and *strong*, but also to *striking a balance* (according to this dictionary, the word *sustainable* in Lithuanian means *patvarus*, *tvirtas*, *tvarioji pusiausvyra*). Thus, one might ask what constitutional values are hiding under the constitutional umbrella of sustainability? As Professor Juozas Žilys also abstractly hints at, in implementing constitutional reforms in Europe as well as in Lithuania, sustainable constitutional values which matured in people's enduring fight for democracy and freedom were followed (Žilys 2017).

The main groups of constitutional provisions regulating different aspects of sustainability

The provisions of some national constitutions suggest that the concept of sustainability is closely interrelated with the concept of sustainable development. In some constitutions, these two constitutional values are even expressis verbis enshrined together in the same articles (or paragraphs). Thus, it is quite complicated to identify the exact scope of those concepts.

Therefore, firstly, the interrelation of these two concepts must be revealed considering the examples of such countries as Luxembourg, Norway, Poland, and Sweden. Accepting the fact that the constitutions of these countries differ very much, one similarity among them can be noticed – they all revised their constitutions in the 2009–2016 period. The Constitution of the Kingdom of Norway (the oldest of them, adopted in 1814) was revised in 2016; the Constitution of the Grand Duchy of Luxembourg (1868) was revised in 2009; the Constitution of the Kingdom of Sweden

(1974) was revised in 2012; and the Constitution of the Republic of Poland (1997) was revised in 2009. In the constitutions of the above-mentioned countries, sustainability is closely related to the concept of sustainable development. On this point, the position of Professor András Jakab should be remembered – according to him, the concept of sustainable development expresses some kind of improvement, while sustainability does not require an improvement, it merely requires that a situation does not deteriorate (Jakab 2021, p. 333). Moreover, the concept of sustainable development is primarily linked to environmental sustainability. These constitutions confirm the fact that, in the words of Professor András Jakab, constitutions traditionally contain sustainability provisions concerning the protection of the environment (Jakab 2021, p. 337).

For example, Article 11bis of the Constitution of the Grand Duchy of Luxembourg in its Chapter dedicated to public freedoms and fundamental rights states that: "The State guarantees the protection of the human and cultural environment, and works for the establishment of a durable equilibrium between the conservation of nature, in particular its capacity for renewal, and the satisfaction of the needs of present and future generations" (this extract from the Constitution and further texts from the other constitutions are gathered mainly from the Comparative Constitutions Project). Article 112 of the Constitution of the Kingdom of Norway in its Chapter devoted to human rights proclaims that: "Every person has a right to an environment that is conducive to health and to natural surroundings whose productivity and diversity are preserved. Natural resources should be made use of on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well."

Moreover, the Constitution of the Kingdom of Sweden stipulates in Article 2 of Chapter I "Basic Principles of the Form of Government" that: "The public institutions shall promote sustainable development leading to a good environment for present and future generations." The Constitution of the Republic of Poland in its Chapter I on the Republic states that: "The Republic of Poland shall safeguard the independence and integrity of its territory and ensure the freedoms and rights of persons and citizens, the security of the citizens, safeguard the national heritage and shall ensure the protection of the natural environment pursuant to the principles of sustainable development"; "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights" (Article 5); and "Public authorities shall pursue policies ensuring the ecological security of current and future generations. Protection of the environment shall be the duty of public authorities. Everyone shall have the right to be informed of the quality of the environment and its protection. Public authorities shall support the activities of citizens to protect and improve the quality of the environment" (Article 74).

The above-mentioned constitutional provisions indicate that sustainability is an integrated concept. They also emphasize the protection of the public interest, such as by protecting the natural or human environment by designating state institutions and/or persons for this purpose, establishing a human right to the environment (including its quality), or including the clear public task of protecting the environment for present and future generations (or the duties of today's citizenry towards posterity). In addition, the aspect of durable equilibrium between the conservation of nature and

the satisfaction of the needs of present and future generations is expressis verbis highlighted in the Constitution of the Grand Duchy of Luxembourg.

The conclusion can be drawn that the above-analyzed constitutional provisions on sustainability, including sustainable development (provided for either in Chapters on the fundamental principles on the functioning of the state or on human rights), refer to present and long-term goals in protecting the environment, where these goals must also be balanced.

The environmental aspect

In addition, such goals and their balancing are enshrined in the Constitution of the Republic of France 1958 (revised in 2008). The preamble of the Charter for the Environment, which is a part of the Constitution, declares that sustainable development shall be ensured in order that choices designed to meet the needs of the present generation should not jeopardize the ability of future generations and other people to meet their own needs.

Regarding the protection of environment, sustainable development is also enshrined in paragraph 2 of Article 66 "Environment and quality of life" of Chapter II "Social rights and duties" of Title III "Economic, social and cultural rights and duties" of Part I "Fundamental rights and duties" of the Constitution of the Republic of Portugal of 1976 (revised in 2005). This declares that in order to ensure the enjoyment of the right to the environment within an overall framework of sustainable development, acting via appropriate bodies and with the involvement and participation of citizens, the state shall be charged with corresponding duties.

Moreover, sustainable development in the context of the protection of the environment is also expressis verbis treated as a constitutional principle, for example, in the Constitution of Greece (the Hellenic Republic) of 1975 (revised in 2008). In paragraph 1 of Article 24 of Part 2, "Individual and Social Rights," it is stated that: "The protection of the natural and cultural environment constitutes a duty of the State and a right of every person. The State is bound to adopt special preventive or repressive measures for the preservation of the environment in the context of the principle of sustainable development…" In the opinion of the author of this chapter, the status of a constitutional principle presupposes a specifically strong protection of the concept of sustainability as having wider interpretational potential than other concrete constitutional norms.

The duty of the state to promote the sustainable development, common welfare, internal cohesion and cultural diversity of the country is also expressed in the Constitution of the Swiss Confederation of 1999 (revised in 2014) (Title One "General Provisions," Article 2 "Aims").

Therefore, the right to the environment is an excellent example for highlighting the evolving environmental aspect of sustainability. Many other national constitutions have also progressively recognized the right to the environment as a human or fundamental right which can be expressed in different terms: the right to a clean environment, to a decent environment or to a sound environment (Committee on the Honouring of Obligations 2022, p. 9), etc. Moreover, it has also been stated that the right to a healthy environment is the most well-known sustainability right (Jakab 2021, p. 348). This trend expresses the traditional categorization of three generations of human rights, used in both national and international human rights discourse and tracing the chronological

evolution of human rights as an echo of the slogan of the French revolution: *Liberté* (freedom, "civil and political" or "first generation" rights), *Egalité* (equality, "socio-economic" or "second generation" rights), and *Fraternité* (solidarity, "collective" or "third generation" rights) (Viljoen, n.d.).

The right to the environment as a human right, economic, financial, and social aspects of constitutional stability, and the perspective of constitutional stability

The rights of the so-called third generation have been clearly reflected in new constitutional provisions relating to the environment and climate change (so-called climate constitutionalism), which were proposed last year in Italy (Abebe *et al.* 2021, p. 29). On February 8, 2022, the Italian Parliament amended the Constitution of the Republic of Italy (adopted in 1947) to expand its environmental protection regime. Two articles of the Constitution of Italy were amended (Articles 9 and 41). Article 9 now states that the republic "protects the environment, biodiversity and ecosystems, also in the interest of future generations." Additionally, it places a duty on the state to "govern the methods and forms of animal protection." Article 41 was also amended to prohibit private industry from damaging "health and the environment," in addition to the existing limits of "security, freedom, and human dignity." Additionally, Article 41 now empowers the legislature to regulate both public and private activity not only for "social" purposes, but also for "environmental purposes" (Abebe *et al.* 2021, p. 29). Therefore, such amendments to the Constitution of Italy can be treated as substantially contributing to the promotion of sustainable development.

The right of the third generation to the environment is also protected in the Republic of Latvia. The Constitution of the Republic of Latvia of 1922 (revised in 2016) establishes, in Article 115 of Chapter VIII "Fundamental Human Rights," that: "The State shall protect the right of everyone to live in a benevolent environment by providing information about environmental conditions and by promoting the preservation and improvement of the environment." In addition, the Preamble of this Constitution states that: "Each individual takes care of oneself, one's relatives and the common good of society by acting responsibly toward other people, future generations, the environment and nature"; and "While acknowledging its equal status in the international community, Latvia protects its national interests and promotes sustainable and democratic development of a united Europe and the world."

Thus, the Constitution of the Republic of Latvia strengthens the sustainable and democratic development of a united Europe and world, noting specifically the responsibility of today's society towards future generations, the environment, and nature.

Professor Jelena Bäumler explains that "the principle of sustainable development provides for two important dimensions: on the one hand, the balancing of the social, economic and ecological spheres; and, on the other, it mandates equity for present and future generations" (Bäumler 2021). Such an explanation is based on the famous Brundtland Report, which developed the formula that "[s]ustainable development seeks to meet the needs and aspirations of the present without compromising the ability to meet those of the future" (United Nations 1987). According to Professor

Jelena Bäumler (2021), "at its heart, sustainable development is a principle of responsibility, requiring taking into consideration the consequences of one's own actions for others now as well as for all of us tomorrow; it is basically a principle for fairness in light of infinite resources and the earth's indefinite ability to cope with harmful activities."

Such a position has also been confirmed by the provisions of the constitutions of other countries composing totally different aspects of sustainability and sustainable development. For example, the Constitution of the Republic of Austria of 1920 (revised in 2013), in its Chapter I "General provisions. European Union," introduces a constitutional provision securing the sustainable, balanced budgets of the Federation, the Laender, and the municipalities (paragraph 2 of Article 13).

The concept of sustainable development in national constitutions is used not only in an environmental, economic and financial sense, but also from a social perspective. As Professor András Jakab (2021, pp. 348–349) states, many constitutions also introduce provisions concerning the financial protection of families or minors, and they also enshrine the protection of pension issues.

The aspects of constitutional stability and endurance are also crucial for the perception of the concept of sustainability in national constitutions. The European Commission for Democracy through Law (Venice Commission), acting as an advisory body to the Council of Europe on constitutional matters, expresses an opinion on the values of adopting sustainable constitutional text and constitutional continuity, as well as enhancing constitutional stability. For example, in the case of Iceland, the Venice Commission noted that, instead of drafting an entirely new Constitution of Iceland, "the changes could have been done through amendments to the current Constitution. This approach would have the advantage of symbolic continuity and would enhance constitutional stability. Constitutional stability is an important element for the stability of the country as a whole and one should not adopt a new Constitution as a 'quick fix' to solve current political problems" (European Commission for Democracy through Law 2015, p. 8).

According to the Venice Commission, national constitutions provide for limitations to constitutional amendments, which are one of the most sensitive issues of any constitution – i.e., unamendable provisions and other special limitations on constitutional amendment. Their overview in comparative constitutional law shows that most constitutions do not provide for unamendable provisions; moreover, nearly all unamendable provisions are substantive, and therefore not related to the procedure for the revision of the Constitution. Some Constitutions do contain "unamendable" (or intangible) provisions, i.e., provisions that are legally precluded from revision (for example, such provisions exist in the Fundamental Law of Germany). "Provisions outlining the power to amend the Constitution are not a legal technicality, but they may heavily influence or determine fundamental political processes. In addition to guaranteeing constitutional and political stability, provisions on qualified procedures for amending the constitution aim at securing broad consensus; this strengthens the legitimacy of the constitution and, thereby, of the political system as a whole" (European Commission for Democracy through Law 2015, pp. 9, 17–20).

In this part of the chapter, the conclusion can be drawn that the different examples of constitutional provisions prove that sustainability is an integrated concept which has very often been treated (or enshrined) together with the concept of sustainable development. Both concepts comprise present and long-term national goals, which are especially visible in protecting the environment and

nature. Moreover, they both oblige today's generation to balance those goals and, more specifically, refer to long-term thinking which is aimed at the future of a united Europe and world. Finally, they both emphasize constitutional stability by, inter alia, adopting sustainable constitutional text and ensuring constitutional continuity.

Environmental and other aspects of sustainability in the case law of constitutional justice institutions

The best example in this field is the landmark ruling in the case of *Neubauer et al. v Germany*, adopted in April 2021 by the Federal Constitutional Court of Germany, in which the Court decided that the provisions of the 2019 State Federal Climate Change Act would be insufficient to meet Germany's climate targets under the 2015 Paris Climate Agreement and, therefore, violated the Basic Law.

The Federal Constitutional Court of Germany agreed with the complainants' argument that the state had "failed to create a legal framework sufficient for reducing greenhouse gases" by placing too high a burden on emissions reductions after 2030 to be feasibly attainable, violating their fundamental right to life and physical integrity enshrined in the Basic Law (see also Press Release No. 31/2021 of the Federal Constitutional Court of 2021). It further found that, by virtue of Article 20a, the state must consider "how environmental burdens are spread out between different generations." The German Government passed an amendment to the Climate Change Act in June 2021 that brought forward the state's climate neutrality goal to 2045, raised the emissions reduction goal from 55 to 65 per cent by 2030 compared with 1990 levels, and set a goal of achieving negative emissions by 2050 (Abebe et al. 2021, p. 30).

It was also argued that "in a decision published on 29 April 2021, the German Federal Constitutional Court joined other Courts around the world in their criticism of governments for failing to take efficient measures against climate change. The Federal Constitutional Court ruled that Germany's Climate Protection Act of December 2019 is not sufficient to meet Germany's obligations. The principle of sustainable development lies at the heart of the judgment's reasoning, requiring political action to take into consideration effects for current and future generations" (Bäumler, 2021).

Additionally, it should also be mentioned that it was argued that "the Court translated the concept of sustainable development into the fundamental rights context and strengthened both the intra-generational as well as the inter-generational relevance of political decision making" (ibid).

Such a position of the Federal Constitutional Court of Germany provides a good legal basis for the obligation of the State to take proper actions for current and future generations, so that efficient measures against climate change are implemented. It also confirms the words of Justice Heinrich Amadeus Wolff from the Federal Constitutional Court of Germany, that "sustainability refers to durability and balance" (Wolff, Vortrag für Riga. Submitted to the International Conference "Sustainability as a Constitutional Value: Future Challenges" which took place on 15–16 of September 2022 in Riga).

On this issue, the decision that the High Council of the Netherlands adopted on 20 December 2019 can be mentioned. In this decision, it was ordered that the Dutch State has to reduce greenhouse gas emissions by 25%, compared to 1990 levels, by the end of 2020. This decision has been treated as a landmark ruling for climate change litigation. It establishes that climate change is a human rights issue, and the protection of human rights is an essential component of a democratic state under the rule of law. This decision also illustrates the environmental aspect of the concept of sustainability and emphasizes that climate change is a human rights issue.

This statement is also clearly reflected in the case law of the Constitutional Court of the Republic of Latvia, which refers to environmental sustainability as well as to the sustainability of democracy and human rights (International Conference "Sustainability as a Constitutional Value: Future Challenges" took place on 15–16 of September 2022 in Riga).

Some insights from the case law of constitutional justice institutions on different above-mentioned aspects of sustainability provide the possibility to treat national constitutions as living instruments capable of reacting to changes in states and societies. Environmental case law which is especially dynamic illustrates this perfectly.

Therefore, on the basis of the analysis provided it is evident that national constitutions embody certain foundations developed by constitutional courts for the sustainable continued existence of these constitutions. As can be seen below, Lithuania is no exception.

Aspects of sustainability in the Constitution of the Republic of Lithuania and the case law of the Constitutional Court of the Republic of Lithuania

In the context of debates on sustainability as a constitutional principle, it must be clarified that neither the Constitution of the Republic of Lithuania of 1992 (revised, among others, in 2019) nor the Constitutional Court of the Republic of Lithuania treat this concept as a separate constitutional principle.

The Constitutional Court refers to the notion of sustainability in the official constitutional doctrine in relation to the European Union legal acts. For example, the notion of sustainability is related to the rules of the European Union on competition (including in-house transactions) aiming at the sustainable development of Europe. In the rulings of 5 March 2015 on competition in the sphere of waste management services and of 22 May 2022 on in-house transactions concluded by municipalities for the provision of public services, the Constitutional Court emphasized the importance of Paragraph 3 of Article 3 of the Treaty on the European Union, stipulating that: "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance."

As can be seen from the case law of the Constitutional Court, the Constitution of Lithuania of 1992 has been "friendly" in relation to the law of the European Union. Such a position is based

on the essential doctrinal statement developed by the Constitutional Court that membership of the State of Lithuania in the European Union stems from the Constitution itself, from a constitutional act that is a constituent part of the Constitution (under paragraph 2 of said constitutional act, the norms of European Union law are a constituent part of the legal system of the Republic of Lithuania). Moreover, such membership in the official constitutional doctrine has been regarded as a constitutional principle of the State of Lithuania and the State's geopolitical orientation (decision of 16 May 2016 of the Constitutional Court of Republic of Lithuania).

Aspects of the national economy, public finances and guarantees of the social system

The Constitutional Court refers to sustainability in its cases mainly in the context of such aspects as national economy, public finances, and the guarantees of the social system. Sustainability is related to constitutional principles such as those enshrined in Article 52 of the Constitution concerning the social system (while interpreting this Article, the principles of the state's social orientation and social solidarity, as well as the principle of responsible governance, have been developed), emphasizing that, among other things, the sustainable social and economic development of the state means that, through granting privileges to certain persons, the state may not suffer financial depletion (in the context of the right to a pension for service; ruling of 26 January 2016 of the Constitutional Court of Republic of Lithuania). Moreover, social assistance relations may be determined by various factors including, inter alia: the resources of the state and society; material and financial possibilities; the need to ensure the financial stability of the state, economic sustainability, and development (in the context of the right to social housing; ruling of 26 May 2015 of the Constitutional Court of Republic of Lithuania); and unemployment insurance benefits (ruling of 7 February 2013 of the Constitutional Court of Republic of Lithuania).

While the Constitution of the Republic of Lithuania does not expressis verbis enshrine the duty (obligation) to balance the state budget, the Constitutional Court – for example, in its ruling of 15 February 2013 on the adoption of the law on the 2009 state budget and related laws – has revealed that, under the Constitution, the drafting of the state budget, which is the plan of state revenue and expenditure (allocations) for a specific period, is the exceptional competence of the Government. Some elements of balancing can be seen from the statement of the Court in this ruling: "all planned state budget revenue and expenditure must be specified sufficiently clearly and by concretely indicating state revenue sources and the estimated sums of funds to be received from those sources, the purpose of the expenditure for financing various spheres, the precise sums of the allocated funds and the subjects to which those funds would be allocated" (ruling of 15 February 2013).

In the ruling of 5 July 2013, the Constitutional Court also acknowledged that "the funds of the budget of the state, as the organization of the entire society and as the organization that is obliged to act in the interests of the entire society, so that social harmony is ensured, must be allocated for the performance of various functions of the state and the provision of public services."

However, the Court has also stressed that the question of whether certain needs (goals) are provided sufficient or insufficient funds from the state budget is not about the compliance of the

state budget with the Constitution, but is about budget planning, the evaluation of the needs of society and the state, their balance with the possibilities of society and the state, and, consequently, social and economic expediency. These questions are not dealt with by the Constitutional Court, except in some defined cases. These cases are: "where the law on the state budget establishes the legal regulation in which it is clear from the start that one has clearly provided for insufficient or no finance for certain needs (objectives), alongside, by not providing for any other (alternative) sources of finance, which, under the Constitution, may be provided for corresponding needs, and this is clearly in conflict with the welfare of the Nation, the interests of society and the State of Lithuania, and clearly denies the values entrenched in, as well as defended and protected by the Constitution" (ruling of 15 February 2013 of the Constitutional Court of the Republic of Lithuania).

In the context of the status of sustainability as a constitutional principle, it could be added that sustainability could be incorporated into the principle of civil society (which is inseparable from the constitutional principle of a state under the rule of law and the principles of justice and democracy). The content of the latter principle is not widely revealed in the official constitutional doctrine and, thus, as Professor Egidijus Kūris (2002, p. 60) noted, this content is not and probably will not be for some time understood by all in the same manner.

The environmental aspect, including human rights issues and the perspective of constitutional stability

The Constitutional Court has often dealt with the constitutional foundations of the protection of the environment, including various human rights enshrined in the Constitution and, especially, people's rights to a healthy and clean environment. The Constitution of the Republic of Lithuania, in its Chapter IV "National Economy and Labour," stipulates that: "The State and each person must protect the environment from harmful influences" (paragraph 3 of Article 53); and "The State shall take care of the protection of the natural environment, wildlife and plants, individual objects of nature and areas of particular value and shall supervise a sustainable use of natural resources, their restoration and increase. The destruction of land and the underground, the pollution of water and air, radioactive impact on the environment as well as depletion of wildlife and plants shall be prohibited by law" (paragraphs 1 and 2 of Article 54).

For example, already in its ruling of 1 June 1998 on compensation for damage done to forests, the Constitutional Court based its position on paragraph 1 of Article 54 of the Constitution, and explained that "in this norm one of the aims of the activities of the State is formulated, i.e., to ensure people's rights to a healthy and clean environment. The environment, as a rule, is understood as the entirety of interrelated elements (the surface and subsurface of the earth, air, water, soil, flora, fauna, organic and non-organic substances, anthropogenic components), as well as natural and anthropogenic systems uniting them, which function in nature."

Furthermore, not only the Preamble of the Constitution, with its striving for an open, just, and harmonious civil society and a state under the rule of law, but also the definition of the Constitution reflects an orientation towards current and future generations, including seeking a balance between them. In the official constitutional doctrine, the Constitution of the Republic of Lithuania

is treated as a social contract, designed for current and future generations. In its ruling of 25 May 2004, the Constitutional Court of Republic of Lithuania noted that: "The Constitution reflects a social contract – a democratically accepted obligation by all the citizens of the Republic of Lithuania to the current and future generations to live according to the fundamental rules entrenched in the Constitution and to obey them in order to ensure the legitimacy of the governing power, the legitimacy of its decisions, as well as to ensure human rights and freedoms, so that the concord would exist in the society."

In connection with the perspective of sustainability, it is worth noting that the Constitution is also characterized by its stability. Having adopted the Constitution, the Lithuanian Nation formed a standardized basis for the common life of its own state community – the civil Nation – and consolidated the state as serving the common good of the whole of society (ruling of 25 May 2004 the Constitutional Court of Republic of Lithuania).

The Constitutional Court has spoken more than once about the value of the stability of the Constitution – the Constitution, as supreme law, must be a stable act. The stability of the Constitution is a feature which, together with its other features (foremost among which is the special, supreme legal force of the Constitution), makes constitutional legal regulation different from ordinary legal regulation established by the means of lower-ranking legal acts. This makes the Constitution different from every other legal act. The stability of the Constitution is a great constitutional value, and the Constitution should thus not be altered if it is not legally necessary. This is guaranteed by the more difficult and more complex procedure for making amendments to the Constitution compared with constitutional and ordinary laws. The stability of the Constitution is one of the preconditions for ensuring the continuity of the state, respect for the constitutional order and law, and the implementation of the aims of the Lithuanian Nation declared in the Constitution and on which the Constitution itself is based (ruling of 28 March 2006 of the Constitutional Court of Republic of Lithuania).

By safeguarding the stability of the Constitution, the Constitutional Court, inter alia, safeguards fundamental constitutional values. Article 1 consolidates these values – the independence of the state, democracy, and the republic – which are inseparably interrelated and form the foundation of the state. Moreover, it is not permitted to make any such amendments to the Constitution that would deny them, and they cannot be denied under any circumstances (decision of 19 December 2012 and ruling of 24 January 2014 of the Constitutional Court of Republic of Lithuania). Such a position was formed in the official doctrine on the limitations on the alteration of the Constitution, which was developed in the rulings of the Constitutional Court of 24 January 2014 and 11 July 2014. These fundamental constitutional values are treated as a part of Lithuanian constitutional identity.

Furthermore, as the Constitutional Court has also emphasized, the Constitution is based on unquestionable universal values such as, *inter alia:* respect for law and the rule of law; the limitation on the scope of powers; the duty of state institutions to serve the people and their responsibility for society; justice; striving for an open, just and harmonious society and a state under the rule of law; and the recognition of, and respect for, human rights and freedoms (the Constitutional Court's rulings of 25 May 2004, 19 August 2006, and 24 September 2009).

The Constitutional Court held in its ruling of 19 August 2006 that one of the most important obligations of a democratic state based on law and justice is to respect, defend, and protect universal

constitutional values, as well as human rights and freedoms; otherwise, one would not be able to consider the state as serving the common good of the whole of society (the Constitutional Court's rulings of 19 August 2006 and 24 September 2009).

These above-mentioned elements can be regarded as the most important objectives of every democratic political order and must properly be defended. Such defense has been ensured by the Constitutional Court. For example, as regards the constitutional definition of democracy, it could be stated that the Constitution of the Republic of Lithuania as the foundation of society and the state is sustainable because democracy – alongside the independence of the state, the republic (decision of 19 December 2012 and ruling of 24 January 2014 of the Constitutional Court of Republic of Lithuania) and the innate nature of human rights and freedoms (ruling of 11 July 2014 of the Constitutional Court of Republic of Lithuania) – is one of the fundamental constitutional values which must not be denied under any circumstances (decision of 19 December 2012 and ruling of 24 January 2014 of the Constitutional Court of Republic of Lithuania). As the Constitutional Court has clearly concluded in its case law, the denial of the provisions of the Constitution consolidating these fundamental constitutional values, i.e., including democracy, would amount to the denial of the essence of the Constitution itself, and would put an end to the restored "independent State of Lithuania, founded on democratic principles" as proclaimed by the Act of Independence of Lithuania of 16 February 1918.

Conclusions

The analysis of the selected provisions of the constitutions of European states confirms the assumption that national constitutions – as well as the corresponding constitutional justice institutions, with their important mission of implementing constitutional justice and protecting constitutional values – could be seen as strong protectors of sustainability, which is a constitutional value. Sustainability as an integrated concept, treated together with the concept of sustainable development, refers to current and long-term national goals in protecting the environment, and emphasizes the need of the proper balance of those goals. Constitutional sustainability can be regarded as being closely related to the person's right to a clean environment, as well as it is reflected in economic, financial, or social constitutional aspects from different perspectives, and, finally, it is evident in the requirement related to constitutional stability and endurance. These aspects could be treated as a minimum basis (standards) for the perception of sustainability, but not as a comprehensive conceptual system.

In the official constitutional doctrine of the Constitutional Court of the Republic of Lithuania the content of sustainability has mainly been expressed while interpreting different constitutional norms and principles, including the duty of the State to protect the environment and, especially, a person's right to a healthy and clean environment; this concept can be identified in the understanding of the Constitution as a social contract, designed for current and future generations, and, moreover, in the official constitutional doctrine on limitations to the alteration of the Constitution. The Constitutional Court, as other European constitutional justice institutions, has the duty to properly balance all constitutional values, including those which are especially protected by their

non-amendable nature under the Constitution, thus ensuring constitutional stability and endurance.

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I.3.THE EFFICIENCY OF GREEN PUBLIC PROCUREMENT REGULATION IN LITHUANIA AS AN ELEMENT OF ACHIEVING OBJECTIVES OF SUSTAINABLE DEVELOPMENT

General remarks

In 2019, Communication No. COM (2019) 640 of the European Commission set out a European Green Deal (hereinafter – the Green Deal) for the European Union and its citizens (The European Green Deal 2019). This entails a new growth strategy that aims to transform the European Union into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use.

The Green Deal acknowledges the role that public authorities play in the achievement of the high aims set forth in the aforementioned document and specifies that public authorities, including European Union institutions, should lead by example and ensure that their procurement is green (The European Green Deal 2019). Therefore, green public procurement procedures are an important measure of achieving the aims of sustainable development set forth in the Green Deal.

Green public procurement in the European Union is becoming more and more relevant as – in directives on public concessions (2014/23/EU), on classic public procurement (2014/24/EU), and on utilities (2014/25/EU) – the aim is to reach the 50% green public procurement target (Cinti 2020).

In the Republic of Lithuania, the high priority of sustainable development is also recognized. The Government of the Republic of Lithuania (2021) has adopted a regulation obligating contracting authorities and contracting entities to ensure that green public procurement procedures amount to no less than 50% of the total procurement value of a particular contracting authority in 2022, and no less than 100% in 2023 and beyond. Therefore, green public procurement procedures in the Republic of Lithuania are given great importance and priority even at the regulatory level.

In the legal doctrine of Lithuania there is little research on the topic of the efficiency of green public procurement regulation. In a recent article by B. Šimkutė (2022), the legal regulation of green public procurement was not analyzed, and a general conclusion was made that the execution of green public procurement will inevitably result in necessary increases in the budgets of contracting authorities. In another article, R. Rudauskienė (2019) analyzed the definition of green public procurement in Lithuania by comparing these definitions in terms of legislative and sub-legislative legal regulation. The author concluded that green public procurement at the legislative level (i.e., the Law on Public Procurement) is considerably wider in scope than at the level of sub-legislative legal regulation. Furthermore, as the environmental criteria outlined in sub-legislative legal regulation are very detailed and specific, this precludes contracting authorities from using other, more innovative, new or advanced environmental criteria that are not expressed or embedded in specific environmental requirements (Rudauskienė 2019).

The requirements for green public procurement procedures in the Republic of Lithuania are regulated by the decision of the Minister of Environment of June 28, 2011, with ensuing alterations (hereinafter – the Decision of the Minister of Environment). This entails not only the definition of green public procurement (i.e., the requirements essential for a public procurement procedure to be qualified as green public procurement) but also particular requirements for each sort of public procurement object (for instance, office supplies, IT equipment, building design services, construction works etc.) that must be applied. In the view of the author, the fact that green public procurement requirements are regulated by the Decision of the Minister of Environment (2011) and not the Law on Public Procurement (1996) is a positive sign, because a ministerial decision can be changed more easily than a law. This enables the legal regulation itself to be more fluid and up to date.

Since the execution of green public procurement entails the application of additional and extensive detailed environmental criteria, an obvious problematic question becomes apparent: can these green public procurement procedures be considered to be efficient? An efficient public procurement procedure is identified by the author as a public procurement which has been carried out successfully and enables a contracting authority to conclude a public contract with the winner of a tender. Therefore, the efficiency of green public procurement is analyzed based on the view that it is hindered by legal regulation or its interpretation, which prevents the successful execution of the public procurement procedure and the conclusion of a public procurement contract.

Furthermore, the analysis of the efficiency of the proposed instruments for green public procurement is suggested by other authors analyzing green public procurement regulation in the European Union (Cinti 2020). The possible problem of the efficiency of green public procurement becomes even more apparent, as a study has shown that European Union institutions themselves present the lowest green public procurement adoption rates in a comparative study with national and regional governments (Badell and Jordi 2021).

The main object of this chapter is the legal regulation concerning green public procurement procedures in the Republic of Lithuania (the Decision of the Minister of Environment, the Law on Public Procurement of the Republic of Lithuania – hereinafter the Law on Public Procurement) and in the European Union (Directive No. 2014/24 on Public Procurement and Repealing Directive

2004/18/EC – hereinafter Directive 2014/24 – the Green deal, etc.). It should be noted that the official constitutional doctrine developed by the Constitutional Court of the Republic Lithuania recognizes that laws establish general rules, and sub-legislative acts implement the norms of law – they may be detailed and contain the procedure for their implementation (*On restoration of citizens' ownership rights to land* 1995; *Regarding state secrets of the Republic of Lithuania and their protection* 1996; *Regarding the provision and payment of social benefits* 2004).

Many different problems can be identified by analyzing the regulation of green public procurement as, by its nature, there is a difficult balance to be struck in green public procurement between the promotion of competition and a narrow circle of suppliers that meet the green criteria; some requirements of green public procurement are often very difficult (if not impossible) to verify, such as CO_2 emissions in the production of certain goods.

However, bearing in mind the aforementioned regulation and the importance of green public procurement, in this chapter the author analyzes two main scientific problems.

Firstly, the problem of the qualification of a public procurement procedure as a green public procurement:

- Are the requirements laid forth in the legal regulation of the Republic of Lithuania compatible with Directive 2014/24?
- Is the qualification of a public procurement as a green public procurement "automatic" or voluntary? Does a contracting authority have the discretion to execute the public procurement as a regular (i.e., not green) public procurement if an object of the particular procurement falls within the scope of the Decision of the Minister of Environment?
- Does the public procurement qualify as a green public procurement if the supplier offers products that meet the requirements of the green public procurement even though such requirements were not set forth in the public procurement documents?

Secondly, the problem of the evaluation of the efficiency of green public procurement, which considers the procedural efficiency of green public procurements:

- the requirements for green public procurement are laid down in extreme detail. It must be analyzed whether the extremely detailed nature of these requirements (i) makes their application impossible, or (ii) significantly interferes with the efficiency of public procurement procedures;
- the extremely detailed nature of green public procurement will certainly lead to the increased application of the correction of irregular tender offers. However, the rules (Law on Public Procurement, Directive 2014/24, practice of CJEU and Supreme Court of Lithuania) regulating the correction of irregular tenders are strict. Therefore, it must be analyzed whether the efficiency of public procurement procedures will be restrained by the extremely detailed nature of green public procurement requirements.

The main objective of the proposed research is to provide an evaluation of the impacts of legal regulation of green public procurement procedures in the Republic of Lithuania, to evaluate its efficiency and to introduce suggestions for improvement.

This objective is implemented via the execution of the following tasks: revealing the multiple meanings and polysemy of the concept of green public procurement and its shortcomings.

Hence, the issues of the impact of the legal regulation concerning green public procurement procedures are primarily tackled at the level of notions and principles established in legal acts, which are the conceptual instruments for the stability of legal power and for a mature legal framework to enable an acceptable balance between risks and benefit.

The area of the proposed research could help develop the current legal regulation of sustainable public procurement procedures and significantly contribute to the efficiency of green public procurement procedures and, therefore, increased sustainability.

The qualification of a public procurement procedure as a green public procurement

The main question the author wishes to analyze in this regard is if the qualification of a particular public procurement as green public procurement is voluntary and depends solely on the decision of the contracting authority, or if it is "automatic." That is, if the procurement depends entirely on the requirements set forth in a particular public procurement procedure and the public procurement procedure is therefore automatically considered to be a green public procurement.

In the Lithuanian legal system, contracting authorities are encouraged to execute purchases with the least possible impact on the environment at one, several or all stages of the life cycle of a product, service or works. The contracting authorities are mandated to ensure that green public procurement procedures constitute no less than 50% of all public procurement procedures in 2022, and 100% in 2023 and beyond (Government of the Republic of Lithuania 2021).

The requirements for the qualification of a public procurement as a green public procurement are set forth in the Decision of the Minister of Environment (2011). In the Decision, a chapter is dedicated for the description of the procedure for the application of environmental criteria to be applied by contracting authorities and contracting entities in the purchase of goods, services or works.

Art. 4 of said procedure regulates the criteria for the qualification of a public procurement procedure as a green public procurement. A public procurement is considered to be a green public procurement when at least one of the following clauses is met when preparing technical specifications and/or setting minimum qualification requirements for suppliers or qualification selection criteria and/or tender evaluation criteria and/or conditions for performance of the procurement contract: i) the procurement object is included in the list of products for which the environmental protection criteria are applicable (detailed in the Decision of the Minister of Environment) and meets all the minimum environmental protection criteria established; ii) the procurement object meets the requirements of the type I Eco-label (according to LST EN ISO 14024); iii) the supplier applies the requirements of the environmental management system in accordance with standard LST EN ISO 14001 or the European Union Environmental Management and Audit Scheme (EMAS) for the purchased services or works; and iv) when the procurement object is not included in the list of products, the contracting authority sets environmental criteria that are relevant to the subject of the procurement at one, several or all stages of the product life cycle by applying at least one of the detailed environmental principles.

Therefore, based on the wording of Art. 4 of the procedure detailed in the Decision of the Minister of Environment, any public procurement procedure must be qualified as a green public procurement if it meets one of the four legal bases detailed. In the view of the author, the wording of Art. 4 does not entail any right of the contracting authority to qualify a public procurement as a green public procurement; rather, it imperatively states that any public procurement that meets one of the four legal bases prescribed is automatically considered to be a green public procurement.

Art. 3.6 of the Decision of the Minister of Environment details that a green procurement is a procurement where the contracting authority seeks to acquire goods, services or works that have the least possible impact on the environment in one, several or all stages of the product, service or work life cycle. Furthermore, it may be asserted that a public procurement would be qualified as a green public procurement even in the event when the minimum environmental requirements are established as bid evaluation criteria based on the wording of Art. 4 of the Decision of the Minister of Environment. However, in the view of the author, such a procurement cannot be qualified as a green public procurement because the suppliers may choose not to meet these bid evaluation criteria and may offer "regular" goods or services that do not meet the green public procurement requirements.

This distinction will be of particular importance from the year 2023, as contracting authorities will be obligated to execute every procurement as a green public procurement. This means that they will be obligated to apply one of the four legal bases detailed in Art. 4 of the Decision of the Minister of Environment to each public procurement procedure.

It is important to analyze whether a public procurement can be qualified as a green public procurement in the event that the supplier offers products that meet the requirements of a green public procurement, even though no such requirements were set forth in the public procurement documents.

This can be an important distinction in cases when the contracting authority did not introduce any environmental requirements in its public procurement procedure that would qualify such procurement as green public procurements, but a supplier has nevertheless offered a "green" product that would meet all the requirements of such a public procurement procedure if it were conducted as a green public procurement. Such situations are theoretically possible and likely to happen in the year 2022, as after 2023 all public procurement procedures will have to be executed as green public procurements.

Furthermore, the legal regulation of public procurement in Lithuania allows for the tender offers of suppliers to exceed the requirements set forth in the technical specification. For instance, the Law on Public Procurement entails that the contracting authority is not entitled to reject a tender offer on the grounds that the goods, services or works offered do not comply with the technical specifications if the supplier proves in its tender offer by any means appropriate to the contracting authority that the characteristics of its tender offer are equivalent to the requirements of the technical specification (Law on Public Procurement 1996). Additionally, such a position is supported by the Lithuanian courts as, in one case that may be *mutatis mutandis* applicable, the Supreme Court of Lithuania stated that contracting authorities are not allowed to reject a tender offer if it entails more products, services or works than are required in the technical specification (i.e., if the tender offer

exceeds the requirements set forth in technical specification) (*UAB Pireka v. VšĮ Respublikinė Vilniaus universitetinė ligoninė* 2012).

However, even though it is explicitly allowed to submit tender offers which exceed the requirements of the technical specification under the circumstances described above, a public procurement procedure could not be qualified as a green public procurement even if the end result of such a procedure would ensure a *de facto* procurement of a product, service or work that meets all the requirements set forth for a green public procurement. This conclusion is drawn from the imperative wording of Art. 4 of the Decision of the Minister of Environment, which states that public procurement can be qualified as a green public procurement only when the environmental criteria are used when preparing technical specifications and/or setting minimum qualification requirements for suppliers or qualification selection criteria and/or tender evaluation criteria and/or conditions for the performance of the procurement contract. Therefore, if no such mandatory requirements were included in the public procurement documents before its public announcement, a public procurement cannot be qualified as a green public procurement.

To conclude, the imperative wording of Art. 4 of the Decision of the Minister of Environment does not entail any right of the contracting authority to qualify a public procurement as a green public procurement; rather, it mandates that any public procurement that meets one of the four prescribed legal bases is automatically considered to be a green public procurement. Contracting authorities are not allowed to qualify a public procurement procedure during which the winning supplier has offered goods, services or works that meet all the requirements that would be applicable for a green public procurement as a green public procurement. Lastly, not all of the environmental protection criteria which are prescribed in the Decision of the Minister of Environment can be qualified as complying with Art. 42 of Directive 2014/24, because in their essence some of them are not functional requirements or terms of performance of the object procured.

The efficiency of green public procurement in Lithuania

In this chapter, the author tries to analyze the efficiency of green public procurement based procedural aspects of green public procurement. The analysis of the procedural efficiency of green public procurement should begin with an evaluation of the requirements for green public procurement that are set forth in the Decision of the Minister of Environment.

Having analyzed the requirements mentioned, a general conclusion can be drawn that they are formulated in extreme detail. Notwithstanding the importance of the introduction of such criteria and requirements throughout the whole procurement process, it is important to note that sometimes these may be considered as a burden both by contracting entities and bidders (Appolloni, Coppola, and Piga 2019).

For instance, the minimum environmental criteria for textile products include ten different technical requirements, ranging from requirements for packaging (Art. 32.1.10 of the Decision of the Minister of Environment) to requirements concerning their composition (Art. 32.1.1 – 32.1.9 of Decision of the Minister of Environment) – including a list of more than 80 chemical substances that are extremely limited in their use. Minimum environmental criteria for products such as plumb-

ing fixtures can be used as another example to prove this point. These criteria include 7 requirements regarding the qualitative attributes of plumbing material, from water flow requirements for different types of equipment (Art. 35.1.1 of the Decision of the Minister of Environment) and advanced devices or solutions regulating temperature to a 4-year minimum warranty and the mandatory provision of spare parts for no less than 5 years. Finally, the detailed extent of these requirements is accurately represented by the sheer volume of the Decision of the Minister of Environment – the current version of the Decision of the Minister of Environment contains approximately 90 pages of environmental requirements for various products, services or works.

The vast majority of these environmental requirements for various procurement objects should be qualified as technical specification requirements (i.e., requirements for the object procured, not for the supplier as a legal entity). It should also be noted that compliance with all of these minimum environmental requirements must also be proven by different documents – ranging from various ecological labels (European Ecolabel; the Blue Angel; Nordic Swan; Forest Stewardship Council; Programme for the Endorsement of Forest Certification schemes; etc.) to written confirmation from the manufacturer and/or importer. Therefore, the practical execution of green public procurement will lead to the extensive use of environmental criteria in technical specifications and additional requirements proving the compliance of the offered product with the environmental criteria established in the technical specification requirements.

In this regard it must be noted that, in accordance with the practice of the Supreme Court of Lithuania, when the characteristics of the items to be purchased are described in precise terms, the requirements of such a technical specification shall be met by providing specific details and not by commitments of an abstract nature that the requirements will be met (*UAB Požeminiai darbai v. UAB Tauragės šilumos tinklai* 2018). As analyzed previously, the environmental criteria that must be applied in green public procurement procedures are described extremely extensively and precisely. Consequently, when submitting a tender offer, suppliers will have an obligation to include specific details – certificates proving compliance with particular ecological labels, written confirmations from the manufacturer and/or importer, etc. – regarding each product. It should be noted that in some instances these requirements may be very broad, but they may not be covered by the requirement to provide specific information or a specific document (certificate). However, this will not be the case in green public procurement procedure requirements as the minimum environmental requirements are specifically detailed and also entail a particular document proving conformity with them.

In reality, this means that if the contracting authority is purchasing 10 different plumbing fixtures, the supplier will have to provide approximately 70 certificates, written manufacturer confirmations and other documents in their tender offer. Even though in the view of the Supreme Court of Lithuania the suppliers are professional subjects of the public procurement process (*UAB Akordas1 v. Visagino savivaldybės administracija* 2011), it is self-evident that the execution of such a high-volume obligation will require a high level of both legal and technical proficiency. Evaluating this additional work-load from a practical perspective, it is obvious that this will generate a lot more mistakes from the suppliers' side when preparing and submitting tender offers, as it will certainly be easy to make a human error and to fail to submit even one particular document in the vast array of mandatory documents.

Based on this additional procedural risk of an increased number of irregular tenders, it is necessary to evaluate its impact on the efficiency of green public procurement procedures. In the view

of the author, the answer to this problem lies with the possibility of correcting irregular tenders. That is, if contracting authorities were legally allowed to ask for suppliers to provide necessary documents (those that were omitted in the initially produced tender offer), then the efficiency of the public procurement procedures would not be regarded as at risk. However, if the contracting authorities were not be able to ask for such corrections of irregular tenders, then this would inevitably lead to an increased number of rejected tenders and, possibly, failed public procurement procedures (in the likely event of the remaining suppliers having produced tender offers that exceed the budget for the particular public procurement or in cases where there are simply no other remaining tender offers).

The legal regulation regarding the correction of irregular tenders at the moment of writing this chapter is not clear in the Lithuanian legal system. The Law on Public Procurement (1996) allows for two different possibilities for correcting irregular tender offers: i) if the irregularity of the tender offer lies within the documents proving the necessary qualification of the supplier, the absence of exclusion grounds, a joint venture agreement and other requirements not relating to the procurement object, new or updated documents regarding compliance with these requirements of public procurement must be requested from the supplier (Art. 45 para 3); ii) if the irregularity of the tender offer lies within the documents proving the compliance with the requirements relating to the procurement object or price, contracting authorities are forbidden to allow change to the essence of the tender offer – to change the price or make other changes that would make the non-compliant tender offer compliant with the procurement documents (Art. 55 para 9).

As analyzed previously, when evaluating the efficiency of green public procurements, it is important to concentrate on the latter possibility to correct irregular tender offers (i.e., to correct irregularities concerning compliance with the requirements relating to the procurement object), as most of the minimum environmental criteria specified in the Decision of the Minister of Environment should be qualified as technical specification requirements.

The legal regulation of the Law on Public Procurement Art. 55 para 9 is detailed in the practice of the Supreme Court of Lithuania. During the last 5 years, this practice had moved towards a stricter position, which did not allow for any clarification or correction of such irregularities. The situation in which the supplier may be allowed to explain the relevant unclear elements of the tender offer is more exceptional; the identified irregularities cannot be corrected when a simple explanation by the supplier is not sufficient to remedy it, and a separate, rather detailed and precise revision, explanation or supplementation (by new data or documents) of the tender offer is required (*UAB Akiro v. Ugniagesių gelbėtojų mokykla* 2015). If the technical documentation submitted by the supplier in the initial tender offer does not substantiate the compliance with the requirements of the technical specification, the supplier may not be allowed to submit documents that would make the non-compliant tender offer compliant with the technical specification requirements. This finding is not invalidated by the fact that this technical information also existed in the past, i.e. if the equipment proposed by the supplier in fact meets the required parameters and if the relevant documents had been submitted initially, the tender would not have been rejected (*UAB Požeminiai darbai v. UAB Tauragės šilumos tinklai* 2018).

In recent practice, the Supreme Court of Lithuania stated that in cases when a requirement specified in the tender documents is qualified as a requirement of a technical specification, the as-

sessment of the compliance of the supplier's tender offer with such a requirement depends on whether the procurement conditions required suppliers to provide supporting documents. If such documents were required, the contracting authority must check that the documents were submitted and that they confirm that the tender complies with the requirements of the technical specification, and is not allowed to ask for any corrections (*VšĮ Bruneros v. Nacionalinis vėžio institutas* 2022). Applying these findings with the previously mentioned practice – that when the characteristics of the items to be purchased are described in precise terms, the requirements of such a technical specification must be met by providing specific details (*UAB Požeminiai darbai v. UAB Tauragės šilumos tinklai* 2018) – leads to the conclusion that because the minimum environmental criteria are of a precise nature and because, due to their essence, compliance with them must be proven by providing specific details (certificates, manufacturers documents etc.), even if no such obligation is established in the technical specification, irregularities concerning compliance with minimum environmental criteria cannot be corrected in any event.

Therefore, based on the decisions mentioned above, the possibility to correct irregular tender offers is essentially limited to technical mistakes, the correction of which necessitates the production of new data or documents, even in cases when the products offered actually meet the requirements set forth in the technical specification, and where such information (or documents) existed at the time of the submission of the initial tender offer or is publicly available. The application of such strict rules for the process of correction of irregular tenders is of great importance when evaluating the possible efficiency of green public procurement requirements, because during their execution suppliers will usually be obligated to supply hundreds of additional documents regarding the compliance of their tender offers with the mandatory minimum environmental criteria, but will have no right to supply any additional or clarifying documents.

However, with very recent practice (*Prabos plus a.s. v. Gynybos resursų agentūra* 2022) the Supreme Court of Lithuania has made substantial changes the over-5-year-old established practice of extremely limited corrections of tender offers concerning Art. 55 p. 9 of the Law on Public Procurement. The expanded panel of judges of the Supreme Court ruled that (i) if, without relevant explanations, additions or clarifications from the public tender participant, the procuring organization cannot determine the actual content of the received offer and its compliance with the set requirements, it must decide on the right (possibility) of this supplier to correct (remove) the identified deficiencies in accordance with the law; (ii) the request to clarify the offer cannot be intended to correct the situation when a document or information required by the procurement documents has not been submitted, as the procuring organization must strictly adhere to its own criteria; and (iii) in certain cases, the relevant shortcomings of the offer can be eliminated by correcting or completing the offer or its individual data, as long as this does not lead to the submission of a new offer. Therefore, both the submission of new data and the change of the submitted data are not absolutely impermissible – the most important thing is not to make a fundamental change to the offer.

Therefore, completely new rules regarding the corrections of tender offers have been formed, which in essence are limited to only two criteria: (i) the corrections do not constitute a fundamental change to the offer and may not lead to the submission of a new offer; and (ii) the procurement requirements did not explicitly state that a failure to produce particular documents or information with the initial tender offer will result in an immediate rejection of the tender offer.

To begin with, the first rule is of extreme importance, because the Supreme Court of Lithuania has stated, that the discretion of the contracting authorities when applying the institute of correction of irregular offers does not constitute a subjective decision to allow or not to explain the irregularity of the tender offer. It is based on a legal assessment of whether the nature of the irregularity in the tender offer allows for its correction and if so, then the supplier must be allowed to correct the tender offer (*Akiro v. Ugniagesių gelbėtojų mokykla* 2015). Therefore, the contracting authorities are not free to decide, if they wish for a particular tender offer to be corrected or not; if the irregularity identified is not fundamental, it must be corrected as is required by the principles of transparency, non-discrimination and unrestricted competition.

Furthermore, the first rule is highly subjective in its application, as in essence any aspect of the tender that must be explained or corrected has importance and must be corrected in order to be announced as a winning bid. Therefore, in practice it is not clear what is the limit of a "fundamental change to an offer." The Supreme Court of Lithuania states, that the establishment whether the change is fundamental or not depends on a variety of individual circumstances, specific to each case, and most of all – the nature of the identified irregularity in the tender offer.

The Supreme Court of Lithuania has explained, that the institute of correction of irregular tenders cannot be used in instances, when the identified irregularity of the tender offer proves the incompliance of the tender offer with the requirements specified. For instance, if particular tender procedure documents established a requirement that computer monitors must not contain mercury in backlight sources and the supplier has provided documentation proving, that mercury is used in backlight sources of the monitor offered, such an offer must be rejected and cannot be corrected. However, if the supplier has simply failed to produce documents, proving that mercury in backlight sources is not used (for instance, European Ecolabel or Nordic Swan certificates), the institute of correction of irregular offers is applicable and such an irregularity in the tender offer must be corrected.

The second rule, according to the Supreme Court of Lithuania, is absolute and must always be applied (regardless of the nature of the data to be corrected), if such grounds for rejection of tenders (i. e. failure to produce particular documents/information with the initial tender will lead to rejection of the tender) were established in the procurement conditions.

Based on all of the above, it is evident that in pursuance of higher efficiency of green public procurement procedures, the strict practice of the Supreme Court of Lithuania and the Law on Public Procurement Art. 55 para 9 call for necessary changes to be made. The decision of the Supreme Court of Lithuania of June 20, 2022, did just that, and allows for the rules of correction of irregular tenders to be extended and not only to be limited to the correction of obvious technical mistakes. Such changes allow for more flexibility for both contracting authorities and suppliers, enabling them to correct irregular tenders by supplementing additional documents or data and therefore salvage an otherwise ineffective procurement procedure.

To conclude, the minimum environmental requirements that must be applied for a public procurement procedure to be qualified as a green public procurement are precise and formulated in extreme detail. This means that, during the execution of most green public procurements (only an insignificant minority of minimum environmental requirements are limited to 3 or less requirements), suppliers will have to diligently execute the obligation to provide a great number of additional documents, proving the compliance of their offered product with these minimum environmental requirements.

The execution of this obligation will inevitably lead to an increased number of irregular tender offers. However, the rules detailed in the Law on Public Procurement and the Supreme Court of Lithuania regulating the correction of irregular tenders now allow for more substantial corrections of the tender offer, besides correction of simple technical mistakes. Therefore, although the efficiency of green public procurement will be significantly restrained by the extremely detailed nature of the minimum environmental requirements, the mistakes often present in the tender offer may be corrected as long as such grounds for rejection of tenders are established in the procurement conditions.

Conclusions

The imperative wording of Art. 4 of the Decision of the Minister of Environment does not entail any right of the contracting authority to qualify a public procurement as a green public procurement; rather, it mandates that any public procurement that meets one of the four legal bases prescribed is automatically considered to be a green public procurement. Contracting authorities are not allowed to qualify a public procurement procedure during which the winning supplier has offered goods, services or works that meet all the requirements that would be applicable for a green public procurement as a green public procurement.

The minimum environmental requirements that must be applied for a public procurement procedure to be qualified as a green public procurement are precise and formulated in extreme detail. This means that during the execution of a green public procurement, suppliers will have to diligently execute the obligation to provide a great number of additional documents, proving the compliance of their offered product with these minimum environmental requirements. The execution of this obligation will inevitably lead to an increased number of irregular tender offers. However, the rules detailed in the Law on Public Procurement and the Supreme Court of Lithuania regulating the correction of irregular tenders now allow for more substantial corrections of the tender offer, besides correction of simple technical mistakes. Therefore, although the efficiency of green public procurement will be significantly restrained by the extremely detailed nature of the minimum environmental requirements, the mistakes often presented in the tender offer may be corrected as long as such grounds for the rejection of tenders are established in the procurement conditions.

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I.4. SUSTAINABLE DEVELOPMENT AND INTERNATIONAL INVESTMENT LAW: A LOOK AT THE NEW GENERATION OF INTERNATIONAL INVESTMENT AGREEMENTS

Preliminary considerations towards a shifting paradigm

It is now commonplace to argue that international investment law and transnational arbitration are moving towards a paradigm shift. The crisis of legitimacy in international investment law and arbitration is generally characterized by a disregard for human, social and environmental considerations in favor of an accelerated approach to economic growth (Franck 2004). This situation has led to the question of how to arrive at a technique of drafting and enforcing international investment agreements (hereinafter – IIAs) that would allow for investment promotion and protection to be beneficial to the host states of these investments – fragile (developing) states (Sornarajah 2010). In other words, this issue refers to the need to rebalance the rights and duties of foreign investors (Subedi 2020). While older agreements generally focused on the rights of investors and the obligations of the host state, some recent IIAs have tried to suggest ways to balance the rights and obligations of foreign investors and preserve the right of the state to regulate in the public interest (Hindelang and Krajewski 2016). Unlike most previous agreements that unilaterally protected foreign investors, recent agreements seek to consider the importance of objectives other than economic protection, such as social and environmental objectives (Mortimer and Nyombi 2018).

To overcome the crisis of legitimacy it faced, international investment law is now opening itself to new, non-economic concerns. This paradigm shift has been supported by the emergence of sustainable development in the current investment protection regime. It seems that sustainable development represents an important critical normative principle that can correct the gaps and imbalances in the current system of international investment law (Monebhurrun 2016). Applied to international investment law, the idea of sustainable development would make it possible to avoid the perverse effects of a frenetic search for growth by considering human, social and environmental

factors. Once the doctrinal prerogative of a critical minority, this position has become widespread in the new generation of IIAs (UNCTAD 2013).

This chapter aims to demonstrate that the introduction of sustainable development into the international investment regime significantly reassures the state's regulatory authority in this area. Current reforms of international investment law and arbitration ensure the state's ability to adapt its policies to the changing needs of sustainable development. At the same time, there are concerns that states' treaty obligations to foreign investors unduly limit this flexibility.

Among the techniques for reaffirming the state in international investment law, the method of limiting the discretion of arbitrators is particularly noteworthy. A part of the doctrine recognizes that the vagueness of the wording of provisions in older IIAs can lead to the inflationary arbitral interpretation of foreign investor protection (Ünüvar 2016). For instance, fair and equitable treatment and indirect expropriation clauses are often defined in broad, vague and indeterminate terms, which can leave the parties to an investor-state dispute based on them in relative limbo (Shirlow 2014). It has also been documented that this uncertainty and unpredictability often benefits foreign investors, to the detriment of the state's desire to protect and preserve public interest objectives (Remmer 2019). Thus, in response to these shortcomings, so-called "greater certainty" clauses and authentic interpretation have been used in agreements to limit the scope of protection for foreign investors and to circumscribe the freedom of the interpreter.

Fearing that a private investment dispute settlement system could have significant public policy implications, states seem to be beginning to understand that the future of international investment law must be written with the ink of sustainable development.

This chapter analyzes the consideration of sustainable development in international investment law. First, it presents the gradual evolution of international investment law from pure investment protection to the promotion of sustainable development objectives. It then explores the implications of this soft paradigm shift to clarify the most controversial treatment standards and reform the investor-state dispute settlement mechanism.

Sustainable development and the evolution of international investment agreements

Introducing sustainable development issues in IIAs is not a new phenomenon (Asteriti 2012, p. 12). Since the 1970s and 1980s, a holistic notion of sustainable development has been used in the preambles of a few IIAs, encompassing a wide range of considerations such as environmental protection, health and safety. For example, such considerations are found in the preamble to the 1971 IIA between the Netherlands and Morocco: "Agreeing that these objectives [investment promotion and protection] can be achieved without compromising the application of general measures on the protection of health, safety and the environment."

Beginning in the 1990s, the preambles to the bilateral investment treaties of Canada and the United States of America promoted respect for labor rights. They recognized that the goal of economic development must be achieved without compromising public interest objectives such as

health, safety and the environment (Danic 2015). The United States of America and Canada went even further by systematically including general exception clauses in their bilateral investment treaties. The purpose of these clauses is to allow states to free themselves from certain obligations under international investment law (Danic 2015, p. 568). A model provision for such clauses is found in Article 10 of the 2004 Canadian Model BIT:

> Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary;
> – to protect human, animal or plant life or health;
> – to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or
> – for the conservation of living or non-living exhaustible natural resources.

This type of clause did not catch on easily in Europe. The Norwegian Model BIT of 2007 is one of the few treaties to have devoted a section to general exceptions. This model proposes a balanced approach between the interests of the investor and those of the host state. It ensures the economic protection of the investor while recognizing the legitimacy of the host state to regulate to protect health, the environment and labor rights (Brown 2013, p. 145).

Today, in the context of international investment law reform, "the principle of sustainable development is becoming the overriding goal of new policy initiatives, a goal conspicuously absent from this generation of IIAs with their emphasis on investor rights only and economic development as the sole policy justification" (Muchlinski 2016, p. 43). Although it took some time to become established, sustainable development is increasingly mentioned in IIAs (Faúndez and Tan 2010). While it is true that only a minority of IIAs contain environmental clauses, recent agreements are increasingly referring to environmental concerns (Bjorklund 2019). For example, in a 2011 OECD report of 1,623 IIAs, commentators observed that, in the mid-1990s, "the proportion of newly concluded IIAs that contain environmental language began to increase moderately, and, from about 2002 onwards, steeply (…) reaching a peak in 2008, when 89% of newly concluded treaties contain[ed] reference to environmental concerns" (Gordon and Pohl 2011, p. 8).

Several recent reports have confirmed this trend. A United Nations Conference on Trade and Development (UNCTAD) report on 18 IIAs concluded in 2013 showed that most of these agreements contain environmental references (UNCTAD 2014). According to a 2020 study of 15 IIAs concluded in 2019 (and for which texts are available), all of these agreements contain provisions relating to the promotion of sustainable development. Eleven of them contain references to the protection of health and safety, labor rights and the environment or sustainable development. Nine of them include exception clauses (UNCTAD 2020). It was also observed that a minority of these agreements contain a reference to corporate social responsibility standards (OECD 2014). A study of the various sustainable development provisions contained in the EU's free trade agreements since 2007 confirmed this evolutionary dynamic (Žvelc 2012). For example, the sustainability provisions in economic partnership agreements such as those with the CARIFORUM states, South Korea,

Central America, Colombia and Peru are similar in several aspects. These agreements all contain provisions on the state's right to regulate in the public interest, obligations not to lower environmental regulations or workers' rights, and to attract trade and investment or to promote green trade and investment (Žvelc 2012). More recently, eight of the 15 IIAs analyzed by UNCTAD in 2020 include provisions on promoting corporate and social responsibility, and four explicitly recognize that state parties should not relax health, safety, or environmental standards to attract investment (UNCTAD 2020).

The functional definition of sustainable development proposed by all of these legal documents does not abandon the idea of increasing economic growth through investment flows to developing countries. However, it requires a more balanced relationship between the developmental effects of foreign investment and the commitment to protecting and preserving the right of the state to regulate in support of social and environmental objectives. New investment law instruments show that the scope of foreign investment is not per se incompatible with environmental and human rights objectives.

The idea of putting IIAs at the service of the overall objective of sustainable development has been reinforced by the clarification of substantive investment protection clauses, in particular fair and equitable treatment and indirect expropriation.

Sustainable development and the reform of existing provisions

It is true that the ultimate objective of IIAs is primarily to support economic development, but there are various ways in which sustainable development can be introduced into international investment law. A first technique would be to define the concept of investment in a way that protects sustainable investment. Another way to include sustainable development in IIAs is to clarify the definition of fair and equitable treatment and indirect expropriation. This definitional effort can exclude measures to regulate the environment, labor rights, public health, or human rights from the scope of international investment law and arbitration.

Conventional tools to support sustainable investment

There are several provisions that make it possible to at least combat certain investment operations whose compliance with sustainable development requirements is questionable. Three techniques can be mentioned here, some of which are more effective than others: the definition of investment, the local law compliance clause, and the no-lowering of standards clause.

First, if the notions of investment and sustainable development seem at first sight difficult to reconcile, one option available to states, in order to better balance international investment law, would simply be to promote only "sustainable investments" in their IIAs. However, this is not an easy option for developing states – capital importers – who often do not have the political weight

to impose their models in the negotiation of agreements. As a result, they tend to follow the agreement models of the major powers, such as the United States and Canada.

The phenomenon of introducing elements of sustainable development into the definition of investment remains marginal and in fact has very little concrete effect (De Nanteuil 2021, p. 48). Such practice may be found in prototype agreements and less frequently in actual signed treaties. For example, Morocco's model bilateral investment treaty published in 2019 refers to participation in sustainable development to qualify as an investment. Its Article 3(3) provides that:

> [i]nvestment means assets invested in good faith by an investor of a Party in the territory of the other Party, which contribute to the sustainable development of the latter Party, and which involve a certain duration, a commitment of capital or other similar resources, an expectation of profit and the taking of risks.

A similar provision is found in Article 1 of the 2018 Agreement between Morocco and the Republic of Congo. This Agreement defines *investment* as:

> An enterprise established, organized or operated in good faith by an investor of a Party in the territory of the other Party in accordance with its laws and regulations and which contributes to the sustainable development of the latter Party and has the characteristics of an investment such as commitment of capital or other resources, expectation of gains or profits, assumption of risks and a certain duration.

This refers to a more inclusive economic development paradigm, and is an approach to be encouraged – although it is probably insufficient.

Second, states may require the investor to comply with local law in order to benefit from the protective provisions of the investment treaty. For example, where local law provides for the protection of the environment, labor rights, or the rights of indigenous peoples, the investor is required to comply with these local obligations, otherwise it will not be entitled to the international protection afforded by the investment treaty. An example of a local law compliance provision can be found in Article 15(1) of the Brazil-Colombia bilateral investment treaty, which provides that:

> Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure it considers appropriate to ensure that investment activities in its territory are conducted with due regard to national labor, environmental, health or safety laws, provided that such measure is not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on investment.

This is also well established by arbitral jurisprudence, as according to the tribunal's conclusion in *Phoenix Action Ltd v. Czech Republic* only investments made in accordance with local law fall under the protection of treaties, even in the absence of an explicit clause on compliance with local law contained in the bilateral investment treaty (ICSID Case No. ARB/06/5, 2009, §§79, 100-113). It should also be noted that in *Burlington v. Ecuador* the investor violated environmental rules contained

in Ecuadorian local law, which obliged the investor to pay $41 million in compensation to Ecuador (ICSID Case No. ARB/08/5, 2008). Thus, the requirement of compliance with local law is a condition for investment protection in IIAs. However, for the local law compliance clause to be an effective tool, the local law itself must constitute a guarantee of sustainable investment. It is known that some domestic laws continue to guarantee only limited freedom of expression or neglect the legal protection of indigenous peoples. This puts the usefulness of the clause on respect for local law into perspective.

Third, and finally, there is another and perhaps more interesting technique, which consists of introducing non-declining standards clauses into IIAs. As provided for in Article 15(2) of the bilateral investment treaty between Brazil and Colombia, these are provisions by which states undertake not to lower the rules for the protection of public health, labor rights or, more generally, the environment in order to attract foreign investors:

> The parties recognize that it is inappropriate to encourage investment by lowering the standards of their national labor and environmental legislation or health and safety measures. Accordingly, each Party warrants that it will not modify or repeal, or propose to modify or repeal, such laws or regulations to encourage the establishment, retention or expansion of an investment in its territory to the extent that such modification or repeal would result in a lowering of its labor or environmental standards.

This type of provision is interesting in that it provides a form of safeguard to preserve sustainable development objectives, even against the possible common will of the foreign investor and the host state. In other words, the provision prevents the two from agreeing on non-compliance with certain standards. Beyond the idea of blocking investments that do not meet sustainable development objectives, it is also about preventing state complicity. The effectiveness of this clause must be put into perspective because it is drafted in terms of a moral commitment, but it remains a tool for promoting sustainable development in international investment law.

Clarification of fair and equitable treatment

Fair and equitable treatment is a core standard in IIAs. Indeed, fair and equitable treatment is present in most IIAs and has been considered a crucial pillar of international investment law. It has been noted that fair and equitable treatment has become the highest standard of protection afforded to investors (Grierson-Weiler and Laird 2008, p. 259).

Nevertheless, it has been found that the provisions of fair and equitable treatment are unclear and indeterminate (Robert-Cuendet 2017, p. 269). Sometimes this standard stands alone or is juxtaposed with other standards such as complete protection and security. Sometimes it is defined by international law or the minimum standard of customary international law. The landscape of fair and equitable treatment is thus diverse and varied.

The Investment Policy Framework on Sustainable Development (IPFSD) proposed by the United Nations Conference on Trade and Development (UNCTAD) has highlighted the problems posed

by the vagueness of fair and equitable treatment, complaining that there is considerable legal uncertainty about the precise meaning of this clause (UNCTAD 2012a). The terms *fair* and *equitable* are themselves imprecise and can give rise to a significant degree of subjective judgment (Berner 2015).

The imprecision of the fair and equitable treatment standard makes it an unpredictable concept. Because of its vague nature, fair and equitable treatment is often seen as inconsistent and overly protective of the foreign investor (Franck 2005). Hence, the risk occurs that courts may go to great lengths to creatively interpret this standard and increase foreign investment protection at the expense of public interest concerns (UNCTAD 2012b). Early arbitral tribunals often interpreted fair and equitable treatment in demanding ways. The provision has thus become an important cause of action for investor claims (*Técnicas Medioambientales TECMED SA v. The United Mexican States*, ICSID Case No. ARB/AF/00/2, 2003, §154). Based on this clause, arbitral tribunals can potentially go so far as to review all kinds of state actions, whether administrative, legislative or judicial, and regardless of the sector concerned (such as the environment, public health or security) (Dolzer 2005). Such a clause "would entail a low level of liability to provide maximum protection and that it would therefore unduly limit the policy space of host State" (Kläger 2016, p. 68).

It is primarily the reference to the concept of legitimate expectations as a component of the fair and equitable treatment standard that has caused most controversy. The concept of legitimate expectations "has often allowed investors to claim the maintenance of simple interests as if they were true vested interests" (Robert-Cuendet 2017, p. 272). As used in the *Tecmed* case, the notion of legitimate expectations could pose a threat to a host state wishing to introduce a public policy that might affect an investment (Potestà 2013).

Under this concept, the foreign investor's host state must protect the foreign investor's assets and the expectations generated by the foreign investor's conduct, thereby significantly increasing the scope of the state's responsibility. Some arbitral tribunals have expanded the notion of legitimate expectations to include the expectation of a suitable environment for foreign private investment. Thus, broadly interpreted, fair and equitable treatment can be a source of "optimal conditions of activity for foreign operators, which can go as far as guaranteeing them a right to stability in the legal and economic environment in which they operate" (Robert-Cuendet 2017, p. 272).

Several options are identified in some new generation agreements to revisit the fair and equitable treatment standard and avoid it being an obstacle to implementing legitimate public policies.

The first option is to omit any reference to fair and equitable treatment in the text of the IIA. This radical option is found, for example, in Brazil's recent investment cooperation and facilitation agreements (Choer Moraes and Mendonça Cavalcante 2021). As UNCTAD has observed, "an omission of the Fair and Equitable Treatment clause would reduce States' exposure to investor claims," but the danger of such an option is that "foreign investors may perceive the country as not offering a sound and reliable investment climate" (UNCTAD 2012a, p. 51).

The second option is to include an express reference to the international minimum standard in the treaty text, with a high liability threshold for gross negligence. This effort at clarification is not entirely novel, as it is the old formula in NAFTA Article 1105(1) that has been replicated in other more recent agreements. The minimum standard provisions generally provide that host states shall accord foreign investors or investments treatment consistent with customary international law. It is

further clarified that customary international law is equated with the minimum standard of customary international law regarding the treatment of aliens. For example, article 5 (2) of the 2004 Canada Model BIT provides on the more concise drafting of examples of that type that:

> The concepts of "fair and equitable treatment" and "full protection and security" in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

This definition addresses the problem of vagueness through an effort of definition and concretization inspired by the *Neer* Award:

> The treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency (Van Vollenhoven *et al.* 1927).

Reference to the minimum standard was seen as an essential tool for raising the threshold of a host state's responsibility for its actions against foreign investors (UNCTAD 2012c, p. 13). Many commentators believe that it is necessary to limit the scope of fair and equitable treatment to customary international law status (Haeri 2011, p. 72). Several states have also shared this view since the NAFTA Free Trade Commission's Interpretive Note to NAFTA Article 1105(1) of July 31, 2001. This note, which was a direct reaction to the first generation of arbitration awards in which arbitrators interpreted fair and equitable treatment very broadly and ruled that states were liable for violations of fair and equitable treatment (Dumberry 2013), narrowed the scope of the standard. According to a UNCTAD study of NAFTA arbitration proceedings, where a provision refers to the minimum standard, a violation of fair and equitable treatment is determined less often than without it (UNCTAD 2012c, p. 61).

However, there is no evidence that the standard is being applied without the provision. There is no certainty as to whether a reference to the minimum standard ultimately leads to a higher liability threshold since, in arbitral jurisprudence, the interpretation of the minimum standard clause remains controversial. While some courts have considered that the minimum standard of customary international law has remained the same since the *Neer* Award, others have emphasized the evolving nature of customary international law (Kläger 2016, p. 72). Because of this uncertainty, it is impossible to say that the fair and equitable treatment option, which establishes a higher liability threshold, will always be conducive to sustainable development. Thus, while this approach has been suggested by UNCTAD and the Commonwealth Secretariat's model guide, reference to the international minimum standard as an alternative option to fair and equitable treatment has faced several criticisms and remains a source of uncertainty (UNCTAD 2015, p. 94).

A final, more recent, and perhaps more exciting option is defining and restricting the scope of fair and equitable treatment by enumerating the definitional criteria for fair and equitable treatment. The idea is thus to frame the interpretative power of arbitrators to prevent them from interpreting fair and equitable treatment in a way that could undermine sustainable development objectives. The

option proposed in the CETA is to define an exhaustive list of situations that constitute a violation of fair and equitable treatment, which is a significant innovation in drafting this standard. Article 8.10(2) of the CETA provides that:

> A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:
> (a) denial of justice in criminal, civil or administrative proceedings;
> (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
> (c) manifest arbitrariness;
> (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
> (e) abusive treatment of investors, such as coercion, duress and harassment;
> (f) (…).

The idea of formulating an exhaustive list of state obligations to the foreign investor makes it easier for the arbitrator to precisely determine the extent to which state responsibility for a breach of fair and equitable treatment can be determined. This has the advantage of requiring a case-by-case inquiry rather than leaving broad discretion to the arbitrator. It thus avoids the risk of perverse effects against social policies. While this approach is far from perfect, as the situations listed may still be interpreted differently by arbitrators, it has the merit of paving the way for a new technique for drafting investment treaties that contributes to the general objectives of sustainable development.

Furthermore, according to UNCTAD, this list of situations should be accompanied by a guide to interpretation, which allows the host state to adopt regulatory or other measures in good faith that pursue legitimate policy objectives and to consider the assessment of the investor's conduct in determining whether the fair and equitable treatment clause has been violated (Kläger 2016, pp. 75–76).

By providing a framework for the arbitrator's interpretation, the guide allows courts to question the existence of a legitimate objective for a state measure and recognize that host states have a broad regulatory space that the application of fair and equitable treatment must not undermine (UNCTAD 2012a, p.76). The framing of the power of arbitrators is an innovative option that could facilitate a rebalancing between investor protection and the guarantee of sustainable development requirements.

Clarification of indirect expropriation

In addition to fair and equitable treatment, the notion of indirect expropriation has been at the heart of arbitral and doctrinal debates (De Brabandere 2017). The definition of the concept of indirect expropriation has given rise to much uncertainty. It has been seen as controversial because it may allow foreign investors to obtain compensation for the effects of a regulatory measure.

Indeed, it is known that it is difficult to draw a line between indirect expropriation and legitimate regulatory measures. The literature has observed that courts have sometimes interpreted this concept broadly, which impedes sustainable development objectives. According to a UNCTAD study, considering state practice, doctrine and case law, an indirect expropriation can be identified by the following elements:

a) an act attributable to the State;
b) interference with property rights or other protected legal interest;
c) of such a degree that the relevant rights or interests lose all or most of their value or the owner is deprived of control over the investment;
d) even though the owner retains the legal title or remains in physical possession (UNCTAD 2012d, p. 12).

In arbitral practice, several tribunals have restricted the right of states to regulate in the public interest by giving a broad meaning to expropriation. The case of *Metaclad Corporation v. Mexico* is a compelling example. In October 1996, a U.S. company that had invested in a waste reprocessing facility brought an action against Mexico before an international arbitral tribunal for being denied an operating permit by municipal authorities. The authorities cited environmental risks as the reason for their decision. This decision prevented the company from operating its facility. The U.S. company argued that this measure amounted to an expropriation for which it was entitled to compensation under Article 1110 of NAFTA. In its final award, the tribunal ruled that *Metalclad* had indeed been expropriated and that Mexico should pay it compensation (Dhooge 2001).

The *Metaclad* case followed the reasoning of the tribunal in *Compania del Desarollo de Santa Elena SA v. Costa Rica*, which held that the fact that the property was taken for environmental reasons did not affect "either the nature or the measure of compensation to be paid for the taking" (ICSID Case No. ARB/96/1, 2000, §71). This approach augured a systematic challenge by foreign investors to environmental regulatory measures. In other words, it would lead "to the effective negation of regulatory action by reason of the risk of liability on the part of the State to the investor for taking legitimate action to further environmental goals" (Muchlinski 2016, p. 51). These two sentences invite reflection on the relationship between the protection of foreign investments and the requirement to guarantee sustainable development. Several IIAs propose reforming the indirect expropriation clause to protect against the annulment of a legitimate regulatory measure. Part of the rationale for improving the indirect expropriation clause is to preserve the regulatory flexibility of host states, particularly developing states, to regulate in the public interest to promote sustainable development. For example, the 2017 Colombian Model BIT contains a restrictive formulation of the expropriation clause:

> Non-discriminatory Measures adopted by a Contracting Party, designed, applied or maintained for the protection of public objectives such as the protection of public health and safety, the environment, consumer and competition protection, amongst others, do not constitute an indirect expropriation.

By formulating a list of legitimate factors to be considered in the interpretation and application of the indirect expropriation clause, the recent agreements attempt to respond to the type of reasoning used by the courts in *Metaclad* and *Santa Elena*. The environmental objective has thus become a relevant consideration in the case-by-case definition of expropriation. Thus, bona fide non-discriminatory regulations related to public interest objectives are not considered cases of indirect expropriation and are therefore not compensable.

The text of the Comprehensive Economic and Trade Agreement (CETA) recently introduced an expropriation clause that balances sustainable development objectives with investor protection. The last paragraph of Annex 8-A of the CETA states:

> For greater certainty, except in the rare circumstance where the impact of the measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, nondiscriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.

Thus, this contemporary language of the indirect expropriation clause is intended to ensure the regulatory freedom of the host state by restricting the scope of what may be considered the elements of indirect expropriation. It should be noted that the illustrative reference to legitimate public welfare objectives such as health, safety and the environment indicates that other legitimate public welfare objectives that fall within the scope of sustainable development would also be covered. The recent language of the indirect expropriation clause is therefore not inconsistent with the host state's pursuit of sustainable development objectives.

In conclusion, by widening the margin of maneuver of host states, the clarification of the indirect expropriation clause opens the possibility that host states may adopt measures that serve the objectives of sustainable development. By restricting the freedom of interpretation of arbitrators, the reform of the indirect expropriation clause attempts to ensure that this norm no longer receives disproportionate attention, which overprotects foreign investors.

Creating obligations for investors

Another way to introduce sustainable development into international investment law is to include obligations for foreign investors in IIAs (Nowrot 2015). This is first reflected in the UN Guiding Principles on Business and Human Rights, the UN Global Compact, and the International Labour Organization's Tripartite Declaration (Addo 2014). Several IIAs include obligations for investors, such as the Canada–Burkina Faso BIT, the India–Belarus BIT, and the Canada–EU Economic and Trade Agreement. For example, to cite only the Canada–EU agreement (CETA), the parties commit to encouraging the development and use by businesses of voluntary best practices in corporate social responsibility, such as those set out in the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, intending to enhance coherence between economic, social and environmental objectives (Henckels 2016). However, the problem is

that such a provision in no way transforms companies' societal or ethical duties into binding legal obligations in a litigation process. Instead, it simply reaffirms the voluntary nature of the idea of social responsibility of investors, which remains a form of self-responsibility of foreign investors.

It would be desirable to adopt more binding instruments for investor accountability. This could give new impetus to the consideration of sustainable development. Some IIAs are making efforts to increase the rigor of investor obligations. For example, the Morocco-Nigeria BIT specifies under the heading "Corporate Social Responsibility" that investors must respect human rights in the host state, act in accordance with core labor standards, and not manage or operate investments in a manner that circumvents international environmental, labor, and human rights obligations (Zugliani 2019). Brazil's new investment cooperation and facilitation agreement model offers an even stricter perspective. It establishes that investors will strive to achieve the highest possible level of contribution to the sustainable development of the host state and local community by providing for socially responsible practices. It goes on to detail how this contribution can be made, including, among other things, building local capacity through close cooperation with the local community, developing human capital, and refraining from seeking or accepting exemptions not established in the host state's environmental, health, and other legislation (Morosini and Badin 2015).

Sustainable Development and the Reform of Investor-State Dispute Settlements

Another way to introduce the objective of sustainable development into international investment law would be to revisit the investor-state dispute settlement mechanism (Kalicki and Joubin-Bret 2015). While in rare cases states have asserted counterclaims against foreign investors, investor-state arbitration remains based on an asymmetric relationship. Through the investor-state dispute settlement mechanism, "private persons acquire the capacity to act directly at the international level against a foreign State" (Pellet 2021, p. 377), to the detriment of national jurisdictions. Granting only investors the right to bring a claim before an international arbitral tribunal likely leads to biased decisions. It has been argued that arbitrators are more likely to decide in favor of foreign investors to have the chance to be appointed in other proceedings (Van Harten 2012). Investor-state arbitration has thus been accused of "exposing host States to heavy financial risks likely to dissuade them from any public policy initiative of general interest, of suffering from a lack of coherence due to numerous jurisprudential divergences" (Guérari 2017, p. 75). If the current investor-state arbitration system favored private investors' interests over non-commercial objectives, it would undermine sustainable development.

The most substantial criticism of the current investor-state dispute settlement mechanism has come from Latin American countries within the Bolivarian Alliance for the Americas (Macías 2013). Bolivia, Ecuador and Venezuela have denounced the current system and have withdrawn from the ICSID Convention (UNCTAD 2010). These states have sought to terminate several investment treaties. They then considered replacing the ICSID system with a regional arbitration center that would be more in line with the values and principles of the societies in the region (Fiezzoni 2011).

Hostility vis-à-vis the current investor-state dispute settlement mechanism is not limited to the Latin American region (Verheecke *et al.* 2019). South Africa, Indonesia and India have taken the step of denouncing bilateral investment treaties. In Europe, Italy has denounced the Energy Charter (Peinhardt and Wellhausen 2016). The effects of such denunciations must be put into perspective, as bilateral investment treaties traditionally contain survival clauses that can postpone the effects of such denunciations for ten or twenty years (Titi 2014). Reactions to international arbitration are diverse and varied. For example, in its agreements, Brazil does not offer access to arbitration to foreign investors, preferring to opt for the outright exclusion of the investor-state arbitration mechanism (Rolland 2017, p. 387). Other Latin American countries maintain the system but, at the same time, create prevention and conciliation bodies to reduce the risk of violation of the obligations recognized in investment treaties and, therefore, the risk of arbitration disputes (Gómez and Titi 2016).

It was noted that prevention and mediation strategies could contribute to an ethical investment environment. It has been argued that "the prevention of disputes or the use of mediation can contribute to the ethical management of disputes that may arise from the investment" (Kessedjian 2021, p. 233).

Many other aspects limit investor-state arbitration and reduce its perverse effects. For example, the new Agreement between the United States of America, Mexico and Canada (USMCA) provides for the availability of investor-state arbitration for a limited list of claims. While Article 14.8 of the Agreement and Part B of Annex 14 recognize the international obligation to compensate investors for direct or indirect expropriation, Part D of Annex 14 denies U.S. and Mexican investors a private remedy for indirect expropriation. At the same time, they retain this remedy for direct expropriation. This is a significant innovation for a country like Mexico, which has been the subject of several arbitration proceedings concerning the violation of indirect expropriation. By avoiding recourse to indirect expropriation, the drafters probably wish to prevent the arbitrator's interpretation from undermining the objective of sustainable development.

Another way to restrict investor-state arbitration would be to require the exhaustion of domestic remedies. In contrast to the delocalized approach that state courts are an obstacle to investment arbitration, the Agreement takes a very different position concerning the role of state courts in investor-state dispute resolution. The USMCA requires the exhaustion of domestic remedies, described as an "innovation audacieuse" (El Boudouhi 2019, p. 881).

The USMCA stands in contrast to NAFTA, which required investors using investor-state arbitration to waive the right to initiate or pursue domestic or other dispute resolution procedures regarding measures alleged to be violations. The old agreement sought to avoid parallel and duplicative proceedings and the risk of doubling damages by excluding state courts. Specifically, one of the most significant changes in the USMCA's investor-state dispute settlement mechanism is the requirement that potential investor-claimants initiate and maintain legal proceedings before a competent national court or administrative tribunal of the host state with respect to measures alleged to violate the USMCA.

With such an innovation, national jurisdictions become the common law judges of investments while arbitral tribunals occupy a palliative or subsidiary function. This responds to some of the recommendations according to which a concern for greater legitimacy would make it necessary to combine the arbitral and state modes of dispute resolution (El Boudouhi 2019, p. 881).

Another way to reform investor-state arbitration is to try to democratize it by opening it up to civil society actors sensitive to public interest issues (El-Hosseny 2018). It is known that arbitrators have rarely considered human rights or environmental submissions by organizations (Wang *et al.* 2021, p. 9). One suggestion is to explicitly define the conditions for amicus curiae participation in investor-state arbitration. This would limit the discretionary power of arbitrators and inject more transparency into the investor-state arbitration process. It would also allow civil society actors to enlighten arbitrators on issues related to sustainable development.

Finally, another critical procedural avenue for introducing the goal of sustainable development into international investment law would be to encourage the enforcement of investor obligations through counterclaims, which allow host states to sue foreign investors who fail to meet their human rights or environmental obligations. The counterclaim would be an essential alternative to the amicus curiae mechanism and a key pillar in rebalancing international investment law, as the arbitral tribunal emphasized in *Aven v. Costa Rica* (Tamayo-Álvarez 2020).

The International Institute for Sustainable Development Model Investment Agreement provides for counterclaims as one of the avenues through which foreign investors' obligations can be enforced (Chalker 2006). The model allows states to bring a claim against investors when they fail to comply with their human rights or environmental obligations. While this approach seems innovative, it is the logical corollary of investor-state arbitration, which investors commonly use to enforce their rights. Like the IISD model investment agreement, the Commonwealth Secretariat's guide makes room for a counterclaim mechanism that would allow a state against which an investor has initially claimed to claim damages for the investor's failure to comply with its obligations (VanDuzer *et al.* 2013). The guide is intended to show Caribbean commonwealth countries and other developing countries how to create standards in their future agreements that foreign investors must meet, such as the obligation to comply with the host state's domestic law, internationally recognized human rights, and international labor standards.

Conclusions

Although it is considered a young discipline, international investment law is among the most dynamic international regimes. From the 1990s to the early 2000s, IIAs underwent a remarkable process of proliferation. However, it did not take long for this discipline to enter a phase of obscurity, or rather a crisis of legitimacy. Investor-state arbitration procedures have revealed the perverse effects of a transnational governance regime that can limit the capacity of states to undertake sustainable development policies. It was noted that the investment governance regime was not designed to align foreign investment with the goal of sustainable development. The structure of early investment agreements was linear and one-dimensional: their sole purpose was to promote and protect private economic interests at the expense of the state.

Today, states continue to sign IIAs, but many of these so-called "new generation" agreements differ in some respects from the models used in the 1990s and early 2000s. This is not a radical undertaking to overhaul the governance of foreign investment across the board. Rather, it is a question of breathing new life into international investment law, introducing a reference to sustainable

development, defining certain investment protection standards more precisely and in greater detail, or limiting the scope of the investor-state settlement mechanism. The idea behind these new agreements is to introduce certain social and environmental values into a system essentially based on neo-liberalism. These recent agreements offer states greater freedom in exercising their regulatory power. Thus, states could express their desire to regulate to combat climate change, free of any risk of litigation. That said, there is no gap between the idea of guaranteeing the protection of investments and the consideration of sustainable development values.

While several recent agreements offer avenues for a better balance between the field of foreign investment and the field of sustainable development, it must nevertheless be emphasized that these agreements are currently in the minority. Moreover, many of the provisions relating to sustainable development are still found in model investment agreements, which means that the integration of sustainable development into international investment law is still incomplete. Therefore, the contribution of recent investment agreements to the achievement of sustainable development objectives remains limited. What is needed is an expansion of the scope of this *lit de braise* that has been seen as the hope for a paradigm shift. International investment law must continue to evolve to join national policies that promote sustainable development. The idea of investor accountability must be strengthened and must go beyond the realm of soft law. Much depends on the will of states, but in this new dynamic, it seems that businesses and various civil society actors also have a say in how "new generation" agreements should look.

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I.5. PRIVACY-FRIENDLY PERSONAL DATA PROCESSING AND SUSTAINABILITY: IS THERE MUTUAL SUPPORT?

The link between sustainable development and data

The modern industrial economic model, started over a century ago, developed in a world far different from the one we live in today. There were few people and plentiful resources. This resulted in the one-way, linear, highly productive "take–make–waste" system (Hedstrom 2018, p. 3). Economic globalization even intensified this "take resources out of the earth–make things–throw them away" flow by improving the efficiency of general production and global consumption. The pursuit of acquiring more physical goods drives modern economies, but this also means greater environmental degradation and the depletion of natural resources (Portney 2015, p. 86).

The idea of environmentally friendly economic growth first attracted widespread attention in the 1970s, when a number of international development programs were criticized for using their extensive financial resources to inadvertently promote environmental degradation under the guise of economic development in developing countries (Portney 2015, p. 22). Increased concerns from non-governmental organizations stressing the necessity of protecting the global environment finally materialized into the ambitious idea of sustainability that was internationally acknowledged in the work of the United Nations' (UN) World Commission on Environment and Development (WCED). In the report, sustainable development was defined as economic development activity that "meets the needs of the present without compromising the ability of future generations to meet their own needs" (WCED 1987, p. 39).

Sustainable development could be interpreted from the material point of view as overarching interests deriving from production–consumption systems. According to the UN (2016), by 2050 three Earths will be required to sustain our current lifestyles. This means that the fundamental transformation of humanity's development model is necessary: not only should production processes, products and services be re-evaluated, but also patterns of consumption and access to goods and services. Changes are required, in which the needs of persons are fulfilled but consumption patterns and lifestyles based on the consumption of far fewer resources are developed (Ceschin and Gaziulusoy 2020, p. 7). There is a need to urgently move towards socio-technical systems that are capable

of operating within the limits of our planet while ensuring that this move follows ethical and just pathways.

Sustainability requires many challenges to be solved, including the development of tools to evaluate the efficiency and impact of measures taken to achieve sustainable development goals (SDGs). The rapid pace of technological advancements and digitalization in recent decades is often considered a promising long-term solution for sustainable development (Portney 2015, p. 199). This approach was strengthened in 2014, when the UN Secretary-General's Independent Expert Advisory Group on the Data Revolution for Sustainable Development (IEAG) issued the report "Mobilising the data revolution for sustainable development" (IEAG 2014, pp. 4–5), encouraging the use of innovative data analysis technologies while monitoring and achieving SDGs. Increasing data collection, more advanced data processing techniques, and the availability of cloud computing services have been presented as solutions to societal challenges, as data are considered a resource for societal improvement and growth and a means by which to promote societal wellbeing and shared values. The potential of processing large amounts of data has been seen as ground-breaking in many domains – from healthcare (Chen 2019, pp. 18–19) to transportation (Rowland and Porter 2021, p. 31; Cottrill and Derrible 2015, p. 61), from reducing hunger (Belaud *et al.* 2019) to fighting climate change (Bibri 2021, pp. 36–37). This allows data to be referred to as the "New Oil" (Marr 2018).

Despite all of the benefits that the data revolution could propose for society's sustainable development, some scientists also draw attention to the negligence towards risks for the achievement of SDGs, which are threatened by the environmental footprint of the data revolution (Lucivero 2020, p. 1010). In the context of environmental research, it is acknowledged that information and communication technologies (ICT) used for data processing have a huge footprint, featuring the high consumption of non-renewable energy, waste production, and CO_2 emissions (Pohl *et al.* 2019; Williams 2011). Data volume is rapidly increasing: in 2012, it was estimated that from 2005 to 2020 the digital universe would grow by a factor of 300, from 130 to 40,000 exabytes (Gantz and Reinsel 2012, p. 1). Today, it is forecast that by 2025 the Global Datasphere (the term used to define the summation of all data that is generated – whether created, captured, or replicated – from three primary locations where digitization is happening and where digital content is created: the core – traditional and cloud datacentres; the edge – enterprise-hardened infrastructure like cell towers and branch offices; and the endpoints – PCs, smart phones, and IoT devices) will grow even further, to 175 zettabytes (Reinsel *et al.* 2018, p. 3). Although data analysis initiatives are continuously supported and well-funded – assuming that a larger amount of data enables better analysis and improved knowledge – this also means that the more data, the bigger its footprint, as it usually needs non-renewable energy and limited resources to function (Lucivero 2020).

Increased demands to process data and initiatives to use more advanced data analysis techniques for the well-being of society have not only received criticism from a number of environmental scientists (Berkhout and Hertin 2004; Williams 2011), but also several scholars who have addressed a series of ethical concerns. These scholars include Tamar Sharon (2016), who raised critical attention to the new power asymmetries based on access to data and control over technological infrastructures, and Danah Boyd and Kate Crawford (2012), who analyzed concerns about the inequalities in accessing data. As the data (both the information that is passively generated as by-products of people's everyday use of technologies and the information people willingly communicate about

themselves on the web) used for data analysis originate from various heterogeneous sources such as people, machines, or sensors (De Prato and Simon 2015, p. 16), analytical techniques applied to very large data sets make it technically possible to "re-identify" a person a large percentage of the time: using 15 months of mobile phone records for 1.5 million callers, researchers showed that three or four data points were enough to uniquely identify users approximately 95% of the time (Montjoye *et al.* 2013, p. 1). As illustrated by a report produced for the second Obama administration (Podesta et al. 2014, pp. 51–54) and used in briefings of the European Parliament (Davies 2016, p. 4), the use of this personal data can lead to surveillance, unwanted disclosure of private information, and discriminatory profiling. Uncertainty and the widespread public perception that there are significant risks to the protection of natural persons may constitute obstacles to achieving SDGs that are driven by data analysis technologies. These include the need to address a scientific problem that will be analyzed in this paper: whether sustainability values, for which data and data analysis technologies are used, and human rights to privacy and personal data protection values are coherent or in conflict. Could these values be mutually supportive?

This paper aims to analyze national and international legal documents that regulate privacy and personal data protection, define the main legal principles relating to the processing of personal data, and evaluate interconnections between those principles and sustainable development values. To achieve this goal, three steps will be taken: first, a comparative analysis of national and international legal documents related to privacy and personal data protection will be conducted; next, the formulation of the main principles relating to personal data processing will be examined, along with the context in which this occurs; finally, how the implementation of these principles may impact SDGs, for the achievement of which advanced data analysis is highly supported, will be assessed. This will allow for a conclusion as to whether sustainability values and human rights to privacy and personal data protection could be mutually supportive.

National and international regulations in the field of privacy and personal data protection

Perhaps not even S. D. Warren and L. D. Brandeis themselves could imagine how their article, published in 1890, could have impacted the world in the proceeding centuries. Their arguments justifying the existence of an independent right to privacy, understood as the right to be left alone (Warren and Brandeis 1890), were a background for other scholars to further develop the concept of the right to privacy that consists of three aspects: (1) physical (associated with a space in which a person can be left alone); (2) informational (the ability to control access to information about oneself); and (3) self-determination (the ability to make free decisions about one's own behavior) (Golding and Edmundson 2005, p. 272).

The first time the right to privacy appeared in international human rights law was in Article 12 of the Universal Declaration of Human Rights (UDHR) as one of the fundamental human rights. Soon after the UDHR was adopted, this right was also established in Europe – in Article 8 of the European Convention on Human Rights (ECHR). It is easy to observe that the UDHR and the

ECHR were adopted well before the rise of the internet and the rapid development of ICT that resulted in the explosion of the collection and use of data and the transformation of the way humans live. Increased computational power and sophisticated data analysis techniques make surprising findings, inventions, and innovations possible that improve quality of life, but at the same time they present new threats to the right to respect for private life. Responding to the need for specific regulation limiting the collection and use of personal information, the concept known as *informational privacy* (in legal literature detailed as the right to "informational self-determination" (de Terwangne 2014, p. 121)) was introduced, which is understood as: (a) protection of the person from disturbing information and the disclosure of inaccurate facts about them (Prosser 1971, pp. 802–815); (b) the ability to decide when, how and to what extent personal information may be disclosed to others (Westin 1967, p. 7); (c) a state where others do not have and do not know information about a person who is not public (Parent 1983, p. 269); and (d) the legitimate interest of the person and the real possibility of controlling the information relating to them (DeCew 1997, p. 53). The concept of informational privacy was the main inspiration behind elaborating special legal instruments that provide personal data protection.

While developing informational privacy frameworks, two different approaches were formed. According to European Union Agency for Fundamental Rights and the Council of Europe (EUAFRCOE 2018, p.18), by the end of the 1980s, several European countries (Sweden, France, Germany, the United Kingdom, etc.) decided to adopt separate laws on personal data protection. This perspective was based on a view that personal data protection is a fundamental human right that generally involves top-down regulation, and the imposition of common rules limiting the use of data or requiring the consent of the person for that use (Podesta *et al.* 2014, p. 17). In contrary to them, the United States (U.S.), because of its constitutional structure emphasizing negative liberties instead of positive liberties, addressed personal data issues through ad hoc, sector-by-sector solutions (Murray 1997, p. 970). These sector-specific laws create privacy safeguards that apply only to specific types of entities and data (Boyne 2018, p. 299) when it is determined that the particular industry would benefit from oversight, e.g., The 1970 Fair Credit Reporting Act, The 1996 Health Insurance Portability and Accountability Act, The Children's Online Privacy Protection Act of 1998, etc.

As more and more countries began to regulate 'informational privacy' and the processing of personal data in their national laws, the limits of national measures when protecting individuals in cross-border data flows soon became apparent. It did not take long before the Council of Europe drafted a Convention for the protection of individuals with regard to the automatic processing of personal data (Convention 108) in 1981. Convention 108 is binding for those states that have legally ratified it and applies to all data processing activities carried out by private and public entities, including by the judiciary and law enforcement authorities. It aims to protect individuals against abuses that may arise when processing personal data, and seeks to regulate the transborder flows of personal data. It should be noted that Convention 108 is open for acceptance even by third countries who do not belong to the Council of Europe, so Convention 108 has the potential to serve as the universal standard promoting personal data protection at the global level (EUAFRCOE 2018, p. 26).

Although all European Union (EU) member states participate in the Council of Europe as contracting counterparts and have ratified Convention 108, the EU is a unique organization at the global level, and is sometimes even defined as "a compelling experiment in political organization

beyond the nation-state" (Pollack 2005, p. 357). As such, its approach to personal data protection warrants more thorough examination. First, it should be explained that the uniqueness of the EU manifests in the sense that it has developed a complete and coherent system of judicial protection such that the rights derived from EU law can be enforced in court, in contrast to other international organizations where such enforceability is often non-existent (Lenaerts *et al.* 2014, p. 1). In essence, this means that sufficient legal remedies and well-defined procedures exist that allow the enforcement of the rights enshrined in EU law and the assurance of judicial review of the implementation of EU legal acts. As the EU legal system consists of primary and secondary law (the treaties that have been ratified by all EU member states form primary EU law; the regulations, directives, decisions, recommendations, and opinions that come from the principles and objectives of the treaties are known as secondary EU law), an understanding of privacy and personal data protection in primary law is needed because of its impact on secondary law. Originally, the European Economic Community was intended to be a regional organization focused on economic integration with a view to creating a single market, so the first treaties of the European Communities did not provide for a separate catalogue of human rights or any additional mechanisms for their protection (EUAFRCOE 2018, p. 27). When cases came alleging human rights violations in areas within the scope of the European Communities law, it was recognized that its policies could have an impact on human rights. This understanding was a stimulus to drafting the Charter of Fundamental Rights of the European Union (Charter), announced in 2000, which became legally binding as EU primary law when the Treaty of Lisbon, amending the Treaty of the European Union and the Treaty establishing the European Community, came into force on 1 December 2009.

The Treaty of Lisbon brought major changes in the legal structure of the EU, including the elevation of the Charter to constitutional status (Kuner *et al.* 2020, p. 3). The Charter provides the whole range of civil, political, economic and social rights of every EU citizen. These rights not only include guarantees to respect private and family life, but also enshrine the right to the protection of personal data, explicitly raising the level of this protection to that of a fundamental right. Such changes in primary EU law not only separated the right to personal data protection from the right to respect private and family life, but also developed it into qualitative new data protection law and granted the European Union the competence to adopt legislation in the field of data protection (EUAFRCOE 2018, p. 28). This led to further initiatives to modernize previous European Union data protection legislation in attempts to make it fit for the protection of fundamental rights in the context of the challenges that are posed by increased digitalization and the usage of data analysis techniques. In this vein, Regulation (EU) 2016/679 (GDPR) on the protection of natural persons with regard to the processing of personal data and on the free movement of such data was adopted, and Directive 95/46/EC was repealed. Directly applicable in the EU member states, the GDPR provides a single set of data protection rules and creates consistent application throughout the EU, serving as a legal certainty not only for the private and public sector that process personal data, but also for individuals that benefit from the protection it grants when their personal data is processed. The GDPR is even recognized as a global milestone for privacy policy (Lee and Hess 2021, p. 2) and is regarded as "a distillation and comprehensive update of the EU's goals in protecting the rights and freedoms of the people who live within it" (IT Governance Privacy Team 2020, p. 13).

Legal principles relating to the processing of personal data

As was introduced before, it is hard to deny that advanced data collection and innovative data analysis techniques could directly impact the well-being of society and contribute to the achievement of SDGs. While data collection and its further processing is highly promoted (IEAG 2014, pp. 4–5), several scholars (Boyd and Crawford 2012, pp. 673–675; Sharon 2016) and privacy policy makers (Davies 2016, p. 4; Podesta et al. 2014, pp. 51–54) still raise concerns relating to informational privacy. This means that it is essential to understand the default rules of behavior that are expected to be complied with even when personal data is supposed to be processed for the interests of general society, including sustainable development. From the legal theory point of view, the expected behavior could be exposed by analyzing legal principles, as they are basic norms that represent the general consensus of the basic understandings of society (Daci 2010, p. 111). Therefore, this section will analyze the principles relating to informational privacy when personal data is processed. For this analysis, Convention 108 (as not all protocols amending Convention 108 entered into force, in this paper Convention 108 will be analyzed with those amendments that are applicable) is selected, which still remains the only legally binding international instrument in the field of data protection, along with legal documents from the United States and the European Union because of their impact on data processing practice around the world.

Convention for the protection of individuals with regard to automatic processing of personal data (Convention 108)

Chapter II of Convention 108 is dedicated to the "basic principles for data protection." This chapter consists of 8 articles (from Article 4 to Article 11), but only Article 5 contains basic requirements of behavior when processing personal data, which in this article are attributed to the "quality of data." Other articles of this Chapter describe: (1) duties and obligations of the contracting parties when implementing Convention 108 provisions to their national laws (Article 4, 9, 10 and 11); (2) categories of data (defined as "sensitive data") that deserve greater protection because of their link to increased risk of harm for the individual (Article 6); (3) safety obligations requiring the implementation of adequate measures for the protection of personal data (Article 7); and (4) safeguards that have to be enabled for data subjects when their personal data are processed (these safeguards enshrine individuals' rights in data processing activities) (Article 8).

Article 5 of Convention 108 provides five main legal requirements that have to be observed while personal data undergoes automatic processing: obtained and processed fairly and lawfully; stored for specified and legitimate purposes; adequate, relevant and not excessive; accurate and kept up to date; and entailing permission for identification of the data subjects for no longer than is required.

The relevant regulation in the U.S.

As mentioned in Section 1 of this paper, the U.S. follows a sectoral approach to informational privacy protection. Instead of all-encompassing federal legislation that ensures the privacy and protection of personal data, legislation at the federal level primarily protects data within sector-specific contexts (Boyne 2018, p. 299). The first legislation relating to informational privacy in the U.S. was enacted in 1970 – The Fair Credit Reporting Act. Until now, this aimed to promote accuracy, fairness, and privacy protection with regard to the information assembled by consumer reporting agencies for use in credit and insurance reports, employee background checks, and tenant screenings (Podesta *et al.* 2014, p. 18). Even the approaches of sector-based informational privacy protection laws require general considerations about requirements that have to be introduced to provide basic protection for handling personal data by various data analysis techniques. In this regard, the Secretary's Advisory Committee on Automated Data Systems of the U.S. Department of Health, Education, and Welfare analyzed the harmful consequences that might result from automated personal data systems and recommended to the government the enacting of a Code of Fair Information Practices (The U.S. Department of Health, Education, and Welfare 1973, p. 50) that is based on five basic principles. Serving as certain safeguards for the use of information, these are known as the Fair Information Practice Principles or FIPPs.

Even though the FIPPs were successfully instantiated in many sectoral laws, in 2012 the White House observed that this framework lacks both a clear statement of the basic privacy principles that apply and a sustained commitment of all stakeholders to addressing consumer data privacy issues (The White House 2012). Considering this, the Administration introduced the Consumer Privacy Bill of Rights and called for Congress to adopt legal acts that implement the Consumer Privacy Bill of Rights to private sectors that are not subject to existing data privacy laws. The Consumer Privacy Bill of Rights reflects the FIPPs and supplements them by holding that consumers have a right to: 1) individual control; 2) transparency; 3) respect for context; 4) security; 5) access and accuracy; 6) focused collection; and 7) accountability.

In the Consumer Privacy Bill of Rights, the enshrined consumer rights clearly present default rules of behavior that have to be complied with by the private sector when the personal data of a consumer is processed. In essence, they are considered legal principles relating to the processing of personal data.

The legal framework in the EU

In the EU, the right to personal data protection constitutes a fundamental human right, and with the Treaty of Lisbon the EU has a specific legal basis for data protection legislation in Article 16 of the Treaty on the Functioning of the European Union. This grants the European Parliament the rights to oversight of and participation in data protection policy-making (Kuner *et al.* 2020, p. 3). With these developments, debates on the need to modernize European Union data protection rules began, and the long legislative process of negotiations between the European Parliament and the Council of the European Union finished in 2016 when the GDPR was adopted. The GDPR

is directly applicable in the EU member states, which are also obliged to update their existing national data protection laws to fully align with the regulation.

In the GDPR, default rules of behavior that are expected to be complied with when personal data is processed are enshrined in Article 5 as "Principles relating to processing of personal data." This article encompasses seven basic legal principles that have to be applied to the processing of personal data wholly or partly by automated means, and to the processing of personal data other than by automated means, which form part of a filing system or are intended to form part of a filing system: 1) lawfulness, fairness and transparency; 2) purpose limitation; 3) data minimization; 4) accuracy; 5) storage limitation; 6) integrity and confidentiality (or security); and 7) accountability.

When comparing Convention 108 in the U.S. to the principles providing the protection of personal data in the EU legal framework, it should be noted that the GDPR does not make fundamental changes in the field of personal data protection (de Terwangne 2020, p. 311) and the principles laid down in Convention 108 (based on the FIPPs) have proven to be sound in their application (Kotschy 2014, p. 277). The main difference can be seen in the enforcement mechanisms of these principles: while Convention 108 is legally binding for contracting parties, to what extent the principles are endorsed still depends on the country's national law. In the U.S., the implementation of principles relating to personal data processing depends on the adoption of sector-based laws; in the EU, the GDPR is directly applicable, and judicial remedies exist to enforce its application.

The implementation of principles relating to personal data processing

From international organizations (IEAG 2014, pp. 4–5) to researchers (Belaud *et al.* 2019; Bibri 2021, pp. 36–37; Chen 2019, pp. 18–19), it is encouraged to use innovative data analysis technologies while monitoring and achieving SDGs. Although data analysis initiatives are continuously supported and highly demanded, the human rights to privacy and personal data protection values raise concerns about the risks that could be posed by unprecedented data processing that could be linked to an individual person and could lead to surveillance, the unwanted disclosure of private information, and discriminatory profiling (Montjoye *et al.* 2013, p. 1; Davies 2016, p. 4; Podesta *et al.* 2014, pp. 51–54). This section will consider how sustainability values and human rights to privacy and personal data protection impact each other, and whether they could be mutually supportive while implementing principles relating to personal data processing.

The implementation of principles relating to personal data processing in the entire system of data processing activities is usually defined as *privacy-friendly* data processing. This term encompasses the commitment to ensuring privacy and personal data protection during the whole life cycle of data processing. Privacy-friendly personal data processing, in the context of sustainable development, means that privacy and personal data protection are highly valued, and the achievement of SDGs respects these values – even if this means that some sustainability initiatives should be

abandoned or modified because of their inadequate intrusion into an individual's informational privacy field (with a negative impact on sustainable development).

One of the most basic principles relating to personal data processing that is laid down in legal documents is the requirement to process personal data lawfully, fairly and in a transparent manner. In this context, lawfully means that personal data processing respects all applicable legal requirements (de Terwangne 2020, p. 314). Fairness implies that personal data processing operations must not be performed in secret, and that data subjects should be aware of potential risks. This is more like the requirement to process personal data in an ethical manner (EUAFRCOE 2018, p. 119). The transparency of personal data processing is explained as the obligation to provide clear information to the data subject about processing: what personal data is collected, why this data is needed, how it will be used, when it will be deleted, and whether and for what purposes it may be shared with third parties (The White House 2012, p. 47). In essence, this means that each initiative to enable data and innovative data analysis techniques for the achievement of SDGs should be carefully assessed in terms of whether there is legal ground for such a form of processing and what information was provided to the data subject in relation to the intended personal data processing. As these requirements can be easily implemented, they should not be obstacles when seeking sustainable development.

The principle of "purpose limitation" (or "respect for context") has long been regarded as the backbone of personal data protection and is connected with transparency, predictability and user control (EUAFRCOE 2018, p. 122). This principle has two aspects: 1) "purpose specification," requiring personal data to be collected for specified, explicit and legitimate purposes; and 2) "compatible use," prohibiting further processing of personal data in a manner that is incompatible for those purposes (de Terwangne 2020, p. 315). These two aspects are linked to the data subject's expectation that personal data is processed in ways that are known to them. This requires the definition of the specific purposes for which personal data is processed before the start of its collection. In the context of sustainable development, this principle means that data collected for a specific purpose linked to sustainable development cannot automatically be used for other related initiatives because of the obligation to evaluate compliance with the requirements of purpose specification and compatibility. If this evaluation shows incompatibility with the initial purposes, then personal data that has already been processed shall not be used for that particular initiative related to sustainable development, and a new data processing system has to be established. From the sustainable development point of view, this could be criticized because of the possible duplication of data that could lead to a larger environmental footprint (Lucivero 2020, pp. 1013–1016).

In the field of sustainable development, it is recognized that high-quality data used to create information that can track progress, monitor the use of resources, and evaluate the impacts of policy and programmes on different groups is a key ingredient in creating more mutually accountable and participatory structures to monitor the achievement of goals (IEAG 2014, p.20). The quality of data can be elevated if the data protection principles of "data minimization" and "accuracy" are implemented in data processing systems. The principle of "data minimization" means that "personal data shall be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed" (Article 5 (1) (c) of the GDPR); in other words, there are limits on personal data that is collected. These limits are defined taking into account the purpose

for which data is collected and the requirement of grounding the data that is needed to achieve set goals. The requirement that personal data be accurate is mostly linked to the risk of adverse consequences to individuals if the data is inaccurate. This principle also requires that reasonable steps be taken to keep the data up to date and rectify inaccurate data – or, if that is not possible, erase it. Accordingly, the implementation of these principles can be significant for sustainability for two reasons: 1) it allows for the reasonable expectation that the data collected will be of a high quality and suitable for sustainability goals (via the assessment of whether this data is necessary for the purposes that they are collected and the accuracy check); and 2) because irrelevant data will not be collected, it reduces the burden on information and computing technologies and saves their manufacturing and maintenance resources, which is essential when talking about sustainable development (Williams 2011).

The "storage limitation" principle in personal data protection implies the prohibition of storing personal data in a form which permits the identification of individuals beyond the time necessary to achieve processing purposes. The data must be erased or anonymized when those purposes have been served. Time limits for erasure or for a periodic review should be established, but these limits only apply to data kept in a form which permits the identification of data subjects. The incorporation of this data protection principle into data analysis systems in general could define the exact end of the data life cycle and serve as a tool to monitor its application. It can also serve as a commitment to discard excessive data that is of no added value and uses limited resources.

The principle of "integrity and confidentiality" or "security" defines the requirement to ensure appropriate organizational and technical security measures to protect an individual's data against accidental, unauthorized or unlawful access, use, modification, disclosure, loss, destruction or damage. Depending on the specific circumstances of each individual case, appropriate technical and organizational measures could include different elements – for example, pseudonymisation and encryption of personal data and/or the regular assessment of the effectiveness of the measures to ensure that data processing is secure (Article 32 (1) of the GDPR). As this principle mostly relates to how to establish a secure, risk-based data management system within organizations, from the sustainable development point of view the implementation of this principle could be beneficial to ensure the quality of data. It also provides assurance that data used for sustainable development or measuring the achievement of its goals has not been modified, lost, destroyed or damaged.

The last principle relating to personal data processing is "accountability." This is more of a general rule stating that the data controller is responsible for compliance with all the previous principles. This principle is understood as an active demonstration that measures which would guarantee that data protection rules are adhered to in the context of processing operations are established, and those measures are documented. As "accountability" is more related to the distribution of responsibilities and the active demonstration of actions taken to protect personal data, it has no direct link to sustainable development.

Conclusions

Data collection and storage covering the entire life cycle of a person or device were important and ground-breaking developments in many domains. The potential of processing large amounts of data for monitoring and achieving SDGs has been presented as a solution to societal challenges, and data are considered a resource for societal improvement and growth and a means by which to promote societal well-being. This approach soon received criticism not only from a number of environmental scientists, but also from various researchers and policy-makers who addressed a series of privacy and personal data protection concerns. This led to the question of whether sustainability values, for which data and data analysis technologies are used, and human rights to privacy and personal data protection are coherent or in conflict – could these values be mutually supportive? Legal analysis shows that to preserve the human rights to privacy and personal data protection there are rules of behavior that have to be complied with – legal principles relating to personal data processing – when personal data is processed. The application of these principles encompasses a commitment to ensuring privacy and personal data protection, and can impact data processing activities during the whole life cycle of data. As such, sustainability, which is highly supported by increased demands to process data for the wellbeing of society, can be directly affected by the implementation of legal principles relating to personal data processing. While some of these principles can be considered neutral in terms of how they relate to sustainable development (e.g., the "lawfulness, fairness and transparency" principle, or the "accountability" principle), other principles – such as "data minimization," "accuracy," "storage limitation" and "integrity and confidentiality" – can be supportive to sustainable development. This is because they serve as prerequisites to the use of high-quality data to measure the achievement of SDGs ("data minimization," "accuracy," "storage limitation" and "integrity and confidentiality") or to reduce the burden on ITC and save on manufacturing and maintenance resources – an essential factor when thinking about sustainable development ("data minimization," "accuracy," "storage limitation"). The principle of "purpose limitation" can be criticized from the sustainable development point of view because of the possible duplication of data that could lead to a larger environmental footprint. The exact impact of the implementation of these principles in the data processing systems used for sustainable development could be an important topic for future research.

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I.6. SUSTAINABLE WORK OVER THE COURSE OF LIFE: A NEW PARADIGM FOR DECENT WORK

Changing the world of work and searching for responses to contemporary challenges

The latest significant worldwide experiences – triggered from one side by digitalization, globalization and technological progress, and from the other by the COVID-19 pandemic, climate and demographic crises – have shown that our world is changing irrevocably. This unstoppably caused essential changes in our world of work (Eurofound 2022), leading, as scientists point out, to the re-commodification of work and consequently endangering the dignity of working people. There is nothing detrimental about this, as since the dawn of time the world has been driven by various mechanisms and imbalances that are exacerbated by the changes and transformations permanently taking place. Therefore, it is important to realize a very simple and unquestionable truth: that the occurrence of changes cannot be stopped. Accordingly, changes need be balanced with adequately developed mechanisms and instruments. What does this mean for the working community and the world of work? In the authors' opinion, first of all this means the need to become responsible for necessary adjustments and rebalance instruments in these new realities. It is challenging and ambitious to act adequately in the present time without compromising the abilities of future generations. This means the responsibility for decent working conditions for present cohorts, together with decency towards future generations. As a result of new challenges in the world of work, a demand for a new quality of protection for decent working conditions becomes obvious. Does the concept of decent work meet the requirements in this range, and are the international labor standards developed so far sufficient?

It is difficult to disagree with the International Labor Organization's (ILO) statement that today "we are witnessing a world of work that is changing at an unprecedented pace and scale" (ILO 2019, p. 8). It is a worrying fact that the difference between what workforces are expecting and what they experience performing work is deepening like never before. Widened inequalities arising from the diversification of types of employment, the development of digital work platforms and

new work relationships make job security and the protection of workers begin to become scarce goods. The response to preventing imbalances in a changing world by considering the interests of both present and future generations is contained in the 2030 Agenda for Sustainable Development, launched during the UN General Assembly in 2015 (hereafter – Agenda 2030, SDG) with detailed goals as milestones to be achieved. Decent work and the four pillars of the ILO Decent Work Agenda (1998) constitute its integral part. Accordingly, decent work plays a crucial role in achieving goals that are fundamental for the worldwide community strategy aimed at protecting humans' decent living, and decent work is explicitly mentioned in Agenda 2030.

Even if the area of employment is treated as only one of the elements influencing quality of life (Budowski, Jany and Schieff 2020, p. 8), its impact on human life and the wellbeing of all members of society is huge. Everyone would agree that as work constitutes a part of everyone's daily lives and is crucial to a person's dignity and development as a human being, economic development should include the creation of jobs and working conditions in which people can work in freedom, safety, equality and dignity and "international labor standards are there to ensure that it remains focused on improving the quality of life and dignity of men and women" (ILO 2019d, p. 13). The risk of commodification of human work resulting from contemporary changes in the world of work threatens the fundamental rights of people at work and causes great danger for the principle of decent work.

Working conditions cover different factors and threats, such as exposure to risk, non-standard working hours, and work intensity (Vendramin and Parent-Thirion 2019, s. 33). They have a strong influence on working people's lives and their ability to perform work during their life cycles, and constitute the main factor that allows them to sustain the ability and capacity to work. As the adjective *sustainable* is applied to something that is "able to be used without being completely used up" (Fleuren *et al.* 2020, p. 2), particular attention should be paid to the issue of the right to work, which is "interpreted as work that must be decent for a meaningful application of the right" (Rombouts and Zekić 2020, p. 355). This means the right to work in a safe, healthy, just and favorable working environment, in which the problem of balancing the personal and professional spheres becomes an important element of human wellbeing that greatly influences working ability and is strongly correlated with the retention of people at work. Consequently, working conditions not only determine the dimension of the prosperity of individuals through the course of their lives, but simultaneously is strongly reflected in the decent lives and wellbeing of future generations, thus having strong social and societal outcomes. The terms of sustainable social and economic development are important to note here, as the proportion of working and nonworking society members resulting from outflows from work interact with the state's economic prosperity and development objectives. Eurofound's research plays a practical role in determining whether working and living conditions are adequate, and it has made a very significant contribution to the concept of sustainable work. This does not mean that we omit the progress and outputs of the scientific literature. For more in this dimension, see Kira et al. (2010, p. 617), who define sustainable work as work "[work that …] promotes the development in employees' personal resources underlying their sustainable abilities to work" (Fleure 2019, pp. 72–74).

Eurofound's working definition of *sustainable work over the life course* means that working and living conditions are such that they support people in engaging and remaining in work throughout an

extended working life. One of the inherent steps toward achieving sustainable social cohesion and development goals is to ensure the protection of fundamental rights at work with adequate attention paid to measures counterbalancing contemporary challenges, considering new threats as their consequences increase work insecurity and reduce social protection. The occurrence of new workforce profiles and the increase in the number of groups that are chronically insecure in employment according to age, sex, disability, and poor health factors cannot be underestimated. The fulfilment of the expectations of different groups of working people and respect for their rights means respect for their dignity, and has a double-edged effect. The perception of work – or, more precisely, the culture of work and its ethos, as perceived through the individual prism – also grants work perception the potential to create benefit or harm for future generations. Ensuring respect for international labor standards and fundamental rights at work undoubtedly becomes of primary need for the sake of the present and future world of work. The question arises as to whether this aim can be achieved without clear rules demarcating obligations and responsibility. The response to this is well-known and does not need clarification.

The strong correlations of both concepts – decent work and sustainable work over the life course, with sustainable development goals in mind – raises discussion around the state of sustainability in labor law, including questions about its legal framework, legal definitions, their practical importance, implications and importance for the realization of the fundamental rights according to new threats. Assigning the concept of decent work such a major role in achieving the goals of sustainable development may raise doubts in the context of the lack of its legal guarantees, and voices have claimed its shortcomings and weaknesses as inherent in it being only a political agenda and a broad, overarching goal for labor law. Indeed, the needs of labor law effectively correspond to this goal. Moreover, labor law needs to be in line with the key issues for decent work such as the protection of human dignity at work and the de-commodification of labor (Weiss 2019, p. 1).

This discussion focuses around the issue of how the labor law shall react to new changes and threats arising in the world of work to prevent the re-commodification of labor with which we have recently been confronted (Weiss 2019, p. 11). The authors touch on the issue of whether the concept of decent work is keeping up with ongoing changes and challenges or whether it needs to be redefined adequately in the given context. As the organization of work and working systems (the definition of *work*, *employee* and *employment relationships*) is evolving (ILO 2017b), the concept of decent work requires parallel evolution considering the development tendencies, changes in working conditions and transformations currently appearing in the world of work. These transformations are not favorable to people at work and do not meet their expectations – whether by raising obstacles to enter the labor market or retaining them at work over longer segments of their lives. The matter of core labor rights as components and means for achieving decent work for all in challenging new circumstances remains open, as new threats are arising.

The analysis of the links between the concept of decent work and sustainable work over the life course are expected to bring a response to the question of increasing the practical relevance and effectiveness of decent work as the fundamental basis for achieving the sustainable development goals.

For this aim, the authors provide a discussion around the new paradigm for decent work embedded in the framework of the analysis of Eurofound's concept of sustainable work over the life

course (2015), as the latter is recognized to be an important mechanism of achieving sustainability during the working lives of community members. This concept also aims to engage and retain people in work throughout their extended working lives by bringing a new quality to the creation of working conditions that contributes to the wellbeing of both individual and society and stimulates inclusive and sustained economic growth. The role of labor law is also referred to as an instrument to counteract broadly understood imbalances in the labor and employment area. As such, labor law brings communities closer to the goals of sustainable development, for the achievement of which decent work has been assigned a special role. Following the above assumptions, the authors decided to detach this debate from the pathetic slogans that populate this area, instead redirecting efforts towards the issue of the practical implementation of fundamental rights at work in changing working circumstances that are intertwined with modern patterns of work and the resulting threats.

Decent work in the framework of sustainability

Decent work as an inherent step toward sustainable development

The term *sustainability*, as Fleuren *et al.* point out, means the "use of a resource over time, without the utility value of that resource being negatively – and preferably positively – affected by its use" (2020, p. 2). The Agenda 2030 embraces three dimensions of sustainability – economic, social and environmental, including joint problem solving. It puts people and the planet at its center, giving the international community a framework for tackling the many challenges that humanity is confronted with. Their huge number is accumulated in the world of work as the main area where the lives of society members are organized, and where economic, social and environmental aspects intertwine with each other. The initiative launched by the Agenda 2030 (2015) confirms the burning, undeniable need to strengthen efforts through the participation of organizations specialized in the promotion and defense of decent work standards.

The challenges of globalization have underlined the indispensable importance of international labor standards as the legal components of the ILO's strategy for governing globalization, promoting sustainable development, eradicating poverty and ensuring that everyone can work in dignity and safety. In the Declaration on Social Justice for a Fair Globalization (2008), it was highlighted that, in achieving the ILO's objectives in the context of globalization, the Organization must "promote the ILO's standard-setting policy as a cornerstone of ILO activities by enhancing its relevance in the world of work and ensure the role of standards as a useful means of achieving the constitutional objectives of the Organization" (ILO 2019, p. 12). In today's globalized economy, international labor standards remain an essential component of ensuring that global economic growth goes in-hand with fundamental rights at work and may be beneficial for all.

As the anthropocentric prism is also characteristic of the concept of sustainable development, Agenda 2030 shows the global importance of the universal principle of decent work as a precondition to eradicating poverty and improving the quality of work and jobs, living conditions, and so on, leading to quality of life and the wellbeing of all members of society. Accordingly, decent work also constitutes the starting point for achieving economic and social development organized in the

framework of sustainable, inclusive and sustained growth. Indeed, it should also lead to greater emphasis on social sustainable development as development that meets the needs of present and future generations. In the above approach, providing decent work appears as the main determinant for improving quality of life and constitutes the fundamental background.

The importance of decent work in achieving sustainable development goals is strongly highlighted and expressed by Goal 8 of Agenda 2030, which aims to promote sustained, inclusive, and sustainable economic growth, full and productive employment, and decent work for all. This brought decent work back to the policy debate, raising its profile at the international level (Piasna *et al.* 2020, p. 7). The detailed tasks involved in achieving the above include numerous actions, approaches and proposed indicators (European Commission 2018, pp. 93–94; Piasna *et al.* 2020, p. 8). Particular attention is directed to the protection of labor rights and the promotion of safe and secure work environments for all workers, including specific groups such as migrant workers, women migrants and precarious workers. Even though the above target is situated in point 8.8, it is, in fact, the flagship initiative to which the other listed tasks to be fulfilled correspond. Strong emphasis is placed on the promotion of development-oriented policies that support productive activities, decent job creation, entrepreneurship, creativity, and innovation, and encourage the formalization and growth of micro-, small-, and medium-sized enterprises, including through access to financial services (8.3). Moreover, it is expected to undertake immediate and effective measures to eradicate forced labor, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labor, including the recruitment and use of child soldiers (8.7). Some of these targets were also included in the calendar schedule. For example, it was expected to substantially reduce the proportion of youth not in employment, education or training by 2020, and by 2025 to end child labor in all its forms. It was also assumed that the following would be achieved by 2030: full and productive employment and decent work for all women and men, including young people and persons with disabilities; equal pay for work of equal value (8.5); and the design and implementation of policies to promote sustainable tourism that creates jobs and promotes local culture and productivity (8.6, 8.7, 8.9). Given the above, additional actions were planned. Namely, they hovered around increasing support for developing countries and the development and operationalization of a global strategy for youth employment and implementation by 2020, via the Global Jobs Pact of the ILO (8a and 8b). As highlighted in the literature, UN targets relating to SDG 8 do not fully correspond with the ILO's Decent Work Agenda (Liukunnen 2021, p. 27). It is also difficult to disagree with the notion that only some of them are directly pertinent to decent work. Piasna *et al.* (2020, pp. 7–8) point out that "for Goal 8 on decent work and economic growth, most of the targets, however, focused on economic efficiency and sustainability, and thus on the quantity, not the quality, of jobs." According to the authors, only three targets – namely 8.3, 8.5, 8.8 – pertain to decent work, and they address informal employment, earnings, occupational injuries and compliance with labor rights.

Notwithstanding the above arguable reservations, key aspects and issues of decent work are also widely embedded in the targets of the other sixteen goals of the Agenda 2030 (ILO 2021; Rombouts and Zekić 2020, p. 355). Decent work strongly corresponds in particular to the first, third, fourth, fifth, and sixteenth goals, highlighting the aspects of ending poverty, ensuring healthy living, the promotion of wellbeing at all ages, inclusive and qualitatively good education and the promotion

of lifelong learning, achieving gender equality, and promoting peaceful and inclusive societies, and constitutes an inseparable component of the holistic concept of sustainable development.

It is important that the elements included in the content of goal 8 of the Agenda 2030 are aimed at the promotion of decent work alongside such objectives as sustainable, inclusive and sustained economic growth, and full and productive employment for all groups of workers. As Rombouts and Zekić (2020) point out, the Agenda 2030 "contains the most comprehensive roadmap until now concerning a global – economically, environmentally, and socially – sustainable future," with decent work as one of the "crosscutting and main elements of its social pillar and figures prominently in SDG 8" (p. 355).

It is important that the idea of inclusivity is placed at the heart of sustainability, while, in line with its aim, the Decent Work Agenda highlights the social dialogue and collective labor rights in dealing with inequalities (Liukunnen 2012, pp. 26–27). The decent work concept creates, in this respect, a framework for the growth of not just any jobs, but emphasizes their creation as quality jobs. Fostering quality of work (working conditions, jobs, employment) shows the inseparable nature of decent work and its close mutual correlations with progressive social cohesion and economic development that is directed to improving people's lives. The international labor standards reflecting the essence of decent work are there to ensure that economic development remains simultaneously focused on improving worldwide quality of life and the dignity of humans (ILO 2019, p. 13).

Decent work, alongside other targets, constitutes a way of fostering an integrated approach to achieving higher-order goals such as poverty eradication, human development and inclusive growth. Hence, decent work has a global dimension for fostering such entire overarching community goals as social cohesion and social justice by promoting opportunities for work that are productive, with: a fair income; a secure work environment; social protection; better prospects for personal development and social integration; freedom for people to express their concerns, organize and participate in decisions that affect their lives; and equality of opportunities and equal treatment for all women and men. Consequently, decent work sums up the primary needs and expectations of people in their working lives and later.

Decent work has multidimensional connections to the achievement of sustainability in terms of economic, social and environment changes (ILO 2018). According to the ILO, the notions of decent and sustainable work are used together (2019d), and decent work drives sustainable development aiming to achieve all of its goals by ranking access to new quality jobs as a priority (2021, p. 3). The ILO Centenary Declaration (2019a) contains many references to sustainability, repeating the text of SDS' 8th Goal and showing strong linkages between decent work requirements and sustainable development (Rombouts and Zekić 2020, pp. 329, 355). The arguments around decent work as essential for sustainable development were provided in analyses of ILO documents and in its correspondence to the Agenda 2030 goals that are linked directly or indirectly to workers' rights (Rombouts and Zekić 2020, pp. 323–333). Consequently, as explorations show, the concept of decent work as one of the leading goals of sustainable development should settle the framework of job quality (quality of work and quality of employment), fostering efforts towards the creation of decent working conditions in challenging circumstances driven by globalization, digitalization, increased inequalities and work insecurity. At the very beginning, this poses the question of the content

and legal framework of decent work, as well as the implementation and enforcement of the rights contained, which is analyzed below.

How sustainable is decent work?

Goal 8 of the Agenda 2030 aims to promote sustained, inclusive, and sustainable economic growth, full and productive employment and decent work for all. According to the ILO, "decent work is indispensable to efforts to reduce poverty and a mean for achieving equitable, inclusive and sustainable development in all countries, developing and developed." As indicated, in social terms, decent work for sustainable development means "that such jobs must be open to all equally and the related rewards have to be equitable." Acts of "inequality and discrimination provoke frustration and anger and they are a recipe for social dislocation and political instability" (ILO 2007, vii). As decent work is treated as the driver of sustainable development, the concept in itself has contributed to the sustainable development goals. This statement motivated the authors to answer the question of how sustainable decent work is. The analyses provided in this chapter give arguments for its fairly deep deficiencies in the above aspect.

The sustainability of the decent work approach is explicitly mentioned in the Agenda 2030, the ILO Global Commission Report (2019d) on the Future of Work, and the ILO Centenary Declaration (2019a). As Rombouts and Zekić highlight, the relations between sustainability and work are also at the heart of the ILO Future of Work Initiative, and as stated in the 2019 Report of the Global Commission of the Future of Work, "increasing investment in decent and sustainable work" in line with the Agenda 2030 is a priority. Indeed, the ILO Centenary Declaration (2019a) outlines key principles for a decent and sustainable future of work (Rombouts and Zekić 2020, p. 320). According to the ILO (2019), "decent work is not merely an objective, but it is a mean of achieving the specific targets of the new international programme of sustainable development" (p. 13). Decent work is also treated as having both functions – i.e., being a substantive norm in international labor and human rights law on the one hand, and being a specific set of key policies of the ILO, the Decent Work Agenda, on the other (Rombouts and Zekić 2020, p. 320). The Decent Work Agenda, as Rantanen *et al.* (2020) point out, contributes substantially to the implementation of the UN 2030 Strategy, but needs strengthening in the implementation of some dimensions, including occupational health, as safe and healthy working conditions are fundamental to decent work (pp. 11, 23, 29). We fully agree with Rombouts and Zekić (2020), who highlight that "decent work requirements are increasingly linked to sustainability objectives and will be used together in many future economic, social and environmental policies" (p. 321), but to achieve them profound improvements are required.

Despite such an important role, decent work is mentioned only fragmentarily and occasionally in few binding legal documents, and has typically been included in soft-law declarations, policy agendas and strategies aimed to promote fundamental human rights and the dignity of working people recently adopted by the ILO (2022a, 2022b), including the ILO Employment and Decent Work for Peace and Resilience Recommendation No. 205 (2017a).

This discussion is now directed towards providing a response to the question of whether the concept of decent work involves a proper response to the ongoing changes and challenges in the world of work, and as such corresponds to the needs and expectations of today's working population and serves as a sufficient means for the implementation of the sustainable development goals.

The term *decent work* undoubtedly reflects the fundamental message anchored in the ILO Philadelphia Declaration (1944) and the Declaration on Social Justice for a Fair Globalization (2008): "Labor is not a commodity." As was emphasized, labor is "not an inanimate product, like an apple or a television set, that can be negotiated for the highest profit or the lowest price," and as "a part of everyone's daily life is crucial to a person's dignity, wellbeing and development as a human being" (ILO 2019, p. 13). Accordingly, this means that the protection of human dignity is undeniably the key issue for the ILO's concept of decent work, and constitutes the starting point for care and protection in labor law regulations, including the creation of international labor standards.

The ILO's decent work concept was launched as "productive work for women and men under conditions of freedom, equity, security, and human dignity" (ILO 1999; Rantanen *et al.* 2020, p. 3) to counterweigh negative effects on employment conditions and the recommodification of labor that occurred during globalization and market liberalization (Piasna *et al.* 2020, p. 2). Even though the concept of decent work has evolved from its initial proposal (Liukunnen 2021, pp. 23–27) and many efforts have been directed towards to its conceptualization and measurement (Piasna *et al.* 2020, pp. 6, 7), employment creation and enterprise development, social protection, standards and rights at work, governance and social dialogue still constitute the main basis for archiving these approaches. As the general director of the ILO, Guy Rider, states: "promoting jobs and enterprise, guaranteeing rights at work, extending social protection and promoting social dialogue are the four pillars of the ILO Decent Work Agenda with gender as a cross-cutting theme."

The decent work concept was accompanied by different measuring tools and indicators (Bescond *et al.* 2003; Ghai 2003; Anker *et al.* 2002; ILO 2013b; Piasna *et al.* 2020), including statistical measures (Anker *et al.* 2002), DWCPrs (Rantanen *et al.* 2020) and those pointing out its deficits (Bescond *et al.* 2020, pp. 180–182). Their suitability for future progress raised concerns nearly 20 years ago (Ghai 2003), and they are still significant as they are based on using different methodologies in relation to the complexity of decent work, its conceptualization, and potential policy leverage. Many objections are focused on the creation of an ideal situation based on the decent work concept, including the use of the composite indicator and country-level differences, and are related to the remaining undefined and unmeasurable concept of decent work (Piasna *et al.* 2020, pp. 2–5, 11).

The ILO contributes to achieving the goal of decent work in the globalized economy "by elaborating and promoting international labor standards aimed at making sure that economic growth and development go hand-in-hand with the creation of decent work" (ILO 2019, p. 14). As the concept of decent work is the product of an agenda enshrined in soft law instruments, international labor standards are also part of the binding legal sources that are included in the international legislative process. It is important to note that international labor standards evolve from a growing international concern that some action needs to be taken on a particular issue (ILO 2019, p. 20), and as they are addressed to fostering fundamental human rights (Rombouts and Zekić 2020, pp. 341–348) they play central role in the realization of the goals of Agenda 2030.

International labor standards set out basic principles and rights at work drawn up by conventions and recommendations with binding or non-binding guidelines, based on Codes of practice and ILO Declarations as meaningful but soft law instruments. Among them, eight "fundamental" Conventions that contain fundamental principles and rights at work (Dambrauskienė and Mačernytė-Panomariovienė 2001), which are also covered by the Decent Work Agenda (1998), were identified. They include: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labor; the effective abolition of child labor; and the elimination of discrimination in respect of employment and occupation. According to the ILO Declaration on Social Justice for a Fair Globalization (2008), Member States are also encouraged to ratify another four Conventions from the viewpoint of governance because of their importance for the functioning of the international labor standards system.

This causes reflections on working conditions that respect the dignity of the people who work and contribute to the aim of sustainability. Following the conceptualization of sustainability and definitions related to this term in the frame of employment (Fleuren *et al.* 2020, pp. 3–7), these conditions shall be understood as those "that are not negatively (and preferably positively) affected by that individual's employment over time."

However, it is in vain to look for the legal definitions of these conditions. Important insights into their perception are contained in Article 31 of the EU Charter of Fundamental Rights (2000), which states that "every worker has the right to working conditions which respect his or her health, safety and dignity." Moreover, every worker has the right to the limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave. The reference point here is analyzed in the literature as aspects of just and favorable working conditions, with a healthy and safe work environment, guaranteed time free of work (Mačernytė-Panomariovienė and Wrocławska 2021), respect for family and private life (Mačernytė-Panomariovienė and Krasauskas 2021), non-discrimination and equal rights policy (Mačernytė-Panomariovienė, Erikson and Wrocławska 2022), just remuneration, and strengthening employability issues and protection against psychological violence at work – or mobbing (Guobaitė-Kirslienė and Blažienė 2021). Consequently, in legal terms working conditions stay in close relation to fundamental human rights that need be provided for all people at work, creating the basis for the decent life of all and referring to the protection of people's dignity during the performance of work.

The notion of core labor standards (fundamental labor rights) as integrating decent work in the core of the system of international labor standards (Liukunnen 2021, p. 27) is worth attention here. Even though there is no space for detailed explanations in this context, it requires highlighting that core labor rights are "essential not only to workers' rights, but to human rights everywhere" (Hiatt and Greenfield 2004, p. 43). As international instruments that define a range of human rights at work and provide a guide to civilized, dignified and sustainable workplaces, and as the most fundamental human rights at work, labor standards create conditions that allow access to other important rights (Howard and Gereluk 2001). As representing minimum standards to achieve the life dignity and self-sufficiency that are inherent in human beings (Hiatt and Greenfield 2004, p. 44), they also mean that workers have a voice and can act to release themselves from exploitation. As Rombouts and Zekić (2020) point out, "the universalistic approach of principle of decent work for all, together with the Decent Work Agenda and the recognition of certain labor rights as fundamental labor

standards, has led to a closer alignment between labor rights and human rights in recent decades" (p. 356).

As the world of work was affected by new transformations over recent decades, important labor instruments contributing to the protection of fundamental rights at work were adopted at the ILO and EU forums. Among them, at the ILO forum the following conventions are worth particular attention: the Violence and Harassment Convention No. 190 (ILO 2019c); the Domestic Workers Convention No. 189 (ILO 2011); and the Employment and Decent Work for Peace and Resilience Recommendation No. 205 (ILO 2017a). The efforts undertaken at the EU forum are also meaningful, as they resulted in the adoption of: Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union; and Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and caregivers and repealing Council Directive 2010/18/EU. The European Economic and Social Committee is of the opinion that work will continue to be the main source of income in the digital age, which also poses threats. For example, informal work, and in particular work on digital labor platforms, is often poorly paid and without social guarantees, and no official mechanisms are in place to address unfair treatment (Berg *at al.* 2018). Consequently, on October 28, 2020, a proposal for a directive of the European Parliament and of the Council on a decent minimum wage in the European Union was presented (EC, 2020), while on 16 September 2021 the European Parliament adopted a resolution on fair working conditions, rights, and social security for workers on digital platforms (2019/2186 (INI)). It is important to note that on December 9, 2021, the European Parliament submitted a proposal for a Directive of the European Parliament and of the Council on the improvement of working conditions on digital platforms. The ability of employees to adapt to new tasks is equivalent to the ability to adapt work to individual job requirements with the help of digital technologies. Additional efforts for the improvement of working conditions are visible in the European Parliament resolution of January 21, 2021, with recommendations to the Commission proposing a directive on the right to disconnect which contributes to the protection of health and safety at work.

Notwithstanding the efforts taken, the *expressis verbis* indicated approach to promoting decent work occurs in only a fragmentary scope in the ILO conventions, while both binding labor law sources (ILO conventions and EU directives) lack the reference to sustainability in terms of employment over the life course. The long-term perspective during working lives, with changing employability or the ability to work in extended life circumstances; the life course transitions approach, with a view to critical life-changing events and changing individual health and preferences; and finally the holistic approach, which considers workers' health, personal characteristics (education, skills and interests) and family and social responsibilities (Eurofound 2016a, p. 6) as meaningful routes for the achievement of sustainable development goals, are still omitted. The lack of a longitudinal perspective for the assessment and adequately tailored quality of tools to measure work go in line with the changing capacities of workers, and abilities throughout the life course should be treated as the main shortage for the effectiveness of achieving sustainability aims. Such a state shall be treated as a significant obstruction in the implementation of the holistic and comprehensive approach included in the idea of sustainable development. While soft legal instruments such as ILO Declarations, Resolutions and Guidelines point out aspects of the transformation of the labor

market and recall responses to the new future of work, the international labor standards embodied in conventions as the bases for decent work lack the explicitly mentioned issues of sustainability in the life course approach (sustainable employability (Fleuren 2019), sustainable employment (van Dam *et al.* 2017) or sustainable work (Kira *et al.* 2010)) that focuses, inter alia, on employment and work environment characteristics, working individuals' capacity and ability to work, their constraints, determinants and predictors. Meanwhile, awareness of the above issues is fundamental for the creation of decent working conditions in the human life course.

Consequently, using the life-course approach to fill the existing gap in the creation of quality work and decent conditions for the decent life approach, with strong linkages between fundamental human rights, should become a new paradigm for the realization of the idea of decent work as the new core international labor standard.

Whether the decent work concept needs to be redeveloped via some specific sustainability mechanisms is another question altogether. The transition to more environmentally, economically, socially sustainable and inclusive growth requires deep transformations and profound changes (ILO 2018), raising discussion about possible changes in the meaning of decent work (Rombouts and Zekic 2020, p. 320). Rombouts and Zekić highlight that "decent work should therefore also be a notion that is dynamic and adaptable to changes in society with respect to securing a sustainable future" (p. 356). There are proposals to broaden the concept by including the WHO quality of life concept, which provides an enriched perspective (Budowski, Jany and Schief 2020, p. 7) via a broader approach that puts weight on the decent life as the framework for decent work within the environmental perspective (Liukunnen 2021, pp. 26–27; Rombouts and Zekić 2020, p. 354). The social aspects of employment are also of particular importance (Rombouts and Zekić 2020, p. 356). Among new ideas, making sustainable work "the desirable horizon" underlines a multidimensional approach to quality of work and considers individuals as the whole. In this vein, combining the priorities of sustainable development and decent work (Vendramin and Parent-Thirion 2019, s. 62), searching for a response to challenging contemporary issues through conceptualization via the comprehensive framework of sustainable employability (Fleuren 2019, pp. 48–80), or focusing on sustainable employment characteristics (van Dam *et al.* 2017) are all worth particular attention. All of the above perspectives should be involved in considerations, as they each shape the framework for the improvement of working conditions for individuals and consider their management in different life stages, having a direct effect on the situation of different working cohorts and the well-being of future workers. This leads to a discussion on labor law instruments that shall constitute the framework for exercising the right to decent work as a common right of present and future generations and a meaningful means of contributing to sustainable development.

Progress in the improvement of opportunities for decent work requires that efforts be undertaken to provide clear conceptualization (definition), obligations and responsibilities (from societal, organizational and individual levels) for its implementation that are embedded in the framework of a new measurable concept. Indeed, the process of such transformations is not simple to implement but is worth the effort, as changes in the new world of work cannot be stopped and need strong and direct counterbalancing measures that are adequate for contemporary challenges.

The characteristics of sustainable work during the life cycle

The definition of sustainable work according to Eurofound

Eurofound has made a very significant contribution to the concept of sustainable work. Since its launch in 1990, Eurofound's European Working Conditions Survey (EWCS) has provided an overview of working conditions in Europe. Eurofound developed a multidimensional model for analyzing the quality of work and employment in 2002 and has since advanced its research on job quality.

Eurofound's definition of *sustainable work over the life course* means that working and living conditions are such that they support people in engaging and remaining in work throughout an extended working life. These conditions enable a fit between work and the characteristics or circumstances of the individual throughout their changing life, and must be developed through policies and practices at work and outside of work. As Eiffe (2021) highlights, Eurofound "takes the perspective of the working individual being in a concrete job situation (job quality, work organization) that interacts with its private life domain. Key features are around job quality, work-life balance, developing skills and employability, having enough earnings etc." (p. 68).

As indicated by Eurofound, it follows that to understand how work is to be sustainable over the life course, two domains need to be addressed:

1) work, specifically the characteristics of the job and the work environment;
2) the individual, specifically their characteristics and circumstances.

The characteristics of the job domain are relevant to workers currently employed, and focus on job quality and working conditions over the life course (such as health and safety, skills development, work organization and working time practices). Many working conditions can have an impact, which we will discuss in more detail below.

Sustainable work is a desirable horizon for Europe, insofar as it is likely to underlie a multidimensional approach to quality of work that will consider working individuals as a whole, with their characteristics, their constraints and their trajectories (Vendramin and Parent-Thirion 2019). As for the second area, factors that influence availability and can prevent an individual from being employed include: care responsibilities; poor health and wellbeing; lack of skills; spells of unemployment and inactivity; and lack of motivation. Availability for work can vary significantly between people and will change for an individual over the life course. Different people have different needs and abilities, which significantly affect their employability and capacity to work, as well as their motivation to work. Jobs and the work environment can be adapted to accommodate specific needs, because the legal regulation also provides for exceptions (positive discrimination) – additional guarantees and rights for persons from socially vulnerable groups. Labor force participation rates, therefore, can be increased by helping people find a job that matches their needs and abilities. In this, three phases are distinguished: education, work and retirement (Eurofound 2003), to which activities related to care might also be added. People change jobs willingly or unwillingly over their life course. Indeed, society has moved away from the "job for life" paradigm. Technological change and globalization have increased the need for companies to adapt and restructure. More flexibility with regard to contracts also leads to more turnover of workers. However, more research is clearly needed to explore

the effectiveness of sustainable work policy mixes. This regards the implementation in various sectors of the labor market (particularly against the backdrop of the growing service sector), posting of workers (Rennuy 2020; Biletta *et al.* 2020), assessments of big industries vs. SMEs and the relevance of the concept for various types of workers such as self-employed, platform workers and many others (Eiffe 2021). Both the characteristics of the job and the circumstances of the individual are influenced by a set of policies, regulations and practices. One of the more recent studies commissioned by Eurofound reached two different conclusions: on the one hand, good progress has been made towards improving job quality overall, demonstrating the effectiveness of regulatory frameworks, joint action by social partners, and workplace policies and practices; on the other hand, important differences remain between different groups of workers. These persisting differences, and the fact that new challenges are developing, signal that the improvement of job quality, in pursuit of increased wellbeing at work, must be inclusive. In other words, it must address the variance between countries, sectors, occupations, employment statuses, worker characteristics and business models. It is paramount that companies and workers together devise a form of work organization that allows for good job quality and working conditions. As Eurofound research has shown, high-involvement work practices are beneficial to all (Biletta *et al.* 2021).

Accordingly, it can be concluded that, considering Eurofound's definition and the two areas it assesses, the answer to whether work is sustainable throughout life is missing an element related to the conditions that would enable people to remain engaged and in work. Work engagement is not just about creating employment (employment as such) opportunity rights, but it should be much broader. Eurofound's study on working conditions needs to consider more working conditions and means for their adaptation to workers at different stages of the life cycle. They also need to assess changes not only in work or employment but also in other areas (for example, business establishment, their limitation, taxes, administrative requirements, social dialog, etc.) that may lead individuals to decide to stay at work and be loyal or to create their own business or workplace (platform), which may also affect the future prospects of individuals and thus the sustainability of work.

The main determinants of sustainable work

According to Eurostat data, persons over 15 years of age are considered to be able-bodied, up to 64 years age. According to Eurofound's concept of sustainable work, in order for these people to remain in work for life, they must not only have good conditions to work and earn, but must also be motivated to stay in work when they start a family, have dependents, or become sick or are elderly. States must therefore take all measures to ensure that workers are cared for at all stages of their life cycle (youth, adulthood and old age; single, married, with children, in mature family without children, or elderly) without discrimination. Sustainable work must accompany all professional (working) life. In turn, a focus on extending the statutory retirement or other labor market-related measures is not enough to make work sustainable over the life course (Eiffe 2021).

Eurofound's concept of job sustainability is primarily concerned with working conditions and the environment, which encourages employees to work and be loyal. On the other hand, it is important to consider whether the employee feels the support and motivation of the state (various

social benefits) and the motivation of the employer (incentives, benefits for decision-makers, training, etc.). Making work sustainable in line with the Eurofound concept depends on how these support systems intervene at different levels: institutional, company, job and individual. This means that when it comes to the sustainability of work throughout life, a broader discourse is required, i.e., not just about the workplace and its environment. This is because not only a specific job with good working conditions can motivate one to work productively for a long time and or stay in the labor market, but much more is required. This includes, for example: the social system in the event of job loss or change of job, illness or maternity; benefits; a flexible pension scheme, and so on.

The most direct and obvious determinants of the sustainability of work are the characteristics of the job. Eurofound's work on job quality identifies the aspects of a job that may have great influence on the sustainability of work (Eurofound 2012). In its model, job quality is defined as a measure of the potential impact of the characteristics of jobs on the wellbeing of workers. The model distinguishes four dimensions of job quality (Eurofound 2015):

1. earnings;
2. prospects (referring to both the stability of employment and opportunities for career progression);
3. intrinsic job quality, which has the strongest direct effect on health and wellbeing and is therefore a key determinant of whether work is sustainable (skills and discretion, social environment, physical environment and work intensity);
4. working time quality, which includes the duration, scheduling and flexibility of working time and having discretion over it, and which has a two-fold effect on the sustainability of work: it is a measure of the time-intensity of the work effort, and therefore has an important direct and cumulative impact on the sustainability of work; it also determines the amount of time available for non-work activities, which makes it the most important dimension for the reconciliation of work and non-working life.

However, one dimension can never perfectly substitute for another, and it is questionable whether certain elements of a job can really be compensated for (Eurofound 2015). For example, earnings probably have the most important indirect effect on the sustainability of work, having a significant impact on the capacity and motivation for work. In addition, not all workers who endure arduous working conditions are compensated by high wages. Pay transparency is therefore as important as ever (Biletta *et al.* 2021). Many are low-paid and may not be able to move to better jobs, with consequences for their health and healthy life years after retirement. They may not be able to continue working until retirement age, which may have an impact on their income and potentially lead to poverty.

The quality of work is also influenced by the actions of the employer or the organization of work and the creation of a working environment for employees. Employment relations, employee participation and the worker's voice at the workplace level are also important factors. The work environment also influences the degree of autonomy and recognition, the potential for learning, fair treatment and the level of direct involvement of workers, all of which has an impact on wellbeing and on employability (Biletta *et al.* 2021). The authors of the study stress that it is important to note, however, that it is not clear which elements of job quality have the strongest impact on sustainability (Eurofound 2015).

Eurofound (Biletta *et al.* 2021; Gerstenberger 2021) outlines the sustainable work framework at the macro level (economic and social context); the meso level (the work context of: (1) quality of work, (2) work-life balance, and (3) quality of life); and the micro level (individual context). All three levels are interrelated, so it is very important not to separate them. Gerstenberger (2021) emphasizes sustainable work throughout her two life levers: job quality and availability for work. The quality of working conditions (quality of work) affects the quality of life: in order to achieve the goal of quality of life, the importance of the quality of working conditions cannot be ignored.

Eurofound (2017) distinguishes seven characteristics that characterize the quality of work: physical environment; work intensity; working time quality; social environment; skills and discretion; prospects; and earnings. We can observe that five out of the seven indicators of the quality of work (work intensity; working time quality; social environment; skills and discretion; prospects) include psychosocial risk factors (Biletta *et al.* 2021; Gerstenberger, 2021). These can be both internal, such as intensive working time, high workload, etc., as well as external, such as assessment, the opportunity to raise qualifications at the employer's expense, the chance to climb the career ladder, the lack of fear of changing jobs, etc. After assessing this, the legal regulation and the practice and politics of its implementation should also change.

Eurofound's research on this topic is not complete. Working conditions and sustainable work form one of the six main activities in Eurofound's work programme for the 2021–2024 period. Accordingly, this research will show which factors have more or less of an impact on lifelong working ability. In their study on working conditions and sustainable employment, as part of the work programme for the 2021–2024 period, Eurofound will take into account the following aspects: work organization and teleworking, working time, work–life balance, equal treatment, workplace health and wellbeing, skills and training, earnings and prospects, job satisfaction, and non-standard forms of employment, particularly self-employment. New elements of the study on working conditions (for example, work-life balance, equal treatment, job satisfaction) describe decent work, which has so far not been evaluated through such elements as work without discrimination, violence and mobbing (bullying, humiliation). These elements are likely to describe the psycho-physical working conditions and environments which are not visible enough and which should be made clear when describing the concept of decent work.

In summary, the quality of work and the working environment are key components in enabling workers to remain in the labor market longer, to work longer in better health (Eiffe 2021), and to feel motivated, contributing to sustainable working life.

Decent work through the prism of sustainable work over the course of life. A new conceptual framework

Sustainable work as the guiding principle

The definition of *sustainable development* was provided in the Brundtland Commission's Report (1987) as development that meets the needs of the present without compromising the ability of future generations to meet their own needs. Embedded in the framework of the Agenda 2030 and aimed

in general at enhancing the quality of human life worldwide, sustainable development constituted a significant background for the analysis of two concepts: sustainable work over the course of life and decent work. Both of these concepts are driven by flagship initiatives to improve working conditions and eradicate inequalities and exclusions, serving as meaningful and positive influences on the quality of work and the quality of people's lives and contributing to social cohesion. This is clearly expressed by the call for increased investment in both decent and sustainable work (Global Commission 2019, pp. 45–48). Decent work cannot be achieved without providing sustainable work (jobs, employment) and without shifting attention towards qualitative instead of quantitative approaches.

The concept of decent work has been well-known for decades and is evidenced worldwide in programs advocating for the protection of fundamental rights at work, becoming an integral part of Agenda 2030 and one of the main development goals to be achieved among the other 16. The international labor standards developed by the ILO are essential components of the international framework for ensuring that the growth of the global economy provides benefits for all (ILO 2019, p. 7), including strong reference to fundamental rights at work and the four pillars of the Decent Work Agenda (1998). As is emphasized, the ILO's decent work concept focuses more on labor law, social protection and social justice issues – themes consistent with the global reach of the ILO's work (Ghai 2003). When the dignity of working people confronts new threats and challenges, the principle of decent work – as based on dignity, equality, a fair income and safe working conditions, and as such placing people at the center of development (ILO 2019) – needs a more proper response in a way that considers challenging contemporary issues and involves acting with adequate mechanisms. Obstacles to such an approach are difficult to overcome without the development of a new reference point for protective instruments that may be identified within the detailed, long-term perspective. These instruments work towards balancing working lives, where the issue of sustainability at work for working individuals (Vendramin *et al.* 2012; Vendramin and Parent-Thirion 2019, Figure 13.1) can be a worthy aim for achieving the sustainable development goals.

According to Eurofound's (2015) definition, *sustainable work over the life course* means working and living conditions that support people to engage and stay in work throughout an extended working life. It is important to note that sustainable work over the life course, as analyzed through the prism of the conceptualization of sustainable development, is referred to as "conditions that enable the individual to meet their needs through work in the present without compromising their ability to meet their needs through work in the future. These conditions enable a fit between work and the characteristics or circumstances of the individual throughout their changing life and must be developed through policies and practices at work and outside of work" (Eurofound 2015, p. 2). The lifelong perspective of organizing work leading to the improvement of the quality of jobs has become the guiding principle of exercising rights at work and shaping the conditions for their performance in line with the aims of decent work. Through the individual prism, these are combined into the goals that the ILO strives to achieve.

Compared to decent work, the concept of sustainable work can be measured in life-long, individual, and more precise terms, even if there are some reservations related to its numerous indicators (Eiffe 2021, p. 69) as they occur when analyzing sustainable employability in relation to the practical level (Fleuren *et al.* 2020, p. 3). Thanks to this, most arguments stay closer to the workplace level.

This constitutes the overwhelming advantage of sustainable work for increasing efficiency. Sustainable work during the life cycle "refocuses on the quality of work, in all its dimensions, and strengthens the notion of individuals' trajectories" (Vendramin and Parent-Thirion 2019, s. 14). As Vendramin and Parent-Thirion (2019) highlight, the approach to sustainable work "involves considering the effects of working conditions – cumulative over time – and their relationship with private life in the long term. It combines framework for analysis of working conditions and the focus on individuals as a whole, with all their characteristics, their trajectories and the constraints that weigh on them" (s. 62). Sustainable work considers different transitions in working life that take place not only between jobs, but also between employment and unemployment, between periods of learning or caring, or when returning to work after a period of illness, enhancing the focus on return-to-work schemes and flexible work arrangements (Eiffe 2021, p. 75). Therefore, together with life-long measurable indicators, sustainable work contributes to achieving quality of work in a better way than the universal concept of decent work. The concept of sustainable work contains a set of variables, parameters and components that bring additional attitudes to measuring the quality of jobs according to its multidimensional approach, with a comprehensive and holistic perspective on working conditions (Vendramin and Parent-Thirion 2019, s. 62). Accordingly, the environmental perspective also seems to be easier to trace.

The concept of sustainable work and its indicators "capture the societal and economic objective of keeping workers longer in the labor market due to population ageing, demographic change and financial constraints (e.g., as regards sustainable pension systems and public finance)" with direct reference to the individual worker. In the context of work, it is particularly important that it "implies simultaneous efforts towards achieving individual, social and economic work; and labor market-related goals that will enable the needs of the present worker to be met without compromising his/her ability of future work" (Eiffe 2021, p. 70). Through the prism of sustainable work, new routes for achieving social cohesion and inclusiveness can be followed and encompassed into the framework of the aims of decent work. Indeed, the lifelong approach as related to working people's expectations, abilities and constraints requires the use of a variety of differentiation methods, reasonable accommodations and adaptations appropriate to the life cycle transitions and changes that typically occur in human life. Measurable working time patterns (Eurofound 2017b, pp. 64–68) and working conditions that are adequate for different ages (Eurofound 2017a) are an important element of the influence of sustainable work on the ability and capacity to work.

It is particularly noteworthy that sustainable work equalizes job opportunities in various life cycles, underpinning the need to focus on workers of all age groups due to the different features of employed persons (Eiffe 2021, p. 79) and considering extended working lives and the abilities of states to finance social protection systems (Eurofound 2015). The multidimensional approach to quality of work presented in the sustainable work concept that considers working individuals as a whole is an appropriate response to contemporary challenges in the world of work, and has real potential to combine the priorities of sustainable development and decent work (Vendramin and Parent-Thirion 2019, s. 62). In return, it provides a solution to the question of how to keep people in the labor market in older age.

Sustainable work should become the new approach for the realization of the goal of providing decent work for all in the life cycle perspective that does not interfere with the wellbeing and pros-

perity of future generations. In such a way, it will contribute to the framework of the new Universal Labor Guarantee that embeds fundamental core workers' rights, for which the ILO advocated in its anniversary document – the Work for a brighter future (2019d, pp. 38–39). The search for sustainability during the life course as a desirable paradigm for the prosperity and wellbeing of all members of society requires the consideration of social, economic and environmental aspects. Previous explorations related to the conceptualization of sustainable employability also cannot be omitted (Fleuren 2019; Fleuren *et al.* 2020). Consequently, the definition of sustainable work cannot abstain from previous scientific achievements related to sustainable work, sustainable employment or sustainable employability, which are treated as a comprehensive framework for the analysis of workers' functioning at work and in the labor market throughout their working lives (Fleuren *et al.* 2020). It must also consider the pillars of the framework of the decent work principle and requires that economic and environmental terms be considered, as jobs have to be productive in a competitive market and use environmentally sustainable resources that are safe and plentiful enough for present and future members of society. The latter principle relates to the creation of conditions for sustainable workplaces and working environments, underlining sustainability in organizations and the role of CSR in its creation.

In the authors' opinion, only when work is sustainable for individuals it is possible to achieve the main approach as indicated in the Sustainable Development Strategy and its goals, including decent work as one of its priorities. The concept of sustainable work may complement the existing gap in the concept of decent work and fill its shortcomings related to threats to the new world of work by providing new quality in the redefinition of working conditions and quality of work according to the long-term perspective, all of which is encompassed in the sustainable development concept. The perspective of the human life cycle approach, embedded in the framework of the sustainable work concept, should become the new paradigm for the realization of fundamental rights at work in new working circumstances. Quality of work requires new measurement tools and mechanisms formed by raising awareness and taking responsibility, taking into account the previous discourse around the measurement of the jobs quality (Piasna *et al.* 2020, pp. 8–9; Piasna *et al.* 2019). This does not mean withdrawal from the concept of decent work, but the application of a holistic and comprehensive approach for its enforcement. This perspective also means the need to equip people at work with the right to protect themselves from increased exploitation towards an inclusive and sustainable future.

A definite response to new challenges

This topic embraces a number of important issues related to the normative framework of labor law (Zekic 2019), the regulatory model of labor law, and the scope of application of fundamental labor law standards. This includes: shifting the perspective from a labor rights-based framework towards a standard-based one (Liukunnen 2020, pp. 18, 25–26, 44); the role and methodology of labor law, including proposals for future constitutions of labor relations (Knegt 2017); interdependencies between trade and labor (business and human rights); and the role of values, principles, and rights in the development and enforcement of labor law regulations (Alston 2004), to name

but a few. The authors focus attention towards the issue of the role of labor law in shaping the legal framework of concepts and terms, and advocate for necessary improvements in labor law regulations that are made on the basis of broadening the effectiveness of concepts in fostering the role of fundamental labor rights and widening core international labor standards. As these findings indicate, "stimulating employees through a supportive, rewarding, developmental and challenging work environment might be an effective strategy to retain employees in the workforce such that they are capable and motivated" (van Dam *et al.* 2017, p. 2466).

According to Eurofound's definition, *sustainable work* means achieving living and working conditions that support people in engaging and remaining in work throughout an extended working life. While following the conceptualization of sustainable development, sustainable work in the life cycle means the "conditions that enable the individual to meet their needs through work in the present without compromising their ability to meet their needs through work in the future." The two domains that need to be taken into consideration – job quality and individual characteristics – mean that making work sustainable requires a match between job quality and availability for work (Eurofound 2015, p. 11). It is difficult to disagree with the notion that availability for work not only differs between people, but is also not characterized by constancy and changes over the life course. Therefore, work must be monitored and transformed accordingly in order to mitigate the factors that discourage or hinder workers from staying in or entering the workforce (Eurofound 2021, p. 42). This cannot be achieved without assurances for individuals' just and fair working conditions, and a healthy and safe working environment that is embedded in the framework of a universal decent work principle, with the strong appraisement of factors related to social and environmental frameworks.

It is difficult to disagree with Rombouts and Zekić (2020) that "traditionally, labor law has not been concerned with the question whether work performed by workers is sustainable socially, environmentally, or even economically" (p. 322). Domestic labor law represents a narrowed approach that is focused mainly on the economic dimensions of work, remaining quite ambivalent to the role that work plays in the social and environmental framework (p. 357). The arguments raised by Piasna *et al.* (2020) in relation to the absence of an appropriate indicator for decent work and the failure to conceptualize and measure decent work are noteworthy, as also the observation highlighted by Ward (2004) regarding the success in this regard of only simple and internationally comparable decent work indicators. Consequently, decent work "remained an undefined and unmeasurable concept with little applicability in policy making process" (p. 11). New, unstoppable challenges that threaten human dignity in the world of work require strong and cumulative efforts to turn principles and values into reality to ingrate with global approaches. The role of legal concepts and terms for fostering the achievement of goals cannot be underestimated. The annual EU Sustainable Growth Strategy (2021) states that Member States should adopt measures to ensure fair and just working conditions (EC 2020) that motivate workers to stay longer at work, and is accompanied by the European Semester. This strongly correlates with the fundamental rights of working people proclaimed in the European Pillar of Social Rights (2017), in particular with its 10th principle (according to it, workers have the right to a high level of protection of their health and safety at work. Workers have the right to a working environment adapted to their professional needs and which enables them to prolong their participation in the labor market.), as well as with its implementation action

plan (EC 2021). Efforts undertaken to turn the 20 key principles and rights of the European Pillar of Social Rights into concrete actions (EC 2021) can also be observed. Even though there is no explicit reference to decent work, these regulations related to fair working conditions overlap with decent work (Piasna *et al.* 2020, p. 9). Indeed, they should be treated as essential for well-functioning labor markets and social protection systems, and have a strong influence on the achievement of Agenda 2030 aims. As Piasna *et al.* highlight, the "Pillar was accompanied by a set of indicators, intended as a key tool for monitoring convergence towards better working and living conditions upon closer examination, many of the indicators in fact replicated the focus on job quantity and structural features of the labor market while failing to include job quality features."

It should be noted that when talking about the right to decent work, which is strongly correlated with the quality of work (jobs and employment), we are not dealing with a right that is secured by legal sanctions and that may be claimed before the courts. Instead, this is a fundamental idea, concept and framework, and the main emphasis is placed on the ways of implementation and protection through policies, law, programs and reforms that focus on social protection and social justice issues consistent with the global reach of the ILO (Ghai 2003). The same is true of the sustainable work concept. This state may change as the axis between quality of work and measurement tools developed through the concept of sustainable work over the life course becomes essential in redefining working conditions in line with sustainable development approaches, in which decent work is treated as one of main priorities. In the concept of sustainable work over the course of life we can perceive a new normative basis for strengthening fundamental rights at work; hence, convincing arguments appear in favor of the precise distinction of the right to sustainable work of every human through the components of decent work at every stage of life. Claims for this right shall be made through well-known means that have been acknowledged for decades: justified differentiation; reasonable accommodations; anti-discriminatory, safe and healthy work mechanisms; freedom from forced and compulsory work; and the aggregation of the votes of employees in the collective representation of their interests and rights. These are fundamental means for the protection of dignity at work and constitute a well-grounded basis for the enforcement of the sustainable work concept.

As the awareness of rights at work plays a crucial role, a legal regulatory framework is required for its effectiveness. Indeed, good practice for the creation of corporate social responsibility with Codes of Conduct is also helpful, even though their weaknesses are based on their voluntary approach to labor rights and the scarcity of their references to core labor standards (Liukunnen 2021, p. 38). However, they now need to receive adequate attention at the level of labor law, as they remain in the orbit of so-called soft impact. Today's narrative, "where individuals do not determine their own path but are trapped in adverse conditions" (p. 20) needs be stopped and broken. For this aim, the strengthening of the role of workers' representatives that provide a voice at work for individuals is of primary need.

According to Rombouts and Zekić (2020), "codetermination, collective bargaining and freedom of association rights," for instance, could be further operationalized to devise, institutionalize, and implement policies that advance the Agenda 2030 (p. 357).

In searching for a definite response to contemporary challenges, we need a regulatory labor law framework that is accompanied by labor law instruments (such as ILO conventions and EU direc-

tives). This should directly refer to the concept of sustainable work based on the fundamental pillars of decent work. This is the way to strengthen the protection of fundamental workers' rights and to react to the challenges of the new and future world of work. The starting points here are recent global initiatives that have introduced "a more ambitious vision of paid work and have the potential to broaden the traditional meaning of decent work" by paying special attention to social and environmental issues (Rombouts and Zekić 2020, pp. 354, 357–358).

Decent work means opportunities for everyone to secure work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development, and social integration. However, the idea of the perspective of sustainable work within the life course – as Vendramin and Parent-Thirion (2019) highlight – puts the focus on working individuals as a whole, with their characteristics, constraints and trajectories, and provides new quality for the creation of quality employment and quality jobs. Moreover, as it is based on the quality of work and the quality of the work-life balance (Eurofound 2018, pp. 59–61), sustainable work also considers the social and economic contexts (Eiffe 2021, p. 69). This concept does not abstain from the diversity or vulnerability of labor forces, and as such moves closer to achieving protection for the dignity of all groups of working individuals. The demands for making work sustainable during the life course are obvious, and are aimed at extending opportunities for the creation of decent working conditions for more people throughout their working lives. Consequently, this will bring closer the realization of full and productive employment from which all of society will benefit. These are conditions for inclusive, sustained and sustainable economic development. The main challenge here is not only the definition or conceptualization of the constructive elements of sustainable work, but, as highlighted, also involves matching the needs and abilities of individuals with the quality of jobs on offer (Eurofound 2017b), as the desirable aim is easier to achieve on theoretical grounds than to provide in a practical sense (Fleuren *et al.* 2020, p. 4). The secondary challenge is related to fundamental attitudes, as sustainable work needs to be treated as a measurable concept with different determinants. The question then is how to agree on appropriate measurement indicators and instruments of their enforcement at the workplace level.

It will not be easy to agree on a definition of sustainable work and its measurable components, but these efforts are worth undertaking as they may contribute to raising awareness of rights and the development of real effective mechanisms for their protection and enforcement. This is especially relevant in a reality where the re-commodification of human work and threats to the dignity of working people are as serious as ever. Reservations related to the creation of a utopian or ineffective system of legal protection – with a view towards the current state of protection of rights at work through anti-discriminatory and safety at work mechanisms, including recently made progress – seem unjustified.

Conclusions

The truth is that as new threats are endangering working cohorts in the modern world, we can observe a growing number of deficits with regard to decent work. To address them, four strategic objectives – the pillars of the Decent Work Agenda (1998) – accompanied by international labor

standards, fundamental principles and rights at work are meaningful foundations for decent work, but still seem insufficient. For the improvement of their practical importance and implementation, the developed and slightly evolved concept of decent work needs to be readapted to the new realities of the changing world of work. People need be capable of performing work throughout their extended working lives, and there is strong demand for workforces that are sustainably employable throughout the courses of their lives. The worrying fact is that, though they have improved over recent decades, mechanisms for the protection of fundamental rights at work, as the basic structural elements of decent work, seem to abstain from the long-term perspective that looks beyond the occurrence of specific situations and changes in the human life cycle. Consequently, decent work is not integrated into the global approach to work sustainability during the life course that is embedded in the framework of sustainable development goals.

Voices pointing out the weaknesses of the concept of decent work, its political context and its fairly narrow definition – and the absence of clear responsibilities and liabilities to implement decent work (Budowski *et al.*, p. 3) – might also be shared. Critics become significant as new challenges constitute serious new obstacles for the promotion and realization of the decent work concept, including: changes in subordination at work; the occurrence of new forms of contemporary "slavery," with a growing number of people working informally and without social protection; the lack of balance between free time and working activity; and disregard for the right to be disconnected with the employer, to name but a few. These factors are compounded by increased isolation at work, the diminished role of workers' representatives, and the crisis of collective bargaining and workplace democracy. At present, the search for decent work for all requires a more concrete response and new measures that may offset these imbalances in the labor market and during working lives. To counteract them, a multidimensional approach addressed to the protection of working people and the creation of fair and decent working environments must be applied. In other words, it is necessary to provide sustainability during working lives for all who are employed. This also means providing protection notwithstanding employment status, in particular by making all working people formally protected.

The idea of sustainable work during the life course contributes to the improvement of quality of life in the globalized, digitalized world of work, with demographic and pandemic threats being accompanied by individualization and isolation trends that seriously endanger human dignity. To provide decent work opportunities for all in the new world of work, sustainable work needs to become a principle that is widely accepted, legally grounded, protected, and enforced through public policies, labor legislation and good practice at the company level. Does this mean that sustainable work has to become the new desirable core standard at work and an international labor standard, included in binding international legal regulations? In the authors' opinion, sustainable work needs to be seen as the normative basis for the promotion, protection and enforcement of decent work and decent working conditions. Although it represents an individual perspective on the life cycle, together with decent work and its fundamental components, sustainable work constitutes an inseparable and conditional part of sustainable social development, social cohesion and justice that are immanent parts of the broader sustainable development idea. As a result of the interaction between these two concepts, we come to the concept of sustainable decent work. Sustainable decent work shall constitute the proper and desired response to the required framework for sustained and in-

clusive economic development, quality of work consistent with regulatory investment regimes and economic considerations, and may contribute to the balancing of the required and inevitable flexibility with the effective, measurable protection of workers' rights. At the level of national legislation, it should allow sustainability courses aimed at removing imbalances between economy and society to be followed adequately in their own context and in a manner consistent with general standards.

The framework for sustainable work over the course of life must go beyond the usage of *ad hoc* soft measures, such as codes of conduct that are practically meaningful only for select socially responsible entities. The enforcement of the sustainable work concept has to encompass a set of economic, social and legal measures, with labor law instruments designed: to plan a person's career for employment; to create working and living conditions throughout their career, considering the diversity that occurs at certain stages of a human's life cycle; and to help them to remain in employment adjusted to their psychophysical and health capabilities. Strengthening the role of workers' workplace representatives in the reconstruction of a new quality of work that corresponds to the sustainable development goals should be seen as the basis for the social and solidary economy (SSE) for which the ILO calls in its Centenary Declaration (ILO, 2019a) and in other recently adopted flagship initiatives (ILO, 2022b). This cannot be provided without the improvement of employees' participation in workplace management. Therefore, it should be highlighted that "well-functioning social dialogue is a key component for the successful design and implementation of reforms needed to increase the competitiveness of Europe's economies and create more jobs. It balances workers' and employers' interests and contributes to both economic competitiveness and social cohesion" (Eurofound 2016b, p. 1). For this aim, without strengthening freedom of association and its consistent parts – such as collective bargaining and social dialogue – the picture of labor law will remain incomplete (Liukunnen 2021, p. 22). All labor market actors need to act and work together in striving for the achievement of sustainability goals in order to cope with diversity in national labor law systems and the different scopes of application of labor standards. It is difficult to disagree with the ILO's statement that "sustainable development is only possible with the active engagement of the world of work" (ILO 2013a). Without making the voices of workers audible and noticeable, the realization of decent work will remain ineffective.

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II. SUSTAINABILITY AND PRIVATE LAW

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II.1. THE LEGAL CONSEQUENCES OF APPARENT AUTHORITY FOR SUSTAINABLE AGENCY RELATIONSHIPS

Apparent authority and sustainability: general remarks

While sustainability is becoming an increasingly common topic in legal research, it is still a *terra incognita* issue in private law. However, private law does not operate in isolation (Akkermans 2020). Thus, there is already an emerging trend towards focusing on sustainability issues in individual private law studies. Sustainability is most often discussed in the context of property law (Robbie 2019), tort law (van Dijck 2019) and company law (Berg and Kawakami 2020). Meanwhile, no studies have yet been carried out on the topic of sustainability in the case of agency law.

Every contemporary economic system is based on the principle of the division of labor in the production and distribution of goods and services, the legal reflection of which is the institution of agency (Müller-Freienfels 2018). Civil legal relations cannot be conceived without the concept of agency, as the ability to participate in these relations through agents ensures freedom of economic activity (Smits 2007). The agency relationship is considered to be a fiduciary one, which implies the utmost trust between the parties to that relationship (Wendel 2020; Laby 2020; Carter 2020). One of the instruments of agency relationships that directly ensures sustainability is apparent authority (Jurkevičius and Pokhodun 2018). The essence of apparent authority is that, without any formal procedure, the principal is legally bound by the actions of an unauthorized agent if certain circumstances imply that the principal has contributed to the third party's justified belief that the agent has acted within the scope of the authority granted to them (Tsiura 2017). Apparent authority is one of the cases when the principal is liable by the actions of an unauthorized agent. Therefore, apparent authority *per se* is seen as a means of ensuring sustainability in agency and safeguarding the legitimate interests of the subjects involved in these legal relationships. However, in separate legal systems, different legal consequences of apparent authority are applied.

The aim of this research is to investigate whether the current rules of agency law on apparent authority provide sufficient incentives and possibilities for sustainable action, or whether these rules need to be changed. This research will focus on the analysis of the legal consequences of apparent authority in order to determine how the balance between the rights and legitimate interests of all

the entities involved in the agency relationship (i.e., the principal, the agent and third parties) is ensured.

The author has chosen the Republic of Lithuania as the primary jurisdiction for the analysis, as it is one of the few countries in the world that *expressis verbis* has the doctrine of apparent authority in its positive law. Using a comparative approach as the main method of data analysis in this chapter, the legal consequences of apparent authority are also discussed in the context of the major jurisdictions – Germany, France and the UK – as well as in *soft law* instruments.

The general legal consequences of apparent authority from the perspective of sustainability

In principle, the conditions for the application of apparent authority in all legal systems have similar legal consequences, the most important of which is that the principal may not invoke against a third party the fact that the agent did not have the necessary authority when concluding a transaction or performing other legal acts (Watts and Reynolds 2017). Such legal consequences are *per se* seen as helping to ensure sustainability in the legal relationship of representation, but an analysis of the specificities of different legal systems shows that the standard of legal protection varies from one country to another. Accordingly, national and international legal systems can be divided into three main groups.

The first group would include those systems where apparent authority is understood as an exclusive remedy for the protection of the rights of a third party. Moreover, these systems do not consider that, once the conditions of apparent authority have been established, a contract concluded by an unauthorized agent is valid (in cases when an agent has concluded a contract on behalf of the principal and has not performed any other legal acts). It is stated that, since the principal did not express their intention to enter into the contract, the legal existence of such a contract cannot be presumed, and that the third party can therefore only protect its rights infringed by means of the institution of damages. Such legal consequences are provided for in the common-law tradition (Tan 2009), and would also arise in the case of the notion of apparent authority as set out in the UNIDROIT Principles of International Commercial Contracts (2016) and the UNIDROIT Convention on Agency in the International Sale of Goods (1983), as well as in the case of agency by estoppel, as governed by the Restatement (Third) of Agency (American Law Institute 2006). It seems that France should also be included in this group. Although there is no consensus in comparative law doctrine as to the consequences of a finding of apparent authority in France (Sainter 2009), it seems likely that the validity of a contract concluded by an apparent agent should not be recognized here. This conclusion can be drawn in the light of the fact that, for a long time in that country, apparent authority has been interpreted in the context of tortious liability, which would seem to rule out the possibility of classifying the relationship between the parties as contractual. This position probably also implies that the principal cannot rely on the doctrine of apparent authority: if apparent authority is linked to civil liability, it would seem illogical for the principal to

claim it in respect of themselves. The rules in this group of countries presumably provide for the lowest standard of sustainability in representation relationships.

The second group includes those countries in which only a third party may initiate the application of apparent authority, but, unlike in the above-mentioned case of the systems of the first group, the contract between the principal and the third party is presumed to be valid. In this context, it is recognized that the principal and the third party are bound by mutual rights and obligations and that the principal may therefore bring any claim arising out of the contract against the third party. Such legal consequences of apparent authority are provided for in the Civil Code of the Netherlands (1992) and are also distinguished by Belgian case law and legal doctrine (Samoy 2009). In this group of countries, it is assumed that if the third party has not invoked apparent authority, the common legal consequences of unauthorized agency arise.

The third group would consist of those countries in which both the principal and the third party can rely on the rules of apparent authority and, given that the contract concluded by an apparent agent has the same legal effects as in the case of real authority, the parties (principal and third party) can assert the rights they have violated either by claiming specific performance or by claiming damages. This most sustainable concept is only reflected in soft law instruments – i.e. the *Draft Common Frame of Reference* (von Bar and Clive 2009), its predecessor, the *Principles of European Contract Law* (Lando *et al.* 2002), the Restatement (Third) of Agency (American Law Institute 2006) (specifically in the case of apparent authority, but not in the case of agency by estoppel), and, presumably, in the European Contract Code (2003). Doubts arise in Germany, where, in the case of true apparent authority – *Anscheinsvollmacht* – it is argued that, although it is a legal fiction, the legal consequences arising from it are real (Busch and MacGregor 2009). In this context, it should be assumed that, in the case of apparent authority, the contract concluded between the parties is valid and they can claim against each other not only for damages but also for the performance of the contract.

The question is which group Lithuania should be placed in. As the drafters of the Civil Code of the Republic of Lithuania (2000) were probably inspired by the notions of apparent authority in the Civil Code of the Netherlands and the UNIDROIT Convention on Agency in the International Sale of Goods (Selelionyte-Drukteinienė, Jurkevičius and Kadner Graziano 2013), in Lithuania only a third party should be entitled to invoke the rules of apparent authority. However, a systematic analysis of the provisions of the Civil Code of the Republic of Lithuania suggests that the principal also has the possibility to apply the doctrine of apparent authority. There is also no doubt that Lithuania, like the legal systems in the second and third groups, recognizes the validity of a transaction entered into by an unauthorized agent on behalf of the principal with a third party.

To sum up, those legal systems which consider apparent authority to be equivalent to real representation, and which make it possible to apply it to both the principal and a third party, in essence provide for the most sustainable rules, guaranteeing a balance between the interests of the parties involved in these complex relations. Lithuania, as mentioned above, could also be included in this group of countries and is therefore considered to have the highest standard of sustainability in agency law. This chapter further analyzes which specific legal consequences of apparent authority are considered to be the most sustainable and effective in terms of the interests of the individual subjects.

The legal consequences of apparent authority for third parties

In all legal systems that recognize apparent authority, third parties can rely on it to defend their rights in cases of unauthorized agency. The implementation of this doctrine depends exclusively on the will of the third party, i.e., they have the right but not the obligation to invoke apparent authority (International Institute for the Unification of Private Law 1983).

As mentioned above, the third party may, upon proving the conditions for the application of apparent authority, claim either performance of the obligation in kind (specific performance) or compensation for damages. Moreover, depending on the particularities of the legal system in question, they may be given the right to choose the specific remedy to be applied (Busch 2005). There is no doubt that, from a sustainability perspective, the interests of third parties are best protected in those legal systems that allow for several different remedies.

It should be noted that, in the common-law tradition, the main remedy for a creditor's violation of their rights is damages. This is also applicable in the case of apparent authority. However, even here, it remains *de facto* possible, in certain cases, to claim specific performance. One such case is where the object of the obligation is the transfer of a thing characterized by individual features (for example, the obligation to transfer ownership of a thing under a contract of sale and purchase). Another such case is where the obligation is monetary in nature.

In contrast, the civil law system gives priority to performance in kind (Beale 2009). An analysis of specific cases in foreign courts concerning apparent authority shows that damages are usually claimed, except where the obligation is pecuniary. This trend may be explained by the fact that this remedy is often not effective, particularly in the case of obligations to perform or refrain from performing certain acts.

In Lithuania, it is likely that the third party in the case of apparent authority also has the right to claim both performance in kind and damages. In Lithuania, as in many other countries in the civil law tradition, performance in kind is the primary remedy for breach of rights. This conclusion may be drawn on the basis of Article 6.216 of the Civil Code of the Republic of Lithuania (2000), which provides that if the debtor fails to perform a non-monetary contractual obligation in kind within the prescribed time limit or if the creditor is not entitled to demand performance of the obligation in kind, then the creditor may seek other remedies. The priority of performance in kind in the case of apparent authority is presumably also enshrined in the provisions of the Civil Code of the Republic of Lithuania (2000) governing apparent authority. The wording of Article 2.133(2) and (9) – "the transaction is binding on the principal" and "the transactions are binding on the principal" – implies that a transaction entered into in the context of apparent authority is enforceable. The Civil Code of the Republic of Lithuania (2000) does not expressly provide for the possibility of claiming damages in the case of apparent authority, but it is to be assumed that, in cases where it is not possible to perform the obligation in kind or in the context of a particular situation where it is not reasonable to do so, the institution of damages could certainly be applied. An analysis of the Lithuanian case law shows that in all of the cases in which the application of apparent authority has been at issue (both where the problem has been directly identified and where

the facts lead to such a conclusion), claims for the performance of pecuniary obligations in kind have been made (Judgment of the Supreme Court of Lithuania of 17 March 2021, civil case no. e3K-3-56-684/2021; Judgment of the Supreme Court of Lithuania of 10 March 2021, civil case no. e3K-3-51-313/2021; Judgment of the Supreme Court of Lithuania of 5 February 2021, civil case no. e3K-3-11-701/2021; Judgment of the Supreme Court of Lithuania of 17 December 2019, civil case no. e3K-3-381-684/2019; Judgment of the Supreme Court of Lithuania of 24 April 2019, civil case no. e3K-3-151-313/2019; Judgment of the Supreme Court of Lithuania of 10 January 2019, civil case no. e3K-3-75-701/2019).

Given that the rights and obligations between the principal and the third party derive from the contract, the third party is normally compensated for positive damages. Since contract law protects expectation interest (Norkūnas and Drukteinienė 2013), the amount of the third party's damages should be related to the benefit that would have been obtained if the principal had performed the contract properly. An exception to this rule is Germany, where the doctrine of *culpa in contrahendo* is used as a basis for true apparent authority (*Ancheinsvollmacht*). Under this doctrine, the injured third party is indemnified for negative damages. In pre-contractual relations, the principal has a duty to ensure that its agents act only within the limits of authority conferred. When this obligation is not fulfilled, the third party's reliance interest is protected, i.e., the aim is to put the third party back in the same position as it would have been in the absence of the breach of the pre-contractual duties (Schmidt-Kessel and Baide 2009).

It seems that, as in other legal systems, in Lithuania the third party claim for damages is likely to be based on certainty interest, i.e., positive damages.

The legal doctrine does not address the nature of the damages that should be awarded when the agent does not enter into transactions but performs other legal acts that cause damage to the third party. Although in the present case there is no contract as a result of the agent's actions, it is considered that the principle of good faith would require that the third party be compensated for positive damages.

The conclusion could be made that from the perspective of a third party, sustainability in the case of the apparent author is ensured most definitively when third parties have the right to choose which remedy is the most effective in the light of the particular factual circumstances of the case, i.e., compensation for the damages suffered or the performance of the obligation in kind (specific performance).

The influence of apparent authority on the principal

Many jurisdictions consider whether the application of apparent authority can be initiated only by the third party or also by the principal, and whether, if it is established that the agent has acted under the terms of apparent authority, the principal has the right to assert appropriate claims against the third party. As mentioned above, in the common-law tradition where the institution of apparent authority is exclusively intended to protect the interests of a third party, and in the UNIDROIT Principles of International Commercial Contracts (2016) which express this position, the principal cannot rely on this institution, and if the third party successfully proves the conditions for the

application of the conditions for apparent authority, the principal will only acquire duties and no rights in relation to the third party (Busch and MacGregor 2009).

However, it is argued that the principal can exercise their rights by confirming the acts performed by the unauthorized agent (Bonell 2011). In Belgium (Samoy 2009) and the Netherlands, the third party has the right, but not the obligation, to assert its interests on the basis of apparent authority, but if this right is applied, the contract between the principal and the third party is deemed to be valid, with the result that both parties acquire both rights and obligations in relation to each other. In countries which take this view (e. g. the Netherlands), a different view on the legal consequences of unauthorized agency is also expressed. It is argued that even a transaction which is concluded in excess of or without the rights conferred on the agent is valid, the third party is not entitled to repudiate it, and the principal is not obliged to initiate apparent authority or to ratify the actions of the unauthorized agent (Busch and MacGregor 2009).

As mentioned above, the most sustainable possibilities for the use of apparent authority are provided for in the *Principles of European Contract Law* (Lando *et al.* 2002), the Restatement (Third) of Agency (American Law Institute 2006) and the European Contract Code (2003), under which both the third party and the principal may rely on apparent authority. The latter position seems to be the most consistent with the general principles of civil law relations. If the third party, when negotiating with the agent, had an interest in the conclusion of the transaction in question, it should not be allowed to change its position subsequently on the basis of the absence of the agent's relevant authority (Busch and MacGregor, 2007). Apparent authority is a remedy for the violation of the third party's rights, but not a means of fraudulently avoiding its obligations towards the principal. In other words, if the principal justifies the conditions for the application of apparent authority, the third party's arguments concerning the scope of the authority conferred on the agent should not be considered. It should also be noted that allowing a third party to repudiate an apparent transaction on the basis of unrelated circumstances would unduly place them in a more favorable position than a person who deals directly with the other party, rather than through their agent. Given that agency, as an indirect means of exercising civil rights, produces essentially the same legal effects as when the subject of civil rights acts themselves, there should be no differentiation in the legal position of persons on the basis of whether they are negotiating with agents or directly with their counterparties.

It is true that there are contrary views in legal doctrine. It is argued that if the principal was entitled to rely on the doctrine of apparent authority, the third party would lose the safeguards which it would have enjoyed if the principal were obliged to approve the acts of an unauthorized agent in order to have the normal legal consequences of agency (Reynolds 2009). It is noted that this would be particularly relevant in cases of fraudulent ratification, although it is not disclosed how the principal's bad faith in ratifying the acts of the *falsus procurator* (unauthorized agent), which the third party perceived to be authorized, might manifest itself.

It is important to note that, where damages are claimed, such a remedy is not to be regarded as a liability of the principal to the third party. Damages are a form of civil liability, and it would therefore be accurate to argue that a claim of this nature by a third party implies that the third party is liable. Although this view has now been abandoned, it would not be wrong to say that the doctrine of apparent authority gives rise to the liability of the principal where the claim is for dam-

ages rather than for specific performance. According to this position, it is also important to determine what type of liability, whether contractual or in tort, is then applied by the principal. This would depend essentially on the prevailing notion of apparent authority in the legal system concerned. In those jurisdictions where the legal consequences arising from apparent authority are no different from those arising in the ordinary course of the agency relationship, the principal's liability to a third party is presumed to be contractual in nature. However, where the validity of the contract concluded between the third party and the principal is not accepted, the principal should be liable under the rules of tort liability.

However, even in legal systems which do not consider the contract between the third party and the principal to be valid, the third party is usually indemnified for positive damages, which implies that the liability of the principal is not based on the rules of tort liability, but on the rules of contractual liability. In view of the above, it is suggested that, where a claim for damages is made, the liability of the principal should not be interpreted in the context of a particular type of civil liability, but should be qualified as a *sui generis remedy* for the violation of the third party's rights in the context of a legal relationship of non-authorized agency.

Although the analysis of Lithuanian case law did not reveal any cases in which the principal invoked the doctrine of apparent authority, it should be assumed that the Civil Code of the Republic of Lithuania (2000) allows for its application at the initiative of the principal. As mentioned above, in the Lithuanian civil law system, a transaction entered into by an agent in excess of their authority is voidable and, therefore, remains valid and has legal consequences for the parties as long as the principal does not bring a claim to that effect before the court. For this reason, it would seem that the need for the application of apparent authority would only arise if the principal were to apply to the court for enforcement of the transaction concluded through the agent, and the third party were to rely, as a basis for its defense, on the general legal consequences of unauthorized agency, as provided for in Articles 2.133 and 2.136 of the Lithuanian Civil Code. In such a case, the principal should probably not be precluded from relying on the rules of apparent authority to justify the validity of the transaction. If, at the time of the conclusion of the transaction, the will of the third party was not distorted and there are no other circumstances which could invalidate the transaction, the third party's claim that the transaction should be declared invalid on the sole formal ground that the representative acted under unauthorized representation should be rejected. The opposite position would constitute a breach of the principle of good faith and would justify an abuse of the third party's rights. The use of apparent authority at the initiative of the principal also seems to be implicitly confirmed by Lithuanian case law. The Supreme Court has noted that it is for the party relying on these circumstances to prove that there were reasonable grounds to believe that the transaction was concluded with an authorized agent (Judgment of the Supreme Court of Lithuania of 17 March 2021, civil case no. e3K-3-56-684/2021). Thus, the possibility of the application of apparent authority to the legal relationship of representation is not limited to any one party. Although the third party is usually the main party interested in this possibility, it is likely that a claim brought by the principal or the agent for the establishment of the fact of apparent authority would also be considered. On the other hand, it should be considered whether the principal's application to the court (as well as the fact that the principal had already, before the commencement of the proceedings before the court, requested the third party to perform the contract) could not be

considered as ratification of the actions of an unauthorized agent, which in principle produces the same legal effects as apparent authority.

In conclusion, the most sustainable possibilities for the application of apparent authority are those where not only the third party, but also the principal can invoke this institution. Where damages are claimed in the context of apparent authority, such a remedy should not be seen in the light of the general rules on the civil liability of the principal to a third party. Apparent authority is a specific remedy for the protection of the rights violated and, therefore, where damages are claimed, the liability of the principal should be qualified as a sui generis remedy for the protection of the rights violated by the third party.

The rights and obligations of the agent in the case of apparent authority

Since the application of apparent authority renders the principal liable for the acts of the unauthorized agent, there is no direct legal relationship between the agent and the third party, i.e., they are deemed not to be bound by any contractual rights and obligations. However, if the third party in good faith is unable to prove apparent authority, they may assert their rights by bringing an action for damages against the unauthorized agent (*falsus procurator*). Some jurisdictions provide for the possibility to rely on these defenses as alternatives; therefore, if the factual circumstances meet the conditions of apparent authority, the third party may choose between applying this doctrine or claiming damages from the *falsus procurator*. The possibility of alternative remedies from the perspective of third parties as victims seems to be the most consistent with the concept of sustainability in agency law.

In contrast to the relationship between the agent and the third party, the application of apparent authority is of considerable importance in the internal legal relationship between the agent and the principal. The establishment of apparent authority means in all cases that the agent did not have authority, or exceeded that which they did have, when concluding the transaction on behalf of the principal, which gives rise to a claim for damages against the principal.

As the doctrine of apparent authority can be invoked only when a person acts without or in excess of their authority, it follows that, in all cases where apparent authority is established, the acts of the agent may be presumed to be unlawful. Where an agent exceeds their authority, they are in breach of the obligations imposed in the internal agency relationship and, in the case of a wholly unauthorized person, their actions are in breach of the general duty of care, i.e., in breach of the requirement that one may act on behalf of another person only with the requisite authority. Consequently, the principal should not have to prove the unlawfulness of the agent's actions in addition to the agent's claim for damages. However, the presumption of unlawfulness, like any other presumption in civil law, can be rebutted. The agent may prove that they have acted in accordance with the obligations laid down in the contract, the law or any other basis governing the internal agency relationship.

It is important to note that the liability of the agent towards the principal should not be strict, i.e., without fault. Given that in most legal systems the presumption of fault of the debtor applies in

the case of civil liability, it is incumbent on the agent to rebut their own fault in order to avoid its application. The agent could do so by proving that they did not know and could not have known, in the circumstances, that they did not have the requisite authority. Therefore, if an agent enters into transactions or performs other legal acts which they believe in good faith that they are entitled to perform, such conduct should not be regarded as supporting the fault condition (Busch 2002).

The specifics of the determination of the fault of an agent depend on the particular situation of the non-authorized agency. It seems that, where the agent acts without any authority, their fault could be excluded only in exceptional cases, such as in situations of *negatiorum gestio*. However, in cases of excess of authority (which would include situations where the agent abuses the authority conferred on them or where there is a conflict of interest between the agent and the principal), account should be taken of the specific factual circumstances on the basis of which the agent's fault may be assessed. If the agent exceeds the authority conferred on them, the content of the rights conferred on the agent should be examined in the first place. In determining the limits of authority, as mentioned above, it is necessary to analyze such factors as the form in which the rights were conferred on the agent (oral or written), the degree of definiteness of the rights, the way in which their content would be assessed by a reasonable person in a similar situation, and so on. Where the doctrine of apparent authority is applied in relation to the termination of an agent's authority, it must be ascertained whether the agent was objectively aware of the specific circumstances to which the termination of their rights is attributed (for example, whether they received notice from the principal that authority was being revoked, etc.). If the finding of unauthorized agency is the result of the invalidity of a transaction in which the agent has been granted rights, it is important to establish the grounds for such invalidity. If these legal consequences arise from circumstances for which the agent is not held liable (e.g., the principal's mistake), then the agent should not be liable to the principal. Conversely, if the reasons for the invalidity of the transaction are in some way attributable to the agent (e.g., fraud, violence, economic threat, etc.), then the principal is entitled to claim compensation for damages.

As a general rule, the amount of the damages to be paid by the agent to the principal shall be equal to the loss resulting from the settlement of the third party's claim due to the agent's unauthorized acts. In other words, if the conditions for the liability of the agent are proven, the principal may claim from the agent the loss suffered by the third party in reliance on the agent's authority. Indeed, the principal may also claim other damages which are the result of the unauthorized acts of the agent.

So far, there has been little discussion in the doctrine as to whether an agent may apply to a court for recognition of the fact of apparent authority. It is considered that the agent may have an interest in establishing apparent authority in order to avoid the negative legal consequences of unauthorized agency. However, as long as the principal has not made a claim for damages against the agent, the agent does not normally have the intention of initiating proceedings for the establishment of apparent authority themselves. The agent will be able to make arguments in this respect in the course of a specific dispute with the principal. On the other hand, in those jurisdictions where it is accepted that, in a situation of apparent authority, the third party cannot bring a claim *falsus procurator*, it may be in the latter's interest to use apparent authority, as it would enable them to avoid, at least for a certain period of time, direct liability both towards the third party and towards the principal.

The question is whether it is possible that, after the court has established the fact of apparent authority, the agent will later have the possibility, in a separate dispute with the principal, to deny apparent authority by claiming, for example, that a relationship of constructive agency has been established. As mentioned above, the basic premise for the application of the deemed agency is that the agent is acting without authority or in excess of authority. It is therefore only when a case of unauthorized agency is established that the possibility of the application of apparent authority can be examined. Consequently, where a final judgment has established the existence of apparent authority, there is no legal or factual basis for re-examining and reassessing the same circumstances. In such a case, the agent could only defend themselves against the principal by arguing that the conditions for their liability to the principal do not exist.

The agent could also challenge the conditions of apparent authority in the course of the dispute between the principal and the third party. Since the resolution of the dispute may affect their rights and obligations (in the event that the liability of the principal under apparent authority is established, it is likely that the latter will seek to recover damages from the agent by way of recourse), the agent should be brought in as a third party by the parties to the proceedings (i.e., the principal or the third party) or on the initiative of the court. By acquiring the status of a party to the proceedings, the agent will be able to state their arguments on the substance of the dispute between the agent and the principal.

It is also necessary to analyze on which side of the proceedings the agent should intervene – whether as a third party or as a principal, taking into account the fact that the agent may not act in the proceedings against the interests of the party on whose side they are acting. On the one hand, the interests of the agent and those of the principal are fundamentally opposed in situations of unauthorized agency (the principal seeks to prove that the agent has exceeded the authority conferred on them without any justification for doing so, and that it is therefore the agent who is liable to the third party, while the agent, on the other hand, seeks to prove that they acted in a manner which did not misrepresent the intention of the principal). On the other hand, the positions of the third party and the agent may also be at odds, where the third party relies on apparent authority and the agent seeks to prove the circumstances of apparent authority. Since the establishment of apparent authority implies a presumption of wrongful conduct on the part of the agent, it is not in the agent's interest to have the third party prove the conditions for its application. Although that presumption may be rebutted, it is important for the agent to establish, already at the time of the dispute between the third party and the principal, that there is a relationship of constructive agency rather than a relationship of apparent authority, and thus to avoid any subsequent claims by the principal. The fact that the agent will try to prove that their rights were implied on the basis of specific facts should not be prejudicial to the interests of the third party, since the principal will be held liable if both implied and apparent authority are established. In some cases, the third party may even benefit more from the establishment of implied agency, since, as mentioned above, the legal consequences of implied agency are not identical to those of actual (express or implied) agency in all legal systems. It is therefore noted that, in a dispute with the principal, the agent and the third party are in the same boat, since, in the event of a problem as to the content of the authority, both parties are primarily concerned with establishing that the agent acted in accordance with the authority conferred on them, and the nature of the authority, whether it is apparent or implied, is a sec-

ondary issue (Stoljar 1961). In this context, it is considered that the agent should generally intervene on the side of the third party. Consequently, if, in the course of the dispute between the principal and the third party, the agent succeeds in proving the existence of implied agency, it would follow that their conduct cannot be regarded as unauthorized agency. Since one of the conditions for the liability of the agent, i.e., unlawfulness, cannot be proven, the claim for damages by the principal against the agent should be rejected as unfounded.

In conclusion, if the particular facts of the case meet the conditions of apparent authority, the third party should have the sustainable choice of applying this doctrine or claiming damages from the *falsus procurator*. The establishment of apparent authority should only imply the unlawfulness of the unauthorized agent, but should not be presumed to be their fault. Although the agent does not normally have an interest in bringing proceedings in respect of authority, it should presumably be possible for them to do so, which would also imply a sustainability standard.

Protecting the interests of fourth parties in the event of apparent authority

The legal consequences of apparent authority, as well as of agency without authority in general, are not only of importance for direct participants in the agency relationship, but may also be of importance for those persons who are in one way or another involved in that relationship. Although the debate on the protection of the interests of fourth parties is still in its infancy in some jurisdictions, the need for the legal protection of fourth parties has been emphasized in those jurisdictions whose courts have already dealt with real problems relating to the violation of the rights of these subjects.

These problems arise mainly when an unauthorized agent enters into a transaction, the objective of which is to give something, and the principal (either directly or through an agent) enters into another similar transaction for the same objective. Where the facts allow the rules of apparent authority to be invoked, the third party to the first transaction may claim performance in kind, but the party to the second transaction (the fourth party) may also reasonably make such a claim. The issue is how the interests of these parties acting in good faith should be protected. In cases where the property has not yet been actually transferred to either person, priority should be given to the person who concluded the transaction earlier. The other party to the transaction could then assert their violated rights by claiming damages. This remedy is also applicable in cases where one of the parties (either a third or a fourth person) has already been effectively transferred. Since that person is a bona fide purchaser, the property cannot be taken from them, and, therefore, the other creditor, who cannot exercise their right to demand performance in kind, can only protect their rights by means of the institute of damages.

It should be noted that fourth parties are not only protected from the adverse consequences of apparent authority, but may also themselves rely on the doctrine as a remedy for their own prejudice (Busch and MacGregor 2007). It is submitted that where persons indirectly concerned in the legal relationship of agency had a reasonable belief that the contract concluded between the principal

and a third party was valid or that other acts carried out by the agent on behalf of the principal had real legal consequences, such a belief must be protected.

A classic example in this context is the US Supreme Court case of *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp* (1982). The essence of that dispute was that the legal relationship between the principal (the American Society of Mechanical Engineers), acting through its unauthorized agent, and the third party (McDonnell and Miller) affected the interests of a fourth party (Hydrolevel Corp.). The American Society of Mechanical Engineers is a not-for-profit organization active in the field of engineering. Since it had adopted a technical regulation on the manufacture, design and safety control of heating equipment and pressure boilers, it was approached by McDonnell and Miller for clarification of the specific provisions of that technical document. On that basis, McDonnell and Miller sought to justify that a company operating in the same market segment, Hydrolevel Corp., did not comply with the standards set. McDonnell and Miller received the requested reply from the American Society of Mechanical Engineers, signed by the president of one of its branches. The courts held that, although this person was not authorized to issue such findings, the facts were such that McDonnell and Miller could reasonably have believed that the reply to the enquiry was signed by an authorized person. In view of the above, it was found that the agent of the American Society of Mechanical Engineers acted under the conditions of a *quasi agency*. As a result of this technical finding, which was later found to be unsubstantiated, Hydrolevel Corp. suffered substantial losses which ultimately led to its bankruptcy. As a result, an action for $6 million was brought against the American Society of Mechanical Engineers, Inc., which was upheld by the courts of all instances. It should be noted that the American Society of Mechanical Engineers, as the principal in the context of the legal relationship with McDonnell and Miller, did not and could not by its conduct have actually caused Hydrolevel Corp. to believe that the agent had the requisite authority, since the opinion was addressed to McDonnell and Miller and not to that company. Moreover, the official report did not contain any reference to Hydrolevel Corp. However, the fact that the fourth party's loss was caused by the actions of a third party acting in good faith and as a result of the principal's assertion of the rights conferred on the agent is sufficient to provide a basis for the fourth party to invoke the doctrine of apparent authority.

Thus, since fourth parties may also be involved in the agency relationship, the principle of sustainability requires that they not only be protected from the negative consequences of apparent authority, but that they themselves may also rely on this doctrine as a remedy for the violation of their rights.

Conclusions

Establishing apparent authority usually leads to the same legal consequences as if the agent had real (express or implied) authority. Those legal systems which make it possible to apply apparent authority to both the principal and a third party in essence provide for the most sustainable rules, guaranteeing a balance between the interests of the parties involved in these complex relations.

In some legal systems, the content of apparent authority is considered to be limited to the principal's obligation to indemnify the third party for the (usually positive) loss suffered. It is sug-

gested that, in the context of sustainability, the application of the doctrine of apparent authority should cover both the compensation of damages and the performance of the obligation in kind (specific performance). The third party should have a choice as to the remedy to be applied in the case of apparent authority. If the particular facts of the case meet the conditions of apparent authority, the third party should also have the sustainable choice of applying this doctrine or claiming damages from the *falsus procurator*.

Not only the third party, but also the principal must have the right to claim the application of apparent authority. Such a right should also be provided for fourth parties who are involved in the agency relationship.

Apparent authority is a specific remedy for the protection of violated rights. Therefore, where damages are claimed, the liability of the principal should be qualified as a *sui generis* remedy for the protection of the rights violated by the third party.

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II.2. THE CHANGE OF COMMERCIAL CONTRACTUAL RELATIONS INFLUENCED BY SUSTAINABILITY CLAUSES

Sustainability goals – the reality of the modern business world

The Cambridge Dictionary (n.d.) defines *sustainability* as "the quality of being able to continue over a period of time." Doubtless, sustainability is now often understood in a slightly different sense. One of the core documents defining the sustainability goals of the United Nations describes *sustainable development* as that which "meets the needs of the present without compromising the ability of future generations to meet their own needs" (World Commission on Environment and Development 1987, p. 2). Mostly, it is associated with the activities of various stakeholders intended to reach the pursued environmental and social objectives. However, in certain cases it even goes beyond that. For the purposes of this chapter, the topic of sustainability clauses in business contracts will be analyzed and explained in close connection with corporate social responsibility (CSR). These definitions are not used interchangeably; the proximity and importance of each one of them to the other is noted. Corporate social responsibility (CSR) is "(…) a business practice that considers the impact a company has on society, employees, and other stakeholders. A CSR strategy is implemented by an organization to: minimize harm, practice fair business, be responsible along a global supply chain, exercise philanthropy and create a self-oriented human resource management system" (Green Business Bureau 2022).

For the sake of clarity and the precision of terminology, there is a need to define the term *commercial* used in this chapter. The term *commercial* should be explained, as it can have different meanings in various jurisdictions. The term *commerce* can be defined as activity that includes all forms of the purchase and sale of goods and services (Butterfield 2003, p. 340). The legal doctrine of Lithuania defines commercial activity as a permanent, independent, i.e., personal, activity that is developed at one's own risk in order to make a profit, and that is related to buying and selling things or providing services to other persons for remuneration (Mikelėnas *et al.* 2001, p. 23). In this article, commercial contracts shall be defined as contracts concluded between businesspeople (business-to-

business or B2B contracts). However, it cannot be doubted that sustainability goals are included not only in commercial contracts, but also in other types of agreements. Nevertheless, they are beyond the scope of this chapter.

Scholars point out that "currently, increasing attention is being paid to the issues of sustainability and social responsibility. The measure of a company's success is not only its profitability, but rather its overall evaluation relies on quantitative and qualitative characteristics, increasingly reflecting the company's interaction with its surroundings" (Myšková and Hájek 2018, p. 1). Furthermore, as the pursuit of sustainability may conflict with the pursuit of profit, the general perception and consciousness of business society must change. This tendency has an obvious impact on commercial contracts and their execution.

On the other hand, most businesspeople are used to clear and specific clauses in their contracts. However, contractual clauses defining parties' obligations in the area of sustainability (sustainability contract clauses) are usually not clear and precise. Moreover, the content of such obligations differs from the other commercial and legal clauses in the contract, leading to confusion and uncertainty regarding full compliance with such sustainability obligations. Sustainability goals are pursued not only by the policies of governments and supranational institutions, but also by the conduct of businesses. Sustainability contractual clauses may be included into commercial contracts even in cases when their inclusion is not mandatory under applicable laws and regulations. Such clauses are relatively new to commercial contractual practices, and contract parties deal with great uncertainty related to them.

Contractual regulation is mainly influenced by three major contract law theories: classical, relational, and social contract law doctrines. The ground rules of contract law were established by the traditional (classical) contract law instruments – starting with the norms establishing freedom of contract and *pacta sunt servanda*, as well as the privity of the contract and clear consequences in case of non-compliance. Relational and social contract law theories reflect modern tendencies and changes, considering the external factors of the contractual relationship and, going even further, requesting the consideration of the interests of the society, even if the contract is purely private and commercial. This chapter reflects some of the aspects of sustainability contractual obligations in the view of each of these contract law theories, explaining how sustainability contract clauses deviate from conventional classical contract law instruments and, in other cases, how sustainability objectives pursued by businesses reflect the relational and social contract law theories as an example of their influence on modern contract law. It is expected that such an explanation with a theoretical background will help to understand how sustainability contract clauses should be applied.

Thus, the aim of this chapter is to reflect on the peculiarities of sustainability contract clauses, showing the difficulties in their application induced by deviation from classical contract law rules and suggesting probable solutions via the consideration of how they reflect relational and social contract law doctrines.

The commercial contract as a tool to aim for sustainable trade

Sustainability has become a goal for most national governments and supranational institutions. The European Union is one of the best examples of this, giving attention to sustainability as an objective of its policy. The consolidated version of the Treaty on the European Union (2008, Article 3(3)) states that "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced."

Furthermore, Article 37 of Charter of Fundamental Rights of European Union (2012) states that "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development." It is declared that the sustainability policy of European Union institutions aims to create a business environment, ensuring not only growth, job creation, and innovation but also supporting the shift to a climate-neutral economy and improving the energy efficiency of products using eco-design regulation (European Commission, n.d.). In this way, the execution of commercial activity following sustainability objectives is becoming an everyday task for businesses in the European Union. Some businesspeople introduce sustainability goals into their strategic plans and publicly announce their sustainability programs, inviting or even demanding current and future counterparties to seek the same goals. Others move forward and include such obligations into their commercial contracts.

Various policies applied within a country or even internationally embody these goals through mandatory legislation and control over their implementation. However, such goals can not only sometimes be hard to achieve due to the shortcomings of legislation and its inability to control implementation, but the restricted scope of mandatory regulation can even limit the possibilities of a particular policy. In some cases, voluntary and profit-driven initiatives can produce the results which were intended by policy makers. The introduction of such goals into commercial contracts can be called "(…) a form of transnational private regulation (TPR) that complements both public-domestic and international regulations. These are voluntary standards implemented along global chains with multiple instruments, including international commercial contracts. Supply chains, involving many thousands of enterprises, operate across multiple jurisdictions, where public regulations can significantly differ. Hence private regulatory regimes have trans-border scope and include multiple jurisdictions, harmonizing (often with stricter standards) public domestic regimes. Governing a common standard implies not only defining its content but also taking actions related to non-compliance, including enforcement and sanctioning. Differences in public regulation can be even more substantial

in relation to monitoring compliance where national practices may significantly diverge" (Cafaggi 2016, pp. 219–220). Such tendencies may seem highly influential, and have great potential to affect the market by shifting the mindset toward setting sustainability goals at every stage of the business process.

Despite this, as pointed out by K. P. Mitkidis, there is a significant contrast between the legitimacy of national and international law, both of which are derived from the state's authority vested in it by the governed subjects. Regulation at the transnational level lacks such authority, and the legitimacy of transnational corporate social responsibility regulation is uncertain. As a result, this leads to its lower effectiveness, which is undermined further by the lack of verifiable reporting and monitoring systems. The results of the implementation of corporate social responsibility are most often monitored through audits, which are conducted without any connection to public authorities (Mitkidis 2014, p. 7). This means that the results of the pursuit of sustainability stay within the particular business relationship and depend on the free will of the contract parties. However, such privacy does not mean that the significance of sustainability tendencies and their influence on commercial contracts should be ignored. Furthermore, one of the most significant challenges is the conflict between pursuing profit and implementing sustainability goals. In most cases, such implementation is a costly process. As will be discussed later, the frequent use of sustainability contractual clauses in commercial transactions and the actual monitoring of compliance will induce businesspeople to follow such agreed rules. This will lead to the improvement of the status of sustainability even without public data.

Revealing the weak aspects of the implementation of sustainability allows us to assess its actual state and understand the intensity of change. The author of this article unquestionably agrees with C. Poncibo (2016, p. 353), that "The objectives of sustainability policy, especially with respect to the environment, impliedly and expressly enter the domain of contract law." This idea can be supported by the fact that sustainability contract clauses "(…) are not a sporadic but widespread phenomenon. (…) The widespread use of sustainability contractual clauses means that certain best practice has or is developing in this respect. Thus, it is easier to build upon an already started trend than to impose new obligations upon companies" (Mitkidis 2014, pp. 10–11). As will be demonstrated later in the article, the more frequent the inclusion of sustainability obligations in commercial contracts, the more impact sustainability will have on contract regulation through norms such as implied contract terms or trade customs and standard practices.

Classical, relational and social contract law theories and sustainability

Sustainability clauses as deviations from classical contract law rules

Current contract law is still strongly defined by the ideas of classical contract law theory, the main tenets of which are party autonomy and contract freedom, as well *pacta sunt servanda*. P. S. Atiyah (1995) points out that, according to the classical (also called traditional or liberal) concept in which

the general principles of contract law are identified with the foundations of the market economy, the contractual relations of individuals were based on several essential rules: the parties in contractual relations were guided by the "at arm's length" rule, stating that each party relies on its skill and judgment and that neither party owes any fiduciary duty to the other.

During negotiations, the parties negotiated on the price and terms of the transaction, offers were submitted, accepted, rejected, or counteroffers were made, and neither party had an obligation to disclose information to the other party voluntarily, nor did either party have the right to trust the other party, except in extremely narrow exceptions. On the contrary, the author points out that each party had the right to inquire about and evaluate the fact of non-disclosure of information, analyze the situation, evaluate the object of the contract, the general market situation, future opportunities, and trust the sources of information. It had the right to negotiate, consult with experts, and acquire information for a fee from third parties; therefore, if the party did not do this, it was recognized that this party acted at its own risk (Beale, Bishop and Furmston 2006, pp. 47–48). The sanctity of the contract – the requirement to strictly comply with the provisions of concluded contracts – is also considered a fundamental idea of classical contract law (Atiyah 1995, p. 8). Such strong separation of the parties to the contract, clarity of obligations and strict compliance with them, as well strict liability for violations may be not so easy to implement in the case of sustainability obligations in business contracts, especially in supply chain cases, where there are multiple participants in the chain.

The language defining the sustainability obligation in commercial contracts may be relatively different in comparison with commonly used clear and precise contractual terminology. This is determined by the unclear definition of sustainability as a concept, as well as the vague national, international or supranational regulation of sustainability policy. As K. P. Mitkidis points out, the conventional economic rationale of businesspeople determines actions towards avoiding the costs and risks of litigation by formulating contractual terms that are as precise as possible, but there are reasons why companies choose to adopt vague contractual terms. Such reasons may vary significantly – from low negotiation power, to a weak corporate social responsibility strategy, to the clear objective of retaining the flexibility of the contract. As it is hard to control and measure compliance, businesspeople define the obligations of the counterparty in vague terms in order to communicate values to the partner rather than to future judges in the potential dispute (Mitkidis 2014, pp. 15–17). In this respect, this tendency greatly differs from the ideas and common practices under classical contract law doctrine, which is oriented towards clear obligations and negative consequences in the event of failure to comply. According to classical contract law theory, the duty of a judge is to ensure that the common will of the parties which existed at the moment of the conclusion of the contract is established and legally protected. For this reason, businesspeople are encouraged to use terminology that is as precise as possible.

Despite the ambiguity of definitions, the express inclusion of sustainability obligations in the commercial contract is a more efficient way to ensure compliance with them. In the words of K. P. Mitkidis (2014, p. 25), "Such formal and conscious acceptance of the terms as a part of a business deal is likely to increase the internalization of the values and goals by the supplier. (…) A signature may seem unimportant if the incorporated standards are drafted in vague terms; but it makes a clear, almost symbolic demarcation of what is considered a part of the deal and, therefore,

ethically binding." For this reason, businesses aiming for the greater efficiency of sustainability contractual obligations should define clear goals to be achieved by the contract parties, set negative consequences in the event of a breach, and choose contract language that is as precise as possible. In this way, sustainability contractual clauses would be more legally protected by the instruments inherent to classical contract law – for example, contractual penalties.

The specificity of sustainability contractual obligations and their differences from the provisions of classical contract law are particularly reflected when assessing the beneficiaries of such obligations and the consequences of breaching such sustainability contractual obligations. They will be discussed by analyzing relational and social contract law theories. Despite this, it may generally be concluded that sustainability contractual obligations are more akin to exceptions in the view of classical contract law doctrine – the introduction of sustainability goals into commercial contracts shows deviation from the traditional point of view. Thus, such differences may imply difficulties in applying legal instruments attributed to classical contract law doctrine (for example, general rules of contractual liability).

Achieving the sustainability goals using the methods of relational contract law

Relational contract law theory is based on the general idea that a contractual relationship is determined not only by the terms of the concluded contract, but also by a very broad spectrum of circumstances and aspects, which may even be external to that contractual relationship. Moreover, according to J. M. Feinman, the essential statement of the relational contract law doctrine is the idea that the basis of the contract is the cooperation and cooperation-based behavior of its parties: contracts are characterized by intense mutual relations formed during the contract's validity. The content of the contract's provisions is determined according to the relational method, which means that obligations arise not only based on the express terms of the contract, but also because of many external circumstances. Such ideas differ from the characteristics of classical contract law, which states that parties are not bound by unnegotiated obligations, and the neoclassical idea that self-interest is limited only by trade customs and legal regulation (Feinman 2000, p. 743).

According to P. Gudel, during the validity of long-term contracts, the content of the contractual obligations changes, and this cannot always be determined solely by the will of the parties at the time of concluding the contract. Such content must also be determined based on other factors – not only the norms expressly introduced or implied in the contract between the parties. Relational contract law moves away from the significance of the initial promise, and emphasizes that expectations also arise based on the cooperation of the parties, i.e., continuing relations. For this reason, the contractual relations of the parties are regulated not only by their contract but also by customs, traditions, and other external circumstances (Gudel 1998, pp. 769–792).

Such ideas of a cooperative approach and the notion of attention being paid not only to the results but also to the execution process correspond to sustainability obligations and the specifics of their performance in commercial contracts. Sustainability obligations in commercial contracts require parties to consider the counterparty's values. Moreover, they require close cooperation. "Generally, the goal to pursue sustainable development goals seems to favor the assessment of

contractual obligations under a 'cooperative ethics' approach – that is, one in which contracting parties are expected to cooperate especially in a long-term contractual relationship and in a supply chain. This approach is central to the relational theory of contract. It views the formal legal infrastructure governing the contractual relationship as being of secondary importance compared to informal norms of decency, solidarity and cooperation. Under this conventional understanding, resorting to the formal law of remedies upon breach misses the mark: instead of reflecting the parties' on-going commitment to promoting their goals through cooperation and mutual agreement, such a move reflects a diametrically opposed set of values" (Poncibo 2016, p. 350). As mentioned above, the traditional (conventional) approach towards remedies is inherent in classical contract law doctrine, which promotes the clarity of obligations as well as the clarity of negative consequences in the event of non-compliance. Furthermore, the values and ethics of the counterparty, as a general rule, should not interest the party to a contract, except in cases of illegal behavior – for example, deceit.

The cooperation requirement is also clearly reflected in the process of monitoring compliance with the sustainability standards agreed by the contract parties. This may become particularly important when the sustainability of a product or service offered in the market is claimed publicly. For this reason, the attention paid to the traceability of compliance with sustainability contract terms is increased. As such, "Traceability in particular provides a tool to monitor products and materials as they travel through the supply chain in order to ensure that responsible social and environmental practices are used at every step. Verifying the claims, they make about these materials through mechanisms like third party audits has been an important issue for stakeholder relations. Traceability systems can help companies fulfil their sustainability promises by providing a means of assuring sustainability and by generating data that can be shared with the stakeholders" (United Nations 2014, p. 21). In this respect, the possibilities of modern technologies are involved in making the process highly efficient. For example, it is noted that smart contracts may potentially have a great impact on monitoring compliance with sustainability contractual obligations as they ensure the quick automatic exchange of information (Salmerón-Manzano and Manzano-Agugliaro 2019, p. 4).

Sustainability contractual clauses significantly differ in the aspect of consequences in the event of their breach. Being regulatory provisions, they "(…) focus on compliance and when breaches occur require corrections rather than compensation for harm. They are prospective rather than retrospective. Their goal is not to risk allocation but ensuring compliance with the standard. The regulatory function in global supply chains calls for wider and more effective collaboration among segments of the chain located in multiple jurisdictions" (Cafaggi 2016, p. 228). This means that requests for compensation or a contractual penalty (the remedies of classical contract law theories) are not inherent, as after the breach of a sustainability contractual clause such instruments do not influence sustainability itself. Instead, they merely improve the financial state of one of the parties and operate as a measure of prevention against future non-compliance. As mentioned above, companies aiming for sustainability in business processes seek correction. Such instruments are relational. "For example, the most common tool that companies use is a 'corrective action plan,' under which the parties agree what the supplier must do to remedy the breach. Sometimes, the buyer will even provide a supplier with capacity building resources, such as training or assistance. Relational remedies

are essential in promoting sustainability goals through contract law and that they are also available when these goals are not enforceable by traditional remedies. However, although neither companies, nor regulators stress it, the effectiveness of the relational tools is grounded in the threat of formal legal sanctions. This reliance on the indirect enforcement power of formal legal sanctions is evident from the frequent reservation of the right to terminate a contract if the supplier's non-compliance status is not remedied" (Poncibo 2016, p. 351). F. Caffagi (2013) also notes that "Different, and at times even divergent, remedial logics are in place. While remedies in contract are still primarily aimed at compensation for damages related to the breach, regulatory sanctions are directed to ensure compliance with standards all along the supply chain. Thus, they combine a deterrence and sanctioning function focusing on hazard detection and correction. Regulatory provisions impose joint problem-solving procedures that might be at odds with the conventional binary allocation of responsibility between sellers and buyers in more conventional commercial settings. Regulatory sanctions in social, environmental, and safety standards target individual responsibilities for monitoring and mitigating negative consequences stemming from breach" (p. 1617).

The same reasoning applies to the termination of the contract as a negative result of non-compliance with sustainability contract clauses. Scholars note that contract termination in such cases is ineffective if a contract party is interested in reaching a higher sustainability level in business. Contract termination does not motivate the counterparty to change its behavior in the future. In this respect, the possibility of contract termination operates as a deterrence tool rather than an actual relationship termination possibility (Mitkidis 2014, p. 22). Despite this, being entitled under the express terms of a contract to terminate a relationship in the event of non-compliance with sustainability clauses is significant if it is obvious that the counterparty is not able or not willing to improve their behavior. Due to the fact that sustainability obligations are often not related to the direct objective of the commercial contract, it may be hard to prove that there are grounds for contract termination under the general clauses of contract law determined in national legal systems. For example, article 6.217 (1) of the Lithuanian Civil Code (2000) states that a party may terminate a contract if the other party does not fulfill the contract or fails to fulfill it properly in a manner that is a fundamental breach of the contract. The circumstances in which a breach is qualified as fundamental are mostly related to the main objective of the contract. This means that if a supplier delivers goods in a timely manner and the quality of goods corresponds to the agreed contract terms, but it turns out that the delivery process was very unsustainable (for example, environmentally unfriendly vehicles were used), it would be hard to prove the existence of a material breach of the contract unless the parties expressly defined the delivery process in the agreement. The principal obligation of the supplier here is to deliver the goods of requisite quality in a timely manner, and the supplier has complied with it. As long as sustainability contractual obligations are ancillary, in most cases only express contract terms stating that a breach of sustainability contractual obligations will be considered a material breach of contract will guarantee, at least to some level, that non-compliance will be qualified as such.

The ideas of relational contract law theory are also reflected by considering the possibility for sustainability objectives to be pursued by the parties, since they may be implied. Implied contract terms are a widely known contractual concept in national legal systems (for example, Article 6.196 of the Lithuanian Civil Code) as well as *soft law* documents (for example, Article 5.1.2. of

the UNIDROIT Principles of International Commercial Contracts, hereinafter referred to as the UNIDROIT Principles) (International Institute for the Unification of Private Law 2016). Such legal norms are also found in other soft law documents, such as article 6:102 of the Principles of European Contract Law (hereinafter referred to as the PECL) (Commission on European Contract Law 2003) and Article II. – 9:101 of the Draft Common Frame of Reference (hereinafter referred to as the DCFR) (von Bar *et al.* 2009). It should be noted that a contract party can expect a counterparty's behavior under implied contract terms only if such an expectation was obvious and agreed but not included into the express terms of the contract. The official commentary of Article 5.1.2. of the UNIDROIT Principles provides an explanation: "The implied obligations may for example have been so obvious, given the nature or the purpose of the obligation, that the parties felt that the obligations 'went without saying.' Alternatively, they may already have been included in the practices established between the parties or prescribed by trade usages according to Article 1.9. Yet again, they may be a consequence of the principles of good faith and fair dealing and reasonableness in contractual relations" (International Institute for the Unification of Private Law 2016, p. 152).

Some authors state that in the area of international contracts of supply, the requirements of sustainability followed by the parties may become an implied part of the contractual relationships without express acknowledgment in the terms of the contract. Sustainability requirements must be complied with if such business conduct has previously been followed as an established practice, as well if such behavior has come into international trade usage (Mitkidis 2014, p. 14). Nevertheless, the expectation of a contract party that the counterparty will act in compliance with sustainability requirements if such requirements are not expressly defined in the contract should be legally protected only if such practices were in fact obviously established by the parties or have become common in the area of trade in question. As was cited previously, the drafters of the commentary of the UNIDROIT Principles gave an example of the obviousness of such an establishment. This means that the expectation should be obvious for the major part of the businesspeople acting in a particular trade area. Such generality is hard to measure and prove. However, if (or, perhaps, when) sustainability goals and/or practices become a common widespread reality in trade (or at least particular areas of it), the United Nations Convention on Contracts for the International Sale of Goods (CISG), UNIDROIT, PECL, as well as DCFR may become the tools of the application of sustainable contracting. Moreover, as C. Poncibo argues (2016), "(…) the way of producing the goods influences their value on the market: a buyer may be willing to pay a higher price for goods manufactured and traded by respecting the environment and other values. Following that reasoning, one may say that the goods produced under conditions violating these goals are not of the quality impliedly asked under the contract (Article 35(1)-(2) CISG)" (p. 348). In such a case, sustainability may even fall under the legal norms of implied warranty.

It can be concluded that the current trade customs and practices of contract parties cannot be assumed to have achieved a level which allows sustainability objectives to be considered as a trade custom and a clearly established business practice worldwide. However, the tendency to take sustainability into account and include it in the commercial contractual relationship becomes more relevant, and it is possible that, in the near future, unsustainable behavior will be considered to be an act of bad faith of a contracting party, with all the negative consequences determined in the legal norms of contract law.

Sustainability clauses as significant social changes of contract law

The social contract law doctrine is associated with significant changes in contract law. The need to introduce social goals into contractual relations arose due to the changing environment and the inadequacy of the traditional approach in reflecting this process. One of the most significant categories and goals of social contract law is solidarity in contractual relations, which in the doctrine is usually opposed to personal autonomy – a value traditionally considered the essential starting point of classical contract law. C. Mak points out that, in a general sense, autonomy can be used to emphasize individual freedom and personal responsibility, while solidarity emphasizes the need to make sacrifices for others. According to the author, this dichotomy can be used to depict and explain such developments as the socialization and constitutionalization of contract law (Mak 2008, p. 200).

T. Wilhelmsson observes that developments in contract law are often interpreted in the context of the idea of the welfare state. Social contract law itself is often seen as the contract law system of such a welfare state. Although this author admits that the concept of such a welfare state is rather vague and imprecise, he does not doubt that one of its main characteristics is intervention into market forces in order to achieve redistributive social goals. Such a concept of the welfare state is inseparable from the constant search for a balance between a focus on market efficiency and solidarity-based intervention (Wilhelmsson 1995, pp. 31–36). S. Grundmann points out that in private law fundamental rights are in clear opposition to classical economic theories because they establish evaluation, with the individual being the center of attention. This prioritizes a person as a living being over their economic resources (possessions), demanding consideration of solidarity and social justice, and giving attention to the weak (young and elderly) and the economically weaker party, which could also be a consumer or a company. According to this author, the focus on contrasting human rights with the individual as an economic agent has led to the recognition of a person's dignity as a central concept in order to develop personal autonomy (Grundmann 2008, p. 161). L. E. Trakman states that "The theory behind a public responsibility holds that a private right is subject to a public good, as when an individual contractor is subject to a public responsibility not to engage in contracts that discriminate on the basis of race or sex, or that damage the environment to the harm of future generations. (…) Viewed affirmatively, public responsibilities transcend restrictive conceptions of reciprocal promises, fictionalized accounts of consent to contract, and formalized depictions of privity of contract. They are woven into the fabric of law, whether under the rubric of moral theory, equitable dealings, or socially responsible contracting" (Trakman 2016, pp. 217–262).

As mentioned previously, sustainability goals in contract law include various social aspects, protecting the social interests of particular groups or the whole of society. Companies pursue sustainability objectives through their concluded contracts, understanding their "impact on social systems. Such systems include society, local communities, employees, consumers and other stakeholders. If business activities harm social systems, degrading the wellbeing of future generations, then operations are not socially sustainable" (Green Business Bureau 2022). For this reason, it can be agreed that the introduction of sustainability obligations into commercial contracts is one of the ways in which social contract law theory changes traditional contractual business practices. Such tendencies may be illustrated with the eloquent reflection of C. Poncibo (2016): "Each generation must put aside a suitable amount of capital in return for what it received from previous generations

that enables the latter to enjoy a better life in a more just society. Hence justice considerations apply to relations that are beyond the present one" (p. 340).

Contract privity is a significant notion of classical contract law, which is based on the idea of contractual freedom. Philosophically, this idea was based on the "will theory" of the contract; economically, on *laissez-faire* liberalism (Beale 2004, pp. 10–11). The principle of contract privity means that the contract creates rights and obligations for the persons who concluded it and, apart from exceptions provided by law, does not create rights and obligations for third parties. This principle determines that only the parties to the contract can make claims due to its improper performance. The purpose of contractual civil liability and the limits of protection provided by it is the protection of the interests related to the proper performance of the contract of the persons who entered into it (for example, the ruling of the Lithuanian Supreme Court of 30 November 2019 in civil case No. e3K-3-357-313/2019; 25 June 2020 in civil case No. e3K-3-197-469/2020; 24 March 2021 in civil case No. e3K-3-44-313/2021).

The content and limits of the operation of the principle of contract privity may be different in different legal systems or countries, and depend on the regulation established in national law. For example, Lithuanian law enshrines the principle of relative privity of contracts. The court of cassation explains contract privity as a general rule of contract law, stating that a contract binds only its parties. Therefore, with the exception of situations established by law, it has a legal impact only on the mutual rights and obligations of its parties. Exceptions to the principle of contract privity include cases established by law when the contract affects the rights and obligations of third parties, not only its parties (for example, Lithuanian Supreme Court 2011 October 4 ruling in civil case No. 3K-3-367/2011; 2020 March 16 ruling in civil case No. e3K-7-151-421/2020). W. J. Chan defines the doctrine of contract privity via both positive and negative aspects. The positive aspect means that only parties to a contract can acquire rights under the contract, and the negative aspect is such that only parties to a contract can be subjected to duties based on the existence of this contract (Chan 2014, p. 24). C. Poncibo divides third-party beneficiaries into three categories depending on the situation: "express beneficiary (a person explicitly named as a beneficiary in the contract); implicit beneficiary (a person, whose right to benefit can be derived from the true will of the original parties and/or by the circumstances, though his right was not expressly worded in the contract); incidental beneficiary (a person, who gets benefit from the contract accidentally or favor has not been considered by the original parties of the contract during the formulation of the contract). In this regard, a third party's right is not generally enforceable if a third party benefitted from the contract only incidentally. The main instance for a valid stipulation in favor of a third party consists in the fact that the beneficiary must be identified with sufficient certainty at the time of performance of the clause" (Poncibo 2016, p. 352).

Sustainability obligations in commercial contracts are mainly aimed at the benefit of the whole of society (for example, the reduction of CO_2 emissions or other environmental goals) or a certain part of it (for example, child labor prohibition). In this way, they differ from the conventional concepts of contractual obligations, where only the parties to the contract receive certain benefits. In this context, the beneficiaries of contractual sustainability obligations are third parties to the contract, and their rights under such contracts are considered to be an exception from the classical contract privity rule.

Scholars exclude two third-party-related situations which are relevant to the enforcement of sustainability contractual clauses. The first relates to cases of third-party claims to enforce a contract between a buyer and a supplier. The second relates to cases when a party to a contract (a buyer) tries to extend the applicability of sustainability contractual clauses beyond the direct counterparties – from first-tier suppliers to further participants of the supply chain. Examples of such attempts include claims of false advertisement, breaches of unilateral promises and claims of other third-party beneficiaries (Mitkidis 2014, p. 17). At this moment, third-party claims under sustainability contractual clauses are not a common practice. Commercial contractual relations are mainly confidential, and it is hard for third parties to acquire such information about the fact that they are beneficiaries under certain contract clauses. Moreover, if sustainability contractual clauses are very vague and benefit the interests of all of society in general, it would be unreasonable for them to give rise to a company's limitless contractual liability. This would discourage business activity in general. However, if a person can be clearly considered as a (not accidental) beneficiary under such a clause, and non-compliance has affected their life in a way which can be proved, then it is possible that the global business world will face a new challenge. It is hard to measure and predict the risks of third-party claims, and it will be in the hands of judges to establish the rules for compensation and determine the limits of the liability of companies.

Conclusions

Sustainability obligations in commercial contracts should be considered as reflecting exceptions from the ideas of classical contract law theory. Differences in approach to contract terms, objectives, privity, and negative consequences in the event of non-compliance with sustainability clauses are more inherent to the relational and social contract law doctrines. Thus, such differences may imply difficulties in applying legal instruments attributed to the doctrine of classical contract law (for example, general rules of contractual liability).

The more frequent the inclusion of sustainability obligations in commercial contracts, the more impact sustainability will have on contract regulation through norms such as implied contract terms or trade customs and standard practices – instruments established by most modern national legal systems and *soft law* documents like the UNIDROIT Principles, PECL and DCFR.

Sustainability contractual obligations are rarely included in the primary object of the contract. As long as sustainability contractual obligations are ancillary, in most cases, only express contract terms stating that a breach of sustainability contractual obligations will be considered to be a material breach of contract will guarantee, at least at some level, that non-compliance will be qualified as significant non-compliance.

The current trade customs and practices of contract parties cannot be assumed to have reached a level which allows sustainability objectives to be considered as a trade custom and a clearly established business practice worldwide. However, the tendency to take sustainability into account and include it in the commercial contractual relationship is becoming more relevant, and it is possible that, in the near future, unsustainable behavior will be considered to be an act of bad faith of a contracting party, with all the negative consequences determined in the legal norms of contract law.

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II.3. THE ROLE OF THE PRODUCT QUALITY GUARANTEE IN PROMOTING SUSTAINABLE CONSUMPTION: LITHUANIAN EXPERIENCE

Promoting more sustainable consumption by legal means

In general terms, "the concept of sustainable consumption encompasses the use of services and products designed to meet the basic needs of the consumer and the environmental impact of the products or services consumed" (Navickaitė and Novikovienė 2020, p. 870). The universally accepted concept of sustainable consumption was formulated at the 1994 Oslo Symposium on Sustainable Consumption, which defined sustainable consumption as "the use of services and products designed to meet basic needs and to create a better quality of life, while minimizing the use of natural resources and the use of toxic substances, and the emissions of waste and pollutants throughout the lifecycle of a product or service, without compromising the needs of future generations" (Ofstad 1994).

Today, the importance of sustainable consumption is being recognized at both the transnational and national levels, and, over time, individual consumers are also changing their attitudes towards excessive consumption. However, as I. Navickaitė and L. Novikovienė (2020) point out, "it should be noted that consumers' interest in environmental issues and their commitment to living more responsibly while protecting the environment do not mean that they will buy green, environmentally friendly products. The reasons for this may vary, but can include mistrust of companies' environmental claims or lack of information. (…). Therefore, a big role in the development of sustainable consumption is played by the entrepreneurs' attitudes towards environmentally friendly business models and the promotion of sustainable consumption. Responsible use of sales promotion measures such as advertising, fair commercial conduct, fair consumer information, labelling, etc., play an important role in the development of sustainable consumption" (p. 871).

For a long time, consumption has been seen as a tool for economic growth. The working principle of a market economy is simple: the more consumers buy, the more the economy grows. Therefore, the traditional aim has been to get consumers to buy more products and to keep replacing old items with new ones. Over time, wasteful consumption has created a global problem, with current production and consumption needs far outstripping existing natural resources. James P. Leape,

Director-General of the World Wide Fund for Nature, stated in the 2008 WWF report, as our population grows and we continue to consume resources at an alarming rate, we'll need the equivalent of a second Earth by 2030 to maintain our current lifestyle (WWF 2008, p. 1). In this context, the objective of ensuring that both producers and consumers receive the same or even a greater quantity of products and services at a lower cost has obviously become increasingly relevant. Various public opinion surveys show that the majority of consumers support the ideas of sustainable consumption. According to a Eurobarometer survey, 77% of EU citizens would rather repair their devices than replace them. A survey on consumer attitudes towards durability, repairability and recycling conducted by the European Commission showed that while consumers are willing to repair their items, they usually have to replace them with new ones due to the high cost of repair (European Commission 2018).

It is no less important that sustainable consumption is promoted through legal instruments and that the norms protecting consumers' rights reflect the rights of consumers who choose sustainable consumption. They should not only ensure the provision of information to consumers leading to the choice of a higher quality, more sustainable product, the provision of the possibility to assess the production technology of products, and the provision of legal guarantees relating to product quality, but also the provision of legal remedies in the event of a breach of consumer rights. Today, we must realize that sustainable consumption is inevitable, and therefore consumer protection rules must reconcile the general objectives of consumer protection with the objectives of sustainable consumption. Only when consumers know that their rights are protected – not only as purchasers of new goods, but also as consumers who choose sustainable consumption – will they be confident in making sustainable choices.

Obviously, the law has various instruments that can contribute to the promotion of sustainable consumption, one of which is the product quality guarantee, which, in the case of new products, creates a consumer's reasonable expectation that the longer the guarantee, the longer the lifetime of the product, and, in the case of second-hand equipment and second-hand products, the assurance that the product will not have hidden defects. For two decades, the guarantee of the quality of consumer goods has been regulated at the EU level by 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. On 20 May 2019, Directive (EU) 2019/771 of the European Parliament and of the Council on certain aspects of contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC and repealing Directive 1999/44/EC (hereinafter referred to as Directive 2019/771 or the Sale of Goods Directive), was adopted. Directive 2019/771 also addresses the need to make goods more durable, which is seen as important for more sustainable consumption patterns and the circular economy. *Durability* in this Directive is defined as "the ability of the goods to maintain their required functions and performance through normal use. In order for goods to be in conformity, they should possess the durability which is normal for goods of the same type and which the consumer can reasonably expect given the nature of the specific goods, including the possible need for reasonable maintenance of the goods, such as the regular inspection or changing of filters in a car, and any public statement made by or on behalf of any person constituting a link in the chain of transactions. The assessment should also consider all other relevant circumstances, such as the price of the goods and the intensity or frequency of the use that the

consumer makes of the goods. In addition, insofar as specific durability information is indicated in any pre-contractual statement which forms part of the sales contract, the consumer should be able to rely on them as a part of the subjective requirements for conformity" (Directive 2019/771, p. 32).

Sociological surveys of consumer opinion show that a significant proportion of consumers do indeed prefer long-term products. A survey on consumer attitudes towards durability, repairability and recycling conducted by the European Commission (2018) revealed that consumers are even willing to pay more for longer-lasting and more easily repairable products, that consumers are becoming more aware of the environmental problems we face and of the climate crisis, and that consumers are not sufficiently informed about durability and repairability when purchasing products.

The guarantee on new items as a precondition for manufacturing longer-lasting products

The main consumer protection measure promoting the manufacture of longer-lasting products is the quality guarantee on new products, which ensures that if a product is defective, it will have to be repaired, replaced, or, in some cases, the consumer will be able to receive a refund by returning the faulty item. The Supreme Court of Lithuania (hereinafter referred to as the Supreme Court), in formulating the legal conditions for the return of a product that does not comply with quality standards, revealed the content of the product quality guarantee. The Supreme Court clarified that "it is the seller's obligation to guarantee to the buyer that the goods comply with the terms of the contract and that at the time of conclusion of the contract there are no hidden defects in the goods which would prevent the goods from being used for the purpose for which the buyer intended them to be used, or which would impair the usefulness of the goods in such a way that the buyer would not have bought the goods at all, or would not have paid the price, if he had been aware of those defects. These general provisions on the quality of goods shall apply to consumer sales contracts, together with additional provisions which are more favorable to the consumer (…)" (No E3K-3-158-469/2019).

As regards the quality guarantee and the conditions of its application in Lithuania, several stages of development of consumer protection remedies in the event of the purchase of a product of inadequate quality may be distinguished: (1) legal regulation before the amendments to the Civil Code of the Republic of Lithuania of 13 June 2014; (2) legal regulation after the amendments to the Civil Code of the Republic of Lithuania of 13 June 2014; and (3) the most recent legal regulation as of 1 January 2022.

Article 6.363(1) of the Civil Code of the Republic of Lithuania, in force until 31 December 2022, stipulated that the seller guarantees the quality of products in all cases, i.e., provides a guarantee in accordance with the law. The Supreme Court interpreted that "the binding nature of the guarantee of the goods sold, as set out in Article 6.333(3) of the Civil Code, is also reflected in the fact that the seller is not entitled to restrict the scope of such a guarantee, i.e. he is not allowed to shorten the term of the guarantee on his own: the guarantee, which is enshrined in the

law and which is in fact the main protection of the consumer's rights in case of a sale and purchase contract, cannot be changed at the seller's initiative" (No e3K-3-5-915/2018).

The term of the statutory guarantee for an item is two years (unless the law or the contract provides for a longer term), starting from the date of delivery of the item (Article 6.363(10) of the Civil Code), and the item has to remain in good quality throughout this period.

Article 6.363 of the Civil Code of the Republic of Lithuania did not provide (neither in the version valid until 12 June 2014 nor in the version valid from 13 June 2014 to 31 December 2021) for an order of priority (hierarchy) of the consumer's choice of remedies, and the consumer was free to choose one of the remedies set out in Articles 6.363(7) and 6.363(8) of the Civil Code. Therefore, if the defects of an item appeared within the guarantee period, the buyer, to whom the defective item was sold, had the right to rely on Article 6.363(7) of the Civil Code:

1) to require the seller to remedy the defects of the item free of charge (repair the item);
2) to require the seller to replace the defective item free of charge with an item of suitable quality;
3) to require the seller to reduce the price accordingly;
4) to unilaterally terminate the contract and demand a refund of the price paid.

The alternative rights of claim mentioned above for a buyer who purchased a defective product did not, in principle, promote sustainable consumption, as the consumer could, in most cases, simply refuse to have the product repaired without objective reason, demand a replacement, or even terminate the contract. Despite the fact that the version of Article 6.363 of the Civil Code of the Republic of Lithuania in force until 12 June 2014 provided that the buyer could choose any of the respective options, the Supreme Court formulated the rule of proportionality in its case law and clarified that "the buyer's right to choose one or another remedy may not, however, be absolutized, since the general principles of regulation of civil relations, *inter alia*, the proportionality of the applicable remedies, the balance of the interests of the parties to the civil relations, the stability of the civil circulation, and etc., apply in consumer contractual relations. The application of the principle of proportionality and the principle of balancing of interests in the protection of consumers' rights means that specific remedies must seek to ensure (restore) a balance between the legitimate interests of the buyer and the seller, and not unduly distort the balance in favor of the consumer and allow for abuse of the law. Situations in which the restriction of the seller's interests is disproportionate to the infringement of the consumer's interests are incompatible with the principle of proportionality. The stability of contractual legal relations is inseparable from the legal protection of its subjects and the certainty of their legal position, which is why the termination of a contract must not be applied indiscriminately but only if sufficient legal and factual grounds are established" (Protection of consumer rights in consumer contractual relations [2010]).

Thus, the consumer was free to choose the remedies specified, insofar as this was not contrary to the principle of proportionality, considering the case law of the court of cassation. However, whereas case law is usually invoked after a dispute has proceeded to trial, in all other cases, the consumer's rights were, in principle, exercised at the consumer's choice.

The right to terminate the contract and sustainable consumption

As of 13 June 2014, Article 6.363(8) of the amended version of Article 6.363 of the Civil Code of the Republic of Lithuania (Law No. XII-700 of 19 December 2013) already establishes that the buyer does not have the right to terminate the contract if the defect of goods is minor. As the Court of Cassation explained, "the legislator has transformed the provision formulated in the case-law on the assessment of the proportionality of the unilateral termination of the contract as the consumer's chosen remedy into a clause of minor importance, which is directly established by the law and defines the nature of the defects in the goods, in the presence of which unilateral termination of the contract by demanding the return of the price paid would be impossible" (No. 3K-3-186-1075/2020, para. 26–27).

Thus, the buyer's right to unilaterally terminate the contract and to demand reimbursement of the price paid became limited by the *minor importance* of the defect (Article 6.363(8) of the Civil Code). In all other cases, the consumer remained free to choose the remedy for the violation of their rights, i.e., they could simply refuse to have the goods repaired and demand the termination of the contract. A minor defect of the product is an evaluative term, which had to be assessed on a case-by-case basis by a court or an out-of-court dispute resolution body. The Lithuanian case law on the interpretation of the concept of "minor importance" states that "the question of the (non-) minor importance of a defect is a question of fact. When deciding whether a defect is minor or not, it must be assessed whether or not the defect can be eliminated at all, and if so, at what cost in terms of labor and time, what impact this has on the future condition of the item, and what impact elimination of the defect will have on the consumer's right to continue to enjoy the good quality of the product. A defect in an item could be considered to be essential if it would not be possible to remedy the defect at all or, if it were possible, the remedying of the defect would involve substantial labor and time which would deprive the buyer of the ability to use the item for its intended purpose for a long period of time, or if the remedying of the defect would fundamentally change the item, or if there are any other circumstances which would result in a disproportionate restriction of the buyer's (consumer's) rights obtained by virtue of the contract and protected by the law" (No 3K-3-252/2013).

The Court of Cassation also held that "when assessing whether the characteristics of an item deviate only slightly (insignificantly) from the provisions of a consumer contract of sale, the consumer's legitimate expectations as to the quality of that item are also of legal significance" (No 3K-3-247/2014; No 3K-3-186-1075/2020) and noted that "a defect of an item is considered to be of minor importance if the deviation of the item's characteristics, quality indicators or functionality from the provisions of the consumer contract of sale is minor (insignificant) and is of little significance for the purpose of deciding on the conformity of the item's quality with the requirements of the consumer contract of sale" (No 3K-3-186-1075/2020; No e3K-3-127-381/2022). As can be seen, the assessment of minor importance must not only be made on formal grounds, but must also consider the consumer's expectations. Hence, the purpose of the consumer contract is also an important criterion in assessing the minor importance of the defects in the goods.

At the same time, it should be noted that the limitation of the right to terminate a consumer contract on the basis of the minor defect of an item can be considered as one of the conditions

that indirectly contributed to the promotion of sustainable consumption, since the contract could no longer be terminated solely on the basis of the consumer's whim.

On 29 June 2021, Law No. XIV-466 amending Articles 1.125, 6.228^{1}, 6.228^{12}, 6.228^{14}, 6.363, 6.364, 6.419 and the Annex to the Civil Code of the Republic of Lithuania, and supplementing the Code with Articles 6.228^{17}, 6.228^{18}, 6.228^{19}, 6.228^{20}, 6.228^{21}, 6.228^{22}, 6.228^{23}, 6.228^{24}, 6.350^{1}, 6.364^{1}, 6.364^{2}, 6.364^{3}, 6.364^{4} was adopted, which entered into force on 1 January 2022 (hereinafter referred to as the Law on the Amendment and Supplement to the Civil Code). The Law on the Amendment and Supplement to the Civil Code was adopted in the implementation of Directive 2019/771, which already contains provisions aimed at ensuring the sustainability and long-term use of items. The Law on the Amendment and Supplement to the Civil Code has changed the way in which the product quality guarantee is applied in Lithuania, allowing the consumer to freely choose the remedy for their violated rights by establishing a hierarchy of rights. Article 6.364(1) of the Civil Code of the Republic of Lithuania established that the seller is liable to the consumer for any non-conformity of the quality of goods (including goods containing digital elements) at the time of delivery and which has become apparent not later than within two years after delivery of the goods (guarantee according to the law). However, when we analyze the rules of the newly introduced Article 6.3641 of the Civil Code of the Republic of Lithuania, we can see that, under the new regulation, a consumer who has purchased a product of inadequate quality, in order to exercise their rights, has to follow a two-step system of enforcement of consumers' rights provided for by law:

- first, the consumer must ask the seller to repair or replace the product with a product of appropriate quality (Article 6.364^{1}(2) of the Civil Code of the Republic of Lithuania);
- only then may the consumer demand (if the seller fails to comply with the request to repair or replace the goods) a reduction in the price of the goods or termination of the contract of sale of the goods (Article 6.364^{1}(4)(1) of the Civil Code of the Republic of Lithuania).

The consumer is therefore no longer free to choose the remedy that they want: they can only demand a reduction in the price of the goods or unilateral cancellation of the contract if the goods are not repaired or replaced by a product of appropriate quality.

It should be noted that the new regulation also provides for certain cases (Article 6.364^{1}(4)(1) to (4) of the Civil Code of the Republic of Lithuania) where the consumer may immediately claim the rights of the second step, i.e., a reduction of the price or the termination of the contract. One of these conditions is if the defect in the goods is essential (Article 6.364^{1}(4)(3) of the Civil Code of the Republic of Lithuania). In the event of an essential defect, the consumer is no longer obliged to follow the hierarchy of their rights, i.e., to ask for the repair or replacement of the product first. The consumer is immediately entitled to demand a reduction in the price of the goods or the termination of the contract, and the seller cannot restrict the consumer's right to choose the remedies available to them.

As regards the essential defect, its content is also of an evaluative nature, which will have to be disclosed to the court hearing the case. As there is no new case law of the Supreme Court on the application of the new provisions, the State Consumer Rights Protection Service (hereinafter referred to as SCRPS), when settling consumer disputes out of court, is in principle guided by the interpretations of the court of cassation on the essence of the defect of the product, which were made in the context of the interpretation of the content of the minor defect of an item (SCRPS 2022a, 2022b).

The SCRPS clarified that "depending on the type of the product, the essential defect may be different from the purpose of the product, i.e. whether the defect is essential would be determined by the intended use of the product: whether its main function is ensured or not; whether, according to the intended use of the product, in the presence of the defect/deficiency, the product cannot be used at all (in the broad sense, taking into account all its essential functions), or whether the absence of a function only makes it more difficult to use the product. Whether the defect is essential can in principle also be judged by the number of times the product has been repaired, the length of time it took to remedy such a defect, and the quality of the product was still not assured after the repair work was carried out (the defect was not repaired or reappeared soon afterwards)" (SCRPS, n.d.). Thus, an essential defect is a significant defect that justifies the application of the last consumer remedy, i.e., termination of the contract.

At the same time, Article $6.364^{1}(5)$ of the Civil Code of the Republic of Lithuania stipulates that the consumer does not have the right to terminate the contract if the defect is immaterial. The interpretation of the term *immaterial* is also not yet available in the case law, and it may of course differ to some extent from *of minor importance*, but we would consider that the difference between the two should not be substantial.

Promoting sustainable consumption through product repair

Before analyzing the consumer's right to product repair, which is now the focus of the new legal framework, it is also necessary to note certain aspects of the sustainability of this consumer right, which have become increasingly important in the European Union in recent years.

In December 2019, the European Commission published the Communication on the European Green Deal, which, among other initiatives, sets out a number of initiatives to protect consumer rights. These initiatives took a more concrete form in the European Commission's new Circular Economy Action Plan, published in March 2020, which has a specific focus on empowering consumers, stating that: "Empowering consumers and providing them with cost-saving opportunities is a key building block of the sustainable product policy framework. To enhance the participation of consumers in the circular economy, the Commission will propose a revision of EU consumer law to ensure that consumers receive trustworthy and relevant information on products at the point of sale, including on their lifespan and on the availability of repair services, spare parts and repair manuals. The Commission will also consider further strengthening consumer protection against green washing and premature obsolescence, setting minimum requirements for sustainability labels/logos and for information tools" (European Commission 2020b). In addition, it is foreseen that the Commission will pursue efforts to establish a new consumer "right to repair."

It has to be acknowledged that many products cannot be easily reused, repaired or recycled due to their short lifespan, as they are essentially single-use products, and consumers are not always keen on repairing products. Therefore, one of the objectives of the circular economy is to ensure that products are sustainable and can be used for a longer period of time, and to create both legal and economic conditions for consumers to participate in the circular economy. As announced in the New Circular Economy Action Plan, the aim is that "products placed on the

EU market will be designed to last longer, to be easier to repair, recycle and reuse" (European Commission 2020b).

In November 2020, the Commission published a Communication – "The New Consumer Agenda: Strengthening consumer resilience for sustainable recovery" – which not only sets out a vision for EU consumer policy from 2020 to 2025, but also details initiatives to contribute to sustainable consumption. The Communication states that "better information on the availability of spare parts and repair services can further support product durability. The upcoming initiative on empowering consumers in the green transition, the Sustainable Product Policy Initiative and, where relevant, sector specific initiatives will be essential to give consumers an effective right to repair. Moreover, the future review of the Sale of Goods Directive (2019/771) would provide an opportunity to examine what more can be done to promote repair, and encourage more sustainable, circular products. Various options regarding consumer remedies will be looked at, such as giving preference to repair over replacement, extending the minimum liability period for new or second-hand goods, restarting a new liability period after repair" (European Commission 2020a).

In January 2022, the European Parliamentary Research Service published an information note on the consumer's right to repair, which presents the right to repair in three aspects: the right to repair during the guarantee period; the right to repair after the legal guarantee has expired; and the right for consumers to repair products by themselves. The European Parliament does indeed raise a topical issue when it talks about the consumer's right to repair after the legal guarantee has expired, since "Once the legal guarantee has expired, neither sellers nor manufacturers are required to repair the products. Consumers no longer have a right to have their products repaired, even if they want to pay for the repair themselves. They are thus often faced with a situation in which repair would cost too much (compared with buying a new product); spare parts are not available; there are no repair shops left in their vicinity; or products are made in such a way that they cannot be repaired (e.g. because parts are glued together or are inaccessible)" (European Parliamentary Research Service 2022, p. 2).

In April 2022, the European Parliament adopted the resolution on the right to repair, which highlighted a number of areas that the European Commission should address when considering a proposal for a separate legislative act on the right to repair. Thus, the European Parliament "underlines that consumers should receive reliable, clear and easily understandable information at the point of sale on the durability and repairability of a product, to help them compare and identify the most sustainable products available on the market; calls on the Commission to propose harmonized rules for such consumer information, including, among other information, repair scores, information on estimated lifespan, information on spare parts, information on repair services and the period during which software updates would be available in the case of goods with digital elements, while keeping in mind the imperatives of consumer safety; notes that, for it to be useful, such information should be made available at the time of purchase." It also proposes "possible smart labelling such as QR codes or digital product passports; possible joint manufacturer-seller liability mechanism for non-conformity of products; durability and repair requirements included in a future Ecodesign Directive" (European Parliament 2022).

Having reviewed the current initiatives in the European Union on product repair and its role in promoting sustainable consumption in the context of this topic, we will further assess the situation regarding the implementation of the consumer's right to product repair in Lithuania.

Article 6.364[2](1) of the current Civil Code of the Republic of Lithuania lays down the seller's obligation to repair or replace goods free of charge, within a reasonable period from the moment when the consumer has informed the seller of the defective quality of the goods, and without causing the consumer any significant inconvenience. This rule of law shows that the main requirements for the repair of goods are that the repair must be carried out free of charge, within a reasonable period of time, and without causing serious inconvenience to the consumer. It should be noted that the expressions "within a reasonable time" and "without causing serious inconvenience to the consumer" are evaluative criteria. Therefore, the authority dealing with a consumer dispute shall decide on each occasion whether the consumer's rights have been adequately protected by repairing the goods.

In one Supreme Court case (No E3K-3-158-469/2019), the court had to decide whether the consumer's right to have an item (in the dispute at hand, a luxury watch) repaired was adequately ensured. In this case, the Supreme Court held on two important aspects: on the one hand, it clarified that where a luxury product is a limited edition, the entrepreneur, having sold the entire edition, cannot replace the fundamentally defective product with another one, because the goods of that edition are simply no longer available, and the consumer's only available remedy is therefore to have the product repaired; on the other hand, the court stated that it was concerned with the issue of the reasonable time for the repair of the item and the consumer's disadvantages that would result from the repair. Since the repair of the goods in the present case took more than five months, the court held that "the consumer did not obtain in substance what he had sought when he entered into the contract of sale, namely to have a good quality luxury watch and to use it for its intended purpose. Thus, remedying the quality defects of the watch sold by repairing it does not constitute adequate protection of the consumer's rights" (No E3K-3-158-469/2019). Since the consumer was subjected to considerable inconvenience, the buyer's demand for termination of the contract and reimbursement was proportionate and justified.

The "reasonable time" to repair an item is a question of fact to be assessed by the authority dealing with the consumer dispute. The period which is reasonable for the repair work should be as short as possible, which of course depends objectively on the nature and complexity of the goods, as well as on the nature and severity of the lack of conformity with quality or other factors. It is important that the consumer is informed of the time period within which the product will be repaired. "The period of time must be reasonable to meet the consumer's request but must not infringe the consumer's right to adequate assurance of the quality of the product. In accordance with the practice of the SCRPS and the case law, a reasonable repair period is 1 month" (SCRPS, n.d., p. 5). It must be stressed that every effort must be made to repair the product within the shortest possible time and without taking an unreasonable amount of time. Otherwise, it is advisable to provide the consumer with a replacement product, so that the repair of the product does not cause the consumer significant inconvenience. If the seller has not repaired or replaced the goods within the specified period, the consumer should have the right to demand a reduction in price or to terminate the contract without any further delay. It should be noted that the application of Article 6.364[1](4)(1) of the Civil Code of the Republic of Lithuania, which provides for such a right of the consumer, constitutes "a separate ground for the consumer to claim a price reduction or a refund, without this claim being linked solely to the seriousness of the defect in the goods (i.e. the defect in the goods may also be minor)" (SCRPS, n.d., p. 5).

The consumer's right to have the goods repaired or replaced could only be limited in cases where such a choice would be legally or factually impossible, or where it would entail disproportionate costs for the seller compared to the other available options. This is the clause contained in Article 6.364[1](3) of the Civil Code of the Republic of Lithuania, which provides that the seller may waive this obligation if it is not possible to repair or replace the goods or if it would cause the seller disproportionate costs, taking into account all the circumstances, including (1) the value of the goods in the absence of defects, and (2) the significance of the defect (non-conformity). This rule of law in principle allows the consumer's right to quality assurance not to be made absolute by requiring the repair or replacement of the product, as there are indeed situations where the defective parts of the product are not manufactured, or the product itself is not manufactured, or where the repair requires the product to be sent to another country, with the additional cost of transport, etc. The exercise of this consumer right must therefore be proportionate to the interests of the business, and the consumer, in turn, is entitled to invoke the remedies provided for in Article 6.364[3] of the Civil Code of the Republic of Lithuania, i.e., to claim a proportionate reduction in the price of the goods or to terminate the contract of sale.

Furthermore, under the new regulation, the consumer has the right to suspend payment of the price of the goods or part thereof until the seller has fulfilled the seller's obligations to ensure the quality of the goods (Article 6.364[1](6) of the Civil Code of the Republic of Lithuania).

Planned obsolescence as the antipode of sustainable consumption

With regard to the lifespan and durability of goods, it is necessary to draw attention to the problem of planned obsolescence, which has been discussed in the European Union for many years. Various measures have been taken to address this (European Commission 2019), including the consumer's "Right to Repair" (European Commission 2022b). "Planned obsolescence refers to a wide range of techniques that certain manufacturers might use to shorten the functional lifespan of products and force consumers to make premature replacements in order to continue selling in saturated markets" (BEUC 2015, p. 4).

Obsolescence is a multifaceted problem that can include intentional and unintentional product failure due to faulty design and failure to maintain, repair or install updated software. Indeed, there is a strange paradox that the lifetime of an item is getting shorter while technology is improving rapidly. However, deliberate acts to limit the lifetime of products can in many cases be difficult to prove. Strategies of planned obsolescence may include:

- "Design features which do not allow repair, upgradeability and interoperability with other devices;
- Programmed failure of a device after limited usage;
- Unavailability of spare parts and high costs of repair;
- Marketing strategies that suggest to consumers that in order to stay trendy they should buy new products and replace existing ones very quickly even though the 'old' ones are still fully functional" (BEUC 2015, p. 4).

Sometimes, consumer dissatisfaction with the performance of their product also leads to product switching. Therefore, even though the product works, it no longer meets the consumer's expectations and is replaced. According to T. Kessler, J. Brendel, "the different points of obsolescence can be illustrated as points Q (qualitative), P (psychological), R (regulatory), and T (technological) on the time line of a products' life-cycle. In this instance the company first tries to make the product psychologically obsolete then the technological obsolescence sets in and if the customer is still not willing to replace his product the regulatory obsolescence forces him to do so. In this example the qualitative obsolescence comes at last, for instance not to harm the company's reputation if the product brakes before the customer is forced to replace it due to legal regulations" (Kessler and Brendel 2016, p. 35). Planned obsolescence is therefore the deliberate production of an item for a limited lifetime, so that consumers have to transact repeatedly by purchasing the item again.

Voluntary commercial guarantee of durability

Article 6.364^4 has also been added to the Civil Code of the Republic of Lithuania, introducing a new voluntary commercial guarantee of durability, under which the manufacturer may be directly liable to the consumer. This article essentially extends the range of entities responsible for the product quality guarantee (commercial guarantee), i.e., not only the seller but also the manufacturer of the product may be held liable for the provision of the product quality guarantee. Article $6.364^4(1)$ of the Civil Code of the Republic of Lithuania defines that "the manufacturer shall be deemed to be the producer of the goods, the importer of the goods into the European Union, or any person who affixes on the goods his name, trademark or other distinctive sign." Article $6.364^4(2)$ of the Civil Code provides, accordingly, that "A product quality guarantee shall oblige the guarantor, in accordance with the terms and conditions set out in the quality guarantee document and in the related advertising published at the time of conclusion of the contract or prior to the conclusion thereof. Unless otherwise provided by other legislation, where the manufacturer gives the consumer a quality guarantee as to the durability of the goods for a certain period, the manufacturer is directly liable to the consumer for the repair or replacement of the goods in accordance with Article 6.364^2 of this Code for the entire duration of the guarantee. The manufacturer may offer more favorable conditions to the consumer in the document of the quality guarantee concerning the durability of the product." It follows from this provision that a commercial guarantee of the durability of a product for a certain period of time may be given to the consumer by the manufacturer. In such a case, the manufacturer is directly liable to the consumer for the repair or replacement of the product for the duration of the guarantee. At the same time, a commercial guarantee is an additional obligation on the part of the seller or the manufacturer (guarantor) towards the consumer, which does not affect the legal guarantee (statutory guarantee) but is simply additional to it. Therefore, during the period of the commercial guarantee, the consumer is not obliged to prove that the product's defects in quality are not their fault, but must inform the guarantor of the defects. Thus, for a consumer who prefers sustainable consumption, i.e., who wants to buy a durable, long-lasting product, the commercial guarantee is an additional indicator in decision-making.

Quality guarantee for second-hand items

The use of second-hand items can also contribute to the idea of sustainable consumption. As we have already mentioned, one of the aims of the circular economy is to use the same things for as long as possible: to repair items that are broken, to recycle items that no longer work and to pass on unused items to others who need them. It is equally important that when consumers decide to buy a second-hand item, they feel that their rights are protected.

The Civil Code of the Republic of Lithuania does not lay down any special conditions for the sale of a second-hand item, and the seller is liable for any discrepancy existing at the time of the transfer of ownership to the buyer, even if the discrepancy becomes apparent later on (Art.6.327(3) of the Civil Code). When interpreting the differences between second-hand and new items in terms of quality requirements, the Court of Cassation stated that "a second-hand item sold may, due to natural wear and tear, previous conditions of use (intensity, etc.), differ in quality from a similar new item, with the result that it may be expected to be less efficient and have a shorter service life but it must also be fit for its intended use. Fitness for its intended use must not be interpreted as meaning that it is possible to use the item, even if this entails considerable inconvenience, disruption of various kinds or additional costs" (No 3K-3-345-248/2017, para. 23; No e3K-3-307-1075/2018; No e3K-3-90-403/2022). Accordingly, unless the contract provides otherwise, the seller must ensure that the second-hand item sold is in conformity with standard requirements and that the buyer will be able to use it for its intended purpose.

As regards the protection of the consumer's rights in the case of second-hand goods, an important provision is laid down in Article 6.364(3) of the Civil Code of the Republic of Lithuania, which provides for the possibility, by agreement between the seller and the consumer, of shortening the period of the statutory guarantee for second-hand goods by a period of at least one year. This new provision is undoubtedly beneficial for sellers of second-hand goods. Considering that second-hand goods are a frequent subject of consumer sales contracts and that sellers of such goods bear a higher risk of possible defects in the goods, the current regulation will allow the seller to reduce the risk of potential liability in the event of the discovery of defects in the second-hand goods sold. It should be noted that before the adoption of this rule, the Court of Cassation had already explained that "the seller's liability for the quality of the item transferred is not absolute. The seller's obligation to guarantee the quality of the item sold does not extend to cases in which the defects in the item were known to the buyer or were so obvious that any prudent buyer would have noticed them without any special investigation (Articles 6.327(2) and 6.333(2) of the Civil Code)" (No e3K-3-454-611/2018, para. 32). As we can see, the burden of the seller's liability had been somewhat eased by the courts in their case law even before the adoption of the Law on the Amendment and Supplement to the Civil Code. On the other hand, when the seller seeks to shorten the statutory guarantee period, the consumer is informed that the goods are second-hand and is clearly aware of the quality guarantee period applicable to the second-hand goods that they are purchasing.

The civil law provides that the parties must reach an agreement on the shortening of the guarantee period. At the stage of drafting the Law on the Amendment and Supplement to the Civil Code, the SCRPS expressed its position that the wording of the provision of Article 6.364(3) of the Civil Code does not make it absolutely clear in what form such agreement between the parties

would have to be formalized – i.e., whether it should be expressed by the active action of the consumer, or whether the agreement will also be recognized as valid if the seller includes the condition on the application of a shorter period of the seller's liability for the second-hand goods in the standard contract of sale of the goods for the consumer's signature or in the rules of the goods guarantee, which are made available to the consumer (SCRPS 2021). It is therefore proposed that Article 6.364(3) of the Civil Code of the Republic of Lithuania should be amended by expressly stating in what form the consumer's agreement on the application of a shorter period of the seller's liability for second-hand goods should be expressed.

The wording of this legal norm remained unchanged after the adoption of the Law on the Amendment and Supplement to the Civil Code. Taking into account that the fact that a product is subject to a shorter statutory guarantee period must be proven by the seller in the event of a dispute between the parties, if the seller does not provide clear evidence that the parties had agreed on a shorter statutory guarantee period then it will be considered that the two-year period from the delivery of the item applies.

Conclusions

The law has a range of instruments that can contribute to the achievement of better sustainability objectives, in particular to ensure a balance between the consumer's right to adequate quality of goods and sustainable consumption. An important role in this area is played by the legal framework for consumer protection, which ensures these consumer rights. In turn, consumer rights stemming from the product quality guarantee encourage sellers (and indirectly manufacturers) to develop products with longer lifetimes, thus encouraging consumers to make more sustainable consumption choices, thereby reducing the negative effects of wasteful consumption.

For a long time in Lithuania, the product quality guarantee gave consumers the freedom to choose the remedy for the violation of their rights insofar as it did not contradict the principle of proportionality, considering the case law of the court of cassation. In the absence of a hierarchy of remedies, the promotion of sustainable consumption was in fact contributed to by limiting the consumer's right to unilaterally terminate the contract and claim reimbursement based on the minor importance of the defect. In all other cases, the consumer remained free to choose the remedy for the violation of their rights, which potentially created the conditions for the emergence of consumer behavior contrary to the idea of sustainability, as the consumer might simply have a subjective preference not to have the goods repaired but to demand the termination of the contract.

Minor defect is an evaluative term. Therefore, once the court has found a breach of the consumer's right to have the goods conform to the quality requirements, it has to decide on a case-by-case basis whether the consumer's intention to exercise the right of termination of the contract is possible. In other words, the court has to decide whether the defect found is of such minor importance that the consumer would not be able to defend their right in this way.

On 1 January 2022, significant amendments to the Civil Code entered into force in Lithuania, not only contributing to the entry into civil circulation of longer-lasting products but also allowing them to be used for a longer period. The consumer is no longer free to choose the desired remedy

for the violation of their rights, but has to comply with the two-step system of enforcement of consumer rights provided for in the law. The essence of this system is based on the fact that the consumer has the right to demand a reduction in the price of the product or to terminate the contract unilaterally only if the product is not repaired or replaced by another product of appropriate quality.

Repairing a product, which plays an important role in promoting sustainable consumption, is subject to the following requirements: the repair must be free of charge; the product must be repaired within a reasonable time; and the repair must not cause significant inconvenience to the consumer. In case law, the court or non-judicial authority hearing the dispute has to assess in each case the factual circumstances of the reasonable time and the serious inconvenience caused to the consumer, and to draw reasonable conclusions as to whether the consumer's right to quality assurance has been properly exercised. On the other hand, rapid advances in technology have led to the problems of planned obsolescence and the lack of a consumer right to repair, which complicate the exercise of the consumer's right to repair.

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II.4. CORPORATE SUSTAINABILITY AND THE SHAREHOLDER ACTIVISM PROBLEM

General outlook for corporate sustainability and the shareholder activism problem

Corporate sustainability has made its presence felt over the past quarter-century because sustainability threats (i.e., food insecurity, climate change, and COVID-19) are now much closer. Recently, the European Commission featured companies as playing the starring role in providing more sustainable and responsible corporate actions via global value chains with the proposal for a Directive on Corporate Sustainability Due Diligence, which lays a burden on executives to consider the sustainability-related outcomes of their decisions. However, this paper argues that not only executives but also every stakeholder should bear the load by taking the initiative when it comes to sustainability. Because said proposal will be brought into force, however, executives are required to assume full responsibility. In this context, companies need to map, align and leverage their current practices to all rules set out by the Draft Directive, particularly considering Articles 5–11. The structure of this paper, accordingly, takes the form of nine sections, together with the preliminary and conclusion sections that briefly remark on the effectiveness of the Directive in terms of shareholder activism.

The end of the primrose path threatens to ruin economic flourishes and permanent assets. Current global events (i.e., climate change, population growth, high poverty rates, and COVID-19) leave companies with no choice but to make mandatory tender offers toward employing more sustainable business practices. In this regard, the efficient use of natural resources by minimizing the environmental damage stemming from economic activities becomes one of the main goals of conscious consumers, businesses, and, more generally, societies.

Corporate sustainability is supposed to mean balancing the environmental, social, and economic outcomes of commercial affairs to follow a growth path which promotes long-term benefits for the company and its stakeholders (Farver 2019; Danciu 2013; McElroy and Van Engelen 2012). Judging the sustainable corporation under this definition, it should firstly be noted that a sustainable

corporation should be transparent in its operation (Farver 2019) by disclosing the company's sensitive information – such as financial status, management policy, or ownership structure – through providing sufficient and reliable information to all stakeholders, including creditors, employees, customers, and the public. As a natural consequence of this liability, the executives shall answer to all stakeholders in regard to the actual/likely results of their managerial decisions (Farver 2019); therefore, they should act in all stakeholders' best interests and correspondingly enhance corporate sustainability.

Companies should positively impact economic efficiency, social equality, and environmental protection to achieve corporate sustainability (Bansal 2005; McElroy and Van Engelen 2012). However, they often prefer to follow strategies prioritizing shareholders through marking share values up instead of balancing the interests of all stakeholders. These shareholder-oriented strategies are common in publicly listed companies as they have an easy exit option for the shareholders. Therefore, executives try to prevent shareholders from selling their shares, as this may reduce the corporation's market value (Admati and Pfleiderer 2008). This perspective often directs executives towards short-term economic prospects. Hence, it risks the long-term interests of stakeholders (Kahan and Rock 2006). In this case, to what extent shareholder activism is supported or how much it should be limited to improve corporate sustainability arises as a problem. Before this review, despite the fact that this chapter circles around corporate sustainability, it is necessary to distinguish two interrelated terms: *corporate social responsibility* and *corporate sustainability*.

Both terms are based on financial, ecological, and social performance scales, with the aim of protecting stakeholders and the environment through managerial decisions and balancing economic obligations with social and environmental responsibilities. However, there are some slight differences between the scope and purpose of their policies (Montiel 2008; Sheehy and Farneti 2021). Corporate social responsibility consists of a global approach based on international, uncontested norms as an organization-oriented idea. It is interested in regulating corporate behavior from the international policy level to individual corporate-specific policies (Sheehy and Farneti 2021). Corporate social responsibility is a broader term as it includes many aspects of the fundamental structure of an organization and constitutes a parameter of corporate sustainability (Sheehy and Farneti 2021; Bansal 2005; Panapanaan *et al.* 2003). In contrast, corporate sustainability represents a socio-ecological policy at the corporate level and a managerial effort in achieving sustainability goals (Sheehy and Farneti 2021).

In terms of terminology, this paper recognizes *shareholder activism* as the active effort of shareholders to maintain control over the company's management. The concept of shareholder activism is not a novel phenomenon, and the transformation process continues. Therefore, today's shareholder activists must be distinguished from their antecedents, who used the market for corporate control (Gillan and Starks 2007; Goshen and Steel 2021). Despite the presence of corporate raiders, shareholder activists often purchase minority stakes with the intent of directing a corporation (Goshen and Steel 2021). They also exercise strategies to bring about a change in operation without a change in control (Gillan and Starks 2007). Presently, the term refers to shareholders' attempts to drive the company's operation by wielding their influence in various ways (Hartmann 2014; Sjöström 2008; Judge *et al.* 2010). In this context, shareholders' activities fall along a large spectrum pursuant to their own interests (Gillan and Starks 2007; Hartmann 2014). One end of the spectrum is shareholders' participation in the usual processes, like voting through proxies during the general assembly

meetings in which they often follow wide-ranging strategies related to agency problems, such as proposing a nominee for a vacant position on the board of directors. On the other end is hedge fund activism, exerted with motives to direct the company single-handedly or bring about a significant change in the company's fundamental structure (Hartmann 2014). The primary motivation for activist shareholders is enhancing the company's value, which consists of their investments. To put it differently, social and environmental goals are secondary to shareholders (Del Guercio and Hawkins 1999; Judge *et al.* 2010; Hartmann 2014).

Activist shareholders rarely focus on the company's management policies from social and environmental perspectives. For example, in 1952, the shareholders of the Greyhound bus company in the US submitted a proposal to change the system discerning between black and white people on bus seats (Fairfax 2019). In 1970, a federal court order permitted a shareholder proposal to forbid the sale of Dow Chemical's napalm bombs (Haan 2019). Although shareholder activism has existed in a form of economic interest grouping, it can be exerted to incorporate social and environmental issues into management policy. From this point of view, it should be considered whether there is the potential for shareholder activism to coexist with corporate sustainability.

An overview of the impact of shareholder activists on corporate sustainability

One of the leading corporate problems of a company is to hold its executives accountable for their decisions. Since managerial authority belongs to professionals instead of shareholders, the ownership and control of a publicly listed company are separated (Berle and Means 1950); this leads to an increase in the executives' opportunistic behaviors (Jensen and Meckling 1976). In view of the lack of a control mechanism over the management, activist shareholders often take on control tasks. Shareholders can force executives to act for the company's benefit by using several means, such as personal talks, media campaigns, or threatening to file legal suits against them (Hartmann 2014). Therefore, shareholder activism can positively influence practicing accountability in a company's management. When viewed from this aspect, corporate sustainability may exist together with shareholder activism (Sjöström 2008).

The other influencing factor is closely related to balancing the interests of all related parties within a corporation. In terms of corporate sustainability, the primary purpose is to perform well in three main areas consistently (Farver 2019). For this purpose, executives should fulfill their environmental, social, and economic responsibilities without prioritizing them. In this regard, the main task of the management is to maintain a balance between internal and external interests while protecting the company's shareholders (McElroy and Van Engelen 2012). However, some activist shareholders, whose sole purpose is short-term returns, may endanger the company's long-term interests and its stakeholders (Bebchuk *et al.* 2015). Specifically, activist hedge funds mainly focus on finance-oriented changes, like the spinning of underperforming company assets or using share buybacks to distribute excess cash to shareholders (Cheffins and Armour 2011; Brav *et al.* 2008). They often hope to benefit from the appreciation in the value of their shares rather than to maintain

long-term performance (Bebchuk *et al.* 2015). For this purpose, they can influence or undermine the corporate decision-making process for specific corporate decisions like mergers, acquisitions, or divestitures (Hartmann 2014). However, a significant change in the fundamental structure of the company will inevitably deviate from common interests. Despite pinning hope on activist shareholders to achieve corporate sustainability, hedge funds' strategies can result in the loss of long-term sustainable earnings (Erdem 2021a). The more aggressive approach of activist shareholders may be more disruptive to corporate sustainability.

Eventually, it can be argued that shareholder activism's influence on corporate sustainability depends on the assertiveness of strategies in public companies. Therefore, the potential of their coexistence hinges upon evaluating practices on a case-by-case basis. However, the EU law approach in this regard seems quite remarkable. The maiden effort on sustainable development was introduced in 2010 with the Europe 2020 Strategy, emphasizing the significant role of businesses for a sustainable future (Commission Communication 2010). The European Commission then published the "Green Paper: Corporate Governance in Financial Institutions and remuneration policies in 2010," remediating the specific corporate governance vulnerabilities in publicly listed companies (European Commission 2010). In the same vein, it states that most shareholders only hold their shares for a short period in public companies, since shareholders are not interested in holding management accountable for their decisions and actions. While bringing out the main reasons for the economic crisis, it indicates the lack of efficient shareholder engagement.

The other development in EU Law, the Action Plan, was released in 2012, outlining the future endeavors of the European Commission to modernize the company law and corporate governance framework (Commission Communication 2012). The Action Plan highlights effective shareholder engagement as a supportive element of sustainability in public companies. Therefore, it aims to encourage shareholders to engage more in corporate governance. Furthermore, it suggests that institutional shareholders may shoulder more responsibilities for efficiently participating in the company's operation.

Then, the EU Parliament and the Council adopted the Non-Financial Reporting Directive to encourage large public-interest companies to achieve their sustainable goals (Council Directive 2014). This Directive envisages disclosing non-financial matters and managerial diversity information in large public-interest companies with more than 500 employees to develop sustainability in the global economy. The primary purpose of the Directive is to ensure accountable, transparent, and responsible business behavior by combining long-term profitability with social justice and environmental protection. However, the limited effects of this regulation are fruitless in solving the short-term investment problem.

Finally, in 2017, the Shareholder Rights Directive was adopted by The EU Parliament and the Council to improve companies' financial and non-financial performance, including environmental, social, and governance factors (European Commission 2017). The Directive criticizes the shareholders in public companies, such as hedge funds, for supporting the management in making risky decisions and focusing only on short-term profits. However, despite these accusations, it also suggests that the greater involvement of shareholders may improve long-term performance and, correspondingly, corporate sustainability (Davies *et al.* 2020). In this respect, it aims to increase shareholder activism for preventing short-term economic goals in public companies.

The European Commission's Communication entitled "Action Plan" (2020) covers that efficient shareholder engagement can pave the way for corporate sustainability. Similarly, the Shareholder Rights Directive (2017) lays down the rules on increasing shareholder activism frequency and quality to change short-term economic prospects in publicly listed companies.

With the amendments brought by the Shareholders' Rights Directive, the role of institutional shareholders has been given a fresh impetus with the allocation of their duties in the context of shareholder activism. This Directive lays down the rules of institutional shareholders' obligations in developing an activism policy involving financial and non-financial performance, risk, capital structure, and social and environmental factors. Furthermore, it facilitates the exercise of shareholder rights, including the right to attend the general assembly and vote. It also raises shareholders' influence by granting them binding votes on the remuneration of executives.

Consequently, the steps taken by EU law have implied an effective engagement of shareholders in the corporation. In this regard, shareholder activism is highly supported for improving a company's long-term performance in financial and non-financial areas. Despite the criticism against hedge funds, the general view regarding shareholder activism seems optimistic (Krishnan *et al.* 2015). However, this is only possible when shareholders act with motives to improve long-term success for the company's benefit.

The consumption culture: law and economic analysis of corporate sustainability and shareholder activism

Capitalism, in a broader sense, has slightly metamorphosed into different subtypes, such as moral, conscious, citizen, and stakeholder capitalism in consideration of kaleidoscopic societal necessities. To illustrate, in addition to the long-standing program of the Green Deal (European Commission 2019), a new trend toward digital and green transitions is currently followed by the European Industrial Strategy (Wright *et al.* 2019). Ostensibly, some studies indicate that consumers are not willing to bear any price increase in products because of the sustainable production process. This is well-defined by the following statement:

> Consumers say they want to buy ecologically friendly products and reduce their impact on the environment. But when they get to the cash register, their Earth-minded sentiments die on the vine. Although individual quirks underlie some of this hypocrisy, businesses can do a lot more to help would-be green consumers turn their talk into walk (Bonini and Oppenhaim 2008, p. 56).

Consumption has an important place as a requirement of capitalism in terms of the continuity of the ever-increasing production-consumption chain because the need for consumption is far beyond actual need. Today's economy is predicated on excessive consumption (Goodwin *et al.* 2008) to spin the wheel of capitalism as its most fundamental feature, which requires the increase of commercial transactions through repetitive demands.

Under this circumstance, in terms of corporate sustainability and shareholder activism, the crux of the matter is that shareholders of public companies are currently acting like customers of the company in favor of easier transactions, which can be made via digital platforms. The most likely reason for this is that companies are controlled by large interest groups, and this minimizes the influence of a limited number of independent shareholders on corporate decisions. For example, especially in publicly traded companies, share values are quite volatile due to hedge funds. This results in the tendency toward making more short-term investments by shareholders. The European Commission's Final Report entitled "Study on Directors' Duties and Sustainable Corporate Governance" also focuses on the short-termism problem and its root causes. Furthermore, it underlines the increasing trend in shareholder pay-outs (European Commission Directorate-General for Justice and Consumers 2020).

Therefore, undoubtedly, shareholder activism comes with massive destructive capability. This demolition is mostly accepted as essential for economic progress, particularly for the survival of capitalism. Lefebvre built his critical theory on the exigency of destruction to explain how capitalism survives by describing how cities have been repeatedly demolished and rebuilt to ensure a more effective production and consumption chain as follows: "The relations of production characteristic of capitalist society require … to … be reproduced. A society is a production and reproduction of social relations, not simply a production of things" (Lefebvre 1976, p. 96; Harvey 2008, p. 23). Therefore, in the pages that follow, it will be argued that the rapid pace of share transactions significantly shortens companies' lifespans and requires these companies to implement successful (i.e., sustainable and profitable) policies. One can also perceive the glass as half full due to the advantages of short-termism in terms of preventing the problems that may occur in terms of the cash flow of the company in the short run. From this perspective, in regard to the co-existence of corporate sustainability and shareholder activism, it *prima facie* seems that there is no common ground, since corporate sustainability prioritizes long-term outcomes of commercial activities, whereas shareholder activism – in fact – gives particular importance to short-term gains.

Statistical data concerning fast-moving corporations

In present-day conditions, companies are keeping up with hyper-consumerism. Consequently, most are sailed through in a fairly short time. As is the case with fast-moving consumer goods, many companies are easily marketable and passed into other hands quickly. These common – but banausian – structures have triggered the debate about the role and responsibility of corporations in building a viable future. Recent research shows that companies are not perennial and can survive for a much shorter length of time compared to the past. The average lifespan of a company will be decreased to 12 years by 2027, whereas it was 24 years in 2016 and 33 years in 1964. Based on the current churn rate, it is expected that half of existing companies will be delisted from the S&P 500 within 10 years (Innosight 2018). This rapid decline in corporate longevity is an imminent danger to the financial order in both the national and global aspects. It is a known fact that the company's death brings costs for all stakeholders, including employees, shareholders, suppliers, and the public (De Geus 1997). Even the failures of large companies, especially financial institutions, results in severe economic crises as seen now and on the stage of history (Garelli 2016).

Framing corporate sustainability

Recent studies on corporate sustainability are mainly listed under three headings: environmental integrity, social welfare, and economic prosperity (Bansal 2005; Farver 2019; Dyllick and Hockerts 2002). Since companies are conducting much larger projects today, they affiliate with society to a broader extent. For example, they employ many people, use natural sources, and emit pollutants into the environment (Sjöström 2008; McElroy and Van Engelen 2012). Due to their essential role for society, their operations may have constructive or detrimental impacts. For example, economic disparity, accordingly, would likely come out if companies solely focused on their commercial transactions to meet their financial concerns. For this very reason, corporate activities can recklessly veer towards natural sources to cover the demands of accelerating consumption. Companies' managerial decisions focusing on short-term returns may also produce adverse long-term outcomes (Brauer 2013). Although the awareness of today's civil society expects companies to respect common principles in their corporate activities, most are devoid of social duties, without any sustainability concerns (Sjöström 2008). In this regard, the debate about the company's purpose has come into prominence regarding whether it has responsibilities beyond profit.

Never-ending discussion on the company's reason for being (raison d'être)

The aim of a company has been a controversial point widely probed in the literature (Fisch and Solomon 2021; Rock 2020; Keay 2012; George *et al.* 2022) by recalling two main theories, namely shareholder and stakeholder primacies, to justify the main tasks and responsibilities of companies and their executives. According to the shareholder primacy theory, the executives of a company should only have an obligation to serve shareholders' interests (Berle 1931; Grossman 2005). Even though large companies involve many stakeholders such as employees and suppliers, they must prioritize shareholders' interests in their operations. This theory is generally based on the agency problem and claims that shareholders are the only risk bearers in the company (Hansmann and Kraakman 2001): thus, the executives should strive to protect their shareholders' investments only.

The transitivity between shareholders in companies is becoming more intense. Public companies have made it their general strategy to obtain short-term gains with short-term applications in order to protect and increase the value of their shares. This has two main consequences: the first is companies giving up their own long-term gains and jeopardizing long-term goals, while the second is increasing pressure on company executives. To date, success has been achieved for companies financed through stock exchanges. Even in this context, there are such companies that, as the company grows, go the way of splitting shares in order to bring in small partners (atomicity in corporate structure – alienated shareholders). The main purpose of this in general is to increase the number of investors by making the company stock more accessible. For instance, while many investors cannot buy a stock at $2,000, when the stock splits and the new value of shares drops to $125, it will be more accessible and the number of people who buy the stock will increase.

Another aim is to increase the number of shares traded in the stock exchange and to ensure that there is always enough stock to be bought and sold. However, there are hundreds of companies that do not prefer stock splitting, with only one share value of over a thousand dollars. In the US, finding "mum-and-dad" investors in these shares is possible through fractional shares (Waring 1931; Sobieski 1960; Da *et al.* 2022). This model, which is becoming increasingly widespread, provides great convenience in reaching adequate financing, especially for American companies. As a result, partners are constantly alienated from the company and leave the company after receiving their targeted profit rate. In this context, since it would be futile to expect awareness from the shareholders, the responsibility for sustainability also rests with the executives. However, until now executives were only accountable to shareholders (i.e., to the company). If the aforementioned directive becomes effective, they will come under a legal obligation regarding sustainability, and this will mean offering a solution to shareholder primacy. Executives will also be responsible for maintaining a balance of interests among all stakeholders.

Regarding the criticism against shareholder primacy theory, the "enlightened shareholder value" approach also receives support. According to this view, stakeholders' welfare should be an instrument for shareholder value maximization (Mayer 2021; Keay 2012; Ho 2010). Therefore, executives must consider stakeholders' interests to serve the long-term goal of maximizing shareholder value. However, this recent approach fails to set a new model other than the two fundamental theories mentioned above (Keay 2012). Hence, it would not deliver any benefits in terms of corporate sustainability by focusing on shareholder value maximization (Bebchuk *et al.* 2022).

On the contrary, the proponents of stakeholder primacy theory assert that executives should balance the interests of all stakeholders to ensure long-term performance (Bodie 2017; Freeman and McVea 2001). Given that the company's sole purpose is to improve shareholders' interests, executives will turn towards short-term economic prospects by sacrificing long-term earnings. Nevertheless, the modern understanding of corporate governance draws more attention to achieving long-term benefits and balancing all interested parties rather than prioritizing the maximization of shareholders' assets (Blair and Stout 1999; Bodie 2017). Therefore, in light of stakeholder primacy theory, companies have social responsibilities, even if they are not favorable to shareholders' interests (Freeman *et al.* 2010).

The stakeholder primacy theory has gained importance after global issues like the 2008 economic crisis and the COVID-19 pandemic (Erdem 2021a; Clifton and Amran 2010). Today, legislators and conscious individuals suggest that companies should bear more responsibility for incorporating social and environmental dimensions into their management policy. In this context, company management should be encouraged to improve its stakeholders' interests. This managerial approach would most likely result in the extension of corporate longevity while contributing to sustainable development (Ahn and Park 2018; Clifton and Amran 2010). Consequently, the shareholder-oriented management mentality will remain incapable of finding a way out for sustainability-related issues (McElroy and Van Engelen 2012). Under these facts, in terms of corporate sustainability, considering stakeholder primacy would be a valid theory and would warrant consideration.

On the proposal for a directive on corporate sustainability due diligence

A general overview of the proposal for a directive on corporate sustainability due diligence

EU law has not existed in a vacuum until recently, but it is currently shouldering responsibility by covering a lot of ground as such in the Green Deal. In fact, as per Article 37 of the EU Charter of Fundamental Rights of the EU, Article 3(3) of the Treaty on the European Union, and Article 11 of the Treaty on the Functioning of the European Union, one of the fundamental goals of EU law is to promote sustainability and environmental preservation. In this regard, the most recent regulatory initiative, the Proposal for a Directive on corporate sustainability due diligence (henceforth the "Proposal"), was adopted on 23 February 2022 to encourage sustainable and responsible corporate behavior for the better protection of human rights and the environment (European Commission 2022c). This proposal envisages the establishment of new rules in global value chains with a corporate due diligence duty by preventing the adverse human rights and environmental impacts of a company's operations while encouraging executives to achieve sustainability and climate change mitigation goals. The Proposal lays down rules for executives to act in the company's best interest as well as considering human rights and the environmental results of their decisions. These duties involve constituting and controlling the application of the due diligence processes and incorporating due diligence into management policy.

The circular economy and a sustainability-driven approach (barriers and promises)

Every single product has a cost to the environment. In this regard, together with a voluntary measure such as corporate social responsibility and conscious consumption (Satyro *et al.* 2018), the circular economy approach presents an all-embracing enforcement to minimize waste in closed loops (Bocken *et al.* 2016; Erdem 2021b, p.70). Towards a zero-waste strategy, Directive 2019/904, for instance, partly banned single-use plastics to raise consumer awareness concerning the use of disposable plastics by informing them about waste management and the impact of using disposable plastics on the environment. It also increased the liability of manufacturers by holding them liable to cover general waste treatment costs.

In a survey conducted in 2014 by the European Commission, more than three-quarters of respondents stated that they were willingly prepared to pay more for environmentally friendly products (European Commission 2014). However, when it comes to reality, they flinch from the additional costs – as seen in the Tomorrow's Chicken (Kip van Morgen) case, where chicken producers made a joint decision to raise chickens in more organic conditions, which would have increased costs by €1.46 per kg. An exemption was not granted, as the total benefits that consumers were willing to pay for amounted to €0.82 (€0.68 for animal welfare and €0.14 for the environment). Instead of

taking the non-economic benefit of the society into account, the Autoriteit Consument & Markt focused on consumer preferences and their sensitivity to price as well as reduction of choice (Bos *et al.* 2018).

A transition to low-carbon economies involves embracing circularity-inspired solutions. However, a circular economy by its definition entails "first mover disadvantages" with high investment costs. Therefore, cooperation on sustainability initiatives between economic agents, holding a long-term view on economic relations and resting on a notion of corporate responsibility beyond economic profit, is essential.

The problem is that externalities (i.e., labor exploitation and environmental pollution) are not internalized in the economic process. Already in 2007, economist Sir Nicholas Stern explained that "climate change is a result of the greatest market failure the world has seen," as the price of a product does not reflect its true costs (Economist's View 2007). The market price does not include the climate and environmental costs ("negative externalities") imposed on society resulting from greenhouse gas emissions and pollution (True Price 2019). The difference between the true price and market price, which is also known as the true price gap (Dolmans 2020), leads to a stalemate for the Green Deal. Neither businesses nor consumers compensate for the true price, which is currently borne by society as a whole. Economists largely agree that measuring the impacts of sustainability to set sustainability-cost-including prices is a thorny, yet essential, task (Long *et al.* 2012; Folkens *et al.* 2020, p.6681).

Intergenerational justice

European policies place great emphasis on environmental concerns, which has given rise to intense interest in the collaborative economy, particularly in the past decade. On top of detailed legal analysis, stress is laid on the collaborative consumption models as opposed to the consumerism trend. Concepts such as the sharing and circular economies, having important rules in the *acquis communautaire*, are particularly considered in this regard. Already, the focal points of the regulations and applications have centered upon issues related to sustainability. Regulators, companies, and shareholders should make ethical and conscious decisions to secure intergenerational justice by conserving the environment (De-Shalit 2005). Therefore, together with voluntary measures such as corporate social responsibility initiatives, more solid steps are required.

Encouraging businesses to maximize their profits at any cost would likely jeopardize the environment, and consequently the fulfillment of basic human wellbeing needs, such as a healthy ecological system and the efficient use of natural resources under intragenerational and intergenerational equity (Gibson 2013). It does not seem possible for judicial and regulatory bodies to make a comparison between profit-driven and low carbon economies, as they are both essential for society but cannot exist together (Pinkse and Kolk 2010). Making effectively applicable legal provisions is therefore key to maintaining the balance between global/irrevocable environmental issues and commerce. From another perspective, possible interference in profit-driven manufacturers for the sake of preventing environmental pollution would probably increase production costs, which would – in turn – reflect on pocket price. This means that fewer consumers would benefit from the related

product/service. Bork defines this situation as "a redistribution of real income" (Bork 1993, pp. 114–115). In such cases, consumers have an incentive to continue to use products longer, despite the adverse results such as safety, low performance, and environmental issues. This also impairs consumer welfare. These two alternative scenarios, consequently, require cautious interpretation, because employing a reasonable approach to tackle this issue would likely need either a sacrifice of the environment or of economic/consumer welfare. It is currently thought that both manufacturers and consumers should make ethical decisions (Maitre-Ekern and Dalhammar 2019; Meunier *et al.* 2015) to secure intergenerational justice by conserving the environment (De-Shalit 2005). Overall, it is not simple to overcome the conflict of interest between economic and environmental sustainability by using legal tools without the initiative of companies and societies.

To what extent should the directive offer a solution for shareholder activism: a critical assessment

Recently, the European Commission has featured companies as playing the starring role to provide more sustainable and responsible corporate actions via global value chains with the proposal for a Directive on Corporate Sustainability Due Diligence (European Commission 2022a). This is essentially based on the United Nation's Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises, and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, as well as internationally recognized human rights and labor standards (European Commission 2022b).

In fact, more awareness has been raised regarding sustainability issues, especially with circular economy policies promoting sustainable investments. Likewise, this situation is ensured not only by regulations made in the axis of corporate law but also by regulations made in the context of consumer law and competition law. However, this Directive is built on exactly two pillars: human rights protection (as well as labor rights) and the protection of the environment (European Commission 2022a). In this context, the most important aspect of the Directive presented to provide harmonized legal certainty on the internal market is that it provides intergenerational justice, and that, with the increase in transparency and informed choice of businesses, it actually results in businesses being either heroes or fully responsible culprits. In other words, the aforementioned reputational risks via greater customer trust and employee commitment lead companies to make more accountable moves (European Commission 2022a).

Provisions concerning human rights and environmental due diligence were enacted among the EU Member States, especially Germany, France, and the Netherlands, as well as Switzerland (as an EFTA member) and the UK (which recently left the Union); no other sufficient attention from the other countries has been received (Business & Human Rights Resource Centre 2022). It would not be wrong to say that the EC has constantly determined sustainability-based policies in recent years, because this is an imminent danger and green transition is a must. This is not only the EC's own initiative but also the expectation of companies and society. To date, companies have developed corporate sustainability tools by themselves and have taken individual steps in some ways, but it is

a fact that these steps provide as much benefit as a grain of sand in solving the general problem. Studies also show that when companies take such voluntary actions, they fail to prioritize human rights and environmental considerations (Smit *et al.* 2020).

The EU Commission indicated that "Institutional investors which invest across the borders own a large part (38%) of the total market capitalisation of large European listed companies, therefore many companies have cross-border ownership and their operations are influenced by regulations in some countries or lack of action in others (Commission Staff Working Paper 2014). This is one of the reasons why frontrunner companies arguably are reluctant to do a further step in addressing sustainability issues including those in the value chains today and ask for a crossborder level playing field." For instance, food producer Danone was recently forced to cut costs by investors on grounds of a lack of short-term profitability (The Economist 2021; European Commission 2022c).

In this case, it does not seem possible for institutional investors (such as hedge funds) to consider sustainability, because the purpose of establishing these companies is to derive profit by all means. However, although the investments to be made with the aforementioned Directive do not need to be made under consideration of sustainability, it may be necessary to take new investment decisions in line with the sustainable goals of the company to be invested in.

In the interpretation of sustainability in the context of the Directive, the concepts of human rights and environmental protection should be interpreted quite broadly, but the concept of sustainability should not be expanded. In this context, for example, it is expected that the working conditions of workers will be improved under the title of human rights, and business strategies will be determined in the light of adverse environmental impacts contrary to environmental conventions within the scope of environmental protection. There is no consensus as to what is meant by sustainability – neither whether it should be interpreted in a broader or stricter sense nor whether there should be a hierarchical order, prioritizing environmental aspects over social aspects such as such as workers' conditions. The Brundtland Report defined sustainable development as "… development that meets the needs of the present without compromising the ability of future generations to meet their own needs." Sustainability could also be defined as the welfare of future generations based on the fair use of limited natural resources (UN 2022; Kuhlman and Farrington 2010).

The crux of corporate sustainability and its intersection with shareholder activism are the cases that need to be added to the director's duties, which are expected to be regulated by the Directive. According to this, there are two important points indicated below:

> When directors act in the interest of the company, they must consider the human rights, climate and environmental consequences of their decisions and the likely consequences of any decision in the long term (European Commission 2022b).

> Companies have to duly consider the fulfillment of the obligations regarding the corporate climate change plan when setting any variable remuneration linked to the contribution of a director to the company's business strategy and long-term interests and sustainability (European Commission 2022b).

As seen in these proposed provisions, executives can no longer refuse responsibility in terms of adverse sustainability-related outcomes because of corporate decisions. Rather, they are liable for considering the long-term interests of companies. This, in our estimation, would likely make a positive contribution to shareholder activism, since it eases off on executives by removing the pressure on them to exactingly follow shareholders' orders on deriving short-term profits by taking no account of sustainability.

The scope of the Directive will be initially limited to large limited liability companies having more than 500 employees and €150 million net turnover worldwide – including non-EU companies conducting their commercial transactions within the boundaries of the EU (called Group 1 EU companies). Other limited liability companies listed under the title of Group 2 EU companies are those which operate in defined high-impact sectors, which do not meet these thresholds, but which have more than 250 employees and a net turnover of EUR 40 million worldwide and more. For these companies, the rules will start to apply 2 years later than for Group 1 companies. It should also be noted that "Group 1 companies need to have a plan to ensure that their business strategy is compatible with limiting global warming to 1.5 °C in line with the Paris Agreement."

This is because, while it can be accepted as an obligation for growing companies to establish their corporate identity and culture, it would actually be a burden to impose such an obligation on other companies, including small and medium enterprises.

In default of the due diligence obligation, specified large limited liability companies will be fined by the authorities to be designated by the Member States. It is also worth considering that those who are damaged as a result of this negligence may also request compensation. In other words, the right of civil liability claim (legal action for damages that could have been avoided with appropriate due diligence measures) will be recognized by the Directive (if accepted).

Having looked at shareholder activism, the most problematic companies are large public companies. Shareholder activism has the capacity to be decisive if this regulation is passed. Although the aim seems to be human rights and a green transition, the side benefit of this regulation will result in the attention of stakeholders.

Companies are established to make a profit. In this context, it would not be wrong to say that the best company is the company that earns the most for its partners. However, with the recent increase in examples that shareholder-centric approaches can bring more harm than good to the company, the search for a shift in a new corporate model in the context of commercial law has started to become more active.

By considering the proxy problem, the board of directors of the company should not serve any purpose other than making the company profit (i.e., protecting the shareholders' financial rights). However, over time, it has been seen that executives that are principally focused on satisfying company partners, not the company, can give up, and this situation causes the duty period of both the boards of directors and the company to be greatly reduced. In this context, one can say that executives' purpose is not the welfare of the company, but their own internal welfare through satisfying shareholders. The sense of belonging to the company is becoming more and more fragile. For this reason, companies have turned into organizations that act excursively and do not care about sustainability in order to make large profits in the short term. The fact that the company only looks after the interests of the company's shareholders (shareholder primacy) also poses a growing problem

in this context (Sjåfjell 2016). However, in the new world economic order, the understanding that companies have responsibilities other than making a profit and that they should also take care of their stakeholders is becoming increasingly common (Möslein and Sørensen 2021; Cavallo *et al.* 2022). While this approach has hitherto been only voluntary, together with the aforementioned Directive, companies will henceforth be obligated to adopt this approach.

Conclusions

Corporate sustainability has made its presence felt over the last quarter-century because sustainability threats (i.e., food insecurity, climate change and COVID-19) are now much closer. This is to say, even if executives can take the initiative in terms of socially responsible investing, they in fact have an ultimate responsibility towards pursuing shareholders' interests. The modern understanding of corporate governance blossoms into the interests of all parties concerned with company management. However, businesses largely follow strategies prioritizing shareholders by means of marking share values up. This brings the mentality that shareholders have an itching palm with short-term economic prospects, and this generally makes companies more ephemeral. This mostly happens when it comes to the shareholders of public companies. Therefore, these companies frantically attempt to remain afloat and so to continue their existence against the activist strategies mostly followed by hedge funds. Since companies are embarking on much larger projects compared to in the past, they cannot always provide the required liquidity from their own resources, and therefore they try to overcome these difficulties by offering a sufficient amount of their shares to the public. For this very reason, public companies have become one of the main actors in the global financial system. However, the fact that these companies, which are constantly growing with an uncontrolled shareholder-centric understanding, are devoid of social duties without any sustainability concerns, poses a major legal problem. In this regard, the debate about shareholder activism has gained fresh prominence, with many arguing that the sole purpose of companies should not be to increase the individual interests of shareholders but to balance the interests of all stakeholders including creditors, employees, customers, and the public. In this context, there are two main directives in EU corporate law.

First, the Non-Financial Reporting Directive lays down the rules on the disclosure of non-financial and diversity information by certain large companies, and is expected to encourage large public-interest companies with more than 500 employees to demonstrate that they shoulder responsibility by furnishing themselves with sustainable goals. However, the effects of this law remain limited and cannot go beyond the role of a controversial topic. Nevertheless, the EU Commission has recently produced a promising Proposal (Directive on Corporate Sustainability Due Diligence) to clear up said problems. If it is passed into law, executives shall be obliged to consider the long-term impacts of all decisions taken, ensuring the benefit of all stakeholders. This paper, accordingly, argued the applicability of this Proposal on corporate actions in the context of current shareholder activism, and illustrated the debate around whether and to what extent ensuring corporate sustainability through neutralizing shareholder-centric corporate governance can actually offer a solution in terms of the sustainability of corporations.

Modern consumption culture, so-called consumerism, now has a hand in the shareholder structures of corporations. Today's shareholders are intertwined in this, whether they are shareholders or consumers, as they treat shares as disposable. Although shareholders are actually bodies who should be seen as investors or traders, they are currently acting like customers when purchasing a share. Compounding this issue is the notion that shareholders' sense of belonging to their companies is also very weak, resulting in bitter fruits. Therefore, shareholder approximation has the potential to redress and instigate the investing preferences of companies. In particular, shareholders' environmental preferences (prosocial attitudes) would likely encourage firms' incentives to greener and fairer practices. In other words, as long as the number of environmentally motivated shareholders increases, firms will move towards sustainability-related issues (i.e. the protection of the environmental and human rights). In fact, every stakeholder should bear the load by taking the initiative when it comes to sustainability; however, given that said Directive will be brought into force, executives are required to assume full responsibility. In this context, companies need to map, align and leverage their current practices to all of the rules set out by the Draft Directive, particularly by considering Articles 5–11.

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II.5. THE REMOTE PARTICIPATION OF SHAREHOLDERS IN THE GENERAL MEETINGS OF PRIVATE COMPANIES AS A TOOL FOR MORE INCLUSIVE SHAREHOLDER ENGAGEMENT

Potential of company law to contribute to more inclusive shareholder participation in general meetings

The 2030 Agenda for Sustainable Development of the United Nations includes the 17 Sustainable Development Goals and their 169 related targets, and provides a new policy framework aimed at balancing three dimensions – economic, social, and environmental (profit, people, and planet) – and ensuring that no one is left behind (UN 2015, p. 3). With the view that companies could take on a bigger role in contributing to the overall progress of achieving the UN Sustainable Development Goals (EC 2019a, pp. 26–27; EC 2019b, p. 17; EC 2020, p. 6), and considering COVID-19-pandemic-related developments that witnessed increased debate on corporate sustainability, there are ongoing discussions over the corporate governance framework being more aligned towards sustainability objectives.

Shareholders can bring changes in corporate policies and practices in order to engage companies on sustainability issues, and the corporate governance framework has to be adapted in such a way as to encourage shareholder engagement for companies to better deliver sustainability. There is the potential for company law to contribute to more inclusive shareholder participation through the mechanism of the general meeting, as the principal venue for shareholder engagement. Although a number of legal tools that could produce desirable changes in the pursuit of these policy goals can be considered, digital solutions offering remote participation can make shareholders more participative in general meetings, and digitalization can produce positive effects on sustainability in more general terms. An example of this is converting to the online format in an emergency situation when, seeking to protect the public health, a physical gathering is not permitted, or this avoids travelling cross-border to the physical address where the general meeting would take place.

Assuming that shareholders can contribute to corporate sustainability, this article analyzes the company law rules that govern remote attendance and voting by shareholders at general meetings as a legal tool for more inclusive shareholder engagement in Lithuanian companies. There are divergent views as to the regulatory approaches that deal with the online and in-person participation of shareholders in general meetings in achieving the policy goals, and their effects in public and private companies. In Lithuania, the LSC provides for certain peculiarities on remote participation for listed limited liability companies, if compared with private limited liability companies (hereafter – private company). The focus of this article, however, is on private companies as the most popular legal form of company in Lithuania (Official Statistics, data for 2021), and a legal form which is not subject to harmonization under European company law.

Although the central role of the general meeting as a mechanism to anchor shareholders' democracy and to increase the accountability of corporate management is highlighted in public companies where ownership and control is separated (Nili and Shaner 2022, pp. 140–153; BETTER FINANCE-DSW 2020, p. 4), the notion of the general meeting as a forum for shareholders should not be overlooked in the context of private companies. This especially holds true in the light of the rulings of the Supreme Court of Lithuania in recent years, which upheld a wider discretion of shareholders-owners that can be exercised thought the medium of the general meeting by endorsing a broader mandate of the general meeting, as a primary corporate organ with the ultimate authority of the shareholders, in a private company (rulings of the Supreme Court of Lithuania of 24 November 2021 in civil case No. e3K-3-294-823/2021, and of 2 December 2021 in civil case No. e3K-3-300-313/2021).

The ease of online participation can also have a reverse side for minority shareholder to effectively interfere into management and affairs of a private company. Shareholders of private companies with partnership-type characteristics are often personally involved in the company's management and its affairs, and thus face-to-face interaction is likely to be more appropriate. Minority shareholders who are not part of the management group and have no similar interaction with the company outside of the general meeting, compared to their fellow majority shareholders, can demonstrate a willingness to be in-person at the meeting in order to be meaningfully engaged in the company's affairs and to influence decision-making as well as corporate policies and practices. Needless to say, striking a balance between the different interests of minority and majority shareholders can be challenging.

Having this all in mind, this article starts with a historical analysis of the Lithuanian legal framework on the remote participation of shareholders in general meetings, which was in force before and during the COVID-19 pandemic (from 2009 to 2022). For the purpose of inclusive shareholder participation, it also addresses the major drawbacks of the light regulatory approach in force at that time. The article then proceeds with an analysis of the Lithuanian case law to identify the key challenges in the light of inclusive shareholder participation that both companies and shareholders have faced in applying the legal regulations governing the attendance and voting of shareholders by electronic means in practice. Finally, on the basis of this analysis and referring to comparative examples, the article evaluates whether and how the new rules on shareholders' remote participation, as adopted in November 2022 by the Lithuanian Parliament, address the notion of shareholder participation in general meetings by electronic means under normal circumstances in the context of private companies.

Company law rules on remote attendance and voting at general meetings: before and during the COVID-19 pandemic

Legal framework since 2009

Since 2009, the Lithuanian legislation has provided a legal basis for shareholders' governance rights associated with general meetings to be exercised in an online format. According to Part 4 of Art. 21 of the Law on Stock Companies (hereafter – the LSC) enacted in July 2009, a company can enable shareholders to attend and vote at a general meeting by electronic means. This rule survived during the COVID-19 pandemic, and it was in force by the end of November 2022.

From the historical perspective, the rule on remote shareholder participation in general meetings was introduced into the LSC by implementing the provisions of Art. 8 of Directive 2007/36 on shareholders rights (hereinafter – the SRD or the directive), which required Member States to permit listed companies to offer to their shareholders any form of participation in the general meeting by electronic means (Arts. 1 and 8 of the LSC). The scope of harmonization was limited to listed companies alone, while the Lithuanian legislator when implementing the directive simultaneously enacted a broader personal scope and established an option for the shareholders of both private and public companies to engage remotely at general meetings.

The LSC embeds the following shareholder governance rights associated with the exercise of the general meeting by electronic means, while the right to attend and the right to vote at the meeting are to be exercised at the discretion of the company, the remaining rights are determined by law:

1. the shareholder's right to attend the meeting may be exercised by electronic means. This right also includes two other components – the right to participate in discussions and the right to ask questions at the meeting (Parts 1 and 4 of Art. 21 of the LSC);
2. the shareholder's right to put items on the agenda may be exercised by electronic means (Part 3 of Art. 25 of the LSC);
3. the shareholder's right to table draft resolutions may be exercised by electronic means (Part 4 of Art. 25 of the LSC);
4. the shareholder's right to vote at a general meeting may be exercised by electronic means (Part 4 of Art. 21);
5. the shareholder's right to vote by correspondence (written ballot) may be exercised by electronic means (Part 3 of Art. 21 of the LSC).

There are no specifically designed rules on the shareholder's right to information when the corporate meeting is organized in a virtual form. The general rule is that a company has to answer or indicate in writing the reasons for the refusal to provide an answer to the shareholder's questions submitted to the company that are related to the items on the agenda of the general meeting, if the company received the questions no later than 3 business days before the meeting. In principle, the company can refuse to provide corporate information if it is considered confidential or related to the company's commercial (industrial) secrets (Art. 16^1 of the LSC).

Among other essential aspects related to remote participation it should be mentioned that following the spirit of the SRD (Part 2 of Art. 8), the use of electronic means for the purpose of enabling shareholders to attend and vote at a shareholders' general meeting is allowed, subject only to such requirements and constraints that are necessary in order to ensure the identification of the shareholder and the security of the electronic communication, and only to the extent that these constraints are proportionate to achieving those objectives (Part 5 of Art. 21 of the LSC and Part 6 of Art. 21 of the current version of the LSC)).

As regards the procedures, the LSC requires that a notice on the forthcoming shareholders' general meeting (or alternatively – information on the company's website) includes a description of the order on attendance and voting at a shareholders' general meeting by electronic means (Item 9 of Parts 2 and 3 of Art. 26 of the LSC).

Regulatory challenges for more inclusive shareholder engagement at general meetings

An overview of the legal framework in force in the 2009–2022 period concerning remote shareholder participation in the general meetings of private companies enables the following conclusions.

Firstly, the focus of the legal rule providing that companies can enable their shareholders to attend and vote at a general meeting by electronic means was on the private autonomy of companies in holding the general meeting through remote participation. Participation in the meeting by electronic means was not an entitlement for shareholders by law, but rather a tailor-made decision at the discretion of the company.

Secondly, by permitting companies to enable remote shareholder participation in general meetings the LSC did not address which corporate body had to decide on this issue. According to the provisions of the LSC, the board of directors (or the managing director if the board is not formed) was responsible for holding the general meeting, and the decision on shareholder participation by electronic means does not fall under the exclusive competence of the general meeting (Parts 2 and 3 of Art. 23 and Part 1 of Art. 20 of the LSC). Further, the LSC had no requirement that remote participation should have been envisaged in the articles of association of the company. It follows that corporate directors alone were able to decide on the issue, unless the articles of association of the company provided that the general meeting should have dealt with it. It is worth mentioning that this issue is not self-explanatory, and, as demonstrated on a comparative basis, there were different regulatory approaches as to who should decide on remote shareholder participation (e.g., the decision on the purely virtual format of the meeting is made by shareholders though the medium of articles of association in Denmark, while the same decision is made by the board of directors in Ireland; ICLEG 2022, pp. 9–10).

Thirdly, by allowing companies to opt for remote shareholder participation in the general meeting the LSC did not provide clarification as regards its hybrid or exclusively virtual format. Furthermore, as is relevant in a private company context, company law rules have not tackled the protection of shareholders disadvantaged by the change to the exclusively virtual format of the meeting. Although

participation by electronic means is not a shareholder right under the SRD (EC 2022, pp. 2, 9), national laws on the possibility to hold a purely virtual general meeting vary (ICLEG 2022, pp. 7–9; VUTT and VUTT 2022, p. 445). There was no legal certainty on whether a general meeting where in-person participation is unavailable should be permissible for Lithuanian companies.

Fourthly, these light regulations presupposed wide discretion of corporate directors in enabling shareholders to participate remotely in these meetings. Therefore, the leeway of corporate directors should have met the standards of good faith and reasonable behavior.

Although the legislative approach enabling the remote participation of shareholders at corporate meetings in force in the 2009–2022 period was rather general and abstract, it can be assumed that these company law rules built the necessary prerequisites for more inclusive shareholder engagement.

Having said that, it should also be acknowledged that light regulations on remote shareholder participation in general meetings – raising uncertainties for companies on how to properly translate general and abstract rules into concrete corporate practices on the one hand, and failing to adequately protect minority shareholders in a private company affected by such corporate practices on the other – can pose challenges to inclusive shareholder participation. The case law discussed below evidences the fact that the courts had to dealt with the interpretation and application of the provisions of the LSC concerning remote shareholder participation in annual general meetings during the COVID-19 pandemic. Although difficulties were experienced by companies and their shareholders in these extraordinary circumstances, the case law also provides valuable insights to forecasting the challenges that can be encountered in relation to the remote participation of shareholders under usual circumstances.

Annual general meeting of shareholders during the COVID-19 pandemic

Duty to hold annual general meeting

Although the legal rule on shareholders' remote participation in general meetings has been in force for more than 10 years, an online format for the use of shareholders' governance rights at the annual general meeting deserved special attention during the COVID-19 pandemic, when legal restrictions relating to physical gatherings aimed at protecting the public health were in place.

The LSC requires a company to hold an annual general meeting of shareholders within 4 months after the end of the corporate financial year (Part 1 of Art. 24 of the LSC). The annual general meeting has to approve the annual financial statements of the company and decide on the distribution of corporate profits. The approved financial statements of the company have to be submitted to the Register of Legal Entities within 30 days following the annual general meeting (Parts 2 and 3 of Art. 58 and Part 1 of Art. 59 of the LSC).

On a comparative basis, during the COVID-19 pandemic, when restrictions on physical gatherings were applied and the traditional form of general meeting could not take place, temporary

special measures in the field of company law were enacted in some jurisdictions, and new legal rules were adopted or existing legal rules were relaxed or suspended (Enriques in press, pp. 261–262). For example, given the restrictions on physical gathering, shareholders had to exercise their rights at general meetings remotely or through proxy, to vote by correspondence in advance of the meeting, or to adopt decisions without meeting. Additionally, the deadline to convene an annual general meeting was extended by simultaneously postponing the delivery of annual financial statements of companies to the business register (Borselli and Farrando 2020, pp. 274–294; BETTER FINANCE-DSW 2020, pp. 6-12).

Unlike in some other jurisdictions that specifically addressed the emergency situation in the field of company law, in Lithuania there were no special legal rules dealing with annual general meetings of shareholders, and the explicit annual general meeting requirement was retained – i.e., neither was the deadline to convene an annual general meeting extended nor were corporate directors released from the duty to convene the annual general meeting. As under normal circumstances, during the COVID-19 pandemic the annual general meeting had to be held within the prescribed term. Shareholders' rights were also not specifically addressed by law during the pandemic.

In Lithuania, due to the quarantine restrictions imposed – where all events and gatherings organized in both open and closed spaces were prohibited, as introduced in the period of 16 March to 18 May 2020 in the territory of the Republic of Lithuania by Resolution No. 207 of the Government of the Republic of Lithuania of 14 March 2020 – companies could not convene annual general meetings with shareholders' physical attendance. For the remainder of May to 1 June 2020, physical gatherings were significantly restricted.

Having regard to the closed nature of the general meeting, in one of the cases, shareholder argued that the quarantine restrictions should be understood within the boundaries of the specific concept of meetings to express views and opinions freely in public gatherings to ensure the expression of the civic activity of the person in society. This position was not sustained by the jurisprudence (the ruling of Vilnius district court of 20 August 2020 in the case of administrative offenses No. AN2-273-898/2020). Given that the quarantine restrictions were aimed at managing the pandemic, the court ruled that the notion of gatherings equally applies to companies holding annual general meeting with the physical participation of their shareholders.

Case law on changing the format of the general meeting

Given the quarantine restrictions on holding a physical form of general meeting, coupled with the restrictions on travel, in order to fulfil their duty to hold an annual general meeting during the pandemic companies had to choose other formats in which to conduct the meeting. Case law evidences that, in 2020, the legal framework would also have permitted the exclusively online format of the general meeting of shareholders, as companies facing the challenge of holding a purely virtual meeting invited all shareholders to vote by correspondence (written ballot) before the date of the meeting took place. In such cases, some minority shareholders felt that their rights were not respected.

This can be illustrated by the following two examples of case law concerning challenging the decisions of the general meeting in private companies that, in principle, share similar arguments of

the parties and reasoning of the court at the appeal instance (the civil cases of Vilnius district court: the ruling of 20 April 2021 in case No. e2A-829-232/2021 and the ruling of 30 March 2021 in case No. e2A-777-565/2021). In civil case No. e2A-829-232/2021, the litigation was initiated by the minority shareholder holding 11.30 percent of the votes and disputing the corporate decisions approved by the majority of votes, holding 78.62 percent. In another case, No. e2A-777-565/2021, the litigation was initiated by minority shareholders holding 8.78 percent of the votes and disputing the corporate decisions approved by the majority of votes, holding 83.16 percent. The ground for raising a lawsuit by the minority shareholders against the decisions of the annual general meeting was an essential violation of their governance rights caused by a change of the format of the general meeting.

The company conducted the general meeting by replacing its traditional form of the gathering with voting by correspondence (written ballot) in advance of the meeting. Essentially, the shareholders, who expressed their will to convene a virtual general meeting being supplemented with voting by written ballots and who finally decided not to vote by correspondence, which was the only option offered by the company to participate in the meeting, argued that the shareholders and not the management are entitled to decide on a change of the format of the general meeting, and that such a decision should be made by shareholders unanimously. The plaintiffs also stressed that due to the change of the format of the general meeting they were deprived of the right to attend the meeting and the right to vote at the meeting, and other governance rights associated with the general meeting were also restricted (i.e., the right to take part in debates, the right to ask questions, the right to propose new agenda items, and the right to table alternative draft resolutions on agenda items). The shareholders-plaintiffs argued that if the general meeting could not have taken place in a lawful manner, then the company had to reconvene the meeting.

In both cases, the court emphasized that due to the quarantine restrictions imposed in relation to the quarantine regime, the company could not organize a physical annual general meeting of shareholders. The court sustained the arguments of the company that the change of the format of the general meeting by choosing voting by correspondence in advance of the meeting was justified since, at that time and under the particular circumstances of the case, the company was not able to deliver a virtual meeting at short notice, nor did it have the necessary funds to hold it. Remote participation would have been available only to a part of the shareholders because some did not have the opportunity to sign documents with an electronic signature, nor did they have the necessary electronic means of communication such as computer equipment, a phone, or internet access.

In case No. e2A-777-565/2021, it was stressed that neither the company nor its 38 shareholders had had enough time to prepare for holding the annual general meeting by electronic means. The court upheld the company's position that the only objective way to fulfil the requirement on the convocation of the annual general meeting within the established deadline (30 April 2020) was the invitation of shareholders to vote by correspondence before the meeting took place.

In both cases, the court not only considered the specific conditions of the quarantine, but also analyzed the engagement of the plaintiffs-shareholders. The shareholders argued that had they voted by correspondence in advance of the meeting, they would have agreed with the proposed unlawful form of the meeting. The court, however, qualified the shareholders' behavior in not using their

associate rights as passive (e.g., the shareholders failed to ask for information related to the agenda of the general meeting, to submit questions in advance, to propose alternative draft resolutions on the agenda items, or to table new agenda items). Given the specific circumstances of the quarantine and the passive engagement of the plaintiffs vis-a-vis the company, the court ruled that due to the change of the format of the general meeting the procedural violations on the convocation of the meeting did not amount to an essential violation of the shareholders' governance rights.

In the legal proceedings initiated by the shareholder of a private company holding 25 percent of the votes, the court (the ruling of Klaipeda district court of 4 April 2022 in civil case No.e2A-195-1092/2022) had to rule, among other things, on the validity of the decisions of the annual general meeting of shareholders as of 30 April 2020 (*inter alia*, the decision to approve the financial statements for 2019) and the decisions of another general meeting as of 18 June 2020, both held by voting by correspondence even though the shareholder had made a request to arrange a virtual or physical meeting. Unlike in the abovementioned cases, the shareholder-plaintiff had voted by correspondence before the date of the meetings.

When assessing the shareholder's arguments about the breach of their governance rights associated with the change of the form of the general meeting, the court partly upheld the company's position that it had difficulties in arranging shareholders' remote participation in the annual general meeting on 30 April 2020 due to objective reasons, since the company had to find safe ways to communicate remotely and to ensure the proper identification of participants-shareholders, as required by Part 5 of Art. 21 of the LSC. Although the legal framework does not guarantee debates at the corporate meeting and direct interaction among its participants (the court expressed the view that other fellow shareholders and corporate management may not attend the general meeting), the plaintiff's position concerning the forthcoming general meeting was disclosed and known to the fellow shareholders, as the shareholder had submitted arguments and concerns in written form both to the company and the other shareholders before the meeting. The court agreed that the shareholder's participation in either a remote or physical face-to-face gathering was constrained by the change of the form of the corporate meeting. However, given the above, it ruled that this hurdle by its nature and scale could not be an independent and sufficient ground for the court to declare the decisions of the general meeting invalid on that particular ground.

In regard to another general meeting convened on 18 June 2020, the court took a different view, stating that the company had sufficient time to adapt to the changes and to organize the general meeting by electronic means. Having said that, the court found no sufficient basis to invalidate the decisions of the shareholders' general meeting on that particular grounds by considering the direct communication of the defendant vis-a-vis other fellow shareholders before the meeting.

The above jurisprudence demonstrates that the courts – by interpreting and applying the legal provisions governing the duty to convene an annual general meeting to approve annual financial statements within the firmly prescribed term, on the one hand, and the respective shareholders' participation rights, on the other – have evaluated the specific circumstances. *Firstly*, the courts have acknowledged that companies facing the COVID-19 pandemic, which was of an exceptional nature and scale, had to adapt to changes and transform their corporate practices towards remote participation with insufficient time to prepare for it. *Secondly*, the courts have considered the *status quo* of the LSC which had to be applied in the absence of temporary special legal measures to address the

situation of the quarantine in the field of company law. And the courts have supported a wider discretion of companies in using voting by correspondence instead.

Judicial challenges for more inclusive shareholder engagement at general meetings

Under normal circumstances, when the use of technology has already progressed significantly, corporate practices that do not enable shareholders' gathering in either form – physical and/or remote – and offer voting by correspondence as the only option to participate in the general meeting should pose concerns about the threshold required to meet the minimum standards of the fundamental rights of shareholders. While aimed at encouraging shareholder engagement, the law obliges the company, following the request of the shareholder, to arrange voting by correspondence on agenda items before the date of the meeting. Therefore, converting a forum for shareholders into their exclusively written participation at the company's own discretion under normal circumstances should not be permissible.

Following the jurisprudence of the Supreme Court of Lithuania, when the governance rights alone of shareholders are violated (and a violation of the financial rights of shareholders or collective interest or public interest is not simultaneously claimed), a breach of the procedural rules governing the organization of general meetings can be a sufficient ground to challenge the decisions of the meeting if the shareholder-plaintiff demonstrates that the decision being disputed causes prejudice which is not of a minor nature (Review of the case-law of the Supreme Court of Lithuania of 22 May 2019 on the implementation of shareholder rights and their remedies). A breach of the most fundamental rules governing the functioning of the corporate body and corporate decision-making at the general meeting, such as quorum requirements or majority rule, is treated as essential, and it forms a sufficient basis for the court to set the decision aside. In other cases, if the same results are anticipated if the meeting is re-convened anew with the attendance of the plaintiff-shareholder, as a rule, no essential infringement of the shareholder's governance rights associated with the procedural violation in holding the meeting will be found (for more about shareholders' remedy to challenge the decisions of general meetings in Lithuania, see: Banytė and Bitė (2013a, 2013b); Mikalonienė (2012a, 2012b); as to the side effects in case of the extensive right to challenge the decisions of the general meeting, see Hopt (2022, p. 8)).

Procedural rules governing general meetings are primarily designed for the benefit of shareholders, enabling them to control the company by using their powers and governance rights through the medium of the forum in collective decision-making (Toiviainen 1998, pp. 14, 26, 31). Governmental rights associated with the general meeting that are of a procedural nature empower shareholders to use their voting rights properly (Mikaloniene 2015, pp. 57, 60). These rules create prerequisites for shareholders to make decisions based on essential and correct information (rather than on the basis of incomplete and defective information) – which, *inter alia*, is obtained in the "*introduction of the agenda item – discussion – decision making*" phases of the meeting – as well as affect the decision-making at a general meeting and make their voice heard (Toiviainen 1998, pp. 40, 83, 95, 128; Perakis 2004, pp. 67–68, 74–75). There are two independent outcomes of the deliberations

at the meeting: *firstly*, the shareholder can make informative decisions; *secondly*, although adhering to the majority rule, the legal framework enables each shareholder to have an influence on the decision-making. For example, during the meeting shareholders can intervene and effectively contribute to the discussion, ask questions (*inter alia*, follow-up questions), express and exchange opinions, clarify positions and participate in debates, as well as, if the shareholder holds 5 percent of the votes, propose alternative draft resolutions on the agenda items and thus influence the substance of the decision to be made by other participants-shareholders.

On the basis of the legal fiction, it is deemed that a shareholder using a written ballot to vote by correspondence before the meeting takes place has participated in the meeting and their votes are counted for quorum and voting purposes (Part 5 of Art. 27 of the LSC). When the right to attend the general meeting, which includes the right to speak and the right to ask questions during the meeting, is eliminated against the shareholders' will, and shareholders are only invited to use their associated governance rights in written form, the elimination of shareholders' face-to-face attendance at the meeting in any form (physical or virtual) is obviously a breach of shareholders' governance rights.

Another aspect is whether such a breach must be a sufficient ground to challenge the decision of the general meeting. It has been long debated whether the restriction of the participation in the meeting is to be qualified under the most fundamental breaches of shareholders' rights, forming the basis to invalidate the decisions of the general meeting as unlawful. The prevailing case law which is aimed at balancing the interests of all persons concerned – those of the company, the plaintiff-shareholder and fellow shareholders who voted in favor of the decisions – considers that the decisions of a general meeting of shareholders should be declared invalid in limited cases, and treats this shareholder remedy to challenge the decisions of the general meeting on the procedural grounds as *ultima ratio* by simultaneously limiting the amount of litigation. Emphasis is placed by the jurisprudence on the legitimacy of the formation of corporate will and protection of the collective interest. As mentioned above, the case law essentially approaches the legitimacy of the general meeting in relation to the violation of the procedural grounds based on whether similar results should be expected if the meeting was to be reconvened anew with the attendance of the plaintiff-shareholder.

The use of public enforcement linked with the court proceedings on administrative offences against corporate directors who have committed offences in prejudicing shareholders' governance rights when holding the general meeting as being initiated by the shareholder can be seen as a partial response to the situation. According to the case law which involves private companies (the ruling of the Supreme Court of Lithuania of 8 February 2022 in renewed case of administrative offenses No. 2AT-3-387/2022; for similar litigation in administrative offenses, see: Vilnius district court, ruling of 12 November 2020, the case of administrative offenses No. AN2-407-908/2020; Šiauliai district court, ruling of 29 March 2022, the case of administrative offenses No. eAN2-28-744/2022), shareholders argued that failure to convene an annual general meeting within 4 months following the end of financial year and postponing holding the meeting until a later date after the quarantine violated their participation rights as shareholders.

Part 1 of Art. 119 of the Code of Administrative Offenses, in embedding sanctions for various violations of members' rights of certain type of companies, *inter alia* provides that failure to convene

a general meeting of a private company within the prescribed term as well as non-compliance with the procedure for holding these meetings leads to imposing fines on corporate directors. According to the case law, when the board of directors is not formed, the managing director has a duty on their own initiative to convene the annual general meeting, and this duty is not subject to any conditions. The director's duty to convene the annual general meeting by 30 April 2020 was violated, although the quarantine restriction on physical gatherings was imposed during the COVID-19 pandemic and therefore the company could not hold the physical general meeting in its traditional way. However, the director of the company should have organized the meeting within the prescribed term by employing other alternative means, i.e., enabling the participation of shareholders by electronic means or voting by correspondence (written ballots) in advance.

In addition, it is worth noting that even though the reasoning of the courts concerning the use of shareholders' rights associated with general meetings applies to the emergency situation in the above case law, it raises uncertainty as to the qualification of the plaintiff-shareholder's behavior under normal circumstances as well. It is not self-explanatory under which circumstances not using the governance rights associated with the general meeting by the shareholder-plaintiff who disagrees with the unlawful corporate procedural rules is to be treated as passive behavior which is not justifiable according to the diligence standard of the *bonus pater familias* shareholder and produces negative consequences for the shareholder-plaintiff. Alternatively, this may be an acceptable standard of behavior of the shareholder-plaintiff assuming that, as a rule, a shareholder has governance rights and not duties and by not using the rights the shareholder demonstrates non-acceptance of the violation of the shareholders' rights and thereby does not waive the protection of their rights.

To conclude, the judicial approach emphasizing shareholders' remedy to challenge the decisions of the general meeting based on the violation of the procedural grounds in holding a general meeting as *ultima ratio* endorses the protection of collective interest over the interest of the particular shareholder, and may suggest that the legal rules on remote shareholder participation have to be revisited to make them more inclusive.

Improving company law on remote shareholder participation for more inclusive shareholder engagement

The COVID-19 pandemic changed the understanding of how general meetings of shareholders should be conducted and during it companies gained experience on preparing for the transition to remote shareholder participation. While the above case law evidences that, in certain cases, transitional cost-based analysis by companies on enabling shareholders of a private company to participate by electronic means in general meetings, coupled with the majority view of shareholders, acted as an impediment to more inclusive shareholder participation.

Having said that, it should be noted that digitalized measures for shareholder engagement can at the same time contribute to certain inequalities among shareholders in fully realizing their voice in corporate governance by electronic means. This is particularly true in cases when corporate meetings are purely virtual and a hybrid format is not maintained. Those who are vulnerable or

disadvantaged in exclusively exercising shareholders' governance rights remotely or those who have not consented to such an exclusively remote format may potentially be concerned that their fundamental rights are respected.

For example, a confrontation among shareholders in a private company could potentially occur when the majority shareholders – seeking to promote efficiency in corporate management and to simplify communication between the company and its shareholders by using the experience gained during the COVID-19 pandemic – refuse to compromise with a hybrid format of general meetings and are in favor of holding purely virtual general meetings. This may occur while the minority shareholder who is not part of corporate management (despite holding 49 percent of the votes) prefers continuing the traditional use of the rights at these meetings by being physically present and having live, face-to-face debates at the general meetings, and contends that the deliberation phase with personal interaction brings real value into corporate decision-making as well as increases the accountability of management. The change of the meeting format which was used in the past as a long-term practice may be seen by the minority shareholder as a material change in the circumstances that fundamentally alters the investment environment, and hence they may consider that purely virtual general meetings should be inadmissible.

Given that social norms may play a role in contributing to inclusive shareholder participation, but the law is of decisive importance (Perakis 2004, p. 15), in the post pandemic context, company law rules have to be revisited to have better prerequisites to facilitate remote shareholder participation, on the one hand, and to ensure that minority shareholders are sufficiently protected, on the other. The protection of minority shareholders' rights are at the core of the procedural rules on holding general meetings (Toiviainen 1998, p. 128), first of all, company law rules should thus clearly approach whether the shareholder is entitled to use shareholders' rights by electronic means in relation to the general meeting, with the corresponding corporate duty to enable the shareholder to use the right in such format, as well as which corporate body decides on the purely virtual form of the general meeting.

New company law rules in 2022

The amendments of the Law on Stock Companies of 17 November 2022 – that *inter alia* aimed at improving the legal regulations of shareholder attendance and voting at general meetings by electronic means by changing Art. 21 of the LSC intended for normal circumstances – have tackled the above-mentioned issues. As the law currently stands (Part 4 of Art. 21 of the LSC), the duty to ensure the remote participation of shareholders at the general meeting is tied up with the interests of minority shareholders: upon the demand of shareholders possessing 1/10th of the voting rights (if the articles of association of the company do not provide for a lower threshold), the law imposes upon a company a duty to enable shareholders' participation and voting at a general meeting by electronic means. From comparative perspective, it should be noted (Borselli and Farrando 2020, p. 284) that this amendment is comparable with the legal rule in Latvia adopted during the COVID-19 pandemic, which permits a minority shareholder holding 20 percent of the share capital (unless

a lower threshold is stated in the articles of association of the company) to request participation in the meeting by electronic means.

It follows that a company will have to maintain a hybrid format of the meeting, i.e., physical presence will be supplemented with remote participation. Shareholders will benefit from expanded ways to use their rights at the general meeting in a more suitable form of participation – whether an online or offline format.

In addition to the physical general meeting or hybrid general meeting, the LSC clearly identifies a virtual general meeting. A conditional precedent for a company to hold a purely virtual (and not a hybrid) meeting is that the articles of association of the company have to provide for such a form of shareholders' gathering. These provisions of the articles of association have to be approved unanimously by shareholders holding voting shares. This amendment is similar to those in Austria, Germany, and Norway, for example, where a purely virtual general meeting in private companies is permissible with the consent of all shareholders (ICLEG 2022, p. 10).

A purely virtual form of meeting should not necessarily be all-inclusive, and the articles of association of the company can list certain decisions to be passed by using another form of shareholders' attendance and voting at the meeting (e.g., a hybrid meeting). According to the *travaux preparatoires* (Explanatory Note No. XIVP-1854 of 2022), if shareholders make a unanimous decision, a virtual meeting is a default rule and a physical meeting is an exception to that rule as stated in the articles of association of the company. A shareholder may consider that certain decisions of major importance deserve to be passed in a physical meeting by listing the decisions in the articles of association (e.g., to amend the articles of association, modify share capital, or change the company's legal status). It is suggested that a qualified majority is sufficient to revert to the physical general meeting as a default format.

Although the rule that the use of electronic means can be made subject to requirements necessary to ensure the identification of the shareholder and the security of electronic communication by the company, as long as the proportionality standard is retained, the board of directors (or the managing director if the board is not formed) has to approve internal regulations for attendance and voting at general meetings by electronic means by, *inter alia*, addressing shareholders' identification and data security issues. As stressed in the *travaux preparatoires*, it is not, however, permitted by the internal corporate rules to reduce shareholders' rights associated with attendance (e.g., the right to ask questions, to express opinions, to participate in discussions, as well as the right to challenge the decisions of the general meeting).

The new legal rules put an emphasis on the traditional form of in-person gathering as the prevailing format of the general meeting, and therefore treat it as a default rule. On the basis of the principle of contractual freedom, shareholders as holders of the governance membership rights that are exercised at their forum can opt out of a physical meeting through the articles of association and replace it with a purely virtual meeting instead. To facilitate more inclusive shareholder engagement, upon the demand of the minority shareholder, the company should allow the shareholder to participate by electronic means in addition to in-person attendance.

Therefore, the legal framework *firstly* implies physical attendance and voting by shareholders at a general meeting, as a default rule, and supplements it with the remote participation. *Secondly*, the new regulations highlight the importance of the private autonomy of shareholders over the discre-

tion of corporate directors in turning to a hybrid or virtual format of their participation at the meeting.

Potential for better law

There is certainly some space for a better law. For example, the notion on shareholder attendance and voting at the general meeting by electronic means in relation to the exercise of their rights in full at the meeting as a forum for shareholders should have been better clarified (for procedures used in remote participation, see Nili and Shaner (2022, pp. 169–172, 185–192, 195)). Shareholders' remote participation is another mode (way and form) in which shareholders can exercise their rights. Unless all shareholders agree otherwise, the right of the shareholder should not be modified because of the format – physical or remote – in which it is being used at the general meeting. Shareholder participation by electronic means, as an alternative to physical participation, should be comparable with the latter, and a different format of the use of the shareholder attendance and voting rights at the general meeting must have no effect on the substance of the rights of the shareholder. Despite procedural changes, companies have to provide shareholders with the same participation rights at a general meeting. Therefore, the content of the right should not change; options for actions under the right should not be restricted, minimized, or eliminated; and the powers of the shareholder should not be reduced. Shareholder participation by electronic means should be a replica of shareholders' in-person participation (e.g., there should be continuous, real-time, two-way transmission of communication that allows participants to see, hear, and speak with each other at the meeting) (for comparative examples, see: ICLEG 2022, pp. 11–12).

According to Part 1 of Art. 14 of the LSC, the governance rights of the shareholder cannot be limited, save for in the cases provided by law. Therefore, as long as the law does not provide limitations in relation to the attendance and voting rights of shareholders at the general meeting being exercised remotely, the company is not entitled to limit shareholders' rights.

Although extra costs and additional administrative burdens for companies are foreseen in a hybrid format general meeting, if compared to a uniform format of meeting, the remote participation of shareholders at a larger scale can be envisaged on the basis of contractual freedom through the medium of articles of association as well as the private autonomy of the company. In this case, it is debatable whether each shareholder rather than only shareholders holding a minimum of 10 percent of the votes should be entitled by law to demand remote participation in the general meeting. Participation by electronic means aimed at more inclusive shareholder engagement should, in general, be part of corporate practices in holding general meetings by private companies.

In some jurisdictions, the impact of technical constrains on the process of remote participation and in challenging the decisions of general meetings has been addressed (EC 2022, p. 11). In Lithuania, the legal framework providing a generally rather casuistic approach in relation to providing for legal grounds to challenge the decisions of the general meeting by establishing that the decisions of legal entities can be declared invalid if the decisions violate the law, the articles of association of the legal entity, or the principles of reasonable behavior and good faith (Part 4 of Art. 2.82 of the Civil Code; Part 10 of Art. 19 of the LSC), should be preserved. Technical constraints that produce

impediments for shareholders to use their rights should be viewed in a way comparable to physical constrains, subject to the peculiarities of their online nature, and therefore defects in shareholders' rights should be treated alike.

Having said that, the amendments of the LSC achieve more legal certainty as regards the remote exercise of the rights of shareholders at general meetings, and contribute to more inclusive shareholder engagement by strengthening the advantages of digitalization and dealing with shareholders' attendance and voting at general meetings by electronic means in an overall more balanced way.

Conclusions

The new Lithuanian legal rules on remote shareholder participation in general meetings, as adopted in November 2022, that are intended for normal circumstances, sufficiently promptly considered the most problematic issues as far as they relate to inclusive shareholder participation in private companies, and have dealt with shareholder attendance and voting at general meetings by electronic means in an overall more balanced way.

Although there is some space for improvement, the amendments of the LSC achieve more legal certainty as regards the remote exercise of the rights of shareholders at general meetings, and contribute to more inclusive shareholder engagement by both strengthening the advantages of digitalization and placing an emphasis on the private autonomy of shareholders over the discretion of corporate directors in turning to a hybrid or virtual format of their participation at the meeting. The new rules are likely to reduce the confrontation that minority shareholders can face in light of a judicial approach endorsing the protection of collective interest over the interests of an individual shareholder when the decisions of a general meeting are challenged on procedural grounds.

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II.6. THE MAIN DIRECTIONS IN THE SUSTAINABLE DEVELOPMENT OF LEGAL REGULATION OF REORGANIZATION IN UKRAINE

Integral components of the sustainable development of legal regulation of reorganization

Globalization, macroeconomic processes, and a quickly changeable competitive environment require a new level of development of national markets which become more integrated. This all predetermines a requirement in defense of the interests of economic entities in relation to strengthening their positions on the proper markets through the introduction of different methods and instruments of an economic and legal character, in particular via the application of reorganization procedures. For many economic entities, the question of leading through reorganization is strategic, as it involves objectively fixing and strengthening positions in the proper market, deepening, and expanding the specialization of production, reducing production expenses, and the resulting growth of competitiveness.

Given the need for the approximation of Ukrainian legislation with EU legislation, the appropriate reflection of economic processes in the law and the balance of interests of all participants in the reorganization process are integral components of the sustainable development of the legal regulation of the reorganization of economic organizations along with economic growth, effective governance, social responsibility, and so on. The existence of sustainable norms for reorganization will facilitate streamlining the relations between the subjects of the reorganization legal relationship; protecting the legitimate rights and interests of economic organizations, participants, and creditors; and improving the further development of this process.

In particular, the Provisions of the Association Agreement between the European Union and the European Atomic Energy Community and their member states, on the one hand, and Ukraine, on the other hand (2014), in the sphere of legislation regarding companies and corporate management (Burakovskyi and Movchan 2014, pp. 11–12), predetermine bringing regulation over the activity of corporations. In particular, this involves regulation of the processes of reorganization of

economic organizations at the national level in-line with the requirements of European standards, and gradual approximation with the rules and recommendations of the European Union.

The purpose of this chapter is to determine the directions of the sustainable development of the legal regulation of the reorganization of economic organizations, how they are influenced by the European requirements, and the prospects of their improvement. Because of the influence of *de bene esse* European requirements, the sustainable development of the legal regulation of the reorganization of economic organizations in Ukraine can be divided into three directions:

1. forming the concept of "reorganization" in Ukraine;
2. implementing the protective mechanism of legitimate rights and interests of creditors;
3. invalidating the reorganization procedure (nullity of reorganization procedure).

All three directions will be explored in the paper below.

Forming the concept of "reorganization" in Ukraine

The term "reorganization" in the Civil Code (2003)

For many decades, reorganization was examined as a method of termination of a legal entity, which was different from liquidation because of the existence of legal succession (Kharytonova *et al.* 2003, p. 94; Zadykhailo *et al.* 2003, p. 435). Such an approach was established in Article 37 (Civil Code of the USSR 1963, 2003). However, the legal definitions of both the general concept of reorganization and its separate forms were absent from the legislation.

As a result of the codification of economic legislation (Economic Code of Ukraine 2003, 2022), this legislative act at first saved the traditional term "reorganization" for national legislation and set out the possibility of the termination of an economic entity by its reorganization (merger, accession, division, spin-off, transformation) (Article 59). However, in part 1 of Article 104 (Civil Code of Ukraine, 2003, 2022), the summarizing term "reorganization," which substituted for the list of its forms, was absent. This is explained as an attempt by the developers of the Civil Code of Ukraine to apply European constructions which this term is not inherent to, but where the separate forms of reorganization or a list thereof (Yefymenko 2002, p. 78) are applied in legal provisions, and where the phrase "stopping, which does not result in liquidation" (pp. 24–25) is used. Nevertheless, based on the Law of Ukraine of 10 October 2013 No. 642-VII (Law of Ukraine on Amendments to Certain Legislative Acts of Ukraine to improvement of the legal regulation of legal entities and physical persons – entrepreneurs' activity 2013), changes were brought to part 1 of Article 104 of the Civil Code of Ukraine, according to which a legal entity ceases to exist as a result of reorganization (merger, accession, division, spin-off, transformation) or liquidation. Here, the legislator enshrined the term "reorganization" again; however, this term operated in the context of those positions which determine the methods of termination of a legal entity. At the same time, in a number of laws and regulations the term "reorganization" has always been preserved, regardless of the changes made by the Civil Code during the years 2003–2013.

The term "reorganization" in the Economic Code (2003)

However, it should be noted that part 1 of Article 56 of the Economic Code of Ukraine underwent some changes through the introduction in an action of the Law of Ukraine on Amendments to Certain Legislative Acts in relation to the perfection of the legal regulation of the activity of legal entities and physical persons – entrepreneurs in 2013. Namely, the legislator eliminated the term "reorganization," replacing its denotations of separate forms (merger, accession, division, spin-off, transformation). It is difficult to unambiguously find out what purpose the legislator worked towards in this case: whether to bring the provisions of the Economic Code of Ukraine and the Civil Code of Ukraine (although the latter has already reverted to the summarizing term "reorganization" for all its forms – part 1 of Article 104) to conformity, or to bring conformity with the provisions of the European Law – in particular the Directives of the European Union (Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law), where such a term does not appear. However, the summarizing term "reorganization" is used 18 times in the different provisions of the Economic Code of Ukraine, is rich in content, and is mentioned as a form of termination of an economic organization next to the other form of termination of an economic organization –liquidation.

It follows to acknowledge that the application of the summarizing term "reorganization" is justified, as it is instrumental in the economy of normative material during the formulation of legal norms and successors in law and is consistent with traditions which are folded into the legal system of Ukraine. This is important not only on the stage of rulemaking but also during the realization of the formed rules of conduct in practice (Shcherbakova 2007, p. 13). As the scientific literature rightly points out, definiteness of concepts, exactness and clarity of formulations, and their synonymous clear linguistic embodiment allows terminology to be correctly and uniformly applied (Samoilenko 1998, p. 98). At the same time, the issue of the content of the term "reorganization" remained undefined at the legislative level, and the legal definition of reorganization was absent.

The definition of the term "reorganization" in the scientific literature

In the scientific literature, there are a great number of decisions which can be summarized in two basic approaches.

Firstly, when reorganization, in its internal content, is considered as one of the methods of termination of an economic organization (the termination of a legal entity entails the transfer of rights and obligations (Brahynskyi 1998, p. 18)). This includes termination which leads to the transition of rights and obligations of legal entities which existed before to other legal entities, namely legal succession (Sukhanov 1996, p. 148). This also involves cases of the termination of a commercial organization related to the change of its property complex (or organizational and legal form), which is directed towards the achievement of the goal for which the organization was created (Trofymov 1995, p. 19).

Secondly, when reorganization is considered as a method of termination of an economic organization and a method of incorporation of the economic organization (when the reorganization

of an economic company involves not only its termination but also the formation of a new entity, with the transition of rights and obligations which belong to the joint-stock company to its legal successors (Dolynskaia 1997, p. 255)). However, the presentation of the reorganization of legal entities only in terms of termination is not all-embracing and does not include such type of reorganization as "spin-off," which results in the creation of a new legal entity (Korovaiko 1996, p. 79). This second group of reorganization also contains the parallel processes of termination and incorporation (Martyshkyn 2000, p. 7).

As already noted, the primary purpose of reorganization is not the termination of a legal subject (this purpose is executed by the institute of liquidation), and, vice versa, the continuity of the realization of economic activity, the maintenance of integral property complex, the creation of a new subject, or "…by including an already existing subject" (Vinnyk and Shcherbyna 2000, p. 56). However, the result of any form of reorganization is the appearance in commercial turnover of a new/renewed integral property complex (or multiple integral property complexes).

The inherent elements of reorganization

Analyzing the process of reorganization, it is possible to select the inherent elements: incorporation and termination. New subjects are created by reorganization in four legal forms: merger, division, spin-off, and transformation. The elements of incorporation in the adopted forms can be seen in the appearance of: a new property base of the organization; changes in the size of authorized capital; changes in the high-quality structure of the integral property complex (or multiple integral property complexes); and changes in the subject (or subjects) of reorganization.

Legal entities are terminated in four main forms: merger, accession, division, and transformation. It is possible to outline the following elements of termination (liquidation): closing bank accounts; removal from the register in tax organs; removing from the Unified State Register of Legal Entities; and handing over seals and stamps to be destroyed.

Consequently, the elements of incorporation and termination simultaneously occur only during merger, division, and transformation. In other forms of reorganization, only one of the elements of termination (at the time of accession) or incorporation (at the time of spin-off) occur.

Legal succession as a qualifying feature of reorganization

The legal predecessors' rights and obligations can pass on to a different number of legal successors depending on the form of reorganization. After a merger or accession, these rights and obligations pass on in full to only one legal successor, not several; as a division or spin-off, they can pass on to one, two, or more. From one perspective, the general aim of such legal forms of market consolidation as merger and accession – in an economic sense, the capitalization of economic organizations – is achieved. From another perspective, this is a feature that distinguishes them from such forms of reorganization as division and spin-off.

Specifically, the existence of legal succession – the transition of rights and obligations from one legal entity (the legal predecessor) to another legal entity (the legal successor) – characterizes reorganization, as well as each of its forms. B. B. Cherepakhin singles out the following signs of legal succession: 1) the replacement of the subject (active or passive) in a legal relationship; 2) the immutability of the basic legal characterization of rights and obligations which are passed on; and 3) the derivative character of the acquired subjective right or civil legal obligation, the characteristic sign of which is the connection between the acquired right or obligation and primordial legal relationships (Cherepakhyn 1962, p. 53). Traditionally in the legal literature, universal legal succession (Shcherbakova 2018, p. 120; Movchan 2006, pp. 97–98) occurs during reorganization. This is due to the fact that only three forms – merger, accession, and division – were acknowledged in legislation as the forms of reorganization (Article 37 of the USSR Civil Code of 1963). However, reorganization forms such as spin-off and transformation later appeared during the process of denationalization by privatization and corporatization. A number of scientists question the traditional recognition of universal legal succession for any form of reorganization, but the majority accept that there is universal legal succession during merger, accession, division, and transformation. In relation to spin-off, there are two points of view. D.V. Zhdanov, I.N. Kucherenko, and A.V. Kachalova consider that in the case of spin-off there is a singular legal succession, as only a part of the rights and obligations pass to the legal successors (transferred as an integrated whole). At the same time, D.V. Stepanov specifies that transfer of succession takes place during spin-off, which consists of the *auctor* (primordial assignee) transferring on to the *successor* (assignee) the right in full (Sishchuk 2018, pp. 432–433). Characterizing the meaningful legal signs of reorganization, it is in this case more appropriate to talk about legal succession as such. The existence of legal succession is an obligatory sign of reorganization, and that is why the legal relationships of economic organizations which will be reorganized are not halted regardless of reorganization form. In place of the reorganized economic organization, the subject of existent legal relationships (a legal successor) emerges, which is created in the process of reorganization as a new subject or a subject which has already existed (Shcherbakova 2002, p. 67). The existence of legal succession distinguishes reorganization from other form of termination of a legal entity such as liquidation, in which no legal succession in rights and obligations arises, because legal entities are halted as subjects.

Juridical consequences of legal succession in reorganization

The change of authorized capital

A change in the size of the authorized capital of an economic organization which will be reorganized is a consequence of legal succession. During merger and accession, authorized capital sizes are combined. This distinguishes these forms from division and spin-off, in which authorized capital is split. Transformation marks a sole exception, because in this case only the organizational and legal form of the economic entity changes. The presence of two terms is thus required: 1) the

immutability of the authorized capital; and 2) the retention of the quantitative composition of the participants of the economic organization. Consequently, the change of the size of the authorized capital, which is inherent in merger and accession, does not always take place during the process of reorganization in other its forms.

The subject composition of the participants

The participants of economic organizations which halted their existence during reorganization become the participants of the successor economic organization. However, the subject composition of the participants of the successor economic organization is not always the total expression of the subject composition of the predecessor economic organization. Termination of membership can take place during the process of the reorganization procedure, as a participant can vote against the approval of such a decision or can not to take part in meetings during the approval of such a decision. In these cases, for example, in a joint-stock company, "…Each shareholder – an owner of the company's common shares – shall have a right to demand mandatory redemption of his/her voting shares by the company if he/she has registered for participation in the company's general meeting and voted 'against' approval of the decisions by the general meeting on: 1) company merger, division, transformation or spin-off…" (paragraph 1 part 1 of Article 68 of the Law of Ukraine on Joint-Stock Companies 2008). As a result, the subject composition of the participants of a successor economic organization can change.

At the same time, a change of subject composition is not a characteristic sign of reorganization, as it can take place during the realization of a participant's right to withdraw from the composition of participants of economic companies in accordance with paragraph (в) of Article 10 of the Law of Ukraine on Economic Companies 1991; paragraph 3 part 1 of Article 116 of the Civil Code of Ukraine; and Article 24 of the Law of Ukraine on Limited Liability and Additional Liability Companies 2018). In a joint-stock company, such a withdrawal is carried out by the sale of all shareholder-owned shares or parts thereof. In addition, the change of participant composition can take place in the case of bringing in a participant to responsibility, as an exception from the economic entity (for example, Article 72 of the Law of Ukraine on Economic Companies).

This leads to the conclusion that the following characteristic features are inherent in reorganization:

(1) the appearance of a new or renewed integral property complex of the economic organization;
(2) the incorporation of one or more economic organizations and (or) the termination of one or more economic organizations;
(3) legal succession exists between the economic organizations which will be reorganized (legal predecessors and legal successors).

As seen in the legal literature (Shcherbakova 2021, pp. 150–151), the concept of "reorganization" as a legal phenomenon is examined under different points of view as a method of termination of legal entities, a method of incorporation of legal entities, a legal institute, a legal deal as a juridical fact, a legal composition, and an example of universal legal succession and complicated legal relationships. Such a multidimensional nature of the concept of "reorganization" touches on its legal

constituents, including: procedural aspects of the reorganization procedure; the grounds of the reorganization process; the registration of its separate stages; abandoning a whole layer; and the complexity of economic relations which must be taken into account for the development of macroeconomic processes. These processes directly influence the efficiency of the activities of economic entities, among which one can identify: internal and external factors; reasons which induce economic entities to conduct reorganization procedures; and the objectives that the participants of reorganization pursue.

Reorganization in special legislation

In the *banking sphere*, the Law of Ukraine on the Simplification of Procedures of Reorganization and Capitalization of Banks 2017 is evident, the purpose of which was to provide stability for the banking system via the optimization of the procedures of reorganization and capitalization of banks. A necessity for the adoption of this Act was the acceptance of other preliminary Laws of Ukraine on making alterations to some legislative acts of Ukraine in relation to the Prevention of Negative Influence on the Stability of the Banking System, 2014. This substantially enhanced the requirement for the minimum authorized capital of newly created banks.

Consequently, the Law of Ukraine on the Simplification of Procedures of Reorganization and Capitalization of Banks 2017 foresees increases in size of the authorized capital of banks due to additional contributions or by accession to another bank. It is necessary to note that passing this Act, which increased the size of authorized capital due to additional contributions, was particularly unique and fast in terms of the implementation of the requirements of capitalization. After passing this Act on the reorganization of banks by accession – which was almost never used by banks because of its complexity, the duration of its procedures, and other unaccounted specificities of the banking sphere – it gradually began to be used in practice. This is because part 4 of Article 1 of the above Law sets out the proper sequence of actions in relation to the features of the reorganization process of a bank by accession via a simplified procedure.

In the *insurance sphere*, in accordance with the Law of Ukraine on Insurance (part 2 of Article 30), an insurance company which is engaged in types of insurance other than life insurance must have a minimum amount of authorized capital no less than €1 million, and for an insurance company which is engaged in life insurance this must be no less than €10 million. Such requirements, firstly, created the impossibility of realizing insurance activity for most insurance companies. Secondly, they created a surplus in the possibility of access to the market for companies that would carry out life insurance ("Future regulation of insurance market in Ukraine" 2020, p. 20). As a result, the unique legal instruments which increased the size of authorized capital – or additional contributions, or the introduction of a reorganization procedure – were enabled by accession. As a result of this, in a legislative sense, the effective and self-weighted procedure of the reorganization process was inculcated by accession, considering the simplified mechanisms of its application and the specificities of insurance activity. Hence, the capitalization of insurers will take place mostly not due to the bringing in of additional financial resources (contributions), but due to the process of reorganization in the form of accession.

Today, Project of the Law on Insurance No. 5315 ("New Law on Insurance will promote transparency, capitalization, and stability of insurance market" 2021) is already incorporated in the Verkhovna Rada of Ukraine. This project considers the key requirements of the legislation of the European Union, which Ukraine is under an obligation to execute in accordance with the Association Agreement with the European Union, and also the principles of the International Association of organs of insurance supervision (IAIS). In particular, this bill offers a special procedure of reorganization or withdrawal of an insurer or a specialized reinsurer from the market (Section VII, "Reorganization of Insurer," foresees the general conditions of the reorganization of an insurer (Article 51) and the reorganization of insurer via a simplified procedure by accession (Article 52)).

In the *investment sphere*, a tendency can be seen in relation to the maintenance of the economic activity of economic companies created by reorganization in relation to the conclusion of large transactions. Based on the Law of Ukraine and alterations to some legislative acts of Ukraine in relation to the Simplification of Business and Investment Attraction by the Securities Issuers 2017, a suite of changes and additions were brought in, including in the Law of Ukraine on Joint-Stock Companies. This foresees the simplified procedure of the conclusion of large transactions for those subjects which were created by reorganization in the two years after the moment of incorporation. This form of reorganization is used as an effective mechanism for the continuation of an economic entity's activity in a new, high-quality manner, without the complicated procedure of conclusion of large transactions.

It has been proven that in the special legislation (in the banking, insurance, and investment spheres) the reorganization of economic organizations is used as an effective instrument for the enlargement of a business or the concentration and capitalization of an asset. These objects are mostly constrained by requirements that relate to the size of the authorized capital of such professional market participants.

Thus, in this subchapter the main tendencies of the development and consolidation of the term "reorganization" in the legislation (in particular in the Civil and Economic codes) that recognize scientific approaches are considered. It is noted that reorganization combines two inherent elements – creation and termination, which can exist simultaneously or separately depending on the form of reorganization (merger, accession, division, spin-off, transformation). The following characteristic features of the reorganization of economic organizations are selected: (1) the appearance of a new or renewed integral property complex of the economic organization; (2) the incorporation of one or more economic organizations and (or) the termination of one or more economic organizations; and (3) legal succession exists between the economic organizations which will be reorganized. It has been shown that the provision of the realization of economic objectives and the achievement of the so-called economic effect of economic organizations are traced by means of reorganization mechanisms in the norms of special legislation (in the banking, insurance, and investment spheres).

Implementation of the protective mechanism of legitimate rights and interests of creditors

The Civil Code of Ukraine foresees the following legal guarantees of the protection of the legitimate rights and interests of creditors during the reorganization process: the right to information on the process of reorganization (part 1 of Article 105; part 3, 5, 6 of Article 105); the right to request the fulfillment of obligations, which is not provided; and the right to the termination or early fulfillment of the obligation, or the right to ensuring fulfillment of the obligation, except in the cases provided for by law (part 1 of Article 107).

For its part, in the special Laws of Ukraine on Joint-Stock Companies (part 1, 2 of Article 82) and on Limited Liability and Additional Liability Companies (part 1, 2 of Article 55) one can find a more regulated approach to the protective guarantees of the legitimate rights and interests of creditors. Namely, these include: the features of reporting order are set regarding reorganization depending on its form (merger, accession, division, spin-off, transformation); the reduced terms of the statement of creditors' requirements are foreseen by comparison with the terms of the statement of creditors' requirements in the provisions of the Civil Code of Ukraine; the methods of satisfaction of creditors' requirements are specified by comparison with those which are foreseen in the Civil Code of Ukraine (protective guarantees of creditors' rights, such as the conclusion of mortgage contracts or bail, and similar damages, are added); and the method of satisfaction of creditors' requirements is selected by the company which will be reorganized, not by the creditor – unlike in the norms of the Civil Code of Ukraine, where the method of satisfaction of creditors' requirements is selected by a creditor.

The expedience of such positions is acknowledged in the scientific literature (Dolynskaia 1997, p. 256; Korovaiko 2000, p. 42), as the reorganization process carries the considerable danger of failure to return debts to creditors. Some concerns are posed in a provision set forth in the Civil Code of Ukraine (part 1 of Article 107) relating to the creditor's right to termination or early fulfillment of obligations during reorganization, and also the possibility for creditors to claim damages (part 2 of the Article 82 of the Laws of Ukraine on Joint-Stock Companies, part 2 of the Article 55 of the Law of Ukraine on the Limited Liability and Additional Liability Companies). This is not foreseen as an independent basis and method of protection in the Civil Code of Ukraine.

All of this creates a certain imbalance of interests between creditors and the company debtor which will be reorganized, strengthening competition on the market. On the other hand, in the legal literature it is repeatedly emphasized that granting creditors the right to termination or early fulfillment of obligations puts the realization of reorganization in a practical sense in doubt (Yefymenko 2002, p. 79), and not a single legal entity is able to foresee exactly how many creditors will appeal (p. 56). In the end, such a norm can simply block most of the reorganization process (Kibenko 2005, p. 383), or can even result in the bankruptcy of the legal entity (Petrov and Beluha 2016, p. 121).

The question of claiming damages as a type of guarantee is also ambiguously perceived among researchers. Some consider that such a guarantee fully represents the logic of the norms of the Civil Code of Ukraine in relation to the protection of the rights of creditors, the economic situation that has unfolded, and contributing to proper legal defense. Others, conversely, speak out

against such a guarantee, as damages are a measure of civil liability for the offence committed, while the reorganization of a legal entity is not a civil offence and, consequently, cannot serve as basis for the application of measures of civil liability (Shcherbakova 2007, pp. 199–200).

It seems that the protection of creditors must directly depend on civil liability, as far as it is substantially violated by reorganization, and the legal entity which will be reorganized must be protected from the submission of creditors' claims if their position will not become worse. It is justly considered that "for establishment of certain balance of interests of creditor and debtor – legal entity, that is reorganized…implement some limitations for a creditor in the case of its right realization" (Korovaiko 2000, p. 42). In particular, some researchers suggest the formation of an agreement, after which a creditor is obligated not to provide the legal entity with requirements regarding the early fulfillment of obligations, but to provide the implementation of such an agreement by punitive damages within these obligations.

Consequently, the mechanism of protection of creditors' interests during reorganization foreseen by the Civil Code of Ukraine (Article 107) does not quite fall within the European approach and the requirements of European standards. In the establishment of the system of protection of creditors' interests, it is necessary to follow the principles in the Directives of the European Union regarding reorganization. These principles were built on the principle of creditors' non-interference in the process of reorganization (Kibenko 2005, p. 384); hence, they are not provided with the plenary powers of early termination or fulfillment of obligations before the process of reorganization.

Invalidating the reorganization procedure (nullity of reorganization procedure)

The current legislation of Ukraine does not foresee special norms regarding invalidating the reorganization procedure (nullity of reorganization procedure) and is limited to the application of general norms about the nullity of a decision of the General Meeting (e.g., Article 50 of the Law of Ukraine on Joint-Stock Companies). Nevertheless, the existence of such norms is necessary for a number of reasons. Firstly, there should be a mechanism for a challenge to address the process and minimize the risk of invalidation of reorganization. Secondly, the availability of such a regulatory mechanism in foreign countries for a long period of time indicates the prospects for such a development in Ukrainian legal regulation. Thirdly, in the Law on Joint-Stock Companies of 27 July 2022 (a new version), the presence of a term for the challenge of reorganization without an appropriate mechanism for invalidating reorganization has hardly contributed to the sustainable development of the legal regulation of reorganization.

Nullity of reorganization procedure in the EU

Directive of 2017/1132/EU of 14 June 2017 determines the exceptional conditions and terms (Articles 108, 117, 153) by which this general rule is set out in a court judgment.

The basic conditions of nullity of reorganization procedure (merger by creation of a new company, acquisition by one company of another company or another few companies, or division of a company) are as follows:

- the absence of judicial or administrative preventive supervision of its legality; or
- the absence of the proper legal form for drafting and certifying the proper documents; or
- the presence of proof of that the decision of the General Meeting is void or voidable under national law.

Moreover, the legislation of the European Union foresees the following: if the proper judicial body finds violations which could result in nullity of reorganization (merger, accession, division), and if there is the possibility of the correction of such violations, then the judicial body is obliged to give the company the time necessary for the correction of these violations (State department is on questions adaptation of legislation 2009, p. 24). It should also be noted that a decision about the nullity of reorganization cannot be used as an instrument for the cancelation of debt obligations. Consequently, the nullity of reorganization (merger, accession, division) is not a basis for the nullity of obligations which arose for a successor company in the period between the realization of reorganization and the nullity of reorganization; thus, both the legal predecessor and successor companies are jointly responsible for obligations which arose in this period.

Invalidating the reorganization procedure in Poland

The experience of Poland concerning questions of the appeal of decisions about the reorganization of commercial companies can become useful. The choice of Poland is obvious, as both Ukraine and Poland have common roots in the development of their legal systems, and the successful development of the Polish economy, considering legal regulation and similar forms of legal entities, is exemplary.

For example, in the Commercial Companies Code of Poland two types of lawsuits are envisaged that give the opportunity to appeal a decision regarding reorganization, which has been accepted by the General Meetings of a commercial company:

(1) a lawsuit regarding the cancelation of a decision about reorganization (Pl. *powództwo o uchylenie uchwały*);
(2) a lawsuit regarding the confession of the invalidity of a decision about reorganization (Pl. *powództwo o stwierdzenie nieważności uchwały*) (Zhaba 2019, p. 29, 30, 32).

The legal grounds of filing a lawsuit about the cancelation of decision about reorganization require the total presence of two legal facts: (1) the decision conflicts with the provisions of a contract (statute) or good customs; and (2) the decision threatens the interests of a commercial company or involves the objective violation of the rights of its participants (shareholders) (§ 2 Art. 509, § 2 Art. 541, § 1 Art. 249, § 1 Art. 422 of the Commercial Companies Code of Poland).

The legal foundation of filing a lawsuit about a confession of the invalidity of a decision about reorganization is that such a decision must contradict the law. Thus, it follows to point out that the contradiction of a decision comes when the maintenance of such a decision, its form, or the procedure for its adoption conflict with legislation (§ 1 Art. 252, § 1 Art. 425 of the Commercial Companies Code of Poland).

Invalidating the reorganization procedure of joint-stock companies in Ukraine

The question of the nullity of a decision about the reorganization of a joint-stock company (merger, accession, division, spin-off, transformation) is especially actualized in connection with the final adoption of the Law on Joint-Stock Companies of 27 July 2022 (in a new version. The Law on Joint-Stock Companies, 27 July 2022 (in a new version) will enter into force on 1 January 2023). This law was able to decide on such basic problems as: providing the effective protection of rights for shareholders and creditors; guaranteeing the protection of minority shareholders' rights; and bringing national standards up to international standards.

Nevertheless, the right to appeal the decision of the reorganization of a joint-stock company is not expressly regulated by this new version of the Law, but a term during which an action regarding the nullity of a merger (part 12 of the Article 117), accession (part 12 of the Article 119), division (part 11 of the Article 125), or spin-off (part 11 of the Article 127) procedure can be filed is however set. It is noted that such a lawsuit cannot be put forward later than six months from the date of completion of the reorganization procedure. In accordance with parts 5, 7, 8 of Article 4 of the Law on State Registration of legal entities, individual entrepreneurs and public formations: a merger is considered completed from the state registration of the termination of legal entities that cease as a result of the merger's data (part 5); a division is considered completed from the state registration of the termination of a legal entity that cease as a result of the division's data (part 7); an accession is considered completed from changes to information in the state registration data that is contained in the Unified State Register of Legal Entities, in relation to the legal succession of legal entity that accedes (part 8).

This means that the new version of the law, not regulating questions of the nullity of the reorganization procedure, determines a term of six months (period of limitation) during which it is possible to file a lawsuit regarding the nullity of the reorganization procedure, and therefore confirms an opportunity for the nullity of the reorganization procedure of a joint-stock company. In relation to transformation, the possibility of filing a lawsuit is not foreseen by the new version of the law.

Thus, it is considered necessary in the Law of Ukraine on Joint-Stock Companies:

- to envisage the possibility of: (1) filing a lawsuit regarding the cancelation of a decision about reorganization; and (2) filing a lawsuit for the nullity of a reorganization procedure;
- to outline the subject composition of such lawsuits;
- to set the legal grounds, terms, order, and consequences of the appeal procedure of reorganization.

Therefore, it should be noted that the input of such a method of defense as the confession of the invalidity of a decision about reorganization must take into account the obligatory comparison of the unfavorable consequences of the realization of the reorganization of the joint-stock company for a shareholder, with the consequences of the confession of the invalidity of the decision about its realization for the joint-stock company that is being reorganized itself, as well as for third parties (Shcherbakova 2020, p. 140).

In addition, at the establishment of the appeal of the proper procedure of reorganization, it is necessary to consider the following: (a) nullity of reorganization is not a basis for nullification of obligations which arose for a successor company in the period between the realization of reorga-

nization and its nullity; and (b) legal predecessor and successor companies are jointly responsible for obligations which arose in this period.

Consequently, the implementation of the nullity of the reorganization procedure of a joint-stock company will be an instrumental mechanism in the prevention of raider seizures of companies; will increase the level of investor and creditor trust; will create the real possibility for shareholders to invest money in the purchase of securities in the fund market; and, as a result, will assist in efficient fund market development.

Conclusions

Grounded on the concept of "reorganization" as a multidimensional legal phenomenon, in the Economic Law of Ukraine this can emerge as: a legal relationship; a legal institute; a legal deal as a juridical fact; a legal composition; an example of legal succession; and a method of the incorporation of economic organizations. It can also be a method of the termination of economic organizations that envisages the presence of special regulation on the transparency of every aspect of this phenomenon, with the aim of its proper application.

It is determined that the provisions of part 1 of Article 107 of the Civil Code of Ukraine, which aims to protect the interests of creditors, once again came about as a result of the private law method of regulation, according to which private interests of separate group of creditors take advantage over public interests (via the creation of legal conditions for the effective enlargement of national commodity producers as a competitive link in the economy – not only in domestic but also in foreign markets).

To strengthen the effectiveness of the protection of both private and public interests during the reorganization of economic organizations, in particular joint-stock companies, it would be useful to envisage in the Law of Ukraine on Joint-Stock Companies the possibilities of: (1) filing a lawsuit regarding the cancelation of a decision about reorganization; and (2) filling a lawsuit on the nullity of a reorganization procedure. It would also be pertinent to outline the subject composition of such lawsuits and to set the legal grounds, terms, order, and consequences of appeals regarding the reorganization procedure.

Considering the above, it is necessity to rethink approaches to understanding reorganization as an economic and legal phenomenon, its socio-economic essence, and the realization of its objectives in order to reactivate the reorganization procedure based on European prospects and the provisions of the legislation of foreign countries. Such legislative innovations will contribute to the sustainable development of the legal regulation of reorganization in Ukraine.

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II.7. ACCESS TO JUSTICE IN CIVIL CASES: FILLING THE GAP IN THE SUSTAINABLE DEVELOPMENT AGENDA

Access to justice and Sustainable Development Goals

Goal 16 of the United Nations (UN) Sustainable Development Goals – "Peace, Justice and Strong Institutions" – obliges countries to "promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels" (United Nations 2015). As one of the sub-goals, access to justice takes a prominent place among the list of sustainable development goals because it deals with the implementation of other goals, being an instrumental tool for bringing them to life. It will be difficult to fulfill the requirements of sustainable development without access to justice, because the effective realization of many goals presupposes the existence of effective human rights protection mechanisms and access to effective remedies (Wrange 2022).

Goal 16 is specified in Target 16.3, which prescribes that States "promote the rule of law at the national and international levels and ensure equal access to justice for all." As we can see, although access to justice was traditionally developed from the Rule of Law concept and is considered to be part of the latter (United Nations Security Council 2004, European Commission for Democracy through Law 2011), the UN puts access to justice directly into Goal 16. Furthermore, national and international dimensions of the Rule of Law appear only in Target 16.3, in line with access to justice. On the one hand, in placing access to justice in the 2030 Agenda for Sustainable Development, the UN emphasized the prominent value of justice and procedural guarantees for the common good. On the other hand, the Sustainable Development Agenda could not exist in a vacuum, and presupposes the development of common ground for a unified understanding of the concept of access to justice within its scope as well as its correlation with other terms.

The latter notion is more important in terms of access to justice in civil cases. Analyses show that special indicators have attempted to clarify the concept of access to justice within the Sustainable Development context. This is enshrined in several indicators: indicator 16.3.1 refers to access to justice in criminal matters ("proportion of victims of violence in the previous 12 months who reported their victimization to competent authorities or other officially recognized conflict

resolution mechanisms"); indicator 16.3.2 reflects the prohibition of arbitrary detention ("unsentenced detainees as a proportion of overall prison population"); and only indicator 16.3.3 refers to access to justice in civil cases ("proportion of the population who have experienced a dispute in the past two years and who accessed a formal or informal dispute resolution mechanism, by type of mechanism"). As we can see, within the UN framework more attention is paid to the criminal limb of access to justice, while the civil limb is not especially developed. Thus, access to justice in civil cases constitutes a deficit in terms of the Sustainable Development Agenda, which may be filled by using the existing approach to access to justice represented in empirical and doctrinal researches in the area of civil procedure. This chapter is an attempt to show how recent developments in civil procedure, especially in the European region, can help to improve the Sustainable Development indicators connected with access to civil justice.

Access to justice as an integral part of the Rule of Law and its value

Access to justice is a supranational phenomenon which is multifaceted and can be interpreted in different ways (Cappelletti et al. 1978; Cappelletti 1993; Lucy 2020; Gerards and Glas 2017; Macdonald 2005). It is commonly understood as the possibility for everyone to suit a claim before a court and obtain judgment in their case. At the same time, the analysis of international documents and the practice of international human rights institutions opens the discussion about the development of a unified, broad understanding of access to justice, especially taking into account the existence of other correlated terms, such as the right to a fair trial, the right to access to court, or the right to an effective remedy (Art. 6 para. 1 and Art. 13 of the European Convention on Human Rights (ECHR), Art. 47 of the Charter of Rights of the EU). The starting point of this discussion is the understanding of access to justice within the broader Rule of Law context.

Although we can find different approaches to the Rule of Law in the literature, in general they can be divided into formal and substantive (Tamanaha 2004; Craig 1997; Summers 1993) – or thick and thin (Peerenboom 2004, p. 10). Traditionally, in international documents and legal literature, access to justice and procedural guarantees are consistently derived from the formal requirements of the Rule of Law principle. In 2004, the UN Secretary General defined the Rule of Law as a "principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards" (United Nations Security Council 2004). A direct correlation between the Rule of Law and access to justice can also be seen in the documents of other international institutions. The European Commission for Democracy through Law (Venice Commission) defines the following among key elements of the Rule of Law: 1) legality, including a transparent, accountable, and democratic process for enacting law; 2) legal certainty; 3) the prohibition of arbitrariness; 4) access to justice before independent and impartial courts, including judicial review of administrative acts;

5) respect for human rights; and 6) non-discrimination and equality before the law (European Commission for Democracy through Law 2011).

Though access to justice is considered to be one of the core elements of the Rule of Law, different approaches to the interpretation of its goal can be observed. F. Francioni (2007, p. 23) pointed out that "although access to justice surely constitutes in itself an important interest worthy of legal protection, in the texts of human rights treaties it is rather construed as a procedural guarantee dependent on other substantive rights and freedoms, which are protected by the same treaty and sometimes by renvoi to the constitution and the law of state parties." The instrumental value of access to justice within the Sustainable Development Agenda is also emphasized by other authors (Wrange 2022), and can be seen in the documents of the UN (United Nations 2022).

For example, a close connection exists between the non-discrimination requirement and access to justice. This is manifested in the idea of equal access to justice, according to which different groups of persons should have the same chances to obtain the same decisions in similar civil cases (Sandefur 2009, p. 951). This connection also follows from the interpretation of Art. 14 of the International Covenant on Civil and Political Rights and Art. 14 of the ECHR, which prohibits discrimination based on the principle of equality. Such a connection was emphasized by the European Court of Human Rights (ECtHR) in the case Anakomba Yula v. Belgium, where the ECtHR found a violation of the right of access to court because of the refusal to provide legal aid to the applicant. In this case, the applicant, a non-resident of Belgium, was contesting paternity concerning the Belgian legislation, which provided the right to legal aid only to residents and other EU citizens. The ECtHR considered such conduct of the state to be discriminatory (Anakomba Yula v. Belgium, No. 45413/07, 10 March 2009). This judgment emphasizes the tendency to broaden the scope of Art. 14 of the ECHR to cases connected with the violation of procedural guarantees – in particular, the right of access to a court. This is a crucial point that reflects the paradigm of equal access to an independent and impartial court for all persons under conventional protection, and emphasizes the instrumental value of procedural guarantees.

At the same time, from the authors' perspective, such a description of the secondary role of procedural rights given by F. Francioni is quite controversial, because within the context of the Rule of Law the value of access to justice and procedural guarantees can be defined as dualistic: on the one hand they have an instrumental value and serve to protect other substantive rights, but on the other they constitute self-values or intrinsic values as an essential part of the Rule of Law (May 2010, p. 52). This second notion lets J. Waldron (2011, p. 3) propose a three-dimensional structure of the rule of law, identifying the procedural component of this principle besides the classical substantive and formal aspects. The author notes that: "the procedural understanding of the rule of law requires (…) application of the rules with all the care and attention to fairness that is signaled by ideals such as 'natural justice' and 'due process'" (Waldron 2008, pp. 1, 7–8). Though J. Waldron particularly associates the procedural dimension of the Rule of Law with the due process guarantees provided by state courts, the current perspective of access to justice standards is also connected with the broader interpretation. This phenomenon also covers non-judicial procedures and Alternative Dispute Resolution (ADR) methods for the protection of human rights.

"Path to justice": a multi-dimensional approach to access to justice

Narrow and broad approach to access to justice

As can be seen, the right to access to justice does not always correlate only with court protection, but also covers non-judicial remedies. The UN Development Programme (UNDP 2005, p. 5) also stated that access to justice is the "ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards." The abovementioned approach is also reflected in indicator 16.3.3 of the Sustainable Development Goals, which presupposes access to both formal and informal dispute resolution mechanisms.

Two main approaches to access to justice can be distinguished in this regard: narrow (associated primarily with access to court) and broad (exploring other dispute resolution methods) (Komarov and Tsuvina 2021). The broad approach is dominant in international documents and the scientific literature. Even the ECtHR emphasizes the broad autonomous interpretation of the term tribunal within the scope of the right to a fair trial (Art. 6 para. 1 of the ECHR). The ECtHR states that the tribunal should be understood not in a technical way but in a more substantive sense, considering its judicial function and the procedural guarantees provided, such as independence, impartiality, etc. (Guðmundur Andri Ástráðsson v. Iceland, No. 26374/18, ECtHR, 1 December 2020, § 219). Taking into account such notions, the ECtHR is considered an arbitration to be a tribunal (Regent Company v. Ukraine, No. 773/03, ECtHR, 3 April 2008, § 54). Besides this, Art. 13 of the ECHR enshrines the right to an effective remedy, which is also non-judicial by its virtue.

The broad approach of access to justice covers not only access to a court provided by Art. 6 para. 1 of the ECHR, but also the entire scope of procedural guarantees provided by the conventional system. The same approach can also be found in EU law. References to access to justice are also contained in part 4 of Art. 67 and part 2e of Art. 81 of the Treaty on the Functioning of the EU. At the same time, the key provision for an understanding of access to justice is Art. 47 of the EU Charter of Fundamental Rights, which enshrines the right to an effective remedy and the right to a fair trial, which essentially corresponds to two separate procedural rights enshrined in the ECHR: the right to a fair trial (Art. 6 para. 1 of the ECHR) and the right to an effective remedy (Art. 13 of the ECHR).

The European Union Agency for Fundamental Rights (FRA) endorses an even broader meaning of access to justice, identifying three paths to justice, i.e., procedures which can help to protect violated rights: courts, administrative organs, and ADR methods (European Union Agency for Fundamental Rights 2016, p. 25-34, 48-49). Predictably, its study focuses not only on the classical judiciary but also on so-called other paths to justice, including non-judicial administrative organs that can protect violated rights and settle disputes, such as: national human rights institutions, data protection authorities, ombudsman institutions, specialized tribunals, etc. Such bodies, according to the FRA, can provide faster protection of the rights of individuals and collective redress and, as a result, can be considered to ensure access to justice if they do not deprive a person of the right to access to court. Moreover, their decisions can be the subject of judicial review. The third path to justice,

according to FRA, is ADR methods, which are an alternative to formal judicial routes (European Union Agency for Fundamental Rights 2016, p. 48; Komarov and Tsuvina 2021, p. 202). The broad approach to access to justice is also presented in other documents and surveys, such as: Art. 9 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998) ; Art. 13 of the Convention on the Rights of Persons with Disabilities (2006) ; the study of the European Parliament's Policy Department on Citizens' Rights and Constitutional Affairs on Effective Access to Justice (Policy Department C 2017), etc.

Other paths to justice: access to an effective remedy and access to ADR

The abovementioned gives us the grounds on which to propose a multi-dimensional approach to access to justice is considered to be more perspective nowadays. It includes not only access to court (judicial protection), but also access to effective remedies and access to ADR (non-judicial forms of dispute resolution).

The right to an effective remedy, enshrined in Art. 13 of the ECHR. Art. 6 para. 1 of the ECHR is considered to be lex specialis to Art. 13 of the ECHR (Kudla v. Poland, No. 30210/96, ECtHR, 26 October 2000): the scope of Art. 6 of the ECHR is limited to the judicial form of protection and those procedures which can be understood as a tribunal within the conventional system (Tsuvina 2015, pp. 122–123), while Art. 13 of the ECHR covers non-judicial remedies. That is why the application of Art. 6 para. 1 of the ECHR usually excludes the need to apply Art. 13 of the ECHR, except in rare cases – for example, when the effective remedies for the right to trial and execution of a judgment within a reasonable time are in question (Kudla v. Poland, No. 30210/96, ECtHR, 26 October 2000). In order to evaluate the effectiveness of such remedies, the ECtHR derives certain criteria in its case law, which can be summarized as follows: a) a remedy should allow the competent national authorities to consider the essence of the relevant complaint of a violation of the rights and provide appropriate compensation (Halford v. the United Kingdom, No. 20605/92, ECtHR, 25 June 1997); b) a remedy must be effective both in theory and in practice (Rotaru v. Romania, No. 28341/95, ECtHR, 4 May 2000); c) a remedy should be available and sufficiently certain (McFarlane v. Ireland, No. 31333/06, ECtHR, 10 September 2010, §114); d) the effectiveness of the remedy does not depend on favorable outcomes for the applicants (Kudla v. Poland, No. 30210/96, ECtHR, 26 October 2000, § 157); e) a remedy should prevent a violation of a right, stop such a violation or provide adequate redress for an already occurred violation (Ramirez Sanchez v. France, No. 59450/00, ECtHR, 4 July 2006); and f) the State can choose the type of remedy or set of remedies, providing that they are appropriate and suitable to protect rights in a particular case and taking into account the significance of the substantive right for the applicant, the circumstances of a particular case, the political context, etc. (Halford v. the United Kingdom, No. 20605/92, ECtHR, 25 June 1997, § 64). The ECtHR may also establish additional specific requirements to the remedies for the protection of certain conventional rights, as it did for the above-mentioned effective remedies for the right to a trial and the enforcement of court decision within a reasonable time (Kudla v. Poland, No. 30210/96, ECtHR, 26 October 2000, Komarov and Tsuvina 2021, p. 202).

As to the ADR methods, the fundamental element of the rule of law from the point of view of interpreting its procedural aspect as one based on respect for human dignity is the guarantee of the right of individuals to choose the most acceptable form of protection of violated rights, which essentially provides for two alternatives: the use of the right of access to the court or the waiver of this right in favor of other ways of dispute resolution, in particular ADR. The right of individuals to choose between formal and informal justice is the primary procedural right in the structure of access to justice. In this context, the waiver of the right to access to court should be interpreted in the generally accepted conventional meaning of the waiver of the right to a fair trial, enshrined in Art. 6 para. 1 of the ECHR, i.e., as non-use of judicial protection (Tsuvina 2015, pp. 68–69). T. Bingham (2010, p. 85) also draws attention to this aspect and considers the existence of a dispute resolution system in civil cases, which allows considering the dispute without excessive costs and delays, as one of the elements of the rule of law. The author notes that the access to justice phenomenon is connected not only with the courts, but also covers ADR methods, which are more correctly called additional ways of dispute resolution because they allow choosing the most optimal way to resolve the dispute, taking into account the features of the latter – in particular, conciliation, mediation, arbitration, etc. At the same time, the court is considered the last resort when the previous alternatives do not provide the desired result (Bingham 2010, pp. 85–86; Komarov and Tsuvina 2021, p. 200). On the other hand, we can see that the implementation of ADR at the national level is recognized as a tool to improve the efficiency of civil proceedings, which is largely associated with the strengthening of the consensual tenet in civil procedure. This obligates the legislator to establish legal frameworks for conciliatory procedures within civil proceedings (predominantly mediation) based on a single concept of interest-based negotiations and the idea of the reconciliation of the parties and the principles of cooperation and settlement in civil procedure.

Access to justice: national and international dimensions

Lastly, the current understanding of access to justice distinguishes the national and international dimensions. The latter is connected with direct access to justice at an international level, provided by international law (Francioni 2007, p. 2). The supranational aspect of access to justice also covers access to international human rights remedies in case of rejection in obtaining effective protection and the restoration of violated, unrecognized or disputed rights at the national level. In civil cases, this element of access to justice is reflected in the possibility of applying to the ECtHR in case of violation of the rights and freedoms enshrined in the ECHR, which is possible after the application of all national remedies (Art. 35 para. 1 of the ECHR), as well as when there are no remedies at the national level. Under such conditions, access to international human rights remedies acts as a subsidiary remedy if a person cannot protect their rights at the national level.

Barriers to access to justice in civil cases

The right to access to justice is recognized both literally and in essence in many international and regional documents, such as Art. 8 of the UN Universal Declaration of Human Rights, Art. 14 of the International Covenant on Civil and Political Rights, Art. 6 para. 1 and Art. 13 of the ECHR, Art. 47 of the Charter of Rights of the European Union, Art. 25 of the American Convention on Human Rights, Art. 7 para. 1 of the African Charter on Human and Peoples' Rights, etc.

A. Roman distinguished availability and access, and pointed out that the former "refers to the question of whether a service exists," whereas the latter "refers to the question of whether a service is actually secured." In this regard, the author pointed out that barriers cause a distinction between availability and access (Roman 1990, p. 181). The phenomenon of access to justice in civil cases is also examined through its barriers (restrictions, obstacles, limitations) by other authors (Cappelletti et al. 1978; European Union Agency for Fundamental Rights 2020, pp. 6, 43).

The ECtHR stated that the right of access to a court is not absolute and requires "legislative regulation by the state, which may vary in time and in place depending onaccording to the needs and resources of society the community and of individuals" (Golder v. United Kingdom, No. 4451/70, ECtHR, 21 February 1975; Ashingdane v. the United Kingdom, No. 8225/78, ECtHR, 28 May 1985). The ECtHR in its case law distinguishes legitimate and illegitimate restrictions on the right of access to a court. Legitimate restrictions are caused by the necessity of the State's legal regulation of civil proceedings to ensure the proper conduct of the trial (the requirements for the form and content of the claim, the requirement to fulfill the procedure of applying the claim, jurisdictional rules, timeframes for appeals, etc.). However, in some cases, these restrictions become real barriers to access to court, which may violate the requirements of Art. 6 para. 1 of the ECHR.

To assess the legitimacy of restrictions on the right of access to court, the ECtHR at the first stage assesses whether such restrictions were provided for by the law (lawfulness criteria). In the second stage, the proportionality test is used, which provides for: 1) establishing the purpose of the restriction of the right to access to court and determining whether it was legitimate; 2) finding out what means were used for the respective restriction, as well as whether they were minimally burdensome and necessary in a democratic society; 3) determining whether there was a reasonable and proportionate relationship between the means used and the goal; and 4) assessing whether the restriction in question does not contradict the very essence of the guaranteed right, since a person cannot be deprived of the right to judicial protection as a result of a restriction at all, but there should always be alternative ways to protect violated, unrecognized or disputed rights, freedoms, and interests if the consideration of certain cases is excluded from the jurisdiction of the judiciary (Tsuvina 2021, pp. 150–151).

Barriers to access to justice can be of different natures. D. Vitkauskas and G. Dikov (2017, pp. 30–39) distinguish substantive, procedural, and practical barriers to the right of access to court. F. Francioni (2007, p. 38) emphasizes procedural and substantive limitations to access to justice. N. Sakara (2018, p. 80) draws attention to potential (jurisdictional, subjective, time, procedural and financial restrictions) and practical barriers to the right of access to court (excessive formalism, conflict of laws, inability to obtain legal aid). A wider list of barriers was proposed by S. Mor (2017, p. 614), who distinguished three groups of access to justice barriers: a) entry barriers, or barriers

to access to court – in particular, formal, physical, and procedural; b) barriers to access to law, which may be structural, cultural or psychological, limiting the abilities of parties to use the legal system, even if there are no formal barriers; and c) outcome barriers to access to court related to the final results, the content of legal acts, their application, and the presence of structural bias. As we can see, the author correlated access to justice not only with the procedural requirement for filing the suit, but also with the final results of the trial.

Barriers to access to justice in civil cases in a procedural sense can be divided into several groups: personal, jurisdictional, temporal, financial, procedural, and practical. Personal barriers are connected with the person of the claimant or defendant. Recent research has shown that this can create problems for particular groups of potential parties of civil litigation – for example, women, disabled persons, foreigners, etc. In some situations, barriers for claimants can be connected with the defendant's special status in the rules of judicial immunities, which can exclude the right to suit to particular persons, such as members of parliament, diplomats, judges, etc. (Radunovic and Others v. Montenegro, No. 45197/13, ECtHR, 25 October 2016; Prince Hans-Adam II of Liechtenstein v. Germany [GC], No. 42527/98, ECtHR, 12 July 2001; Al-Adsani v. United Kingdom, No. 35763/97, ECtHR, 21 November 2001; Naït-Liman v. Switzerland, No. 51357/07, ECtHR, 15 March 2018).

Jurisdictional barriers are connected with the exclusion from the court jurisdiction of particular cases without leaving any alternative remedies to protect the violated substantive right (Chernichkin v. Russia, No. 39874/03, ECtHR, 16 September 2010; Ryabikina v. Russia, No. 44150/04, ECtHR, 7 June 2011; Beneficio Cappella Paolini v. San Marino, No. 40786/98, ECtHR, 13 July 2004).

Temporal barriers can be caused by the wrongful application of the procedural rules regarding timeframes for logging a claim or an appeal, which results in the denial of justice (Kursun v. Turkey, No. 22667/10, ECtHR, 30 October 2018; Greguric v. Croatia, No. 33804/06, ECtHR, 4 February 2010; Cherednichenko and Others v. Russia, No. 35082/13, ECtHR, 7 November 2017).

Financial barriers refer to the high costs of litigation for vulnerable groups of people and the lack of legal aid for such people – at least in some types of cases (Paykar Yev Haghtanak Ltd v. Armenia, No. 21638/03, ECtHR, 20 December 2007; Marina v. Latvia, No. 46040/07, ECtHR, 26 October 2010).

Procedural barriers can be caused by the absence of special procedures for the protection of some kinds of human rights – for example, the absence of class actions or other collective redress remedies can constitute a serious problem for the protection of so-called diffuse interests. Another example of a procedural obstacle is the existence of pretrial procedures which are compulsory and ineffective (Ponomarenko v. Ukraine, No. 13156/02, ECtHR, 14 June 2007).

Lastly, there can also be practical barriers to access to justice connected with the lack of knowledge or information about effective remedies in particular types of cases or with the factual resource imbalance between parties (Cappelletti et. al. 1982, p. 680).

Evaluating access to justice in civil cases: filling the gap

To implement effective remedies to overcome these barriers, the latter should be properly evaluated in each particular country. In this regard, access to justice should be understood as a practical rather

than theoretical concept within the Sustainable Development Agenda. That is why appropriate indicators for measuring access to justice and evaluating its development should be defined. Indicator 16.3.3 of access to justice should be evaluated within the "proportion of the population who have experienced a dispute in the past two years and who accessed a formal or informal dispute resolution mechanism, by type of mechanism." This indicator evaluates by asking four questions connected with: the experience of a person with a dispute over the past 2 years; the nature of the dispute; access to dispute resolution mechanisms; and reasons why no dispute mechanism was accessed (if one was not used) (United Nations 2022). From the authors' perspective, the abovementioned indicator is too narrow to evaluate all access to justice issues in a particular country.

A prominent place in this regard is taken by the Rule of Law Index assembled by the World Justice Project. The Rule of Law Index aimed to evaluate the fulfillment of the Rule of Law in a particular country with concrete indicators, such as: 1) constraints on government powers; 2) the absence of corruption; 3) open government; 4) fundamental rights; 5) order and security; 6) regulatory enforcement; 7) civil justice; and 8) criminal justice (World Justice Project 2022). The Civil Justice measurement includes such indicators as whether: 1) people can access and afford civil justice; 2) civil justice is free of discrimination; 3) civil justice is free of corruption; 4) civil justice is free of improper government influence; 5) civil justice is not subject to unreasonable delay; 6) civil justice is effectively enforced; and 7) ADR mechanisms are accessible, impartial and effective (World Justice Project 2022). The methodology of the study is based on a survey of experts and members of the public, and includes questions based on both the experiences of respondents and the general perception of judicial institutions and procedures in society in a particular country. For example, the first indicator – "people can access and afford civil justice" – shows the accessibility of the courts in civil matters, "including whether people are aware of available remedies; can access and afford legal advice and representation; and can access the court system without incurring unreasonable fees, encountering unreasonable procedural hurdles, or experiencing physical or linguistic barriers" (World Justice Project 2022).

More attention was paid to the problems of access to justice in civil cases by the World Justice Project (2019a) in the "Global Insights on Access to Justice: Findings from the World Justice Project General Population Poll in 101 Countries" international survey, in which the indicators of access to justice in civil cases from Rule of Law Index were modified and used. As a result, the matrix of questions consisted of 128 questions which were divided into 11 sub-sections: 1) types of legal problems experienced in the last two years; 2) problem seriousness; 3) sources of help and advice, both professional and informal; 4) residual problem-resolving behavior, such as attempts to learn more about the legal issue; 5) reasons for advice not being obtained; 6) resolution process, through both formal institutions and informal means; 7) fact and manner of conclusion; 8) perceptions of the quality of the process and outcome; 9) cost of problem resolution; 10) legal capability, awareness, and confidence; and 11) impact of experiencing a legal problem (World Justice Project 2019a).

The survey shows that 49% of respondents encountered at least one legal problem in the last two years, and in 36% of cases this problem was serious. Among the latter, 51% could not meet their needs in civil justice. At least 1.4 billion people could not meet their needs for justice in civil cases because of different obstacles, such as pure knowledge in the legal area, lack of money and legal aid, and poor resolution processes (World Justice Project 2019a, pp. 6–7). As can be seen, this

survey shows an incredible deficit in terms of access to justice (World Justice Project 2019a, 2019b). The approach introduced by the World Justice Project can be taken as a basis for the improvement of the indicators of access to civil justice according to the 2030 Sustainable Development Agenda (World Justice Project 2019a, p. 4). This aims to improve indicators of the evaluation of access to justice in a particular country, as well as to develop ways of refining it.

Conclusions

Putting access to justice in the 2030 Sustainable Development Agenda emphasizes its importance for common growth. One of the core elements of the Goal 16 is promoting the rule of law at the national and international levels and ensuring equal access to justice for all. In this vein the most prominent development in the ongoing access to justice movement is the acknowledgment that there is more than one path to justice. Apart from regular state courts, numerous ADR methods may be employed to attain justice and ensure peaceful settlement of disputes arising among the members the society. This idea of so called 'procedural pluralism' informs multiplicity of forms and methods to protect violated human rights.

Recent research shows the existence of a justice gap in many countries, which exposes existing illegitimate barriers to access to justice in civil cases for ordinary people. Such personal, jurisdictional, temporal, financial, procedural, and practical barriers to access to justice need to be overcome by providing particular measures. At the same time, indicator 16.3.3 of the Sustainable Development Goals has a formal character rather than one that aims to fulfill real-world situations, which would be much more complicated. One of the main tasks now is to develop the adequate tools at the UN level for measuring access to justice in civil cases. As one such solution, the World Justice Project's tools of measuring civil justice in terms of the Rule of Law can be taken as a basis.

The availability and relatively low costs of ADR is an important factor that alleviates the said barriers that obstruct victims' way to vindication of the rights infringed. For this reason, ADR development is vital for attaining 'justice for all'.

However, the sustainable development goal of providing justice for all shall not be interpreted in a narrow sense denoting the procedural aspect of access to justice only. The substantive justice cannot be overlooked too (Brinks 2019; Manhart 2019, pp. 12–15; Farrow 2014, pp. 970–972). While the former is understood as an unencumbered opportunity to apply to the court, to have a case heard in court, to receive a court decision in a case, and to have it executed, the latter includes not only the possibility to initiate proceedings in court, but also certain consequences of the case – that is, the results of the trial, which should be assessed according to settled standards. The UNDP interprets access to justice as "much more than improving an individual's access to courts or guaranteeing legal representation. It must be defined in terms of ensuring that legal and judicial outcomes are just and equitable" (UNDP, 2005). This broad understanding of access to justice is fairly comprehensive, and encompasses not only the procedural element of the Rule of Law, but the substantive element as well which is the predomination of human rights. A balance between the procedure and the results of the dispute resolution becomes more and more essential, and should be the subject of further research in terms of the Sustainable Development Agenda.

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III.
TRANSFORMATION OF CRIMINAL LAW IN THE CONTEXT OF SUSTAINABILITY

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III.1. ENVIRONMENTAL CRIME: LITHUANIAN CRIMINAL POLICY IN THE CONTEXT OF EUROPEAN REGULATION

Environmental crime and its regulation in the EU context

The European Union (hereinafter – the EU) has recently taken global leadership to ensure a safe environment. This can be seen in the European Green Deal, adopted by the European Commission in 2020. The European Green Deal "aims to protect, conserve and enhance the EU's natural capital, and protect the health and well-being of citizens from environment-related risks and impacts" (European Commission 2019). The "European Green Deal priorities include protecting our biodiversity and ecosystems, reducing air, water and soil pollution moving towards a circular economy improving waste management ensuring the sustainability of our blue economy and fisheries sectors" (European Commission 2022). To implement the European goals provided by the European Green Deal, "the Commission will also promote action by the EU, its Member States and the international community to step up efforts against environmental crime" (European Commission 2019). According to the European Commission, "in 2016, the UN and Interpol estimated the global economic loss related to environmental crimes at $91–259 billion, rising by 5%–7% annually. Illegal trade in wildlife products alone accounts for $7–23 billion. This makes environmental crime the fourth largest criminal activity in the world after drug smuggling, counterfeiting and human trafficking. In the EU, annual revenues from illicit non-hazardous waste trafficking are estimated to range between €1.3 billion and €10.3 billion, and for hazardous waste trafficking between €1.5 billion and €1.8 billion" (European Commission 2020). The fight against environmental crime started long before the European Green Deal, primarily commencing with the adoption of Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law (hereinafter – the Directive). After the evaluation of the Directive, the European Commission stated that "over the past 10 years the number of environmental crime cases successfully investigated and sentenced remained very low. Moreover, the sanction levels imposed were too low to be dissuasive and cross-border cooperation did not take place in a systematic manner" (European Commission 2021a). There is "a real need to strengthen the pro-

tection of the environment through criminal law" (European Commission 2021b), so the European Commission has delivered a proposal to revise the Directive (European Commission 2021a).

The European Union's right to tackle environmental problems

Environment crime is one of the EU's central concerns. The Tampere European Council of Ocotber 15 and 16, 1999, at which a first work program for EU action in the field of Justice and Home Affairs was adopted, asked that efforts be made to adopt common definitions of offences and penalties in several especially important sectors, amongst them environment crime (European Commission 2021b). However, despite this agreement, environmental criminal law has become the center of a serious institutional fight between the European Commission, supported by the European Parliament, on the one hand, and the Council, supported by the great majority of the EU Member States, on the other (Aghenitei and Boboc 2011). The main dispute relates to the distribution of powers between the European Commission and the European Council, so the Court of Justice of the European Union (CJEU) was the main figure solving these disputes in 2005 and 2007 (*Commission v. Council* 2005; *Commission v. Council* 2007). Those judgements of the CJEU were the basis for adopting two Directives based on the First Pillar competences – Directive 2009/123/EC on ship--source pollution, and Directive 2008/99/EC on environmental crime (Giardi 2015). Later, the Treaty of Lisbon, which amended the Treaty on the European Union and the Treaty establishing the European Community, was signed in Lisbon on the 13th of December 2007. This treaty, called the Treaty on the Functioning of the European Union (TFEU), codified and clarified CJEU judgements and changed the EU's powers in the field of criminal law. This change of powers was mainly implemented in Article 83. Part 1 of Article 83 of the TFEU states that "The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis." The same article names the areas in which the EU has the right to "establish minimum rules concerning the definition of criminal offences and sanctions (…) – terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime." Environmental crimes were not mentioned in the TFEU, but according to the same article "(…) the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph" (Consolidated version of the Treaty on the Functioning of the European Union 2012). Therefore, Article 83 gave the Council the right to identify other areas of crime which could be regulated by EU law if the Council was acting unanimously after obtaining the consent of the European Parliament (Consolidated version of the Treaty on the Functioning of the European Union 2012).

The main goal of the Directive was to improve the protection of the environment by reducing environmental crime. Before the Directive, existing systems of penalties in Member States had "not been sufficient to achieve complete compliance with the laws for the protection of the environment.

Such compliance can and should be strengthened by the availability of criminal penalties, which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law" (Directive 2008/99/EC). Criminal penalties need to be more dissuasive "for environmentally harmful activities, which typically cause or are likely to cause substantial damage to the air, including the stratosphere, to soil, water, animals or plants, including to the conservation of species" (Directive 2008/99/EC). According to the European Commission, the main goal (the improvement of the protection of the environment by reducing environmental crime) must be achieved through specific objectives: "to create a level playing field with respect to the offences criminalized and the relevant sanctioning systems, and to prevent safe havens (…); to ensure a system that is a deterrent, through criminal penalties (…); to protect fair-playing businesses and reduce illegal trade in environmentally harmful products (such as illegal waste shipments) and wildlife trafficking (…); to improve judicial cooperation (…)" (European Commission 2020).

The Environmental Crime Directive and its implementation in Lithuanian law

To achieve these objectives, all Member States had to criminalize unlawful acts committed intentionally or at least with serious negligence. Most of these acts are criminalized only if they cause or are likely to cause death or serious injury to any person, or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants. Taking this criterion into account, the Directive requires that the following acts are criminalized: "(a) the discharge, emission or introduction of a quantity of materials or ionizing radiation into air, soil or water; (b) the collection, transport, recovery or disposal of waste, including the supervision of such operations and the aftercare of disposal sites, and including action taken as a dealer or a broker (waste management); (d) the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used; (e) the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances" (Directive 2008/99/EC). Three of the four offences, i.e., the offences mentioned in points a, b and d of the Directive, are criminalized in one single provision of the Criminal Code of the Republic of Lithuania (hereinafter – the Lithuanian CC, or the CC). These crimes were transferred to Article 270, which criminalized the violation of rules on the protection of the environment or the use of natural resources, or the maintenance or use of structures where hazardous substances are used or stored, or where potentially hazardous installations are located, or where hazardous activities are carried out. The offence referred to in Article 3(e) of the Directive is criminalized in Article 256 of the Lithuanian CC – Illegal disposal of nuclear or radioactive substances or other sources of ionizing radiation. This group of acts can also include those listed in Article 3(h) of the Directive, which are directly linked to the causing of environmental damage – "(h) any conduct which causes the significant deterioration of a habitat within a protected site" (Directive 2008/99/EC). This offence is provided for in Article 271 of the CC (Destruction or destruction of protected areas or objects of natural heritage).

Other acts related to specimens of flora or fauna are criminalized except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species: "(f) the killing, destruction, possession or taking of specimens of protected wild fauna or flora species; (g) trading in specimens of protected wild fauna or flora species or parts or derivatives thereof" (Directive 2008/99/EC). These offences have been transposed into two norms of the Lithuanian CC. However, unlike the Directive, these offences are distinguished in the CC not on the basis of the acts, but on the basis of the subject matter of the offence, i.e., on the basis of what is affected – the flora or fauna. If the offence is against wildlife, Article 272 of the CC (Unlawful hunting or fishing or other use of wildlife resources) applies, and if it is against flora, Article 274 of the CC is invoked (Illegal collection, destruction, sale or other disposal of protected wild plants, mushrooms or parts thereof).

The other crimes provided in the Directive do not require any impact on the environment or people: "(c) the shipment of waste, where this activity falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006 on shipments of waste and is undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked; (i) the production, importation, exportation, placing on the market or use of ozone-depleting substances" (Directive 2008/99/EC). Furthermore, these acts have been transferred to Article 270^2 (Illegal transportation of waste across the state border of the Republic of Lithuania) and Article 270^1 (Illegal disposal of ozone-depleting substances or mixtures thereof) of the Lithuanian CC.

An examination of the provisions of the Directive and the Lithuanian CC reveals that Lithuania has fully implemented the requirements of the Directive by prohibiting all of the required offences. Although the European legal regulation is fully transplanted into Lithuanian law, its implementation causes some problems.

The study of Lithuanian case law

Lithuania is formally considered to have implemented the Directive by criminalizing all of the offences set out in it, but the actual implementation of the Directive at the level of court practice remains unexplored. Therefore, there is a need to examine Lithuania's practical criminal policy in the implementation of the EU's commitment to combating environmental crime, both in terms of the incrimination of specific offences and the sentencing for them.

In order to reveal and assess the current Lithuanian criminal policy in practice in the implementation of the Directive, the most general norm related to environmental offences was chosen. Article 270 of the CC states that "violation of the rules on the protection of the environment or on the use of natural resources, or on the maintenance or use of structures where hazardous substances are used or stored, or where potentially hazardous installations are located or where hazardous activities are carried out." The first part of this study refers to a potential threat to human life or health, or which could have caused serious damage to air, land, water, animals or plants, or other serious consequences for the environment, while the second part refers to the actual occurrence of similar damage. The study consists of two parts: 1) in the first part, the case law of the Supreme Court of Lithuania was examined in order to investigate the main problems of the incrimination

of these norms; 2) in the second part, a comprehensive study of the verdicts (criminal orders issued by a court in a criminal case were examined alongside convictions) handed down by the Lithuanian courts of first instance was carried out for a 10-year period (from January 1, 2012, to January 1, 2022), examining the sentences imposed by courts. The period was chosen considering the fact that amendments to the law related to the implementation of the Directive were adopted on December 22, 2011, and entered into force on January 1, 2012.

In order to examine sentencing policy, all court sentences handed down during the period (a total of 9 sentences) in which individuals were convicted were studied:

1) in accordance with Paragraph 1 of Article 270 of the CC (a total of three convictions);
2) in accordance with Paragraph 2 of Article 270 of the CC (a total of six convictions).

The verdicts were selected using LITEKO, the publicly accessible information system of Lithuanian courts (Teismai.lt, n.d.). Cases were selected using the Criminal Case Classifier. In the analysis of the imposed sentences, both repeated convictions of the same person for separate criminal offenses and the convictions of separate persons in the same case were considered as separate convictions. Thus, a total of 10 convictions (sentencings) were investigated (according to Article 270(1) of the CC – four convictions, according to Article 270 (2) of the CC – six convictions).

The qualification of problems in Lithuanian case law

The problem of the abstractness of the consequences

One of the main problems encountered by case law is the problem of the abstractness of the consequences provided for in Article 270(1) and (2) CC. The abstract definition of consequences was a fundamental problem in this Article both before and after the adoption of the Directive. In one case examined by the Supreme Court of Lithuania (2K-96/2014, 2014), a person was tried in accordance with Paragraph 1 of Article 270 of the CC (redaction of the Law of June 23, 2005). According to this redaction, the liability was to be imposed on "anyone who has violated the rules on the protection of the environment, or the use of natural resources laid down by law, if this has endangered the life or health of a large number of people or has been likely to cause serious damage to fauna, flora or the environment or to have caused other serious environmental consequences" (Criminal Code of the Republic of Lithuania (2005 06 23 redaction)). Cases when the criminal act has caused not only the possibility of occurrence of danger to human life or health or damage to nature, but also real dangerous consequences, are classified in accordance with Article 270 (2) of the CC. Although this offence was committed before the adoption of the Directive, the definition of the consequences was very close to the future requirements of the Directive, so the analysis of that has not lost its relevance. In the present case, by the verdict of the Court of Appeal, E. B. was convicted under Article 270(1) of the CC for having, on June 2, 2008, in violation of the requirements of the Law of the Republic of Lithuania on Waste Management as well as of other legal acts related to environmental protection requirements, employed F. D., who, following the verbal

instruction of E. B., pushed and buried with a tracked tractor waste that had been illegally transported and dumped on the land by persons who have not been identified. A total of 54.5 m^3 of plant waste and tree stumps, 472.47 m^3 of construction waste, and 5 m^3 of household waste were dumped in pits dug on the land, which could have had serious consequences for the environment (2K-96/2014, 2014).

The Supreme Court of Lithuania in this case devoted considerable attention to the analysis of the consequences provided for in Article 270 of the CC. As the court noted, "the constitution of the offence under Article 270(1) of the CC is somewhat unusual in that it is not the damage caused by the offence that is considered to be the consequence of the offence, but rather the threat of such damage that is considered to be the consequence that has to be proved for the purposes of Article 270(1) of the CC" (2K-96/2014, 2014). At the same time, the Court stressed that if the threat does not arise, a person may be held administratively liable for infringements of rules on the protection of the environment or the use of natural resources. Importantly, any violation of environmental rules may in principle jeopardize (but does not actually jeopardize) certain values protected by the criminal law (2K-96/2014, 2014). Given that the elements of danger and threat of serious harm or other serious consequences are not spelled out in the law, they are subject to assessment in the light of all the circumstances of each case. The consequences or threat of consequences are assessed on a case-by-case basis, which may lead to different interpretations, as it is difficult to identify and measure a specific hazard or risk of environmental damage (2K-96/2014, 2014). In such a case, the court must assess the species and part of the flora or fauna threatened, the nature, extent and seriousness of the environmental damage, the possibilities of restoring the affected natural resource, the monetary value of the damage, and other circumstances. The threat to the environment must be real (i.e., there was a specific or clear danger in the form of a real threat to the environment, or a reasonable likelihood of damage to the environment in the near future) and must have been recorded in the criminal case (2K-96/2014, 2014).

In the present case, although it was established that the defendants had dumped a relatively large quantity of various types of waste in an unauthorized place, no specific investigation was carried out as to the environmental impact of the waste dumped in the places referred to in the judgement. Thus, no consequences were identified. It should be noted that the Court of Appeal, in judgement, found that the illegal method of disposal and the very large quantity and type of waste could have had serious consequences for the environment and endangered the contamination of groundwater. However, this conclusion of the Court of Appeal was not sufficient, and the Supreme Court of Lithuania therefore did not recognize this threat within the meaning of Article 270 of the CC, as the absence of an investigation of the surface of the land plots and the deeper layers of its soil and groundwater does not allow for the establishment of the occurrence of damage (2K-96/2014, 2014). The Supreme Court of Lithuania, in denying the threat to the environment as an element of the consequences of Article 270(1) of the CC, has stated that the threat of damage to the environment and nature and the amount of such damage can only be established on the basis of the conclusions of a qualified specialist, and that it is not enough to presume that the threat to the environment has arisen, but that the threat has to be proved. The determination of the types of waste was not based on a hazardous or non-hazardous assessment, but simply on the fact that the natural soil had been mixed with the waste, which constitutes contamination as the

soil structure was destroyed. The threat of groundwater contamination was established throughout the criminal proceedings (2K-96/2014, 2014).

This case is also interesting because, in addition to the above-mentioned arguments, the panel of judges of the Lithuanian Supreme Court stated that it is undeniable that waste management is an important part of the EU's environmental protection policy, and also mentioned the importance of the Directive 2008/99/EC (2K-96/2014, 2014). It is very interesting that the panel of judges, after mentioning this Directive and recognizing its importance, interpreted the purpose of this Directive in a rather different way. Here, the panel of judges, referring to the Directive, concluded that the Directive does not require such a broad criminalization and punishment of the mere possibility of creating an environmental hazard. According to the Supreme Court, the mere presumption of endangerment is clearly not sufficient to render a person criminally liable (2K-96/2014, 2014). It is, in fact, very difficult to answer the question of why the Supreme Court of Lithuania came to such a conclusion, because Article 3 of the Directive is quite clear that for some offences, liability must be linked to cases in which the relevant violation of the rules occurs "which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants" (Directive 2008/99/EC). Moreover, the preamble to the Directive also states that "in order to achieve effective protection of the environment, there is a particular need for more dissuasive penalties for environmentally harmful activities, which typically cause or are likely to cause substantial damage to the air, including the stratosphere, to soil, water, animals or plants, including to the conservation of species" (Directive 2008/99/EC). It is therefore clear from the text of the Directive that it is precisely aimed at combating not only environmental impacts that have already occurred, but also any threat of such impacts occurring. In other words, the aim is not to deal with the consequences that have already occurred, but to deal with the environmentally dangerous activity itself.

In addition, the Supreme Court noted that administrative liability is the main type of liability for environmental protection violations, including environmental pollution. In distinguishing between administrative and criminal liability for breaches of the rules on the protection of the environment or the use of natural resources, it is necessary to assess the act committed in terms of the content of the objective and subjective elements and their manifestation, and to be guided by the provisions of the principles of reasonableness, proportionality, fairness and other general principles of law. The scale of the intensity of the infringement is a key element of the distinction between criminal and administrative liability for environmental infringements. In this case, the determination of the potential threat of damage to the environment and the magnitude of the threat of such damage is a decisive criterion for the distinction between criminal and administrative liability for environmental offences. In such cases, the justification of the threat of damage to the environment becomes crucial. In the light of the foregoing considerations, the panel of judges upheld the acquittal of the Court of First Instance (2K-96/2014, 2014).

In another case, the Supreme Court of Lithuania, addressing the problem of definiteness of consequences and in order to establish a clearer distinction between criminal liability for violations of environmental protection rules and similar administrative offences, examined the case in an extended panel of seven judges (2K-7-57-489/2020, 2020. Emphasizing the importance of environmental protection, the Extended Chamber noted that even Article 53 of the Constitution of

the Republic of Lithuania establishes that the State and every person is obliged to protect the environment from harmful effects, and Article 54 provides that it is prohibited by law to destroy the land, its subsoil and waters, to pollute the waters and the air, to have a radiological effect on the environment and to impoverish flora and fauna. Moreover, according to the Court, these requirements of the Constitution are detailed in the Environmental Protection Law of the Republic of Lithuania. The Constitutional Court of the Republic of Lithuania has also stated that it is in the public interest to ensure the protection of the natural environment, fauna and flora, and the rational use and enhancement of natural resources, and that it is the constitutional duty of the State to guarantee this. Violations of environmental law are punishable by criminal or administrative penalties. The level of seriousness of the act depends on the damage to nature, which determines the distinction between administrative and criminal liability (2K-7-57-489/2020, 2020).

In the case before the Extended Chamber of Seven Judges, Mr A.P. was tried for violating the legal rules on the use of natural resources on his plot of land adjacent to a wetland. A. P., when preparing the land plot for housing and farm needs by excavating impermeable surface water bodies – a pond and a ditch – did not comply with the prohibitions established in the above-mentioned legal acts, as he mechanically dismantled the vegetation cover of 0.8248 ha, destroyed it, and transformed it into water bodies. In the present case, it has been established that A. P. did not destroy the entire wetland, but his actions caused damage to the natural environment in the amount of €113,245.04 (2K-7-57-489/2020, 2020).

In describing the legal assessment of analogous infringements, the Supreme Court of Lithuania stated that analogous cases usually resulted in administrative liability. Such offences were referred to in Article 51^{13} (1) of the Code of Administrative Offences of the Republic of Lithuania (the law in force before January 1, 2017). It was this article that first established liability for violation of the special conditions for the use of land, forest and water bodies (the current equivalent of the same administrative offence is set out in Article 256(3) of the Administrative Offences Code of the Republic of Lithuania). Subsequently, depending on the outcome of the administrative offence case, environmental damage is recovered from the perpetrators in civil proceedings under civil claims brought by the Department of Environmental Protection under the Ministry of Environment (2K-7-57-489/2020, 2020).

The panel of judges also notes that the amendment of Article 270 of the CC with effect from January 1, 2012, and the increase in the degree of dangerous consequences necessary for criminal liability under this Article (decriminalization of the elements of minor damage and minor consequences which qualified this offence) make it even more important to ensure the proper delimitation of administrative and criminal liability. Following the amendment, criminal liability for violation of the rules on the protection of the environment or the use of natural resources laid down in the legislation is imposed if such an act could have caused, or resulted in, serious damage to the air, land, water, animals or plants, or other serious environmental effects (2K-7-57-489/2020, 2020).

Thus, the main criteria distinguishing between the criminal offences laid down in Article 270 of the CC and the administrative offences laid down in Article 51^{13} of the Code of Administrative Offences in cases where the special conditions for the use of land are violated, are the following: 1) the infliction of (or threat of) serious damage to the air, the land, the water, or the animals; and 2) the infliction of (or threat of) severe damage to the environment. It is for the court to assess

the form and extent of the specific damage (or serious consequences) in each individual situation and to decide whether the damage (or threat of damage) to air, land, water, animals or plants is significant, whether the environmental consequences are serious, whether a breach of the rules on the protection of the environment or on the use of natural resources is a criminal offence, or whether the damage caused and the consequences of the damage are worthy of administrative liability only (2K-7-57-489/2020, 2020).

The Supreme Court has confirmed that significant damage to air, land, water, animals or plants, or other serious consequences for the environment, as a constituent element of the offence, is evaluative, and its determination is directly related to the seriousness of the violation of environmental protection rules. In assessing this element, account must be taken of the nature of the breach of the environmental rules, the extent of the material loss, the nature and extent of the damage to the ecosystem, the value of the natural objects damaged, the extent of the damage, the possibility of restoring what has been destroyed or damaged, etc. (2K-7-57-489/2020, 2020). However, the Supreme Court also held that the amount of material damage cannot be the sole criterion for determining serious damage. A necessary element of the objective part of the offence under Article 270(2) of the CC is real consequences, which implies not only an assessment of the actual damage, but also the need to identify the specific component of the environment that has been damaged. Serious damage occurs when a specially protected object of the State is completely destroyed or severely damaged or suffers substantial material loss. This is an evaluative element of the offence, the content of which is revealed by looking at the specific facts of the case. Moreover, in cases of this kind, the fact of adverse effects on the environment is a provable fact (2K-7-57-489/2020, 2020).

The Court found that the element of serious damage had not been proven in the case at hand, and that serious damage to the environment had been established solely on the basis of the amount of material losses calculated in accordance with the methodology (Order of the Minister of Environment 2002), contrary to the above-mentioned examples of cassation case law. In the present case, the formation of the extended Chamber of Judges concluded that, in the light of the foregoing considerations, the conclusion of the Court of Appeal that the unlawful acts of A.P. had caused significant damage to the wetland and to the plants was not based on proper legal reasoning. The acts of mismanagement by A.P. established in the case, which violated the special conditions for the use of land when he carried out excavation works on his land from April 1, 2014, to October 23, 2015, cannot be regarded as acts of the gravity of the seriousness of the crime under Article 270(2) of the CC, as such acts did not constitute the element of causing serious damage to the air, land, water, animals or plants. It is the imposition of administrative liability on A. P. for such actions that would be a proportionate legal measure (2K-7-57-489/2020, 2020).

The Supreme Court ruled that the courts of lower instance had incorrectly applied and interpreted this provision of the Criminal Code, had failed to properly assess the seriousness of the violation of the rules on the use of natural resources, and had failed to consider the possibility of imposing administrative liability on A. P. Consequently, it concluded that the environmental damage in the amount of €113,245.04, in view of the lack of seriousness of the damage, did not constitute a criminal offence (2K-7-57-489/2020, 2020).

In addition, this ruling of the Extended Chamber of seven judges is significant in that it also addressed the issue of the assessment of the risk of environmental damage. Prior to this ruling,

the case law on the assessment of environmental risks was not consistent. In some cases, the court required a specific assessment of the threat of harm expressed in monetary terms (2K-155-693/2015, 2015), but in others, a more abstract, non-monetized assessment of the threat to the environment was sufficient for conviction (2K–114–696/2015, 2015). Here, a person was convicted under Article 270(1) of the CC for irresponsibly storing harmful substances and endangering the environment. In this case, the Supreme Court stated that "the threat to the environment has not been quantified in monetary terms in this case (…) the evidence in the case confirms that (…) 32 metric tons of contaminated soil, about 12 metric tons of contaminated water, 3 metric tons of waste lubricants, and about 0.15 metric tons of waste rodent poisons have been recovered and disposed of" (2K–114–696/2015, 2015). However, according to the Court, the elimination of these consequences does not constitute an assessment of the threat of damage, since "it is clear that no other consequences – the cure of human injury, the breeding or restoration of flora or fauna, the restoration of the natural environment to its original state, etc. – are included in the calculation, and that therefore the damage does not refer to the specific consequences of Article 270(2) of the CC, since they have not yet occurred, but have only threatened to occur" (2K–114–696/2015, 2015). However, the aforementioned recent ruling of the seven-judge chamber nevertheless upheld the practice which requires that the assessment of any of the consequences provided for in Article 270 of the CC must be quantified in monetary terms – "in cases of both the threatened (Article 270(1) of the CC) and the actual infliction of harm (Article 270(2) of the CC), the amount of the harm must be calculated in monetary terms" (2K-7-57-489/2020, 2020).

The timing of environmental damage

Another topical issue that has arisen in case law is the timing of environmental consequences. This issue is particularly important in environmental crime, as environmental damage following an unlawful act does not usually manifest itself as a one-off effect but tends to increase over time if the unlawful effect is not remedied. This naturally raises the practical question as to which point in time is the time of the damage. The answer to this question directly determines the question of criminal liability, as regards the calculation of limitation periods.

Here, the Supreme Court heard an appeal by R. P. and R. P., convicted under Article 270(2) of the CC. They were convicted of having illegally – i.e., without a permit from the Ministry of Environment, where a permit is required – installed a 1.70-metre-high dam on a state-owned river, in violation of the environmental protection regulations laid down in the legislation. Thus, they had partially flooded plots of land, which included a plot of forest land, in the period from August 22, 2007, to a date not precisely determined at the time of the preliminary investigation. These illegal actions caused damage to the environment in the amount of 65,169.50 LTL (€18,874.25) (2K-395-489-2016, 2016). In this criminal case, the issue of the statute of limitations for conviction became relevant, as it depended on the determination of the time of the commission of the act. The Court found that the offence committed by R. P. and R. P. was in essence of a continuous nature, since it is apparent from the circumstances established in the case that the infringement of the environmental protection rules was established by the environmental protection officers in an inspection

act of September 21, 2010, and that the consequences of this infringement, namely the specific damage to nature, were calculated on November 19, 2010. A re-inspection on June 6, 2011, found that the dam was partially washed out or dismantled and that water was already flowing. It was not established in the case file whether and when this action was carried out by nature or by man (2K-395-489-2016, 2016).

The Court concluded that the infringement of the environmental protection rules did not consist solely in the construction of the dam, but consisted both in the prohibited act of constructing a 1.70-metre-high dam across the river from August 22, 2007, to an unspecified date in 2008, and in the subsequent lack of measures taken to prevent the environmental hazard of flooding of the plots. By constructing the dam and using the ponds constructed, R. R. P. was indifferent to any harmful effects on nature. Moreover, according to the construction of the constituent elements of the offence (the significance of the consequences for the offence), the constituent elements of the offence committed by Mr R. R. P. are substantive, i.e., the consequences of the offence – the occurrence of significant damage to the environment – are a necessary feature of the offence. The consequences were of a lasting nature, since they did not occur immediately after the construction of the barrier, but over time. Therefore, in the absence of the possibility to establish the exact date on which the offence was interrupted, the Court of Appeal was justified in choosing, in the factual situation established in this case, to calculate the starting point of the limitation period for the conviction from the date on which the damage to nature was recorded. The calculation of the statute of limitations for the conviction from the time of the recording of the consequences led to the conclusion that the statute of limitations had not expired (2K-395-489-2016, 2016).

The problem of competition between legal norms

Interestingly, sometimes the legislator's desire to strengthen the fight against environmental infringements, due to the interaction between the norms of the CC and the Penal Code, can have the opposite effect. On June 25, 2015, the legislator adopted a law replacing Article 273 of the CC. Prior to this amendment, Article 273 of the CC criminalized a person who "without authorization, cut down or otherwise destroyed an area of his forest exceeding one hectare or drained a swamp." The explanatory memorandum to this amendment justified this with the aim of establishing criminal liability, considering the nature and degree of seriousness of such acts and their prevalence, while at the same time reinforcing legal liability (Explanatory Memorandum on the Draft Amendment 2012). Following the amendments, Article 273 of the CC now provides for the liability of a person who "cuts down, destroys or damages more than 500 cubic meters of trees on forest land or drains a swamp without a permit." Interestingly, this amendment has substantially limited the applicability of Article 270 of the CC and has essentially decriminalized acts such as illegal deforestation causing damage to the environment.

In a case of the Supreme Court of Lithuania, it was established that K. B. had organized clear-cutting of a pine forest in an area of 0.3 hectares in a state-protected territory, and clear-cutting of a non-clear-cutting pine forest in an area of 0.4 hectares, with part of the cleared area, i.e., 0.3 hectares, falling in the area of the Merkiai ichthyologic reserve. A total of 209.803 cubic meters of

green trees were found to have been felled, causing significant damage to the stand and €102,065.39 in environmental damage (2K-280-689/2019, 2019).

The Court stated that, according to the legislation of the Republic of Lithuania, liability for the unauthorized felling, destruction or mutilation of trees and shrubs in private forests is laid down in Article 273 of the Code of Administrative Offences of the Republic of Lithuania, and liability for the unauthorized removal or disposal of illegally felled trees and shrubs that have been growing in the forest area is laid down in Article 274 of the Code of Administrative Offences. It should also be noted that Article 273(1) of the CC establishes criminal liability for anyone who, without a permit, cuts down, destroys or damages more than 500 cubic meters of trees on forest land. Therefore, the act of K. B. – the unauthorized felling of 209.803 cubic metres of trees in a private forest and their extraction and removal without a permit – fulfils the elements of the administrative offences laid down in Article 273(3) and Article 274(3) of the Code of Administrative Offences (2K-280-689/2019, 2019).

As the Court noted, "the unauthorized felling of forests and the extraction and removal of felled forests without a permit invariably violate the rules laid down by law for the protection of the environment and the use of natural resources, and cause damage to plants (the stand of trees) and the environment. The unauthorized felling of a forest may also cause significant damage to plants (stand of trees) or other serious consequences for the environment and may formally fulfil the elements of the offence referred to in Article 270(2) of the CC. This is how the consequences of K.B.'s act were assessed: the courts found that there had been significant damage to the stand of trees and €102,065.39 to the environment. However, as mentioned above, the felling of more than 500 cubic meters of trees without a permit on forest land is punishable under Article 273(1) of the CC" (2K-280-689/2019, 2019).

According to the court, cases in which several rules of law may be applied to a given legal fact are known in legal theory as a concurrence of norms. In the event of a concurrence of norms, only one norm must be chosen and applied to the legal fact in question. In order to decide which norm should be applied to K. B.'s act – the unauthorized felling of a forest on private land and the extraction and removal of the felled forest without a permit – it is necessary to compare the nature and scope of the relations governed by Article 270(2) of the CC with those of Article 273(1) of the CC. When comparing the legal regulation laid down in the aforementioned norms, it can be concluded that the scope of the relationship regulated by Article 270(2) of the CC is broader than the relationship regulated by Article 273(1) of the CC. As mentioned above, unauthorized deforestation and the extraction and removal of deforested trees without a permit always violates the legal rules on the protection of the environment and the use of natural resources, and causes damage to plants (stands) and the environment. Article 273(1) of the CC therefore contains all the elements of the offences set out in Article 270(2) of the CC. At the same time, it should be noted that Article 273(1) of the CC establishes a special matter of the offence (trees growing on forest land) and a special method of committing the offence – cutting down, destroying or damaging trees without authorization. Consequently, Article 270(2) of the CC is a general norm in relation to Article 273(1) of the CC. In the event of a conflict between general and specific norms, the specific norm, in this case Article 273(1) of the CC, must apply. In conclusion, the act of K. B. – the unauthorized felling of 209.803 cubic meters of trees in a private forest and their removal and disposal

without a permit – could not be qualified under Article 270(2) of the CC, as this act, in terms of the matter of the offence and the way it was committed, corresponded to the elements of the offence set out in Article 273(1) of the CC. By applying the general rather than the special norm, the courts misapplied the criminal law – Article 270(2) of the CC. However, K. B.'s act also could not be qualified under Article 273(1) of the CC because less than 500 cubic meters of trees were cut down, and therefore K. B.'s act does not have the necessary constituent element of the offence, namely the consequence (2K-280-689/2019, 2019).

It should also be mentioned that in the present case, if K. B.'s actions were found to comply with the elements of an administrative offence, they did not give rise to any real additional liability, as the Supreme Court of Lithuania found that the perpetrator's actions, which should have been regarded as an administrative offence, had been committed in the context of an ideal coincidence with the concurrently criminalized Article 271 of the CC. This is because neither the CC nor the Administrative Offense Code regulate the rules on the qualification of an act and the imposition of a penalty in cases where the perpetrator commits both a criminal offence and an administrative offence at the same time. Taking into account the fact that criminal offences are more serious than administrative offences, as well as the fact that in the case of an ideal coincidence of criminal offences, the sentences imposed for the individual offences are to be consolidated by means of consolidation of the sentences (Article 63(5)(1) of the CC), the following conclusion is to be made: in the case of an ideal coincidence between a criminal offence and an administrative offence, an act corresponding to the elements of an administrative offence should not be qualified individually under an article (part of an article) of the Administrative Offense Code, and this circumstance should be taken into account in the sentencing of the criminal offence (Art. 54(2)(1) of the CC). Consequently, K.B. was convicted only under Article 271(1) of the CC, while the sentence imposed was a fine of 120 MGL (€4,519.20) (2K-280-689/2019, 2019).

The abstractness of the consequences both in the Directive and in the Lithuanian CC leads to a tendency of the case law to interpret the nature of environmental damage narrowly, thus limiting the application of criminal liability and giving priority to administrative liability.

Analysis of Lithuanian legislation and case law on sentencing

One of the main goals in fighting environmental crimes is to ensure that effective criminal responsibility is provided for by the national criminal laws of Member States. As stated in the Directive "experience has shown that the existing systems of penalties have not been sufficient to achieve complete compliance with the laws for the protection of the environment. Such compliance can and should be strengthened by the availability of criminal penalties, which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law" (Directive 2008/99/EC). It is therefore obvious that administrative penalties and the compensation of damages caused to the environment should not be considered enough. Furthermore, the Directive emphasizes that "in order to achieve effective protection of the environment, there is a particular need for more dissuasive penalties for environmentally harmful activities, which typically cause or are likely to cause substantial damage to the air, including the stratosphere, to soil, water,

animals or plants, including to the conservation of species" and that crimes against the environment are "punishable by effective, proportionate and dissuasive criminal penalties" (Directive 2008/99/EC). Article 270 (especially part 2) of the Lithuanian CC is the main article in the criminal code tasked with punishment for substantial damage caused to the environment.

Article 270(1) of the CC establishes criminal liability for persons who violate the rules laid down by law for the protection of the environment or the use of natural resources, or for the maintenance or use of structures where hazardous substances are used or stored, or where potentially hazardous installations are located, or where potentially hazardous activities are being carried out, if such violation has resulted in a danger to life or health, or if such violation is likely to have resulted in serious damage to the air, the earth, the water, animals, plants, or to have caused any other serious damage or other serious environmental effects. The essential feature of this offence is that the threat of the foreseeable consequences is sufficient to incur criminal liability; the occurrence of serious consequences is not necessary for liability. The offence is not serious and is punishable by a fine or restriction of liberty, arrest or imprisonment for up to 3 years.

Of the four persons convicted under Article 270(1) of the Criminal Code, 75% (three cases) were sentenced to a non-custodial punishment of deprivation of liberty, with an average of 8 months of deprivation of liberty. Only one case (i.e., 25% of cases) resulted in a sentence of 10 months of imprisonment. However, this case stands out because in it a person with two previous convictions was convicted of two other offences in addition to environmental crimes. It can therefore be assumed that the sentence of imprisonment was essentially determined by the personality of the perpetrator, rather than by the seriousness of the crime.

Article 270(2) of the CC provides for criminal liability for persons who have committed an act referred to in paragraph 1 of the Article, or who have systematically violated the rules laid down by law for the protection of the environment or for the use of natural resources, or for the maintenance or use of constructions in which hazardous substances are used or stored, or in which there is a potentially hazardous installation, or where a potentially hazardous activity is being carried out, if as a consequence of such violation, serious damage has been caused to the air, the earth, the water, animals, plants or the environment or if any other severe environmental effects have resulted. Unlike paragraph 1, paragraph 2 provides for an aggravated crime, in which liability is limited to causing the aforementioned consequences. The offence is considered to be of a serious nature and is punishable by a fine or arrest or imprisonment of up to 6 years.

Of the six persons convicted under Article 270(2) of the CC, as many as 33% (two cases) were exempted from criminal liability (in one case, after reconciliation between the perpetrator and the victim (the forest authority) in accordance with Article 38 of the CC, and in the other case, after the application of Article 40 of the CC, they were exempted on the basis of bail). A fine was the result of 50% of convictions (three cases, with an average fine of €3,453), and only one case resulted in a prison sentence of 1 year and 9 months. However, in this case the person again had a previous conviction, was also tried for another offence, and his sentence was suspended under Article 75 of the CC. At the same time, it should be noted that, in addition to the penalties, the persons convicted under Article 270(2) of the CC were also ordered to pay an average of €27,586 in damages for damage to the environment, which suggests that the relatively large amount of civil damage may lead to less severe penalties for the offences themselves.

Lithuania does not stand out in the EU in terms of the maximum sanctions for the offences defined in the Directive, and appears to be rather average in this regard. This conclusion can be drawn from the extreme decisions of other countries, such as Greece, Bulgaria, Hungary, and Austria, to impose up to 20 years of imprisonment in their laws for offences of this kind, or Malta, which imposes a penalty of life imprisonment (European Commission 2020). However, while the Directive calls for a serious fight against environmental crime, Lithuania is only really fighting it at the level of law. A real analysis of case law shows that a significant number of persons are completely exempted from criminal liability for the offence under Article 270(2) of the CC, and that fines, which can be up to a maximum of €200,000, are actually imposed at levels extremely close to their minimum. It can only be assumed that case law does not impose higher fines in view of the relatively high amounts awarded for compensation for environmental damage. These amounts are as much as nine times higher than the average of the fines imposed. However, this approach is clearly inconsistent with the Directive's requirement that the fight against environmental crime be linked not only to civil, but specifically to criminal law measures.

Conclusions

The abstractness of the consequences, both in the Directive and in the Lithuanian CC, leads to a tendency of the case law to interpret the nature of environmental damage narrowly, thus limiting the application of criminal liability. The case-law requires a financial assessment of both the threat to the environment and the damage to the environment, but the financial amount of the damage is no longer an essential criterion for assessing the seriousness of the criminal offenses. Lithuania's sentencing policy under Article 270 of the CC is not characterized by harshness, with priority given to non-custodial sentences, and the fines imposed are close to the minimum level.

The overall results of this study show that Lithuania has implemented the requirements of the Directive, both in terms of criminalizing the acts required by the Directive and in terms of the corresponding penalties. At the same time, however, it is necessary to state that the actual Lithuanian case law gives priority to administrative (in terms of criminalization) and civil (in terms of penalties) liability rather than criminal liability.

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III.2. THE PRINCIPLE OF SUBSIDIARITY OF CRIMINAL LAW AS A PREREQUISITE FOR SUSTAINABLE CRIMINALIZATION

The significance and justification of the principles limiting criminalization

An important feature of the sustainability of the legal system of a democratic state is the compatibility of the legal regulation established by various branches of law. Thus, the pursuit of a sustainable legal framework naturally presupposes the need for legislation to avoid competition and conflict between different legal regulations. With regard to criminal law in the framework of a sustainable legal system, it is essential that criminalization processes do not lead to an unjustified invasion of the normal positive legal relationships that citizens follow in their daily lives.

Perhaps every lawyer and any other well-educated person understands that criminalization is a sharp way to solve problems in society, and is associated with intensive restrictions on human rights and freedoms. Intensive criminal law-making and constant retaliatory punishments, based solely on the idea of deterrence, have strong side-effects: overcrowded prisons; and an "army" of convicted, socially excluded and semi-loyal citizens prone to recidivism. Therefore, the need to follow certain restrictive principles in criminal law no longer requires proof. The legal and criminological axiom has therefore become the view that criminal liability, by its very nature, is the last of all possible legal remedies that a democratic society can take against various public wrongs. In the legal debate, it is agreed that a legitimate act of criminalization must be based on evidence of the danger to society of the conduct being criminalized, the importance of the legal good to be protected, and the necessity, effectiveness and utility of criminal liability. Unfortunately, in reality, criminal legislation often does not comply with these provisions. This situation is identified in a number of legal studies that provide various examples of excessive and unjustified criminalization around the world. Thus, the search for principles and criteria for criminalization is still one of the most pressing issues in modern criminal law.

The author of this chapter fully agrees with expression that "the application of criminal law always has to rely on a 'limiting principle,' lest it grows into a nightmare" (Kaiafa-Gbandi 2011,

p. 17). The following statement is also undisputed: "After all, the more conduct that constitutes a criminal offence (allowing the state authorities to interfere), the more individual freedom is cut back" (Ouwerkerk 2012, p. 230). There are many examples in legal practice where a poorly grounded criminal law directly affects human destinies. Any under-discussed or ambiguous criminalization can lead to unnecessary criminal proceedings against individuals, and even the fact of judicial acquittal only partially offsets the damage suffered by the artificially accused person.

The essence of the question of the restrictive principles of criminalization is revealed by the following statement: "The crucial question for any theory of criminalization is whether latter range of offences really belong within the criminal law: or should they be formally separated off, into a distinct realm of non-criminal 'regulatory' or 'administrative' violations …" (Duff *et al.* 2014, p. 4). During the last two decades, numerous legal texts have been written about the limiting principles of criminalization, and almost all of them state that in reality the legislature often does not follow them (Luna 2005; Ashworth 2008; Husak 2005; Ouwerkerk 2012; Krey and Windgätter 2012; Smith 2013; Vaccari 2014). Therefore, the phenomenon of excessive criminalization and the question of what to do with it is still one of the most pressing problems in modern criminal law. In the vastness of the legal literature, the opposite idea can also be found, namely that there are no convincing and effective principles limiting criminalization and that only deterrence of future crime actually justifies current penal practices (Tadros 2011). This sounds like a kind of pessimistic admission that the theory of criminalization is generally unnecessary, and the legislature has unlimited powers in the field of criminal law, because, as practice shows, all excessive criminalization is based precisely on preventive purposes. In this context, I consider the following expression to be very accurate:

> Academic writings about criminalization theory should have a purpose beyond our internal discussions: ideally, they should help to make political decision somewhat more rational. Their decisions are mostly based on gut reactions, typically emotional responses to incidents that were reported in the media. … The essential point is to provide structures for thinking about criminalization. (Hörnle 2019, p. 211)

In my opinion, the principles limiting criminalization have not lost their relevance, despite the frequent examples of their being ignored. Even in cases where criminalizing laws are criticized for not complying with the restrictive principles, these principles have nevertheless been the subject of discussion in the legislative process. Thus, the theory of criminalization is slowly performing its function and there is no reason to abandon its further development.

There is no doubt that the essential constitutional principles (proportionality of legal remedies, rule of law, protection of human rights, legal certainty, equality, etc.), which naturally limit the use of repressive measures in a democratic state, are also an integral part of the theory of criminalization. In this context, the following provisions formulated by the Constitutional Court of the Republic of Lithuania should be mentioned:

> The measures established by the state for violations of law must be proportionate (adequate) to the violation of law, they must be in line with the legitimate and generally important

objectives sought, they may not restrain a person more than necessary in order to reach these objectives; there must be a fair balance (proportionality) between, on the one hand, the pursued objective to punish the violators of law and to ensure the prevention of the violations of law and, on the other hand, the measures chosen for reaching this objective. (Rulings of 6 December 2000, 31 January 2011, 15 March 2017)

A law may recognize as criminal acts only such acts that are truly dangerous and by which harm is really inflicted on the interests of persons, society, or the state, or if threat occurs where, due to such acts, the said damage will be inflicted. (Rulings of 8 May 2000, 10 June 2003, 16 January 2006, 15 March 2017)

Crimes are violations of law by which human rights and freedoms as well as other values protected and defended by the Constitution are grossly violated. (Ruling of 29 December 2004)

Every time when it is necessary to decide whether a particular act is a crime or another violation of law, it is very important to assess what results may be achieved when applying other measures (administrative, disciplinary, civil sanctions, or measures of public influence, etc.), which are not linked with the application of criminal punishments. (Rulings of 13 November 1997, 10 November 2005, 15 March 2017)

The classical principles of criminal law (*nullum crimen nulla poena sine lege, lex retro non agit, non bis in idem*) should also be considered part of the theory of criminalization, because without observing these principles it is simply impossible to create a legitimate definition of a criminal offense. At the same time, certain special principles and ideas of sustainable criminalization are highlighted in the theory of criminal law. Among the most important are the German concepts of subsidiary protection of legal goods (*Rechtsgüterschutz*) and criminal liability as a last resort (*ultima ratio*), which oblige the legislator to base criminalization on evidence of the importance of a legal value, which needs additional protection, and the inadequacy of other (less severe) measures to respond to assessed wrong. The principle of utility is also distinguished, according to which the importance of arguments regarding the need, control costs and efficiency should be evaluated in the criminalization process. The literature on these issues is enormous (for reviews of the above theories and their originators, see: Dubber 2005; Jareborg 2004; Dambrauskienė 2017), and the aforementioned ideas seem to have already become part of the European legal culture.

As a limiting principle of criminalization, the common law tradition emphasizes the *harm principle*, under which "the state may criminalize only harmful wrongs – conduct that is both wrong and harmful (or risks harm) to others," and when such criminalization seeks "to prevent private and public harms" (Tomlin 2014, p. 280, 283). This idea, sourced from British legal philosophers John S. Mill (*On Liberty*, 1859) and Herbert L. Hart (*Law, Liberty and Morality*, 1963), aims to limit criminalization of behavior that is unacceptable to morality alone or that harms only the person who does so. It is argued that such criminalization violates the freedom and autonomy of the individual. In terms of its content and legal purpose, the harm principle is considered as analogous to the

German *Rechtsgüterschutz* (Peršak 2007, pp. 105–106; Chiesa Aponte 2007, p. 131; Dubber 2005, p. 683; Micheletto 2021, p. 261). The legal literature also mentions: the principle of minimum criminalization, according to which "the decision should not be taken without an assessment of the probable impact of criminalization, its efficacy, its side-effects, and the possibility of tackling the problem by other forms of regulation and control" (Ashworth 1999, pp. 67–68); the idea that criminalization should be directed only at wrongdoings that are serious enough to justify the public censure inherent in conviction and punishment (Ashworth 2008, pp. 408–410); and the principle that only public wrongs must be criminalized when "society is not prepared leave the matter to the victim to seek compensation" (Clarkson 2001, p. 2). It has even been proposed that the concept of public wrongs be given the status of a master principle of criminalization. According to this point of view, the only reason to criminalize a type of conduct is if it constitutes a public wrong that violates the polity's civil order (Duff 2018, pp. 275–277). However, I have to agree with those who do not support such an idea, stressing that this criterion is too abstract to have a real impact on the legislature and that an effective theory of criminalization must not be limited to one principle (Hörnle 2019, p. 210).

The theorists of Lithuanian criminal law usually mention the following special principles of criminalization which should be taken into account by the legislator.

First, the dangerousness/harmfulness of the offence and the principle of criminal liability as a last resort (Bluvšteinas 1994; Švedas 2012; Fedosiuk 2012; Pranka 2012; Dambrauskienė 2017).

Second, the social sphere of undesirable activity and its suitability for criminalization. After all, it goes without saying that criminalization is not the right way to deal with marital infidelity, prostitution, drug addiction, alcoholism, smoking and other similar unwanted behavior. Lithuanian criminologists also oppose the criminalization of extremely rare behavior, which is only possible theoretically, as well as widespread negative habits in society which are not considered unacceptable in people's minds (Bluvšteinas 1994; Justickis 2001; Švedas 2012).

Third, the significance of the protected legal good, the subject matter of the deed, and the importance of preventing such acts (Bluvšteinas 1994; Pavilonis 1996).

Fourth, there are also suggestions to take into account the procedural and utilitarian aspects of criminalization, namely whether procedural measures are effective in proving the commission of an offense or whether the investigation and disclosure of such offenses will not require a disproportionate effort and resources in relation to the seriousness of the offense (Poškevičius *et al.* 2000; Justickis 2001).

Fifth, the appropriate legal technique for defining criminal offenses. Sustainable criminalization is not possible without ensuring that the definition of a criminal offense is clear and consistent and does not run counter to fundamental principles of criminal law. Whatever the legitimate aims of the legislature, they will not be achieved if the definition of a criminal offense is formulated with ambiguous, vague or unlimited legal features (Fedosiuk 2014). Therefore, the definitions of offenses must consist of a uniform and precise legal wording, if necessary giving their interpretation in the norms of law, giving priority to formal legal features over those that need to be interpreted, and using only such features that can be proved (Švedas 2012).

In the theory of Lithuanian criminal law, the idea of the subsidiary nature of this branch of law has only recently become the object of research, exclusively as an idea accompanying the con-

cepts of protection of legal goods and *ultima ratio* (Fedosiuk 2012; Dambrauskienė 2015; 2017). However, in my opinion, this principle is more than just a shadow of other well-known concepts, so it is worth examining it in more detail. This chapter is intended to develop the above-mentioned principle, which, together with other ideas, is aimed at giving criminalization processes more rationality and coherence.

The concept of the principle of subsidiarity of criminal law as a limitation on criminalization

The idea that, among other things, criminalization processes must comply with the principle of subsidiarity, that is, only to assist other branches of law in achieving regulatory objectives, is often mentioned in the works of scholars of the democratic world, but there are different opinions about its place in the theory of criminalization and its effectiveness in influencing legislative powers. The very term *subsidiarity* is derived from the Latin word *subsidium*, which means *aid*. The concept of subsidiarity in the social sciences is mentioned when there is a hierarchy of social instruments used – in other words, when a particular mean is used only to the extent that other means are not sufficient to achieve the same purpose. Thus, subsidiarity can be seen as an ancillary nature of a particular social measure. This is how subsidiarity is understood in law. In civil law, for example, subsidiary liability means that the debtor is liable to the creditor in addition to the principal debtor – then and to the extent that the principal debtor fails to fulfill their obligations.

The principle of subsidiarity of criminal law means that the legal measures of this branch of law (criminalization, punishment, conviction) are supplementary to the regulation of other branches of law. Considering the over-regulated modern social order, talking about the subsidiarity of criminal law with regard to informal means of social control has, I think, no practical significance.

The originators of the idea of subsidiarity as a limitation of criminalization (Hans-Heinrich Jescheck, Ewald Brandt, Günther Jakobs, Claus Roxin, Jürgen Baumann, Arthur Kaufmann, Thomas Vormbaum, Günther Stratenwerth, Cornelius Prittwitz and others) based it on the general principles of the social state, the rule of law, the proportionality of legal measures, as well as the purpose of criminal law in protecting legal goods fragmentarily and as a last resort (*ultima ratio*). Arguing with the provided arguments is hardly possible and absolutely unnecessary.

Thus, the content of the subsidiarity principle is quite broad and can be revealed in the light of various legal theories and ideas. Despite this, a significant number of modern scholars examine the subsidiarity of criminal law only as a synonym of the principle of *ultima ratio* (Herlin-Karnell 2010; Karsai 2013; Kotlán 2016). For example, Karsai (2013) defines the principle of subsidiarity as follows:

> In every modern democratic society, the subsidiarity of criminal law is an acknowledged principle, which entails that criminal law and responsibility based on criminal law shall apply only if the infringement of the legal interests in question cannot be dealt with by way of measures of other – less severe – legal regulations (p. 55).

There are also examples where the content of the principle of subsidiarity, corresponding to the *ultima ratio*, is established even in criminal legislation. For example, the "principle of subsidiarity of criminal repression" is formulated in the Criminal Code of the Czech Republic (Act of 8 January 2009), which reads as follows: "Criminal liability of an offender and criminal consequences associated with it may only be applied in socially harmful cases where application of liability according to other legal regulations does not suffice" (Article 12(2)). The fact that such a rule is enshrined in the text of law is a great achievement of legal theory. On the other hand, such an understanding of the principle of subsidiarity as nothing more than *ultima ratio* raises doubts about its independent normative status and function (Jareborg 2004, p. 534), and makes its further analysis redundant as it would have no real additional methodological significance for the legislator.

It is sad to admit that legislative practice shows that the political majority in parliament is able to overcome any known legal principles limiting criminalization, which are naturally characterized by a high level of abstraction and are not resistant to populist arguments. Indeed, with all due respect to the grand theory of *ultima ratio*, those who do not expect legislation to be directly based on it in practice (Husak 2005, p. 545) have good reason to think so. Activists of criminalizing laws are likely to find it easy to argue that certain unwanted behavior is extremely harmful and that only the strictest legal measures can help. It is noteworthy in this context that, in Lithuania, no legal discussion on criminalization is possible without reference to the principle of *ultima ratio*, but in real decisions the influence of this idea on the legislator is rather limited. Lithuanian criminologist Justickis sadly remarks on this: "The principle of *ultima ratio* often has the status of a kind of "theoretical principle," a "noble desire." It is seen as something to be talked about but not done" (Justickis 2011, p. 122). Even in a country with such a liberal criminal policy as the Netherlands, lawyers complain that the legislature disregards the principle of last resort, which in Dutch literature is usually referred to the subsidiarity principle (Ouwerkerk 2012). Of course, the lack of practical applicability does not eliminate the great ideological importance of the principle of last resort in the theory of criminalization. To me, despite the similarities, the principle of subsidiarity with its reference to the complementarity of criminal law instruments is nevertheless a separate and more practical way of explaining the limits of criminalization.

Personally, I am more convinced by the position that derives the subsidiarity of criminal law from the theory of the protection of legal goods (*Rechtsgüterschutz*), namely that criminal law cannot defend any "own" legal values that are not recognized by the general legal order (Vormbaum 1995, p. 757). In my opinion, it is precisely this aspect that allows us to develop the principle of subsidiarity of criminal law, and to give it a certain autonomy and practical application in legislation. Of course, there are skeptics who generally disagree that the principle of subsidiarity in relation to the protection of legal goods can be convincingly justified. Here, Jareborg's question is relevant: "And why could not a certain interest or value be protected only by criminal law, in which case its recognition as a legitimate *Rechtsgut* would not be prior to the criminalization?" (Jareborg 2004, p. 532). However, it is not clear what example could prove this thesis. As I see it, any search in criminal legislation for at least one norm protecting some exceptional value assigned exclusively to criminal law is unlikely to yield results. An elementary analysis of the values protected by the criminal legislation shows that they are all nothing more than details of the values recognized by the Constitution and other branches of law. In the debate, it is sometimes heard that the protection of

a person's sexual freedom and inviolability and the prohibition of rape (or similar actions) are an exclusive sphere of criminal law, but this statement is also easily refuted. After all, these values are an integral part of constitutionally protected human freedom, inviolability and dignity.

From my point of view, the idea of subsidiary protection of legal goods comes naturally and is logically grounded. After all, a sustainable legal order in a democratic society is not based on the fear of punishment, but on rules that promote public awareness, creativity and development, based on the freedom and initiative of individuals. In the words of Schünemann (2004):

> In the end, the principle of subsidiarity is grounded in the social contract, according to which each citizen only wishes to relinquish as much freedom as is essential for the necessary protection of freedom between the citizens… Primarily, a citizen must retain the right to deal with his legal goods. Only where his efforts are inadequate does he require intervention by the state (pp. 567–568).

Thus, in the legal order of a democratic society, which cares about human rights and freedoms and where the state naturally has an interest in limiting its powers to use repression, the function of criminal law in protecting legal goods must not exceed the space of a "watchdog." The absence of its own area of protected legal goods, in turn, justifies the selectivity, fragmentation and exclusivity of criminalization as a method, when criminal law only joins non-criminal legal regulation and becomes an additional element in the field of social control (Vormbaum 2012, pp. 667-668; Dambrauskienė 2017, p. 81).

Of course, the theory of subsidiary protection of legal goods is at an excessively high level of abstraction, as it requires a debate about which legal goods need additional protection. The practical application of this theory presupposes such viscous stages as: the identification of legal good affected by the conduct; the assessment of whether this good is important enough to be protected by criminal law; the question of whether the conduct harms or endangers the identified legal good in a significant way, etc. (Micheletto 2021, p. 246). In such a discussion, anyone can easily get lost. Here, Jareborg (2004) sadly notes:

> In German legal scholarship, ideas and doctrines about *Rechtsgüter* have played a central role in the discussion of the legitimacy and limits of criminal law. Personally, I see the doctrines concerning *Rechtsgüter* as a blind alley; something must be wrong when almost 200 years of intensive intellectual activity seem to have resulted in more confusion than clarity. The literature is enormous (pp. 524–525).

Hörnle (2019) puts it even more strongly: "It is not only a thin concept, but also so thin as to be an empty concept. The notion of a 'good' does not give any guidance at all – every state of affairs could be labeled this way" (p. 211). Such pessimism in relation to this famous theory is possibly caused by the fact that in the actual process of criminalization, the features of an act claiming to fall within the scope of criminal protection are much more important than the uniqueness of the legal good sought to be protected. Thus, criminalization is mainly determined by such features of the deed as the prohibited item (drugs, forged documents, fake money, explosive materials, child

pornography), dangerous mode of operation (violence, threats, deception, various types of abuse), serious consequences or their risks (death, injury, substantial damage), intent and malicious purpose, carelessness, etc. The mosaic of these features indicates the appropriateness of the deed to be criminalized. This is the legal language by which criminal law joins the protection of legal goods. Therefore, in the context of the principle of subsidiarity, it is more worthwhile to discuss the compatibility of criminalization with other legal regulation than to focus on the importance of specific legal goods. I believe that this direction of analysis of the principle of subsidiarity of criminal law can help reduce the level of theoretical abstraction and make ideas limiting criminalization more applicable in legislation.

The principle of subsidiarity of criminal law as a methodology for legislation

I would think that the most productive and methodologically significant aspect of the principle of subsidiarity of criminal law lies in the provision that criminalizing norms must be harmonized with the regulation of other branches of law and not create any competitive legal protection. The idea is simple, practical and easy for lawmakers to understand. In more detail, this interpretation of the principle of subsidiarity provides certain specific recommendations to the legislator when criminalizing acts.

First, the norms of criminal law should not prohibit conduct which is unequivocally permitted under the regulation of other branches of law.

Second, when criminalizing certain conduct that is illegal under the primary regulation, the legal means available in this branch of law and their effectiveness should be properly assessed. In other words, unlawful acts that fall exclusively and without gaps within the scope of regulation of other branches of law should not be criminalized.

Third, in a situation where the legal consequences of a certain illegal behavior are regulated in another branch of law, but the available legal means are obviously not proportionate to the harmfulness of such behavior and not sufficient to ensure its prevention, the criminal law norm should lay down clear additional criteria for the application of criminal liability. In other words, in such cases the general criterion of unlawfulness alone is not sufficient for criminalization.

What is permitted outside criminal law cannot be criminalized

The first aspect of the compatibility of criminalization is probably the easiest to understand. The sustainability of the legal system and order is simply not possible if criminal law prohibits conduct that is obviously permitted outside criminal law. This would bring nothing but legal chaos to society. There have been such situations in Lithuania in the past. For example, when free market laws came into force in Lithuania in 1990, and thousands of people began to engage in various businesses, even before 1995 the criminal legislation provided for imprisonment for a crime known only in

Soviet law – speculation, that is for the purchase and resale of goods for profit. The conclusion is that criminal legislation must always respond in a timely manner to changes in primary legislation and adjust its own regulation accordingly.

With regard to the conflict of criminal law with other legal regulations, it should be noted that, according to the Criminal Code of Republic of Lithuania, it is not forbidden to own or watch pornographic content (in relation to non-child pornography), but the elementary sharing (regarded as distribution) of such items already entails criminal liability (Article 309). Such a provision had some meaning when there was no internet and no legal circulation of pornography. However, knowing that in modern reality everyone can freely find non-child pornography legally displayed on the internet, the above-mentioned criminal regulation contradicts the general legal order in which residents of Lithuania really live. In connection with this, it is possible to ask what the purpose is of criminally prosecuting a Lithuanian citizen for sending a pornographic photo to a friend if an unlimited amount of pornography is freely available on the internet.

There may also be situations where certain undesirable behavior is not regulated outside criminal law and does not have a clear legal status. For example, in some countries the phenomenon of prostitution is neither prohibited nor legalized (Estonia). Society is constantly faced with unwanted events that are not legally regulated. For example, quite recently in Lithuania there was a sharp discussion about the responsibility of persons who help families to give birth at home. In the absence of special primary regulation (legal or not), such persons were nevertheless accused of illegal economic activity, but the criminal case ended in acquittal (Judgment of the Supreme Court of Lithuania No. 2K-7-102-222/2018). After the legal regulation of the aforementioned activities was adopted, the ideas of criminal prosecution of such persons naturally disappeared.

The conclusion is that in order to criminalize unregulated deviation, it is necessary to identify its danger to legal interests that are protected in the legal order outside criminal law. In any case, situations where criminal law is the sole basis for considering such conduct to be illegal should be avoided.

Illegal acts that fall exclusively and without gaps within the scope of regulation of other branches of law should not be criminalized

The principle of subsidiarity is clearly violated when criminal liability simply begins to compete with measures of other branches of law that have been specifically designed against the wrong being assessed and are even more effective. This is particularly true when criminal law invades branches of law that provide for coercive recovery measures, primarily in the area of tax administration and enforcement of civil judgments.

For example, Lithuanian criminal law is clearly not harmonized with the field of tax administration. In this context, it should be recalled that tax law generally distinguishes between the following forms of taxpayer behavior in reducing the tax burden: 1) tax planning (legal activity); 2) tax avoidance (unlawful, but not criminal activity); and 3) tax evasion (criminal activity). The essential feature of tax evasion is that the taxpayer deliberately conceals from the tax authority the real circumstances on which fair taxation depends, so that the determination of the actual circumstances

requires powers available to the prosecution authorities, which the tax administrator simply does not have. Meanwhile, in the case of tax avoidance, the taxpayer does not falsify data relevant to taxation, but simply provides the tax administrator with a version of the content of taxable transactions that is not in line with the principles of taxation (Fedosiuk 2017, p. 64). Tax avoidance does not fall within the scope of criminal liability in a democratic world and is overcome by the legal means and procedures available to the tax authorities. The principle of subsidiarity in this context requires that the criminal justice must be able to distinguish between tax planning, tax avoidance and tax evasion, as well as to ensure that criminal liability would be applied only for the unlawful tax burden reduction which corresponds to the concept of tax evasion. However, notwithstanding that there are different words in the Lithuanian language to name *tax avoidance* and *tax evasion*, the norms of the Lithuanian Criminal Code (in original version) criminalizing the illegal reduction of the tax burden (Articles 220–221) use the term *avoid*, thus sending the wrong signal to law enforcement. In my estimation, this is a clear breach of the principle of subsidiarity, which creates legal uncertainty in a very important area of the legal order. I believe that the use of the concept of tax evasion in criminal law texts would provide more certainty and protect criminal justice from some unnecessary criminal proceedings.

The principle of subsidiarity is also violated by the norm of the Lithuanian Criminal Code which criminalizes failure to pay declared taxes on time (Article 219). The only condition mentioned in this criminalization, which seems to justify the application of criminal liability, is that the taxes are not paid after the tax administrator reminds the debtor of this and sets a time limit for the performance of the obligation. In reality, however, this condition does not create any subsidiary ground for criminal liability, as the tax authorities have been given all possible legal means of enforcing recovery of the taxpayer's tax arrears (Articles 105–106 of the Law on Tax Administration of the Republic of Lithuania). Naturally, the enforced recovery of tax arrears (together with a fine) makes the application of criminal liability illogical and even unlawful due to the violation of the principle of *non bis in idem*. The principle of subsidiarity would not be infringed if criminalization were based on a completely different approach, namely that the debtor acted maliciously, such as by deliberately emptying accounts or bringing assets offshore, and where justice would be achieved only through criminal proceedings.

The effectiveness of the provisions of civil procedure for enforced recovery should also not be ignored in the criminalization process. For example, Lithuanian courts are forced to decide on the difference between the grounds for applying criminal liability and the grounds for applying coercive recovery measures when the debtor intentionally fails to comply with a court decision in a civil case. This problem is created by the content of Article 245 of the Criminal Code, which without any additional criteria establishes criminal liability for failure to comply with a court's decision.

The courts remedy this shortcoming by interpreting the content of the criminal law restrictively and on the basis of the principle of *ultima ratio*:

> Taking into account the purpose of criminal liability as a last resort, the application of Article 245 of the Criminal Code may be justified in such a case if the debtor, having the opportunity to fulfill his property obligation, maliciously avoids it and has created such a legal

situation that enforcement of the judgment has become largely impossible. (Judgments of the Supreme Court of Lithuania Nos. 2K-69/2014, 2K-228-788/2019)

The test of subsidiarity is also not passed by Article 164 of the Criminal Code, which, without any additional criteria, criminalizes evasion of the duty as established by a decision of a court to maintain a child. The norm simply lacks references to the particularly malicious nature of such conduct, which would draw at least some distinction between the grounds for criminal liability and the enforcement of a judgment in a civil case. As a result, the courts are forced to interpret this norm narrowly and to include in the legal construction a feature of special malice, which is not present in the text of the law. In that regard, the case-law emphasizes that the basis for criminal liability for that act arises only after an unsuccessful attempt to enforce the obligation to maintain the child by civil proceedings, that is to say, where the debtor knowingly creates such a situation (Judgment of the Supreme Court of Lithuania No. 2K-9/2014).

Of course, it is good that courts have the legal means to apply laws wisely and, in unclear cases, to follow generally accepted legal principles, not just the ambiguous texts of laws (Frøberg, 2013; Ažubalytė and Fedosiuk 2021), but this does not negate the poor quality of laws and their non-compliance with the principle of subsidiarity of criminal law.

The need for additional criteria indicating the seriousness of the act intended to criminalize

This aspect of the principle of subsidiarity means that the invasion of criminalization into another legal regulation that sets "its own" legal means against the unlawful deed should not be based solely on this unlawfulness. In the absence of additional criteria indicating the seriousness of the act, the definition of an offense will pose problems for its application in practice. Specific terminology naturally inherent in describing criminal behavior (dangerous means of operation, serious harm, malicious purposes, etc.) is highly desirable in definitions. There are many examples in Lithuanian criminal law where definitions of crimes are formulated without complying with this provision.

An obvious example of such legislation, the removal of which from Lithuanian law is still delayed, is Article 206(1) of the Criminal Code, which *inter alia* criminalizes the use of a loan (in the amount of €7,500) not in accordance with its purpose. It should be noted that in civil law such non-compliance with the contract is unlawful, but the Civil Code of the Republic of Lithuania clearly sets out the legal consequences of such a breach – the lender shall be entitled to request the borrower to repay the amount of loan prior to the term and pay the interest (Article 6.877(2)). It is not clear what the legal logic is for criminal liability for this breach of civil contract, as the criterion of €7,500 does not really indicate such a necessity. Thus, the legislature actually leaves the issue of the delimitation of criminal and civil liability to the court, which must somehow overcome that competition. There is also Article 195 of the Criminal Code without any additional criteria criminalizing the infringement of the exclusive rights of the owner of a patent or design, as well as the right of a legal person to a name. Thus, the criminal and civil protection of these values is

in full competition. It is clear that if the principle of subsidiarity were remembered in the preparation of the above-mentioned criminalization, the Criminal Code would simply not have such norms.

In this context, Article 167 of the Criminal Code should also be mentioned, according to which it is an offense to unlawfully collect information about a person's private life. The reference to the unlawfulness of such an action seems to indicate the limits of criminalization. On the other hand, any attempt to find an answer as to what specifically becomes unlawful regarding the collection of information about a person's private life puts us in a great deal of legal uncertainty. Questions of how, in general, a person may have a legitimate interest in another person's private life; what are the limits for journalists in seeking out information about the lives of public figures; in which cases does a person's privacy become important to society and does this justify an interest in it; and what aspects of a person's privacy fall under criminal law protection, are far from easy to answer.

The above-mentioned subsidiarity provision was also not met by criminalizing the unlawful use of another person's electronic means of payment or electronic identification data (Article 215 of the Criminal Code), as well as the unauthorized access to an information system (Article 198-1 of the Criminal Code). The only criterion for this criminalization is an indication that these acts are unlawful. However, banks, when issuing payment cards and electronic data to customers, oblige them not to pass on these cards and data to any other person. This is explicitly stated in the banks' publicly available rules and agreements with customers. In this regard, the use of a spouse, parent or other relative's card or accessing their electronic accounts at their request is unlawful. Obviously, it would be utter nonsense to persecute a son who bought food for his mother at a grocery store and paid for it with her card, or made an electronic payment on her behalf without any bad intentions. Such artificial allegations have not become the practice solely because of the case law in which it has been clarified that if another person's card or special data for electronic payment has been used with the permission of the owner and without any malicious intent, no criminal liability is incurred (Judgments of the Supreme Court of Lithuania Nos. 2K-389/2013, 2K-509/2014, 2K-44-788/2019).

The wording of additional criteria for the application of criminal liability (as opposed to mere illegality) in a criminal law provision must be clear and specific. Ambiguous criteria only complicate the problem. For example, a long-standing problem that Lithuanian courts are constantly faced with is the question of the difference between criminal engagement in undeclared economic activity and the same administrative violation. Article 202(1) of the Criminal Code seems to specify the following criteria: "large-scale" or "in the form of a business." The large scale of such an activity is explained in the law and is clear, but it is not possible to consistently explain what it means to engage in economic activities "in the form of a business," because economic activities are nothing but business. This problem has been repeatedly reported in the legal literature (Fedosiuk 2013, pp. 308–310; Dambrauskienė 2017, p. 251), but the legislature is in no hurry to rectify the situation, so again the courts themselves take the interpretation that this criterion must show a higher degree of danger compatible with the purpose of criminal law (Judgments of the Supreme Court of Lithuania Nos. 2K-574/2011, 2K-515/2014). On the other hand, in the absence of clarity, the prosecutor can easily prosecute any small informal entrepreneur on the basis of the "business-like" criterion, and courts are often forced to decide on the differences between the grounds for criminal and administrative liability.

In summary, a rule of criminal law should not be limited to referring to the unlawfulness of certain conduct in a sense of primary regulation, but should specify the additional criteria on the basis of which it has been decided to criminalize such unlawful conduct. Failing this, the problem is transferred to the courts, which have to solve the problem of competition of criminal law with other legal regulations. The outcome of criminal proceedings in such cases is always difficult to predict. This is presumed to be incompatible with the principle of legality in criminal law (*nullum crimen sine lege*), which requires that criminal conduct be formulated in such a way that its content is clear to all persons.

The subsidiarity principle and non bis in idem

Non-compliance with the principle of subsidiarity in criminal legislation creates preconditions for proceedings that violate the principle of *non bis in idem*. It should be noted that in Lithuania there is a Code of Administrative Offences, full of various punitive prohibitions and establishing its own procedures, as well as the Law on Tax Administration, which establishes liability for tax avoidance and appropriate procedural norms. According to the case law of the European Court of Human Rights, the reference to the administrative nature of the violation does not, in itself, exclude its classification as "criminal" in the autonomous sense of the Convention of Human Rights – thus, the combined application of criminal and administrative liability (or duplication of proceedings) for the same facts is incompatible with the principle of *non bis in idem* (for example, *Sergey Zolotukhin v. Russia*, 10 February 2009, No. 14939/03; *Šimkus v. Lithuania*, 13 June 2017, No. 41788/11). The same position was expressed by the Constitutional Court of the Republic of Lithuania (Rulings of 15 March 2017 and 10 November 2005) and the Supreme Court of Lithuania (Judgments Nos. 2K-226/2014, 2K-360-976/2018, 2K-36-697/2019, 2K-167-788/2015, 2K-109-788/2016, etc.). Notwithstanding these provisions, in reality, the duplication of administrative and criminal proceedings on the same objective facts is quite common, as many of the rules in the above-mentioned branches of law are simply in competition with each other. Courts are constantly faced with the need to address the issue of how to remedy a breach of the principle of *non bis in idem*, as it becomes clear during criminal proceedings that a person has already been punished administratively for the same offence. For example, a person who has been administratively punished for misconduct in a public place later becomes a defendant in a criminal case for a breach of public order.

There are also more serious cases of *non bis in idem* infringement. For example, when criminalizing such a topical legal phenomenon as unjust enrichment in Lithuania, competition with the tax administration has not been considered. Without detailing the legal features of unjust enrichment in national criminal law (Art. 189-1), the essence of this crime is that the person owns property whose sources cannot be substantiated. According to the definition, the minimum threshold for such assets must exceed €25,000. Without mentioning all the problematic aspects of such criminalization (there are many of them), when assessing its compatibility with the tax administration provisions we see that the Law on Tax Administration gives the tax administrator the power and obligation to tax unclear income and impose a fine, and such practices are quite common. In practice, this leads to a situation where criminal proceedings for unjust enrichment begin after the tax office

imposes a fine on the owner of the property for the same fact. Although prosecutors have argued that the principle of *non bis in idem* does not preclude the duplication of such proceedings, the Supreme Court of Lithuania has ruled to the contrary:

> In the criminal case A. A. was held criminally liable for part of the same essential facts which gave rise to the tax investigation and the final decision of the tax administrator to find a breach of tax law and to impose a fine on him; according to the nature and severity of the infringement and the sanction, the tax proceedings are equivalent to criminal proceedings. Therefore, … the conviction of A. A. under Article 189-1 of the Criminal Code violated the principle of *non bis in idem*. (Judgment of the Supreme Court of Lithuania No. 2K-48-648/2022)

The competition of administrative and criminal prohibitions in the Lithuanian legal system is so wide that naming all the examples would take up a great deal of scope. However, what has already been said allows us to conclude that compliance with the principle of subsidiarity of criminal law presupposes that the prohibition of double jeopardy enshrined in the Convention on Human Rights and national law is not infringed in practice. Conversely, uncoordinated criminalization creates the preconditions for unauthorized duplication of proceedings.

Conclusions

The principle of subsidiarity of criminal law means that the legal measures of this branch of law (criminalization, punishment, conviction) are supplementary to the regulation of other branches of law. Compliance with this principle in criminal legislation is a necessary condition for ensuring the sustainability and compatibility of criminalization in the legal regulatory system.

As regards the autonomy of the principle of subsidiarity from other principles limiting criminalization, as well as its applicability and significance in legislation, its most productive and methodologically significant aspect is the provision that criminalizing norms must be harmonized with the regulation of other branches of law and must not create any competitive legal protection. This interpretation of the principle of subsidiarity provides certain specific recommendations to the legislator when criminalizing acts.

First, the norms of criminal law should not prohibit conduct which is obviously permitted under the regulation of other branches of law.

Second, when criminalizing certain conduct that is unlawful under the primary regulation, the available legal means and their effectiveness should be properly assessed. In other words, unlawful acts that fall exclusively and without gaps within the scope of regulation of other branches of law should not be criminalized.

Third, in a situation where the legal consequences of a certain unlawful behavior are regulated in another branch of law, but the available legal means are obviously not proportionate to the harmfulness of such behavior and not sufficient to ensure its prevention, the criminal law norm should lay down clear additional criteria for the application of criminal liability indicating the seri-

ousness of the act that it is intended to criminalize. In other words, in such cases the general criterion of unlawfulness alone is not sufficient for criminalization.

Non-compliance with the principle of subsidiarity in criminal legislation creates the preconditions for excessive criminalization and for proceedings that violate the principle of *non bis in idem*.

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III.3. DECRIMINALIZATION OF THE ILLICIT POSSESSION OF SMALL QUANTITIES OF DRUGS AND THE SUSTAINABLE REDUCTION OF DRUG CONSUMPTION

Endless debate

Recently, a growing number of states have decriminalized the illicit possession of small quantities of drugs for non-distribution purposes. Discussions are taking place on this matter in various countries. Arguments for and against the decriminalization of such acts are relevant now and are likely to be relevant in the future. A clear understanding and evaluation of these arguments is critical for national parliaments to make reasonable and sustainable decisions in line with the represented values.

In victimology, the use of drugs is referred to as one of the types of "crimes without victims" where an immediate victim of the crime is absent, and the society is the main victim of the crime. Victimless crimes, such as drug use or driving while under the influence of alcohol, are under debate in various countries. The criminalization, prevention and control of such acts depend on the maturity of society and politicians, the prevailing criminological approaches, the perception of the damage and risks, the existing relationship between the individual and society and the prioritization of freedom, health, responsibility and security. There are many arguments for and against the criminalization of such acts, and unequivocal decisions are hardly possible in the social sphere.

"The statements by member states at the UN General Assembly Special Session (UNGASS) on the world drug problem in 2016 show that countries are significantly divided on a number of topics central to drug policy reform" (Csete and Wolfe 2017, p. 91). Approaches in individual EU member states are so different that a common EU drug policy is hardly possible (Blickman 2014, p. 16).

Despite the abundance of research and scientific publications supporting the need to decriminalize the illicit possession of small quantities of drugs for non-distribution purposes, modern drug policy is primarily based on the prohibition of such substances in most states (Kammersgaard 2019, p. 346).

Many states have decriminalized the illicit possession of small quantities of drugs for non-distribution purposes. However, some states are introducing stricter liability for such acts. For

example, the Danish Parliament adopted a zero-tolerance policy in 2004 and reintroduced penalization of the possession of illicit drugs for personal use after 35 years of depenalization (Houborg *et al.* 2020, p. 1).

Liability for possession of small amounts of narcotic or psychotropic substances for personal use has been tightened in Lithuania since 2017. Until 2017, double regulation existed in Lithuania, where liability for the possession of small amounts of narcotic or psychotropic substances for personal use was proscribed both in the code of administrative offenses and the criminal code. From 2017, with the entry into force of the new Code of Administrative Offenses, administrative liability for the possession of small quantities of narcotic drugs or psychotropic substances for personal use was abolished. Thus, offenses that could formerly be qualified as violations of the administrative law acquired the status of only criminal offenses from 2017.

The European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) publishes reports by the Member States on the existing legal regulation on drugs. According to EMCDDA data of June 16, 2022, the possession of a small amount of illicit narcotic substances for personal use was criminalized in 18 (67%) European Union countries: Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Lithuania, Luxembourg, the Netherlands, Poland, Romania, Slovakia and Sweden. Some of these countries had exceptions in the criminal prosecution, depending on the type and quantity of the drug or characteristics of the person. Possession of a small amount of illicit narcotic substances for personal use was not criminalized in 9 (33%) European Union countries: Croatia, Czechia, Estonia, Italy, Latvia, Malta, Portugal, Slovenia and Spain (EMCDDA 2022)

Possession of narcotic or psychotropic substances is a criminal offense in the Republic of Lithuania (in June 2022) and has always been qualified as a criminal offense during the years of independence (from 1990). The illicit possession of small quantities of drugs or psychotropic substances for non-distribution purposes is criminalized in Article 259 (2) of the Criminal Code of the Republic of Lithuania and may be punished by community service, a restriction of liberty order, a fine, or arrest (no custodial sentences).

In 2020, the governing parties of the newly elected Parliament of the Republic of Lithuania took the initiative to decriminalize the illicit possession of small quantities of drugs or psychotropic substances for non-distribution purposes, with a view to transpose liability for such acts to the Code of Administrative Offenses. Lithuania had numerous discussions, parliamentary deliberations and public campaigns on the decriminalization of such acts. One of the main arguments for decriminalization, heard frequently in the media and in the explanatory note to the draft decriminalization law, was that the refusal to apply criminal liability for the possession of small quantities of drugs or psychotropic substances for non-distribution purposes will prevent people from experiencing custodial sentences and other risks associated with limitation of their liberty (The Seimas of the Republic of Lithuania 2021a, p. 5). However, imprisonment for such criminal offenses is not provided for and cannot be applied in Lithuania.

In the third and final stage of consideration of the amendment to the Law of November 11, 2021, the Parliament of the Republic of Lithuania refused to approve the proposal to decriminalize the possession of small quantities of drugs or psychotropic substances where the holder has no intention to sell or otherwise distribute them (The Seimas of the Republic of Lithuania 2021b,

p. 8). All of this shows that the arguments for and against decriminalization of such acts are relevant now and are likely to be so in future – not only in Lithuania, but in other countries as well. It is important to analyze the arguments of the opposing groups, which could ground decisions by members of parliaments of different countries. When enacting or amending laws, parliaments refer to the results of research and public opinion, evaluate various factors and the impact of changes on individuals and the society, consider the interests of various social groups and the society and follow the values recognized by the electorate.

The arguments of the supporters and opponents of decriminalization of such acts and the results of scientific research are examined here. The aim is to answer the question of whether the decriminalization of such acts sustainably reduces drug consumption and threats and harm to both society and the environment.

Decriminalization here is understood as "de jure removal of criminal sanctions for the possession of drugs for personal use" (Stevens *et al.* 2019, p. 31).

Arguments for and against decriminalization

This discussion focuses primarily on arguments against the decriminalization of illicit possession of small quantities of narcotic substances for non-distribution purposes as they are rare in recent scientific publications, the majority of which are intended to justify decriminalization.

Is drug abuse a health problem?

Supporters of decriminalization argue that drug abuse is a health problem (Csete and Wolfe 2017, pp. 91–94) and therefore control instruments must be humanistic, i.e., aimed at helping rather than penalizing addicts. Criminalization automatically means the persecution of addicts, and drugs are used by hundreds of millions of people around the world. The overwhelming majority of individuals who use illicit drugs do no significant harm to other people. The Portuguese National Strategy for the Fight Against Drugs, adopted in 1999, was grounded on the values of humanism and pragmatism (Gonçalves *et al.* 2015, p. 199).

Advocates of criminalization claim that decriminalization has little to do with humanism, and that drug abuse is not just a health problem: it is irresponsible behavior and poses a serious danger to the individual and the society, for which drug addicts must be held accountable. Specialists warn about the risks of drug use and negative effects to the user and the society. Drug addicts are aware of the consequences and liability, but choose to ignore the warnings and head down the path that can lead to addiction. Drug users expect that they will never develop addiction and will be able to quit at any time. However, the doses and substances that were previously enough gradually become insufficient. A stronger drug is needed to achieve the same effect. Finally, the addiction gets out of control and comes to the point of needing a dose at any cost. This aspect distinguishes drug trafficking from all other criminal activities in terms of dangerousness. The danger is far greater than for conventional crimes such as theft or violation of public order. When it develops into an

addiction, drug use leads to other crimes (theft, robbery, etc.) committed in order to obtain the required dose at any cost. Therefore, drug abuse is not just a health problem – it is also a criminal problem, as the addiction does not repeal the addict's legal capacity. Before becoming addicted, a drug user can hardly be considered to have a medical condition. It is therefore critical to prevent drug use as early as possible and as strictly as possible before the user becomes fully addicted. It is important to create a social environment (including criminal liability along with other preventive measures) where drugs are perceived as a gross evil, with potentially very bad consequences, so that nobody has the temptation to even try them. Without attempting to use drugs, there is no chance to become addicted.

Depending on the situation, drug users and addicted people need medical treatment, social, psychological and/or material assistance. Such treatment or assistance is funded by the public purse. On the other hand, drug addicts owe the society for their education, health care, security, public infrastructure, social, cultural, and other services. Like ordinary citizens, they are expected to work and pay taxes to the national budget to allow the state to fund pension schemes, education, health care, etc. Instead of contributing to the state budget, drug users become dependent on state support themselves. Can we call this humanism? Does humanism exclude responsibility and tolerate harm? If someone violates the norms of conduct, acts in a dangerous manner, and causes harm to their surroundings, the state's reaction cannot be limited to just providing assistance. Such a reaction is unacceptable; it would violate the sense and principles of justice. As consistent advocates of non-committal assistance suggest, we should abolish all criminal law and give the wrongdoer, who commits dangerous and harmful acts, everything that they want in the expectation they will stop acting so. Humanism is about perceiving the harm suffered by society, mitigating the harm, understanding responsibility and acting in a responsible way. Humanism is such that, under certain circumstances, we impose suspended sentences, probation or even exemption from criminal liability. Humanism also involves the fact that, apart from prosecuting and punishing offenders, we also help them to rehabilitate, reintegrate into society and deal with addiction. Humanism is inseparable from the sense of duty and responsibility for one's acts.

Proponents of decriminalization emphasize that drug use is often predetermined by a traumatizing experience, desolation or social exclusion. Therefore, instead of punishment, we should tackle the social problems that create conditions favorable for drug use.

Supporters of criminalization, on the other hand, argue that similar social factors predetermine not only drug abuse, but any criminal conduct as well; however, we punish those who engage in criminal behavior. Most individuals punished for criminal offenses commit offenses because of the social conditions they live in. Social factors are decisive. The social environment is not always the free choice of the individual – it is often predetermined by the place of birth, the parents, their social opportunities and attitudes, education, income, etc. However, unfavorable conditions are never an excuse for criminal conduct. Where there is a choice of behavior, there is also a responsibility for the choice leading to harmful dangerous consequences. This is one of the key aspects of the concept of criminal justice.

The impact of criminalization on the availability and use of drugs

Based on the conducted research, supporters of decriminalization claim that criminalization has no impact on the availability and use of drugs (King and Mauer 2006; Grucza *et al.* 2018; Červený *et al.* 2017). Therefore, criminal liability for the illicit possession of small quantities of narcotic drugs for non-distribution purposes is an excessive measure.

Proponents of criminalization point out that some studies show no effect of decriminalization, while others (Miech *et al.* 2015; Mgebrishvili *et al.* 2021) reveal that decriminalization of drug use and possession increases their availability and consumption. Other studies (Hughes and Stevens 2010; Williams and Bretteville-Jensen 2014) show that decriminalization leads to increases in use among some groups of users (adults) and leads to decreases in use among other groups (adolescents). Debates on the legalization of the use of cannabis for entertainment imply that this contributes to the increase in the use of cannabis (World Health Organization 2016).

In 2001, Portugal decriminalized the use/possession of small quantities of drugs. In 2001–2007, the prevalence of lifetime and last 12 months use of almost all illicit drugs in Portugal increased (Hughes and Stevens 2010, p. 1007). This increase was observed in all age groups older than 19 years. In 2001–2007, the prevalence of lifetime use of any drug in Portugal among people aged 15–64 increased 58% (p. 1007). Of course, decriminalization is not necessarily the only reason for this increase. Between 2000 and 2005, the estimated prevalence of intravenous drug use in Portugal decreased from an average of 3.5 to 2.0 users of intravenous drug per 1,000 population aged 15–64, or from 2.3–4.6 to 1.8–2.2 (p. 1006). The number of drug-related deaths in Portugal fell in 2002 compared to 2001, but increased between 2001 and 2008 (p. 1015).

The results of meta-studies (Scheim *et al.* 2020; Melchior *et al.* 2019) on the effects of decriminalization are also ambiguous, with some showing an increase in drug use and some showing no significant effect. Generally, in the social sciences, the impacts of processes and phenomena are very difficult to measure, because their effects may not necessarily appear quickly, but over a long period of time. People's attitudes towards behavior are inert. Because of this inertia, the impact may not be visible in studies that measure effects over a short period of several years. Tens or hundreds of various factors are acting simultaneously. The same factor in combination with other factors may encourage a crime in one situation and preclude a crime or have no effect in another situation or in combination with different factors. Therefore, decriminalization may have specific effects in certain countries and completely different effects in other countries. We can never be sure that decriminalization will universally have the same effect on drug use as it has in Portugal.

Various studies on the impact of stiffer penal policies show that tougher penalties for the most grave and violent crimes have little or no deterrent effect (Dölling *et al.* 2009; Ghasemi 2015). However, meta-analyses of such studies show that penalties have the greatest deterrent effect in cases of non-serious, non-violent criminal offenses and administrative offenses (Dölling *et al.* 2009; Ghasemi 2015). The offenses we are discussing here are exactly of this kind, and therefore the deterrent effect of strict criminal liability is very likely to be effective in their case. Criminal laws have a limited deterrent effect on violators. Only some people avoid committing criminal acts in view of criminal liability (i.e., they understand the illegal nature and harmful effects of such acts or avoid being punished). It is exactly those people that criminalization has an effect upon.

Arguments based on studies (Hughes and Stevens 2010) comparing similar countries maintaining different decriminalization policies without estimating complementary factors, such as drug prevention and control policies or social assistance and medical treatment, are debatable in terms of methodology. For example, decriminalization of the possession of drugs can be followed by stiffer prevention of drug use and stronger control of drug distribution. Arguments (King and Mauer 2006; Grucza *et al.* 2018) referring to specialist opinions (albeit closely related to the problem under discussion) based on the statistics on seized drug quantities, arrests or criminal investigations, are also debatable. For example, the growing number of criminal offenses related to the illicit possession of small quantities of narcotic drugs or psychotropic substances for non-distribution purposes was used in Lithuania to ground a conclusion that stiffer liability for such offenses is inefficient (The Seimas of the Republic of Lithuania 2021c). Administrative liability was abolished on January 1, 2017, leaving only criminal liability enforceable.

However, only a very small proportion of real crimes is recorded. The registered crime rate alone or changes in the number of arrests is insufficient to evaluate the actual changes in the crime rate. For example, only around 2.7 percent of cases of illicit possession of narcotic drugs or psychotropic substances for non-distribution purposes were registered in Lithuania in 2016, compared to the numbers based on the data of public opinion polls.

Calculations are made as follows: In 2016, the prevalence of drug use among respondents aged 15–64 in Lithuania was 3.1% (Drug, tobacco and alcohol control department 2017). At the beginning of 2016, Lithuania had 1,916,284 inhabitants aged 15–64 in total (Statistics Lithuania 2016). This shows that around 59,405 inhabitants used drugs in Lithuania during the last year (1,916,284 x 0.031 = 59,405). However, only 1,590 criminal offenses of illicit possession of narcotic or sychotropic substances for non-distribution purposes were registered in Lithuania in 2016 (Informatics and Communications Department under the Ministry of the Interior 2017), or 2.7% of the cases compared to the data by public opinion polls. The calculation did not take into account repetitive cases and the applicability of administrative liability along with criminal at that time.

The registration of offenses associated with drugs and psychotropic substances is highly dependent on police activity and available resources. Usually, there are no victims who can report the crime to the police because the immediate victim is the drug user. In general, the registered crime rate is more likely to reflect the activity, available resources and opportunities of the police to register and investigate crime than the actual crime rate, changes in which are not necessarily reflected in the registered numbers.

When dealing with issues of scientific justification of criminal policy, it is not enough to rely solely on the official crime statistics and it is necessary to refer to complex data on drug use and distribution, obtained from regular representative public surveys and other sources at the same time. It is important to find out what proportion of the population has used drugs (it is not appropriate to criminalize acts that the majority of the population commits), how widespread the distribution of drugs is and how these indicators change over time. If these indicators of drug use and distribution increase over a long period of time (this seems to be the case in Lithuania), especially if the official crime rate statistics approve this increase, it means that the applied prevention and control measures fail to stop the spread of drug use. In such a case, the application of criminal liability as an instrument of last resort (*ultima ratio* principle) is justifiable.

It is well known in criminology that effective prevention and control of criminal conduct requires the application of complex measures – as many instruments as possible, targeting as many different types of factors as possible – since the number of factors is massive. Particular importance must be given to the strongest factors. Inhibition or elimination of a single or several criminogenic factors by introducing a single or several instruments may be ineffective, as many other criminogenic factors will remain effective. The supporters of criminalization argue that the complex, harmful and dangerous issue of drug trafficking must be tackled by the application of all possible preventive and control measures, including criminal penalties. As an instrument of last resort, criminal liability extends upon those who ignore other preventive measures. If the prevention of drug use is successful, then criminal liability is not required; it is applied only in rare cases. It is not consumption, but possession that is punished. In addition, drug use and the drug trade are interrelated. Distribution requires demand (consumption), and consumption requires distribution. Therefore, by preventing consumption, we are likely to prevent the distribution and production of drugs and ensure a cross-cutting effect. Having introduced criminal liability, we cannot ignore measures of prevention, treatment and social assistance. All of these measures must be introduced concurrently. In Lithuania, criminal liability for the possession of drugs is intended to apply and applies along with the application of preventive measures and treatment. The prevention of health-affecting drug use is a key issue. Criminal liability is not and cannot be a substitute for prevention, treatment and assistance measures.

Harm-reduction policy

Proponents of decriminalization tend to rely upon a harm mitigation strategy. The main objective of the harm reduction policy is not to cut down on drug use, but to reduce drug-related negative effects. Instead of punishing, they suggest to reduce the harm suffered by drug users and the society. Punishment does not automatically reduce the damage. Decriminalization of drugs reduces the number of drug-related deaths (overdosing, fatal infections, etc.). Research shows that drug-associated social harm has lessened after decriminalization of the possession and use of illegal drugs (Gonçalves *et al.* 2015).

Advocates of criminalization agree that decriminalizing drugs can potentially reduce the harm caused by drugs to the user. However, decriminalization fails to reduce the prevalence of consumption, and therefore consumption-associated problems (medical treatment, social assistance, etc.) are left to the public. There are numerous medical studies that reveal the harm of various illicit drugs – such as cannabis, one of the least harmful and most prevalent drugs (Wilkinson *et al.* 2016). The damage constitutes the essence of the concept of illicit narcotic drugs. For example, narcotic and psychotropic substances are defined in Lithuania as natural or synthetic substances included in the register of controlled substances, approved by the Ministry of Health, the harmful effects or abuse of which result in serious health disorders manifesting in mental and physical addiction and grave adverse effects on human health (The Seimas of the Republic of Lithuania 2021d). Because of the damage to health, these substances are banned by the state. Damage and consumption are interconnected. If there is no consumption, there is no damage. Prevalence, intensity and changes in consumption are therefore important subjects of drug policy.

There are many ways to reduce drug-associated damage, but one of the most reliable is to reduce the overall level of drug consumption. Criminalization hampers the overall level of drug use by restricting legitimate use, increases the non-monetary cost of consumption and makes drug use expensive (Weatherburn 2014). The non-monetary cost of consumption includes the risk of arrest, the possibility of police harassment, the risk of assault by other drug users who want to steal their stash, and the risk of violence from dealers who want to enforce payment of unpaid debts (Weatherburn 2014).

It is difficult to determine the exact extent to which social harm is caused by narcotic drugs (Lievens *et al.* 2017). Some researchers conclude that there is no conclusive evidence on the results of cannabis legalization (Fischer *et al.* 2020). Cost-benefit assessments contain many loopholes and render no clear answers (Shanahan and Cyrenne 2021). Other researchers conclude that it is impossible to say which policy is the most effective in minimizing drug-associated harm because the harm is very versatile and individual users are very different (Weatherburn 2014).

Supporters of decriminalization argue that criminalization incurs significant additional costs upon the criminal justice system (Moore 2005). Decriminalization of criminal offenses associated with the illicit possession of drugs for non-distribution purposes would also help reduce the costs of criminal investigations and criminal trials incurred by the criminal justice system.

Supporters of criminalization suggest opposing arguments. Research shows that $1 spent on drug treatment in a penitentiary institution saves $6 (Welsh *et al.* 2012). No doubt, the police, the public prosecutor's office, the judiciary and penitentiary institutions would benefit from decriminalization of drugs. It is in the interest of these institutions to reduce their workload. However, when making a decision, we have to consider its possible consequences. Lithuania has already been in a similar situation. On January 1, 2015, Lithuania decriminalized petty theft where the amount of loss suffered was €38–€114, qualifying the wrong as an administrative offense. What were the consequences? The police may choose to ignore such thefts as the investigation of criminal offenses is given higher priority than administrative offenses.

According to the supporters of criminalization, disclosure and investigation of crimes associated with narcotic drugs and psychotropic substances should be a high priority for the police, adequate to the potential harm and seriousness of such offenses. Such acts should not be qualified merely as health problems, which can be tackled by medical treatment, assistance and prevention alone. In addition, we need to know the exact capacity of treatment, assistance and prevention systems to provide quality services. In Lithuania, for example, the provision of such services faces many problems in terms of scope and quality.

Proponents of criminalization argue that fines imposed for criminal offenses associated with the illicit possession of drugs for non-distribution purposes would allow at least partial recovery of the costs incurred by the state. It would be logical that, as far as possible, society would not pay for the inappropriate behavior of individuals, the damage they cause, the danger they pose, and the assistance and other services provided to them, but they themselves would also pay indirectly at least partially. Of course, a large proportion of drug users have very limited opportunities to pay the fine. It would therefore be appropriate to share the experience of other countries such as Germany (Jehle 2019), where a fine is imposed in the form of so-called day units. If the convicted fails to pay the fine, it is replaced by a penalty of imprisonment for the number of days equivalent to

the imposed fine. The imprisonment may also be converted into community service. The application of criminal liability for criminal offenses associated with the illicit possession of drugs for non-distribution and the introduction of a system of penalties like that in Germany would ensure the inevitability of criminal liability, which is not the case in a situation where such acts are decriminalized and are subject to administrative liability. If a person fails to pay an imposed administrative fine in the absence of personal property and/or funds (Article 676 of the Administrative Code), the fine cannot be changed into arrest or imprisonment, and community service is only possible with the consent of the offender. Attending programs/courses of prevention, early intervention, medical treatment or rehabilitation may only be ordered with the consent of the offender (Article 30 of the Administrative Code). Thus, administrative liability in the form of an administrative penalty, prevention of drug addiction, medical treatment or rehabilitation can be easily avoided.

Proponents of decriminalization refer to assertions that a criminal record can adversely affect one's potential future income and career opportunities (Fagan and Freeman 1999).

On the other hand, a criminal record has a deterrent effect, as supporters of criminalization argue. Potential offenders also avoid committing criminal offenses because a criminal record may undermine their future prospects. Negative effects manifest not only in the criminal record itself (damage to the reputation), but also in the need to take part in court proceedings. The least serious criminal offenses, such as the illicit possession of small quantities of narcotic drugs or psychotropic substances for non-distribution purposes, should entail judicial proceedings, but should not result in a criminal record. This is now the case in Lithuania.

Proponents of decriminalization refer to the popular argument, well-known in criminology, that social problems should preferably be tackled by means other than criminal penalties, because the latter often cause more harm than benefit. Criminal liability has a significant side effect – stigmatization of individual citizens and the problematic rehabilitation of the sentenced. Criminalization of drugs contributes to the social exclusion of drug users, puts them at risk of losing their jobs and hampers the allocation of public funds necessary to deal with drug-related damage.

Supporters of criminalization agree that social problems are better dealt with by reference to measures of a non-criminal nature; however, the alternative measures are sometimes insufficient for solving certain problems. When preventive and control measures fail to prevent the spread of drug use and drug-related harms, severe punitive measures should be applied, while understanding the adverse side effects and introducing measures to minimize the latter. This provision extends not only on the case of drug trafficking, but also on dealing with any other criminal offenses. Criminalization incurs additional costs on the criminal justice system, but prevents the consumption of drugs and drug-related harms. Criminalization also acts as a guideline for social behavior. Criminalization conveys the message that wrongful acts are unacceptable, dangerous, harmful to society and punishable by law.

According to supporters of decriminalization, prohibited drugs are more expensive, so it is logical to assume that criminalization pushes the expenses of drug addicts up and encourage them to commit crimes in order to afford drugs (Weatherburn 2014).

Those in favor of criminalization agree that the average price of illicit drugs in Portugal decreased between 2001 and 2008 following the decriminalization of the use/possession of small quantities of narcotic drugs in Portugal (Hughes and Stevens 2010). However, they notice that there are other

factors as well. Lower prices of drugs increase the availability of and access to drugs and, consequently, the risk of addiction. Drug addicts are always at risk of losing their income, leading, as a consequence, to them committing crimes in order to afford a dose.

Environmental protection and sustainable development

Supporters of decriminalization claim that counter-narcotics policies can work in opposition to policies intended to protect the environment and enable sustainable development. The areas of land needed for the cultivation of narcotic plants are often created by the destruction of forests, which are crucial to the sustainability of the world's ecosystems. However, the destruction of narcotic plants in their growing areas causes even greater damage to ecosystems, as the plants and ecosystems in those areas are destroyed. As a result of such anti-narcotics methods, the cultivation of narcotic plants moves to other, more remote, isolated places, where the forest is destroyed and narcotic plants are grown again. Due to this displacement effect, the fight against narcotic cultivation further contributes to deforestation. The eradication and prohibition of narcotic plants pushes drug growers into remote areas that are havens of biodiversity, including national parks and nature reserves. The presence of violent criminal organizations in protected areas can discourage park rangers from visiting them and weaken their protection. (Malinowska-Sempruch and Rychkova 2015, pp. 12, 15–16).

On the other hand, the cultivation of narcotic plants and the production of narcotic substances pollute the environment. The more narcotic substances are grown, produced and consumed, the greater damage to the environment. Damage includes clear-cutting of forests, destruction of plant and animal habitats, ecosystem pollution and unsustainable water use. Toxification of the environment includes the improper or illegal usage and disposal of fertilizers, pesticides, and chemical compounds used in the production of drugs. The usage of illegal fertilizers and pesticides in illicit crop growth results in the poisoning of wildlife and the indirect toxification of watersheds. The cultivation of some narcotic plants (such as marijuana) requires a lot of water, which leads to unsustainable use of it. Indirect effects of drug production include biodiversity loss, ecosystem degradation, theft, violent crime, drug addiction, drug enforcement and treatment costs, and government destabilization. Preventive, not reactive, actions must be implemented to stop the production of illicit drugs in their initial stages before ecosystem injury occurs (Burns-Edel 2016, p. 11). The cultivation of non-narcotic plants can also be harmful to the environment. Instead of narcotic plants, it is better to grow plants that are necessary and useful for people and that do not cause so many negative consequences.

Losses or benefits for organized crime?

Proponents of decriminalization emphasize that the criminalization of drugs promotes the development of the black market. "The drug market is a major source of income for organized crime groups (OCGs) in the EU, with a minimum estimated retail value of €30 billion per year" (EMCDDA

and Europol 2019, p. 13). Legalization of the use, production and trade in drugs would obliterate the main source of revenue for organized crime. Prohibition of the production, distribution and use of narcotic drugs creates favorable conditions for illegal income from organized crime.

However, decriminalization of the possession of illegal narcotics substances for non-distribution purposes does not eliminate the conditions for organized crime to profit from illegal drugs, as supporters of criminalization argue. As long as these offenses remain illegal (subject to administrative liability rather than criminal liability), the conditions for organized crime to benefit from drug trade remain favorable. Moreover, decriminalization of such offenses and their qualification as subject to administrative law create better conditions for the distribution of illicit drugs, since the possession of drugs incurs no criminal liability, and the purpose of distribution is difficult to prove. Decriminalization of the illicit possession of narcotic drugs for non-distribution purposes increases the number of drug users, at least within some groups. The more consumers there are, the greater the demand and the greater the probability of addiction is. Organized criminal groups do their best to take advantage of this. It is in the interest of organized crime to maintain high levels of drug use prevalence, intensity and addiction. Organized crime would be unable to benefit if potential users refused to use or even try drugs. The possession of narcotic drugs for non-distribution purposes may be fully legalized. This would reduce the potential for illegal gains from organized crime as drugs could be obtained legally. However, organized crime would still have opportunities to benefit from drugs by trading at a lower price than legal dealers. Organized crime would be able to profit from illegally sold drugs, much like it profits from smuggled cigarettes or arms. Even if we manage to completely eliminate the possibility of profiting from drugs, organized crime is likely to lose only one source of revenue – the drug market. Thus, organized crime is likely to survive. The question is whether it is worth destroying one of the revenue sources of organized crime by means of total legalization of drugs at the cost of likely growth in drug use and drug-related harm to individuals and society.

Criminalization, human rights and social solidarity

Proponents of decriminalization argue that drug use is the right of an individual. Hughes and Stevens (2010) emphasize that decriminalization is for reasons of human rights, social solidarity and acknowledgement of the failure of punitive policies. Nations recognize rights to citizenship and limit interference by the state in the private lives of citizens. Decriminalization does not inevitably lead to rises in drug use. The choice to decriminalize is not simply a question of the research. It is also an ethical and political choice of how the state should respond to drug use. Decriminalization of illicit drug use and possession does not appear to lead automatically to an increase in drug-related harms. Nor does it eliminate all drug-related problems, but it may offer a model for other nations that wish to provide less punitive, more integrated and effective responses to drug use. We need to stop talking about drugs as if they are a moral evil – the problem of drug use is highly exaggerated.

Proponents of criminalization argue that there are no rights without duties, except for natural rights and cases when a person cannot yet have duties – when they are very young, etc. Help and

medical treatment is rendered to the addict by the community, which uses public funds to support a person who has been warned about the potential harms and consequences of drug use but acts contrary to the warning. This raises a question of values, namely – what is more important: the rights of an individual or the interests of the society? In making their decisions, politicians must take into account and consider the needs not only of the individual, but also of the society. An individual is definitely supposed to exercise the right to use drugs, but the society, in its turn, has the right to punish such individuals for the harm caused to the society.

Conclusions

Various studies suggest contradictory arguments for decriminalization of the possession of small quantities of narcotic drugs for non-distribution purposes. There are no solid grounds to argue unequivocally that the decriminalization of such acts is necessary until the proportion of drug users in the state has reached a critical threshold when the criminalization of such acts becomes inappropriate due to their high prevalence.

Decisions on criminalization or decriminalization may be predetermined by the values supported by the legislator as to what is more important: freedom of individuals, opportunities to enjoy life to its full, and society's responsibility to deal with subsequent problems; or enforcement of criminal liability against individuals who cause danger or damage to the society.

The use of narcotic drugs negatively affects and endangers both the individual and the society. Decriminalization of the illicit possession of small quantities of drugs for non-distribution purposes does not solve the problem of reducing drug use. Studies show that decriminalization can result in both the stability of or an increase in consumption of individual substances in individual groups of users.

Decriminalization is for the benefit of organized crime as it is only likely to increase the number of users and improve opportunities for the drug trade.

The examined research results and the arguments of the supporters and opponents of criminalization do not give grounds for concluding that decriminalization of the illicit possession of small quantities of drugs for non-distribution purposes is a sustainable solution that reduces drug consumption, threats and harm to the society and the environment.

The choice between criminalization and decriminalization of the illicit possession of narcotic drugs for non-distribution purposes is not just a research-based decision. It is, at the same time, a political and value-based decision made by the legislator.

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III.4. ACCESSIBLE AND SUSTAINABLE CRIMINAL JUSTICE: THE RIGHT OF AN INCAPACITED ACCUSED PERSON TO BE PRESENT AT A COURT HEARING

Empowering an accused person with mental disabilities in the criminal trial – towards a more sustainable criminal procedure

Protecting and empowering people with disabilities means ensuring their full enjoyment of civil and political rights, as well as economic, social and cultural rights. Empowering people with disabilities means enabling them to reach their full potential as equal and active members of society. However, all over the world, people with disabilities face a range of challenges every day, including an inability to access justice. The right of persons with disabilities to access justice and its implementation should be seen as an important factor in the sustainable development of society. As stated in Resolution of the United Nations General Assembly 70/1 of September 25, 2015, "Transforming Our World: The 2030 Agenda for Sustainable Development," for sustainable development it is necessary promote and enforce non-discriminatory laws and policies (Resolution 70/1 2015, 16b). One of the goals of UN sustainable development is to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels (Resolution 70/1 2015, 16). This directly determines the need to improve access to justice for one of the most vulnerable groups in society – persons with disabilities. It is accepted that access to justice is not only integral to achieving the Sustainable Development Goals (SDGs) and inclusive growth, but is also crucial to implementing many of the other SDGs (Leveraging the SDGs for Inclusive Growth 2016, pp. 2–3). Thus, access to criminal justice is also one of the most important factors in building a sustainable society. Criminal justice and its accessibility are particularly important for people with mental disabilities who are suspected/accused of a criminal offence. They have a reasonable expectation that they will be able to understand the essence of the allegations against them and participate effectively in the criminal proceedings. However, criminal

justice is often made difficult for people with mental disabilities when they are denied the right to participate in the process and/or when they are unable to participate.

The very concept of "persons with disabilities," according to the United Nations Convention on the Rights of Persons with Disabilities (hereinafter – the CRPD) of 13 December 2006, is defined broadly: "those who have long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others" (Article 1) (CRPD 2006). Under the Convention, persons with disabilities are not social or treatment "objects," but subjects with rights, capable of exercising those rights and making decisions freely. Persons with disabilities are also entitled, on an equal basis with others, to enjoy and exercise all the rights guaranteed by the European Convention on Human Rights (hereinafter – ECHR, Convention) (ECHR 1950), the European Social Charter (European Social Charter 1961) and in other international and European Union (hereinafter – EU) human rights standards.

According to Article 13, the CPRD recognizes that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life (CRPD, 2006). Persons with disabilities have the right to participate in court proceedings as direct or indirect participants and witnesses. In this respect, the very right to apply to court encompasses much more: "(…) the concept of access to justice encompasses not only procedural access (i.e. effectively engaging in and using the established legal system), but also substantive access (i.e. equitable and beneficial judicial outcomes) and promotional access (i.e. promotion of citizens' belonging and empowerment)" (Beqiraj *et al.* 2017, p. 14).

With regard to criminal proceedings and the right to a fair trial of persons suspected/accused of having committed a criminal offence, it is noted that the CRPD moves from the question of whether a person is able to understand the process to the question of what support such persons need to receive in the process in order to be able to become an active participant in the proceedings. In this respect, the idea is to move away from "tailor-made" types of criminal proceedings and to ensure that the general criminal process is responsive to the needs of persons with disabilities and is accessible to them (Gooding and O'Mahony 2016, pp. 122–145). According to some scientists, "unfitness to stand trial laws seek to remove a person from the criminal justice system where there is a risk that the person will not receive a fair trial. The CRPD Committee have not condemned this objective explicitly, although its reiteration of the aims of Article 9 to make mainstream legal processes accessible rather than creating "special" alternative measures appears to imply as such. Principally, the Committee has expressed its concern with the consequential loss of liberty flowing from a determination of unfitness to stand trial" (Gooding and O'Mahony 2016, p. 138).

As a general rule, additional procedural safeguards are put in place in general criminal proceedings concerning an accused person with a mental disability. Such procedural safeguards may include the involvement of a defence counsel, legal representatives, family members or close relatives, special procedures for interviews and other procedural steps, etc. However, in some European countries, the "legal fate" of an alleged incapacitated person is shaped by introducing a specific type of criminal procedure, viz., a Coercive Medical Measures Procedure. For example, this specific type is provided for in the Code of Criminal Procedure of the Republic of Lithuania (hereinafter – CCP) and Bulgaria (Chapter 29 of the CCP, Chapter 34 of the Code of Criminal Procedure Code of the Republic

Bulgaria). However, independent of the procedures laid down in the law, the alleged incapacitated person must have an effective opportunity to be part of the proceedings.

Within the framework of international law, legal capacity is understood as encompassing two constitutional elements. The first element is legal standing, where a person is considered to be a subject of law capable of having rights and obligations. The second element is legal agency, where a person is considered to be the subject of a legal relationship, capable of exercising rights, duties, or of entering into and/or terminating legal transactions (Commissioner for Human Rights 2012, p. 22 cited McSherry 2012, p. 22). Unfitness to stand trial assumes that defendants with mental disabilities are not capable of participating meaningfully in court proceedings because of their special needs. The law on unfitness to stand trial relates to the period of the trial, not to the person's state of mind at the time of the offence (timing of the offence). On the contrary, the insanity defence relates to a person's state of mind at the time of commission of the offence and their capacity to be held criminally responsible. Both unfitness to stand trial and the insanity defence constitute a long-standing means of defence of defendants with mental disabilities (Gooding and O'Mahony 2016, p. 135).

There is a large body of research on non-discrimination against persons with disabilities, the grounds for their legal status, and the right to a judicial remedy (Gooding and O'Mahony 2016, McSherry 2012, Beqiraj *et al.* 2017, Verbeke *et al.* 2015, Arstein-Kerslake *et al.* 2017 etc.). Such research findings constituted the basis for the present study when analyzing the legal status of individuals with mental disabilities. However, such studies do not usually distinguish between the rights of persons who suffer from mental disorders but are fit to stand trial, those involved as defendants in ordinary criminal proceedings (seeking to determine their liability and punishment), and persons who cannot be punished (because they have committed criminal offence in a state of insanity, and because of their mental state they may be a danger to themselves or others).

It should be noted that compulsory committal to a psychiatric hospital is one of the most severe measures. The European Court of Human Rights (hereinafter – the ECtHR) has on a number of occasions insisted that individuals suffering from a mental illness constitute a particularly vulnerable group and therefore any interference with their rights must be subject to strict scrutiny, and only "very weighty reasons" can justify a restriction of their rights (see *Alajos Kiss v. Hungary* 2010, § 42, *D.R. v. Lithuania* 2018, §§ 87–88). The detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained (see *O.G. v. Latvia* 2014, § 81, *D.R. v. Lithuania* 2018, §§ 87–88). Therefore, when deciding whether an accused person with a mental disorder should be admitted to hospital, it is also important to determine whether the person diagnosed with the mental disorder is socially dangerous, and whether the person's mental state poses a real threat to themselves and to others. When addressing such a serious matter, the procedural rights of the accused person must be safeguarded, taking into account the fact that, due to their mental health condition, they are only able to exercise such rights to a limited extent, or are completely unable to do so.

The aim of this study is to analyze the issue of the fitness to stand trial of alleged incapacitated persons on the basis of the law of non-discrimination and the principles of criminal procedure law. Scholars that study the rights of accused persons with mental disabilities and criminal proceedings maintain that the pre-trial stage is a crucial moment in the criminal procedure that often strongly

influences and may even determine the outcome of the entire judicial proceedings (Beqiraj *et al.* 2017, p. 29), but the present study focuses on the right to participate in court proceedings. This present paper also does not analyze the problems of incapacity as a substantive category of criminal law.

Referring to the methods of systematic analysis and case study analysis, the research aims to achieve the following objectives: 1) to analyze the impact of the concept of the legal status of a person with a mental disability on the status of an alleged incapacitated person; and 2) to examine the right of such a person to participate effectively in a court proceeding, either in-person or through a representative, in the adjudication of the question of whether or not they have committed a criminal offence being mentally disabled, and thus the issues relating to their compulsory medical treatment, including their involuntary hospitalization if that is the case.

The impact of the concept of the legal status of a person with a mental disability on the status of an incapacitated accused person

As already mentioned, the CRPD establishes that persons with disabilities should enjoy legal capacity on an equal basis with others. The CRPD focuses on persons with disabilities and does not approach disability from a "vulnerability" perspective, but rather a human rights-based approach (Council Conclusions on the Protection of Vulnerable Adults 2021, § 7).

The Committee on the Rights of Persons with Disabilities (hereinafter – the CmtRPD) has repeatedly pointed out, "(…) that under Article 12 (3) of the Convention, States parties have an obligation to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity." It also recalls that, under Article 13 (1), "States parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages" (CmtRPD No. 30/2015 2017, §B – 7.6). Ensuring that justice is accessible to all, as emphasized by the UN in the context of sustainable development, is inseparable from the pursuit of a peaceful and inclusive society (Resolution 70/1 2015, 16b). In addition, while States have some discretion in imposing the procedural conditions set out above, the rights of a person with a disability must be respected (CmtRPD No. 30/2015 2017, §B – 7.6). For instance, the CmtRPD concluded that a State violated the rights of a participant of proceedings according to Article 12 (3) and Article 13(1) of the Convention, i.e., failed to properly apply the relevant procedural conditions, when a person wanted to be heard at a hearing but could not attend the hearing because of their disability. The person, who suffered from a mental disability, informed the court of this and asked the court to represent them at first instance and at the appeal court. However, the request was not granted, and the necessary assistance was not provided (CmtRPD No. 30/2015 2017, §B – 7.6).

Articles 6 and 13 of the ECHR "(…) guarantee the right to a fair trial and to an effective remedy, as interpreted by the European Court of Human Rights (ECtHR) (…)" (Handbook on European law relating to access to justice 2016, p. 17). The term *right to a fair trial* under Article 6 of the

Convention is treated in the academic literature as a composite right "consisting of the following elements: the right to a trial, the principle of equality, and the adversarial principle, the right to remain silent, the right not to be compelled to incriminate oneself, the right to have access to one's own lawyer, the right to participate in the proceedings in a personal and effective manner, and the right to a reasonable judgement of the tribunal" (Štarienė 2006, p. 40). The composite content of this right means that "the disregard or improper exercise of any element of its content raises doubts as to whether a person's right to a fair trial is not being violated or impeded at all" (Jurka *et al.* 2009, p. 56). Relatively new ECtHR case law explains that Article 6 of the ECHR guarantees the suspect and the accused the right to participate effectively in the criminal proceedings from the earliest stages, i.e., from the first interviews at the police station. Different types of mental disability may mean that a person's right to participate effectively in proceedings, including court proceedings, may not be fully realized. Such a person's ability to "participate effectively" may be limited or even impossible. In criminal proceedings, people with mental disabilities can be affected by additional stress factors such as detention, interrogation, court appearances, etc. For example, people with emotional disorders (e.g., depression, post-traumatic stress disorder) and/or behavioral disorders (e.g., hyperactivity with attention deficit, severe drug or alcohol withdrawal) are at risk not only of failing to fully grasp the importance of the court proceedings or the implications of the proceedings, but also of failing to participate effectively in the proceedings. Appropriate measures must therefore be taken to enable the person with a mental disability to exercise their right to participate effectively in the proceedings, either directly or through representatives (Verbeke *et al.* 2015, p. 69).

The EU legal framework on the rights of persons with disabilities is based on the CRPD and its principles. The Charter of Fundamental Rights of the European Union (hereinafter – the Charter) maintains that "Everyone is equal before the law" (Article 20) and that "Any discrimination based on disability shall be prohibited" (Article 21) (Charter 2012). The prohibition of discrimination requires EU Member States to take positive action and measures to ensure that people with disabilities can effectively exercise their rights. Secondary EU legislation sets out specific rights for people with disabilities. The EU has adopted directives to strengthen the procedural rights of all suspects or accused persons, including specific safeguards for vulnerable suspects or accused persons. For instance, according to Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (hereinafter – Directive 2013/48/EU), Member States shall ensure that the particular needs of vulnerable suspects and vulnerable accused persons are taken into account in the application of this Directive (Directive 2013/48/EU, Article 13). Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (hereinafter – Directive 2012/13/EU) requires Member States to ensure that information shall be given orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons (Directive 2012/13/EU, Article 3(2)). The requirement to provide appropriate assistance for persons with hearing or speech impediments is established in Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (Article 2(3)).

Furthermore, the Court of Justice of the EU (hereinafter – the CJEU) has indicated that the concept of "criminal proceedings" is to be regarded as also covering proceedings which, although they do not lead to a "sentence" in the strict sense, nevertheless result in a measure involving the deprivation of liberty in respect of persons who have committed acts constituting a criminal offence. The CJEU concluded that Directives 2012/13 and 2013/48 cannot be interpreted as excluding from their scope judicial proceedings in which an order may be made for the compulsory committal to a psychiatric hospital of a person who has committed a criminal offence in a state of insanity. Any compulsory medical measure is based not only on therapeutic grounds, but also on safety grounds (Judgment of the Court (Third Chamber) of 19 September 2019, §§ 55–63). The CJEU also recognized that, on account of its penal purpose, the procedure falls within the scope of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (hereinafter – Directive 2016/343). "Article 3 of Directive 2016/343 requires Member States to ensure that suspects and accused persons are presumed innocent until proved guilty according to law. That obligation must be respected by the competent authorities in a procedure for committal to a psychiatric hospital, such as that at issue in the main proceedings. In accordance with Article 6 of that directive, the Public Prosecutor's Office bears the burden of proof for establishing that the criteria laid down by law for authorizing the committal of a person to a psychiatric hospital are met" (Judgment of the Court (Third Chamber) of 19 September 2019, § 72).

Finally, the Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (Commission Recommendation 2013) encourages Member States to strengthen the procedural rights of all suspects or accused persons who are not able to understand and to participate effectively in criminal proceedings due to age, mental or physical condition or disabilities. This legal measure "objectifies the general understanding that specific attention should be given to vulnerable defendants in order to safeguard the fairness of the proceedings, because individuals who are not capable of fully understanding or fully participating in the proceedings are a special category of defendants and, therefore, require a higher degree of protection. This is a logical consequence of the equality of arms concept, which requires a fair balance between the parties in court proceedings" (Verbeke *et al.* 2015, p. 69).

Historical patterns: from the "status approach" to a sustainable, "people--centric" approach?

To begin with, the contents of "legal capacity" and "mental capacity" are different (McSherry 2012, pp. 22–27; Devi 2013, p. 794). The status of mental capacity is based on various cognitive research methods. In the most general sense, "mental capacity" means the ability to make decisions. For the purpose of assessing mental capacity, most jurisdictions currently use the so-called "functional approach." Functional assessment is carried out with a view to establishing the ability to make decisions when performing certain tasks. The "functional approach" is believed to have replaced the previously prevailing "status approach" model, according to which individuals were considered either globally capable or incapable based on clinical diagnoses (Gooding and O'Mahony 2016, p. 135).

As claimed by Booth Glen (2012, p. 115), in terms of the "functional approach" people are perceived as a "bundle of capacities." As a rule, functional mental capacity is assessed as a criterion for the so-called "understand and appreciate test" (Gooding and O'Mahony 2016, p. 135). "This test requires that a person can demonstrate 'independent' capacity to: (i) consider a range of options when deciding; (ii) consider the consequences of different options; and (iii) communicate a choice" (Gooding and O'Mahony 2016, p. 135). Although this model of functional mental capacity is highly controversial, it is still used in the jurisdictions of the cited authors, as well as in a number of other jurisdictions.

Added to the "status approach" and "functional approach" models is the "outcome approach" model and the newly emerging disability-neutral doctrines. "(…) the 'outcomes approach' grants or withholds legal capacity based on the 'reasonableness' of an individual's decision-making, rather than on a disability *per se*" (Beqiraj *et al.* 2017, p. 17). Disability-neutral doctrines are promoted in the field of criminal law, eliminating defences that justify the denial of criminal responsibility on the grounds of mental or intellectual disability. The subjective elements of the offence should be assessed on the basis of the disability-neutral doctrine, which takes into account the situation of the individual accused. Accordingly, the legal framework for both pre-trial and trial proceedings should be reviewed in order to address the participation of such an accused in criminal proceedings (Gooding and O'Mahony 2016, p. 137).

The "fitness to stand trial" concept is based on the right of each defendant to a fair trial. Different countries use different counterparts of the term *fitness to stand trial*. For instance, "competency to stand trial" is used in the United States of America, "fitness to plead" in Australia, England and India, and "capacity to defend" in Canada (Houidi and Paruk 2021). Obviously, it is difficult to ensure justice if a person does not (or seems not to) understand court procedures. The "fitness to stand" concept is, in addition, based on other important principles. For example, a person who is severally mentally ill should be provided the required medical assistance, rather than punished; where such persons are not able to participate at the court hearing, they must be represented (Rogers *et al.* 2008, p. 576). If a person is not able to understand the court process, and is nevertheless forced to endure it, that is an abuse of the law. Moreover, there is a risk of convicting an innocent person, as a person who is not aware of the nature of the proceedings cannot deny their guilt (Law Commission 2010, pp. 3–4). In a cultural context, the "fitness to stand trial" concept is based on the assumption that "(…) accused persons are treated fairly and have an opportunity to defend themselves, and that this fairness is compromised when the accused is not capable of standing trial" (Mossman *et al.* 2007, p. S29).

Thus, the authors of the present study hold the position that the issue of a person's fitness to stand trial should be addressed by referring to the functional model with some respective "adjustments." The content of "fitness to stand trial" itself is therefore further analyzed – in particular, by indicating how it is perceived in the jurisdiction of the civil law tradition of the authors of the work.

The ability to make a conscious choice of conduct, to foresee the results and consequences of a particular act, and to assess the most appropriate means of defence, is the basis of the fitness of the accused to stand trial. Any defendant has procedural rights conferred on them by the law on criminal procedure – they can exercise them independently, assume procedural obligations and

be held liable for exercising the rights improperly. An accused person can participate independently and effectively in the proceedings only if they correctly and accurately understand the substance of the charge, the content of their procedural rights, the significance of the procedural steps to be carried out, and the significance of the evidence gathered in the criminal case, and if they can, without the help of others, give explanations, draw up complaints and applications, select the documents necessary for their defence, etc. In some cases, a mental disability may limit the defendant's ability to perceive, comprehend, remember and retrieve the facts relevant to the case, and to participate in the proceedings independently and without the help of others, i.e., to use the full range of means and methods of defence. Therefore, the fitness of an accused person to stand trial may be limited in some cases due to mental disability, while in other cases it may be completely abolished and the person may be declared unfit to stand trial (Ažubalytė *et al.* 2011, pp. 314–317).

The content of the fitness to stand trial encompasses the criteria of intellect and will. Intelligence is the ability of a person to grasp the nature and significance of the offence and their procedural position. All legal norms, including those of criminal procedure, are of a normative, evaluative nature, so defendants must not only be aware of the social significance of legal events (circumstances), but at the same time must assign to them some personal meaning. In other words, a person must be aware of the normative evaluative nature of the legal events (circumstances) that are the subject matter of criminal proceedings (including the circumstances of the commission of a criminal offence) and of the legal norms that regulate the entire criminal proceedings. The criterion of will is defined as the ability to implement, independently, one's own legal rights and duties. This capacity can be affected by both perceptual impairments (a criterion of intelligence) and various types of psychopathological disorders of will. Memory should be specifically distinguished as another structural portion of this criterion. The latter refers to possible memory disorders, which may cause the defendant to forget the circumstances of the commission of the offence or the circumstances of the pre-trial investigation or trial (Ažubalytė *et al.* 2011, p. 316).

This reasoning of fitness to stand trial allows us to distinguish cases where a defendant with a mental disability has sufficient capacity to correctly understand the relevant facts of the case and to testify/not testify about them, but is not fully able to defend their own rights and legitimate interests on their own (limited fitness to stand trial). In this case, the criminal proceedings must be made accessible to the defendant by providing them with additional procedural safeguards, i.e., by empowering them to participate effectively in the criminal proceedings in-person. In other cases, where it is shown that a person's mental disability renders them incapable of understanding the substance of their own actions and decisions or of controlling their own actions during the course of the criminal proceedings, such a person should be recognized as unfit to stand trial. In such cases, the criminal process would be made accessible to the person with a mental disability through mandatory legal representation and other additional fair trial procedural safeguards.

The above justification of "fitness to stand trial" through the criteria of intellect and will has certain points of contact with the common law tradition.

The "fitness to plead test" in common law, otherwise referred to as the "Pritchard test," comes from the 1836 case of *R. v. Pritchard* in England. "The judge directed that in order to be fit to stand trial a defendant must be capable of performing the following six things: (1) understanding the charges; (2) deciding whether to plead guilty or not; (3) exercising his right to challenge jurors;

(4) instructing solicitors and counsel; (5) following the course of the proceedings; (6) giving evidence in his own defence" (Gooding and O'Mahony 2016, p. 125). The Pritchard test was further developed in the cases of *R v. Davies* and *R v. M (John)*, etc. (Arstein-Kerslake *et al.* 2017, p. 401). Over the years, the Pritchard test has attracted a lot of criticism from those who argue that the criteria it established did not meet proper legal scrutiny and that the threshold for unfitness to plead was set too high. With the problems of the Pritchard test in mind, and based on the concept of effective participation in a trial developed according to Article 6 of the ECHR, in 2016 the Law Commission proposed a new test of capacity for effective participation in a trial. This test considers the defendant's decision-making capacity – i.e., from a functional point of view, decision-making capacity is the ability to make decisions at a specific relevant point in time, rather than a person's overall decision-making capacity (Law Commission 2016).

In the US, competency to stand trial refers to the ability to participate only in the guilt determination stage of a trial. Furthermore, other "competences" are distinguished in the USA. Thus, the term *competency to proceed* is a broader term, encompassing both the competency to stand trial as well as the competency to participate in the sentencing proceeding. The decisional competency of the defendant is singled out, as it encompasses competency to plead guilty, competency to wave an attorney, competency to wave the right to remain silent, etc. (Reisner *et al.* 1999, p. 933).

A standard definition of *competency to stand trial* was provided in the case of *Dusky v. United States*. The Supreme Court pointed out that even if the defendant is oriented to the time and place and has some recollection of events, that does not constitute their competency to stand trial. The competency to stand trial encompasses both the ability of the defendant to consult with their lawyer and to possess a reasonable degree of rational understanding of the proceedings against them. Subsequently, some States specified further criteria. For example, the Florida Rules of Criminal Procedure state that a defendant is deemed competent to stand trial based on the following six criteria: (1) understands the charges against them and other allegations against them; (2) appreciates the extent and nature of the possible punishment; (3) understands the adversarial nature of the trial; (4) is able to consult with their attorney regarding matters before the court; (5) demonstrates adequate behavior in the courtroom; and (6) testifies in a manner relevant to the case (Zajančkauskienė 2010, p. 253 cited Reisner *et al.* 1999, p. 933). The first three criteria relate to the ability to perceive what is happening during the trial and to understand the trial itself. The other three criteria focus on the ability of the accused to "function," i.e., to participate effectively in the trial. These criteria have some points of contact with the fitness to stand trial criteria of intelligence and will as described earlier.

Although different legal traditions may interpret and assess the content of "fitness to stand trial" differently, it is nevertheless universally accepted. The overall concept is that it is not enough for a person with a mental disability to have the "capacity to understand the process," but the defendant must be able to participate effectively in the process. In such cases, the criminal justice process must therefore be made accessible, with sufficient empowerment for the individual to participate effectively in the process. In cases where a person is unfit to stand trial, suspending proceedings until a person's mental health improves sufficiently to enable them to stand trial, or resolving a criminal case by diverting the person out of the criminal justice system and providing them with the medical and other assistance that they need, are considered to be just decisions. The

continuation of proceedings in the context of "unfitness to stand trial" – i.e., forcing a person to do what they are incapable of doing or to endure a process that they do not understand the meaning of – is incompatible with a civilized legal system (Verbeke *et al.* 2015, pp. 67–75, 70–71). According to the authors, this approach does not contradict the paradigm of a sustainable society, which is focused on the people-centric approach (Leveraging the SDGs for Inclusive Growth 2016, p. 12).

The subsequent sections of this paper will explore the prerequisites for the effective and direct participation in court proceedings of accused persons with mental disabilities who have committed an offence prohibited by criminal law and who are alleged to be legally incapacitated.

The right of a defendant with a mental disability to be present in court and to give explanations (testimony): international and national case-law

General legal prerequisites for the right of an accused person with a mental disability to be present in court: towards inclusive and participatory criminal trials

A prerequisite for the development of a sustainable society, including persons involved in criminal proceedings, is responsive, inclusive, participatory and representative decision making at all levels (Resolution 70/1 2015, 16.7). It is recognized that in ensuring sustainable development, legal empowerment is one of the people-focused innovations in access to justice (Leveraging the SDGs for Inclusive Growth 2016, p. 12). In the context of criminal proceedings, this becomes an especially important legal and factual prerequisite for a fair trial. The well-established case law of the ECtHR states that "Article 6, read as a whole, guarantees the right of an accused to participate effectively in a criminal trial (*Murtazaliyeva v. Russia* [GC] 2018, § 91). In general, this includes, inter alia, not only his or her right to be present, but also to hear and follow the proceedings. Such rights are implicit in the very notion of an adversarial procedure and can also be derived from the guarantees contained in sub-paragraphs (c), (d) and (e) of paragraph 3 of Article 6" (*Colozza v. Italy* 1985, § 27; *Stanford v. the United Kingdom* 1994, § 26). Individuals suffering from a mental illness constitute a particularly vulnerable group and therefore any interference with their rights must be subject to strict scrutiny, and only "very weighty reasons" can justify a restriction of their rights (*Alajos Kiss v. Hungary* 2010, § 42; *Anatoliy Rudenko v. Ukraine* 2014, § 104). However, an issue concerning lack of effective participation in the proceedings may arise with regard to the failure of domestic authorities to accommodate the needs of vulnerable defendants, including defendants with intellectual impairments (*Hasáliková v. Slovakia* 2021, § 69).

As was noted earlier, defendants have the right to participate effectively in criminal proceedings from the earliest stage of police interrogation. However, the aim of this study is to analyze the legal prerequisites for the direct participation of an accused person with a mental disability in court. Therefore, the identification of the possible mental impairment of a person suspected of commit-

ting a criminal offence in a timely manner, in order to enable such a person to benefit from additional procedural guarantees, is outside the scope of this study.

In analyzing the prerequisites for an alleged incapacitated accused person's participation in a criminal proceeding, in which, *inter alia*, the question of their compulsory committal to a psychiatric hospital is at issue, several relatively different procedural situations can be identified. This is the case, firstly, when it comes to deciding whether such a person should be present at the hearing; secondly, when it comes to deciding whether an accused person with a mental disability should be able to participate effectively in court; and thirdly, when it comes to deciding on the legal significance of the accused's statements at the hearing.

The authors of the present study took the position that the right to be present in-person at a court hearing should be guaranteed to an accused person with a mental disability in the context of criminal proceedings (or, rather, it should be a matter of deciding whether they are able to take part in such proceedings): (1) in the case of deprivation of liberty for the purpose of conducting a psychiatric assessment and, subsequently, in the case of appeals against a decision to commit a person to an expert/treatment institution; and (2) when examining the case on its merits, viz., in proceedings concerning the commission of an criminal offence, the accused person's incapacity and the imposition of coercive medical measures (in particular, compulsory committal to a psychiatric hospital), as well as examining the appeals in the instance proceedings. Thus, when examining a person's right to participate in such hearings, Articles 5 and 6 of the ECHR, and the ECtHR jurisprudence developed on the basis of them, become particularly relevant. Although the procedural guarantees set forth in the relevant Articles are similar, the content of the right of a person to be present at the trial of a criminal charge (treated by the ECtHR as part of the guarantee provided for in Article 6(1) of the Convention) and of the right of a person to be brought before a judge (Article 5(4) of the Convention) are not the same. The ECtHR has previously accepted that deprivation of liberty for the purpose of conducting a psychiatric assessment ordered by a court fell under the provisions of Article 5 (*Trutko v. Russia* 2016, § 33). However, as the ECtHR noted in the *Winterwerp v. the Netherlands* case, "the judicial proceedings referred to in Article 5(4) (art. 5-4) need not, it is true, always be attended by the same guarantees as those required under Article 6(1) (Art. 6-1) for civil or criminal litigation (*De Wilde, Ooms and Versyp ("VAGRANCY") v. Belgium* 1971, § 78). Nonetheless, it is essential that the person concerned should have access to a court and the opportunity to be heard either in-person or, where necessary, through some form of representation, failing which he will not have been afforded "the fundamental guarantees of procedure applied in matters of deprivation of liberty" (*De Wilde, Ooms and Versyp ("VAGRANCY") v. Belgium* 1971, § 76; *Winterwerp v. the Netherlands* 1979, § 60).

A second important premise of the research is that modifications (peculiarities) in the exercise of the right to be present at a hearing due to an accused person's mental state (in particular illness) can be, and are, justified. In relation to the participation of defendants with mental disabilities in criminal proceedings, it is not even discussed that "all substantive and procedural safeguards recognized in international law, whether in criminal, civil or administrative procedures, including the presumption of innocence and the right to remain silent, are afforded to all persons with disabilities, on an equal basis with others. Procedural accommodations, when needed, must be available to all persons with disabilities, including suspects and accused persons, who require assistance to participate

effectively in investigations and judicial proceedings" (International Principles and Guidelines on Access to Justice for Persons with Disabilities 2020, p. 19). States shall: (a) ensure that all suspects and accused persons with disabilities are presumed innocent until proven guilty under the law; and (b) ensure that suspects or accused persons with disabilities are provided with accessible and understandable information about their rights, including the right not to incriminate oneself (International Principles and Guidelines on Access to Justice for Persons with Disabilities 2020, p. 19).

However, when a person is involved in criminal proceedings to decide whether they have committed a criminal offence while incapacitated and whether they need to be forcefully hospitalized, it is necessary to take into account the legal consequences of the accused person's participation and testifying in courts. In such a case, without additional (special) procedural safeguards, and without special rules for the evaluation of the accused's explanations, the participation of an accused person with a mental disability may not guarantee their right to a fair trial, but may rather negate it. The ECtHR has noted that "mental illness may entail restricting or modifying the manner of exercise of such a right (see, as regards Article 6 para. 1 (Art. 6-1), *Golder v. the United Kingdom* 1975, § 39), but it cannot justify impairing the very essence of the right. Indeed, special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves" (*Winterwerp v. the Netherlands* 1979, § 60). The Supreme Court of Lithuania also takes the same view: the court's observance of the special rules governing the process of prescribing forced medical measures to a mentally incapacitated person who has committed a criminal offence does not violate the principle of equal treatment – on the contrary, it provides them with additional procedural safeguards (Decision of the Supreme Court of Lithuania of 3 February 2021 in Criminal Case No 2K-5-976/2021). Established mental health disorders and their nature and degree determine not only the recognition of an accused person's insanity and the selection of a specific compulsory medical measure, but also the manner in which the procedural rights of the accused person are exercised in the criminal proceedings (Decision of the Supreme Court of Lithuania of 7 January 2020 in Criminal Case No. 2K-55-222/2020).

In cases regarding the deprivation of freedom by imposing the compulsory hospitalization of mentally disturbed individuals (Article 5(1)(e) of the Convention), the ECtHR has indicated that the lawfulness of deprivation of liberty under this provision presupposes a fair and proper procedural order; in this context, national proceedings must afford the individual sufficient protection against potentially arbitrary deprivation of liberty (*D.R. v. Lithuania* 2018, §§ 87–88). In the *Winterwerp v. the Netherlands* case, the ECtHR concluded that failing to provide to a person concerned access to a court and the opportunity to be heard either in-person or, where necessary, through some form of representation, would constitute a violation of Article 5 of the Convention. In the case concerned, it was established that "the applicant was never associated, either personally or through a representative, in the proceedings leading to the various detention orders made against him: he was never notified of the proceedings or of their outcome; neither was he heard by the courts or given the opportunity to argue his case. In this fundamental respect, the guarantees demanded by Article 5 para. 4 (Art. 5-4) of the Convention were lacking both in law and in practice" (*Winterwerp v. the Netherlands* 1979, § 61).

The case law of the ECtHR regarding Article 6 of the Convention indicates that "there can be no justification for interpreting the guarantees of the Convention restrictively," and that in cases

related to mentally ill defendants their very weakness (vulnerability) should enhance the need for supporting their rights. The domestic authorities must show requisite diligence in ensuring their effective participation in the proceedings and must act particularly carefully when limiting that right (*Hodžić v. Croatia* 2019, § 57).

All of the guarantees referred to above not only determine meaningful participation in court, but also have an impact on the final judgement. As has been rightly pointed out in literature sources, to establish whether the effects of mental disorders could genuinely obstruct the fairness of the proceedings in the light of the ECtHR case law, however, it is first necessary to explore the legal boundaries of the concept of effective participation (Verbeke *et al.* 2015, p. 69).

It should be noted that effective participation normally presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for them, including the significance of any penalty which may be imposed. This means that they should be able – if necessary, with the assistance of, for example, an interpreter, lawyer, social worker or friend – to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to their own lawyers their version of events, point out any statements with which they disagree and make their representative(s) aware of any facts which should be put forward in their defence (*S.C. v. The United Kingdom* 2004, § 29). The ECtHR, however, also stated that Article 6 of the ECHR does not require defendants to understand or to be capable of understanding every point of law or evidential detail (*S.C. v. The United Kingdom* 2004, § 29). The authors of the present paper support the position that given the sophistication of modern legal systems, many adults of normal intelligence are unable to fully comprehend all the intricacies and exchanges that take place during proceedings. This is why the ECHR, in Article 6(3) (c), emphasizes the importance of the right to legal representation (Mowbray 2012, p. 426 cited Verbeke *et al.* p. 70).

Although the ECtHR case law is clear on the fact that this principle (effective participation) is to be followed during both the pre-trial and the trial phase, the court has not yet set clear-cut conditions as to when (and which) measures need to be instigated in order to assist defendants with mental disorders in participating in proceedings. There is some logic to this, in the light of the many ways in which psychiatric disorders may externalize and impact an individual's cognitive abilities. As a result, assessments on a case-by-case basis will have to be made in order to determine whether or not defendants will need to be granted measures, other than the mere assistance of a legal representative, to be able to participate effectively in the proceedings (Verbeke *et al.* 2015).

Thus, according to the established case-law of the ECtHR, in proceedings relating to the compulsory hospitalization of a mentally ill person, the accused person must, as a general rule, be given the opportunity to be heard, either in-person or, where necessary, through some form of representation. This guarantee is, in fact, necessary not only as an intrinsically important procedural element of a person's right to a trial. An accused person's immediate participation in judicial proceedings is also important to ensure a substantively fair judgement. Both the procedural and the material aspects of the realization of the right have been acknowledged by the case law of the ECtHR: "the proceedings in question concerned the assessment of the applicant's mental condition, and thus he (she) is not only an interested party, but also the main object of the court's examination. His (her) participation was therefore necessary not only to enable him (her) to present his (her) own case,

but also to allow the judge to form a personal opinion about his (her) mental capacity" (*Shtukaturov v. Russia* 2008, § 72; *Mifobova v. Russia* 2015, § 57; *A.N. v. Lithuania* 2016, § 96; *D.R. v. Lithuania* 2018, §§ 90–91; Recommendation Rec(2004)10 of the Committee of Ministers to member States concerning the protection of the human rights and dignity of persons with mental disorders). Should such measures be found insufficient, other measures to compensate for the inability to participate effectively in the proceedings may also be considered.

In view of the scope of the present paper, the following analysis will be limited to what the authors consider to be the most important aspects of the right of an alleged incapacitated accused to participate effectively in a criminal trial: the right to participate in-person, the right to participate through a representative, and the right to make a statement in court.

The right of a mentally impaired person to participate in the court hearing personally as the background for legal empowerment

Both international and national case law maintain that where proceedings involve an assessment of the personality and character of the accused and their state of mind at the time of the offence, and where their outcome could be of major detriment to the accused (for instance, the court may recognize that the person has committed a criminal offence and impose compulsory medical measures), it is essential to the fairness of the proceedings that the accused be present at the hearing and afforded the opportunity to participate in it (during trial and during the hearing of the appeals) together with their counsel (*Pobornikoff v. Austria* 2000, § 31; *Zana v. Turkey* 1997, §§ 71–73; *Kremzow v. Austria* 1993, § 67; *Vasenin v. Russia* 2016, § 135). In such cases, taking into account the importance of the case for the individual, the courts cannot, in the interests of the fairness of criminal procedure, decide the case without direct observation of the accused individual's behaviour or direct assessment of their testimony (unless this would be objectively impossible owing to the individual's state of health, as will be discussed later). According to the ECtHR, the mere fact that an accused person suffers from a mental illness or has been declared legally incapacitated cannot automatically lead to the exclusion of the exercise of the right of being heard. In this context, the authorities must show requisite diligence in ensuring the accused's right to be present in an effective manner and must act particularly carefully when infringing upon that right, so as not to place the mentally ill at a disadvantage compared to other defendants who do enjoy such a right (*Valeriy Lopata v. Russia* 2012, § 125; *Vasenin v. Russia* 2016, § 139).

It should be noted that the presence of defence counsel and the applicant's legal guardian cannot compensate for the applicant's inability to state their own case by appearing before the court (*Valeriy Lopata v. Russia* 2012, § 128; *Mamedova v. Russia* 2006; *Duda v. Poland* 2006; *Vasenin v. Russia* 2016, § 140). Thus, Article 399 § 2 of the CCP of Lithuania provides that in proceedings concerning compulsory medical treatment the judge examining the case has the right to request the presence of the person concerned if, according to the conclusion of a psychiatric expert, this is not precluded by their mental disorder. According to the established case law, courts should take advantage of this opportunity despite the fact that the person concerned is represented by a lawyer (Decision of the Supreme Court of Lithuania of 7 January 2020 in Criminal Case No. 2K-55-222/2020).

In this context, circumstances where such an accused person had submitted to the court requests to participate in the hearing, or other rational arguments on the merits of the case or on the procedure, but the court did not respond adequately to these requests, can be seen as a violation of the rights of the person in question. For example, the unjustified denial of access to the hearings of the courts to a person who had been subjected to a compulsory medical measure in a specialized mental health institution, ignoring the relevant requests of the person concerned, was one of the grounds for finding a violation of Article 5 § 1 of the Convention in the *D.R. v. Lithuania* (2018, §§ 92–93) case. It was concluded that the decision was passed without ensuring guarantees for the accused against arbitrariness. Courts must make a proper assessment of the accused person's ability to participate usefully in the criminal proceedings against them: the court must assess the evidence and convincingly demonstrate that the accused person's behavior or mental condition precluded them stating their case in open court. A situation where the accused person's inability to participate in the proceedings in-person seems to have resulted not from the seriousness of their mental condition, but rather from the lack of a legal provision in domestic law which recognized their right to attend the court hearings even in a limited number of situations, is inadmissible (*Vasenin v. Russia* 2016, § 139).

In the context of the present case, it is also necessary to mention the possibility to hear the accused person remotely. In order to achieve the goals of sustainable development, new technologies are identified as a means to revolutionize legal services, thereby providing more opportunities to ensure access to justice (Leveraging the SDGs for Inclusive Growth 2016, p. 17). In the opinion of the authors of the present study (Ažubalytė 2022; Ažubalytė and Titko 2022; Zajančkauskienė and Jurka 2021), as well as of many other researchers in criminal proceedings, such a possibility by itself is recognized as not violating the principles of a fair process. However, in the case of a vulnerable person, including a suspect / accused person with a mental disability, this possibility is treated with caution (Byrom 2020). The case law of the ECtHR is being developed in a similar direction: "Similarly, as regards the use of a video link in the proceedings, the Court has held that this form of participation in proceedings is not, as such, incompatible with the notion of a fair and public hearing. However, recourse to this measure in any given case must serve a legitimate aim and the arrangements for the giving of evidence must be compatible with the requirements of respect for due process, as laid down in Article 6. In particular, it must be ensured that the applicant is able to follow the proceedings and to be heard without technical impediments, and that effective and confidential communication with a lawyer is provided for" (*Marcello Viola v. Italy*, §§ 63–67; *Asciutto v. Italy*, §§ 62–73; *Sakhnovskiy v. Russia* [GC], § 98). In the case of accused persons with mental disabilities, their participation in a remote hearing may not be effective, which is why the court needs to assess this alternative to participation in court with particular care.

Similar guarantees for such a person are set out in the context of the right to lodge a complaint against the deprivation of liberty and to participate in the proceedings. The Court reiterates that the existence of the remedy required by Article 5 § 4 of the Convention must be sufficiently certain, not only in theory but also in practice, failing which it will lack the accessibility and effectiveness required for the purposes of that provision (see *Hadi v. Croatia* 2010, § 41, with further references). In this regard, the Court has previously held that a patient compulsorily detained for psychiatric treatment must have the right to seek judicial review of their own motion (*Gorshkov v. Ukraine* 2005,

§ 44, *Rakevich v. Russia* 2003, §§ 43–44; *Raudevs v. Latvia* 2013, § 82; *O.G. v. Latvia* 2014, § 62). More generally, the Court has indicated that it would be inconceivable that Article 5 § 4 of the Convention should afford procedural guarantees to a party whose detention matter is pending before a court without also protecting that which in fact makes it possible to benefit from such guarantees – that is, the possibility to access the court by making an application to review the lawfulness of the detention (*Proshkin v. Russia* 2012, § 92; *O.G. v. Latvia* 2014, § 62). It is beyond doubt that situations can be envisaged where a detainee's mental state or other circumstances would render their personal involvement in detention proceedings impossible. However, the Court has been unwilling to accept the state of mind of a detained person, on its own, as an implied and blanket limitation on their right to institute judicial review proceedings for the purpose of Article 5 § 4 of the Convention, particularly when no assessment of their ability to be personally involved in the proceedings leading to their detention has been performed by the court (*Proshkin v. Russia* 2012, § 92; *O.G. v. Latvia* 2014, § 62).

Nor can an accused person be deprived of the opportunity to participate in criminal proceedings to present their own arguments and other procedural rights (in the context of Article 6 of the Convention) on the sole ground that the person suffers from a mental illness or has been declared incapacitated. These procedural rights can only be limited or deprived where the objective and exhaustive evidence in the case establishes that the accused person's state of mind prevents them from exercising the rights in-person for a significant period of time, which would make the person's participation meaningless.

Thus, in cases of compulsory medical measures, the participation of the person whose case is pending may be limited or eliminated altogether, but only if it is established, on the basis of the evidence, that such participation is not possible due to the accused person's mental health condition in one way or the other, and on the basis of the adequacy of the person's defence (representation) (*Vasenin v. Russia* 2016, § 135). In that case, it must be established that at the relevant time the accused person's mental condition was of such a degree that their personal participation in the proceedings would have been meaningless (*D.D. v. Lithuania* 2012, § 122; *D.R. v. Lithuania* 2018, § 91). In any case, valid reasons must be provided by the domestic court to justify the accused person's exclusion from the proceedings (*M. v. Ukraine* 2012, § 60; *Anatoliy Rudenko v. Ukraine* 2014, § 114; *D.R. v. Lithuania* 2018, § 92). The decision to exclude the accused person must be based on the evidence and arguments pertaining to the current case, rather than any other. The ECtHR has indicated that it would not have been appropriate for the judge to base the decision concerning the person's compulsory hospitalization on an opinion which they had formed in different proceedings (*D.R. v. Lithuania* 2018, § 92).

Scholars have reasonably indicated that determining whether or not a defendant with a mental disorder is able to participate effectively in the proceedings, and the additional procedural measures that need to be instigated, will depend on how the defendant's mental condition manifests itself during the criminal investigation and trial. The mere diagnosis of a mental disorder or disability does not imply that the person involved is unable to participate actively in the proceedings. Whether extra procedural protection measures are taken will therefore depend on the presence of thorough screening mechanisms to evaluate whether or not the mental state of the defendant warrants additional procedural aid. Although it is of crucial importance that these mental states are identified

as early as possible, screening mechanisms should be available throughout the proceedings (since it is possible that, over time, the mental condition of the defendant could evolve, for better or worse) (Verbeke *et al.* 2015, pp. 70–71).

It should be noted that the ECtHR has found violations of Article 6(1) and (3)(c) and Article 5(1) of the Convention in cases of a person with a mental disorder who may have committed a criminal offence not being allowed to participate (present their case) in a trial: without the court having properly assessed their capacity to participate usefully in the criminal proceedings; without reasoned findings as to the need to limit such participation; and without compelling evidence of their behaviour or mental state to support such findings (*Vasenin v. Russia* 2016, § 139; *D.R. v. Lithuania* 2018, §§ 91–95). Inter alia, the case law of the ECtHR shows that any recommendations from experts not to invite a defendant with a mental disability to a court hearing without having provided specific motives do not by themselves justify the person's removal from the process (see, *D.R. v. Lithuania*, §§ 93–95). As has been indicated by the ECtHR, with all respect to the professional expertise of the psychiatrists, the broad powers vested in healthcare professionals are to be counterbalanced by procedures aimed at preventing indiscriminate compulsory hospitalisation (*L.M. v. Latvia* 2011, § 51, *I.N. v. Ukraine* 2016, § 81, *D.R. v. Lithuania* 2018, § 96).

The Supreme Court of Lithuania also notes that, although forensic expert opinions on the person's (non-)attendance at the hearing or the type of compulsory medical measure to be recommended are of particular importance in cases of this kind, their mere existence does not relieve the court of its obligation to assess all the circumstances of the case – namely, the nature of the illness and its treatment, the seriousness of the criminal acts committed, the person's own state of health and the changes in that state of health, and their social dangerousness (Decision of the Supreme Court of Lithuania of 19 May 2021 in Criminal Case No. 2K-121-976/2021). Importantly, when deciding whether an accused person is fit to stand trial in-person, the court must be in possession of information about their condition that is as up-to-date as possible at the time of the trial. For example, the Supreme Court of Lithuania pointed out that the court, without taking into account the fact that almost a year had elapsed since the expert examination of a person's mental health condition, did not have and did not request any information about the person's state of mental health (its possible change) during the period of time in question, did not investigate whether the condition of the person's mental health condition was such as to prevent them from being able to give an explanation and to be heard before the court, and failed to consider at all the person's request for their participation in the case during the hearing of the appellate proceedings (Decision of the Supreme Court of Lithuania of 7 January 2020 in Criminal Case No. 2K-55-222/2020). Such case law of national courts is in line with the position of the ECtHR. Courts must, firstly, consider the reasoned requests of the defence for a new expert examination and, secondly, state the reasons why they are satisfied that the person's mental state is such that they are unfit to stand trial or that they need to be subjected to compulsory medical measures. The domestic courts in their decisions have to address the issue of the applicant's subsequent treatment at all stages and provide valid reasons for dismissing the request for a new psychiatric assessment. In a contrasting case, the ECtHR recognized that domestic courts in their decisions did not adequately demonstrate that at the time when the decision to hospitalize an applicant was adopted, their condition was such as to require compulsory treatment (*M. v. Ukraine* 2012, § 80, *D.R. v. Lithuania* 2018, § 93).

At the same time, attention should also be drawn to the fact that circular reasoning is not uncommon in such cases, according to which a person's reluctance to undergo psychiatric hospitalization demonstrates their inability to appreciate their condition and thereby yields yet another reason for compulsory hospitalization. Such circular reasoning is incompatible with the principle of the effective protection of Convention rights (*Plesó v. Hungary* 2012, § 67; *D.R. v. Lithuania* 2018, § 95).

In conclusion, the right of an accused person to be present in court cannot be restricted or denied on the sole ground that they are involved in proceedings of a criminal nature in which the question of their compulsory hospitalization is being discussed. In any case, that participation must be meaningful. An accused person with an expert-diagnosed mental disorder can only participate effectively in a court hearing involving criminal charges and compulsory treatment (including compulsory hospitalization) if they are able to grasp the substance of the charges and the nature of the proceedings and avail themselves of third-party assistance, including legal assistance. Therefore, a fundamental prerequisite for the exercise of these rights is the person's right to know what they are charged with.

The ECtHR has indicated that the right to be informed of the nature and the cause of an accusation must be considered in the light of the accused's right to prepare their defence (*Pélissier and Sassi v. France* [GC] 1999, § 54; *Dallos v. Hungary* 2001, § 47). Article 6 § 3 (a) points to the need for special attention to be paid to the notification of the "accusation" to the defendant. The particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against them (*Pélissier and Sassi v. France* [GC] 1999, § 51; *Kamasinski v. Austria* 1989, § 79). In the case of an accused person with mental difficulties, the authorities are required to take additional steps to enable the person to be informed in detail of the nature and cause of the accusation against them (*Vaudelle v. France* 2001, § 65).

Within EU law, it is generally considered that the right to be informed must also be implemented in the case of a defendant with disabilities. However, the content of the right must be modified with regard to the health condition of the vulnerable defendant. Most importantly, the person to whom the information is intended must be able receive it and understand it (Resolution of the Council of 30 November 2009). In case C-467/1, the General Council emphasized that the term *vulnerable defendant* covers persons suffering from serious mental disorders who may have virtually no understanding of the information presented to them. That the prescribed information, which must be provided to the suspect or accused person regarding their rights, may be subject to certain modifications on account of the suspect or accused person's psychiatric state is another matter. Thus, it is the mental state of the suspected or accused person that may lead to adjustments in the information on their rights that must be provided. In the case of certain mental disorders, it would be redundant to give the person concerned a printed sheet setting out their rights because that person would not be capable of understanding them, and both that formality and the notification of the charges against the accused must be carried out vis-à-vis their defence counsel, because the right of access to a lawyer is absolutely irreplaceable (Opinion of Advocate General Campos Sánchez-Bordona. C 467/18, 2019, §§ 66–67).

The participation of a defendant with mental disabilities in a criminal court through a representative: sustainable support in the exercise of legal capacity

As was mentioned earlier, in research papers the essence of Article 12 of the CRPD is presented as a prohibition of the discriminatory denial of legal capacity, and at the same time the requirement that support be provided in the exercise of legal capacity where needed (Beqiraj *et al.* 2017, p. 17). This model is frequently referred to as "supported decision-making" (Jeste *et al.* 2018, pp. 28–40). It recognizes that a person with disabilities should remain the primary decision-maker, and simultaneously acknowledges that improving support from multiple sources can bolster the autonomy of persons with disabilities (Beqiraj *et al.* 2017, p. 17). The Committee on the Rights of Persons with Disabilities points out that support in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making. Article 12(3) does not specify the form that the support should take. *Support* is a broad term that encompasses both informal and formal support arrangements, of varying types and intensity (Committee on the Rights of Persons with Disabilities. General comment No. 1, 2014, § 17). Support can be provided in different degrees (e.g., translation services or peer advocacy) and from different people or institutions (e.g., a trusted friend or legal counsel). Support also includes: measures relating to universal design and accessibility (i.e., when public and private actors (e.g., banks) provide information in an understandable format or provide professional sign language interpretation); the recognition of diverse, nonconventional communication methods (e.g., nonverbal communication); and the possibility for persons with disabilities to engage in advance planning (i.e., stating their will and preferences in advance), which will be followed at a later date when they may not be in a position to communicate their intentions (Beqiraj *et al.* 2017, pp. 17–18; see Committee on the Rights of Persons with Disabilities. General comment No. 1 2014, § 17).

All of the above mechanisms are therefore relevant to the general right of persons with disabilities to a judicial remedy. Concerns have been raised in research papers as to the effect that the legal capacity of persons with disabilities is most often denied or restricted through guardianship arrangements, under which they may lose some or all of their civil rights (Legal Capacity in Europe 2013, p. 18, Beqiraj *et al.* 2017, p. 18). However, the authors of the present research hold the view that when dealing with the issue of compulsory hospitalization (or other coercive medical treatment) of a person in a criminal court, it is essential to ensure that the alleged incapacitated accused person receives adequate legal representation. This is one of the fundamental procedural rights of a person, and is particularly important in cases where a lawyer represents a person who lacks legal capacity. All other mechanisms for the participation of any representatives of such persons including an appropriate adult (the AA) – a relative, guardian or other person responsible for the defendant's care or custody (Verbeke *et al.* 2015, p. 72) – should be subsidiary (supplementary).

Thus, in cases of this kind, it is often the case that, on the basis of the experts' reports, the court has to decide that it is not possible, without additional measures, to ensure the provision of information to such a person, or to hear them in-person in court. In that case, when additional measures are needed, it is up to the member states, and not the defendant, to provide the necessary assistance (*G. v. France*, § 52). Researchers indicate that this mirrors the concept of reasonable

accommodation stemming from the UN Convention on the Rights of Persons with Disabilities (Verbeke *et al.* 2015, p. 70).

In this context, the ECtHR specifically notes the importance of proper information about the charges: in case the person concerned has a mental disorder, the national authorities should take additional steps so that the person can be properly informed about the nature and the cause of the charges against them, i.e., they could order the person to attend an appointment with a psychiatrist, or arrange for them to be represented by a supervisor or a lawyer (*Vaudelle v. France* 2001, § 65). In the context of the application of the EU directives on procedural safeguards for individuals, it should also be noted that where a person suffers from a mental illness which results in severe mental disability, it may be appropriate to make use of a third party acting on their behalf for the purposes of the transmission of information (Opinion of Advocate General Campos Sánchez-Bordona. Case C 467/18, 2019, § 69). The recommendations of the Commissions note that accused persons with disabilities should receive upon request information concerning their procedural rights in a format accessible to them. At the same time, it has been noted that vulnerable persons, and, if necessary, their legal representative or an appropriate adult, should be informed of their specific procedural rights (Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, §§ 8– 9).

In any event, national criminal procedural law must provide for solutions to supplement the procedural capacity of persons who cannot act in their own name. The algorithm of the CCP of the Republic of Lithuania is as follows: the presence of a defence counsel is mandatory if the accused has a physical or mental disability that prevents them from defending themselves (limited fitness to stand trial). In this case, the person is presumed to be competent and the criminal proceedings may result in a conviction. If the person's mental disability is such that they were incapacitated at the time of the offence, or if they have fallen ill during the trial and are completely incapable of understanding the proceedings (unfitness to stand trial), they must be appointed a lawyer without delay, and a close relative or family member may also be present. In this case, the process may result in the prescription of compulsory medical measures, including compulsory hospitalization. In criminal proceedings concerning the imposition of compulsory medical measures, the legal representative, family members or close relatives of a person with a mental disability have the right to participate in the proceedings and to exercise a wide range of procedural rights (to contest the act committed by the person, the person's state of health, the medical measures under consideration, to lodge an appeal and cassation appeal, etc.) (Articles 399, 404 and 405 of the CCP of the Republic of Lithuania).

The consistent case law of the ECtHR claims that "the aims pursued by the right of access to a lawyer include the following: prevention of a miscarriage of justice and, above all, the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused; counterweight to the vulnerability of suspects in police custody; fundamental safeguard against coercion and ill-treatment of suspects by the police; ensuring respect for the right of an accused not to incriminate him/herself and to remain silent, which can – just as the right of access to a lawyer as such – be guaranteed only if he or she is properly notified of these rights. In this connection, immediate access to a lawyer able to provide information about procedural rights is likely to prevent unfairness arising from the lack of appropriate information on rights" (*Beuze*

v. Belgium [GC] 2018, §§ 125–130). When examining the proceedings as a whole, the fact that the applicant was particularly vulnerable, by reason of their mental capacity, should be taken into account (*Ibrahim and Others v. the United Kingdom* [GC] 2016, § 274; *Beuze v. Belgium* [GC] 2018, § 150; *Sitnevskiy and Chaykovskiy v. Ukraine* 2016, §§ 78–80). Regarding a person's right to waive the right to remain silent, research papers also maintain that early access to counsel most effectively assures that a mentally disabled person's waiver of constitutional rights is voluntary, knowing and intelligent (Praiss 1989, pp. 431–465).

It is also important to note that only a properly informed accused who has the procedural capacity to act can waive the right to a lawyer. This conclusion is drawn based on a general rule according to which any purported waiver of a right of access to a lawyer must satisfy the "knowing and intelligent waiver" standard in ECtHR case law (*Ibrahim and Others v. the United Kingdom* [GC] 2016, § 272; *Pishchalnikov v. Russia* 2009, § 77). In the EU law context, it is also acknowledged that the person's mental state is the basis for strengthening the right of access to a lawyer in the case of a serious offence because, for example, the suspect or accused person will not be capable of lawfully waiving the right to have a lawyer present (Article 9 of Directive 2013/48) (Opinion of Advocate General Campos Sánchez-Bordona. Case C 467/18, 2019, § 81). Thus, an accused person whose procedural capacity is limited by reason of a mental disability, or who is incapacitated altogether because of the severity of the disability, is presumably not in a position to refuse to be represented by an appointed defence lawyer, nor are they in a position to give their lawyer binding instructions.

In Lithuania, the court is not obliged to accept a waiver of a defence lawyer from an accused person who, due to mental disability, is unable to exercise their right to defence (Article 52(2) of the CCP); the defence lawyer has the right to carry out certain actions (e.g., to lodge an appeal and cassation appeal) in spite of the will of the defendant, subject to compulsory medical measures (Article 312(6) of the CCP; Article 367(2) of the CCP). Such a decision is usually based on a mandatory medical expert's opinion that the accused person does not understand the proceedings and their legal significance, and is unable to participate effectively, as well as on other material in the case.

In the case law of the US, it is emphasized that when a defendant seeks to waive the right to a lawyer, a determination that they are competent to stand trial is not enough. The waiver must be intelligent and voluntary. In addition, a defendant should understand the potential dangers and disadvantages of self-representation (*Indiana v. Edwards* 2008, *Holland v. Florida* 2014). Thus, a judge would determine whether the symptoms of mental disability rose to a level that warranted a finding of incompetence to proceed per se. Furthermore, mental health professionals must be aware of the competencies that are required when conducting various types of forensic evaluations. They must also understand, and effectively convey to the court, how specific symptoms of mental illness might affect each particular type of competency (Rohlehr and Pinals 2015, p. 387).

As stated in the context of sustainability, many countries are shifting strategies toward access to legal services and justice as a continuum of services, including access to understandable legal information and to legal representation (Leveraging the SDGs for Inclusive Growth 2016, p. 15). On the other hand, it is recognized that due to financial, organizational and other reasons, many countries struggle to maintain an affordable and sustainable legal aid system (Barendrecht and Van den Biggelaar 2009). In the analyzed case, despite the objective difficulties it is the State that has to fulfil its positive obligation to provide a timely and effective remedy. Inter alia, the State is under

an obligation to provide legal aid "where the interests of justice so require" (*Quaranta v. Switzerland* 1991, § 27).

The ECtHR's case law also states that the legal representation (legal defence) of a person suffering from a mental illness must not be of doubtful effectiveness, and the legal services must be of high quality. While the effectiveness of the legal assistance does not necessarily call for a proactive approach on behalf of a lawyer and the quality of legal services cannot be measured by the number of applications or objections lodged by counsel with a court, manifestly passive conduct might at least give rise to serious doubts about the efficiency of the defence. This is particularly so if the accused strongly disputes the accusation and challenges evidence or is unable to attend the trial and ensure their defence in-person (*Vasenin v. Russia* 2016, § 142). Passive defence occurs, for instance, when a lawyer and legal guardian: appear to have mirrored the position of the prosecution; do not request the consideration of the essential arguments or requests of the defendant (regarding participation in the process, alibi, etc.); do not challenge the admissibility of evidence; fail to lodge an appeal, etc. When passive defence has sufficient shortcomings, it may be (and often is) recognised as inefficient, i.e., not compliant with the requirements of Article 6 (1) and (3) (c) of the Convention (*Vasenin v. Russia* 2016, §§ 144–145). The ECtHR judgments also emphasize that the appointment of a defence lawyer does not in itself mean that a mentally ill person has been provided with the necessary legal assistance; the effectiveness of the legal representation of such persons requires enhanced scrutiny by the examining court (*Vasenin v. Russia* 2016, §§ 142–147). National courts have similar views on the legal aid provided by defence counsel (Decision of the Supreme Court of Lithuania of 5 June 2014 in Civil Case No. 3K-3-302/2014; Decision of the Supreme Court of Lithuania of 7 January 2020 in Criminal Case No. 2K-55-222/2020).

The right of the alleged incapacitated person to provide explanations and their assessment

Even if the right of an alleged incapacitated person to be present in court is fully exercised, the question arises as to the legal significance of their explanations or statements. When answering this question, it is important to take into account that some individuals with metal disorders are likely to have difficulties in understanding and veraciously responding to questions, since they may have difficulties in recalling and processing information. They are also more likely to make damaging assertions, including false confessions, since they may be acquiescent and suggestible and, under pressure, may try to appease other people or may incriminate themselves (Nemitz and Bean 2001, pp. 595–605 cited Verbeke *et al.* 2015, p. 69). This is particularly important because the right to a fair trial in criminal cases includes the right for anyone charged with a criminal offence to remain silent and not to contribute to incriminating themselves (Verbeke *et al.* 2015, p. 69).

The presence of an accused person with a mental disability in court has certain specificities, which is why their explanations usually have a different legal significance than the accused's testimony given in court. It should be stressed that, in accordance with the principle of non-self-incrimination, no person may be compelled to testify against themselves in criminal proceedings. However, the right to be heard in court is, of course, the right of every person subject to criminal proceedings.

The recommendations of the European Council regarding persons with mental disorders note that the court should take into account the opinion of the person concerned and act in accordance with procedures provided by law based on the principle that the person concerned should be seen and consulted (Recommendation Rec(2004)10, Article 20). As has been mentioned, the ECtHR has noted that the participation of a person of unsound mind is therefore necessary, not only to enable them to present their own case, but also to allow the judge to have at least brief visual contact with them, and preferably question them in order to form a personal opinion about their mental capacity (*Shtukaturov v. Russia* 2008, § 72). In cases where the potential finding of the applicant being of unsound mind is, by its very nature, largely based on their personality, their statements would have been an important part of the presentation of their case (*D.D. v. Lithuania* 2012, § 120; *A.N. v. Lithuania* 2016, § 96; The Recommendation No. R (99) 4 (1999), Principle 13).

In Lithuania, criminal procedure law does not require a person with a mental disorder to be heard (give testimony) in court. It should be noted that the Supreme Court of Lithuania, referring to the jurisprudence of the ECtHR, has formed the practice that such a regulation does not release the court from the obligation to take all measures, including listening to the person themselves, when deciding on their possibility of participating in the court. The Supreme Court of Lithuania has noted that "although Article 400(2) of the Code of Criminal Procedure does not require a person with a mental disorder to be interviewed, and, given his/her perceptual deficiencies, the testimony of such a person is not a source of evidence, but his/her explanations, if possible, may help the court to evaluate the other evidence in the case and to clarify more fully the facts of the case" (Decision of the Supreme Court of Lithuania of 7 January 2020 in Criminal Case No. 2K-55-222/2020). Thus, the requirement to protect the rights of the individual during criminal proceedings (Article 44 of the CCP) implies the necessity of carefully checking whether, at the time of the proceedings in question, the type and degree of a person's mental disorder preclude their participation, access to the case file, the possibility of submitting explanations and other information, as the mere fact that a person suffers from a mental disorder does not, in itself, exclude the possibility of them exercising the rights of procedure, including the right to be heard. Such an examination and decision, which excludes a person from taking part in one or another procedural step, or, more generally, from taking part in the criminal proceedings in-person, must be based on objective and convincing data on the accused person's actual state of mental health, which may change over time, depending, for example, on medical treatment. Thus, an actual mental disorder that allows or prevents an individual from participating in the process at a specific time relevant for the case (e.g., submitting explanations in the court hearing), is one of the circumstances that need to be proved (Article 395(2) and (3) of the CCP). Therefore, this circumstance describing the person must be established by referring to the data of the case, in compliance with the rules on providing evidence set forth by the CCP (Decision of the Supreme Court of Lithuania of 7 January 2020 in Criminal Case No. 2K-55-222/2020; Decision of the Supreme Court of Lithuania of 3 February 2021 in Criminal Case No. 2K-5-976/2021). When ordering a forensic psychiatric examination of a suspect or accused, Lithuanian courts ask the following questions of psychiatric experts: Is the defendant able to stand before the court? Is the accused, due to their mental condition, capable of understanding the circumstances relevant to the proceedings and giving evidence? (Examples of questions to judicial psychiatry expert examination).

The authors of this research conclude that such a defendant's explanations in relation to their criminal offence should be assessed very carefully, considering the vulnerable accused person's capacity to understand and exercise their right not to testify against themselves. Meanwhile, the person's explanations about their state of health, attitude towards the treatment, etc., together with the other evidence in the case, including expert reports, should help the court to decide on the choice of the appropriate medical measure, if any.

Conclusions

International and EU legal standards for persons with disabilities, including defendants with mental disabilities and alleged incapacitated defendants, are based on the principles of equality and non-discrimination. The right of persons with disabilities to access justice and its implementation should be also seen as an important factor in the sustainable development of society. Effective implementation of such standards ensures access to justice, i.e., by enabling accused persons with mental disabilities to participate directly or through representatives in criminal proceedings.

Historically, certain models have been defined in relation to the assessment of a defendant's mental capacity: next to the "functional approach" model that replaced the „status approach," there are some newly emerging models in the "outcomes approach" and "disability-neutral doctrines." The present research assumes that, due to the specificity of criminal proceedings, it is the functional approach model, with appropriate adjustments, that should be applied to the issue of the content of the fitness to stand trial of a defendant with a mental disability and of the fitness to stand trial of a person who has committed a criminal offence in a state of insanity.

The content of fitness to stand trial for both a mentally disabled defendant and a person who may have committed a criminal offence in a state of insanity includes the criteria of intellect and will. The criterion of intellect determines the person's ability to grasp the nature and significance of the offence and of their procedural position; the criterion of will determines the person's ability to independently exercise their procedural rights and obligations. This justification of the content of a person's fitness to stand trial makes it possible to distinguish: 1) limited fitness to stand trial; and 2) unfitness to stand trial.

Although different legal traditions may interpret and assess the content of "fitness to stand trial" differently, it should nevertheless be considered universally accepted. The overall concept is that it is not enough for a person with a mental disability to have the "capacity to understand the process," but the defendant must also be able to participate effectively in the process.

The accused person with a mental disability must be given the opportunity to be heard, either in-person or, where necessary, through some form of representation. This guarantee is not only an important procedural element of an accused person's right to a court, but also makes it possible to ensure that the judgment is substantively fair.

A defendant cannot be deprived of the right to participate in criminal proceedings, to present their own arguments and other procedural rights on the grounds that the defendant has been declared mentally incapacitated or is suffering from a mental illness at the time of trial. These procedural rights can only be limited or deprived where the data of the case establishes that the person's

state of mind prevents them from exercising their rights in-person for a significant period of time, which would make the person's participation meaningless. Courts must give reasons for their decision to restrict an accused person's right to participate in court, and they cannot rely solely on the opinions of medical experts.

When dealing with the issue of compulsory committal to a psychiatric hospital (or other compulsory medical measures) for an accused person with a mental disability in a criminal court, it is essential, first and foremost, to ensure that the individual is provided with timely and adequate legal assistance. All other mechanisms for the participation of any representatives of such persons, including an appropriate adult, should be subsidiary (supplementary). In that case, the state has a positive obligation to ensure effective legal aid and, if necessary, to limit the person's right to refuse legal aid.

Any testimonies and explanations presented by a mentally disabled accused person to the court concerning their offence should be assessed with particular care, taking into account their capacity to understand the legal significance of the explanations and their right not to testify against themselves. Meanwhile, the accused person's explanations about their state of health, attitude towards treatment, etc., together with the other evidence in the case, including expert reports, should help the court to decide on the choice of appropriate medical measure, if any.

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III.5. ENCOURAGING COORDINATED VULNERABILITY DISCLOSURE: THE PROTECTION OF VULNERABILITY REPORTERS*

Information and communication technologies can contribute to the achievement of all Sustainable Development Goals; however, they are not immune to vulnerabilities that may result in cybercrimes. Ill-intentioned actors worldwide exploit vulnerabilities – weaknesses, susceptibilities, or flaws in an asset, system, process, or control that can be exploited by cyber threats in both the private and public sectors. A number of countries around the world have approached this problem through policies of coordinated vulnerability disclosure (CVD).

This section of the research aims to establish the differences in the scope of legal protection provided for vulnerability finders at the national level, particularly considering possible negative consequences once the vulnerability is established and revealed. It discusses legal provisions regulating the process of CVD and criminal law provisions ensuring that vulnerability researchers do not face criminal liability. The analysis is limited to an overview of the legislative perspectives of different EU countries, as existing regulation is compared with the aim of establishing the scope of a common approach existing among the Member States. Furthermore, this section proceeds with a review of existing regulation in the EU in this field, and continues with a discussion on the added value of EU-wide regulation obliging Member States to empower CVD by establishing legal regulation protecting vulnerability finders.

There is no uniform approach toward the protection of vulnerability researchers in the European Union, primarily because only very few Member States have a comprehensive CVD policy, which includes different aspects of the protection of vulnerability researchers. The legal protection of a researcher may incorporate different aspects, such as the acknowledgment of the vulnerability researcher or the right to stay anonymous, as well as the right to receive remuneration for their efforts. Due to the patchy legal framework in different Member States, the scope of these rights varies significantly both in existing national policies and the practices of private organizations. The

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NIS 2 Directive will clearly change the patchy regulatory landscape at the European level by harmonizing approaches towards CVD, since it requires Member States to implement a national CVD policy. Additionally, under the new regulation Member States will have to nominate their CSIRTs as trusted intermediaries between the reporting researcher and the entities providing ICT services likely to be affected by the vulnerability, which will harmonize the status of national CSIRT within CVD policy. Additionally, since the need for a common approach toward the criminal liability of security researchers relates to the harmonization of criminal law provisions, the revision of the Cybercrime Directive would be a proper choice.

The sustainable development of infrastructure, as sought by the United Nations (hereinafter – UN) in the agenda for sustainable development (United Nations 2015; OECD 2021), requires resilient information and communication technology (ICT) solutions. In the view of the International Telecommunication Union (hereinafter – ITU) (2021), ICT can help advance progress towards each of the 17 Sustainable Development Goals (SDGs) identified by the UN. The efficiency and affordability of ICT infrastructure and services are key factors helping countries to involve themselves in the digital economy, leading to the increase of their economic competitiveness and well-being. The majority of the world's 42 least-developed countries have demonstrated monumental improvement towards the sustainable development of infrastructure (Goal 9), with meaningful effects in financial inclusion, poverty reduction and health improvement. The ITU considers that ICT equips states with measures to provide first-rate goods and services in such areas as health care, education, finance, commerce, governance, and agriculture. These technologies can contribute to diminishing poverty and hunger, improve health, set up new jobs, mitigate climate change, increase energy efficiency, and render cities and communities increasingly sustainable. The COVID-19 pandemic has expanded connectivity due to more individuals moving online for work, studying or staying in touch with family and friends over lockdowns and confinement. On the other hand, the pandemic and associated economic decline have resulted in additional problems for the accomplishment of the SDGs. Since the international community has vowed to learn from the global pandemic challenge and "build back better," expanded connectivity and ICT may prove to be a major part of doing so by empowering countries to employ increased connectivity for better engagement with their citizens in achieving the SDGs (ITU 2021).

However, ICT is not immune to vulnerabilities. Any software may contain bugs or security flaws which can be exploited to cause harm. In 2022, 22,500 new common IT vulnerabilities and exposures were reported – the highest annual number to date (Statista 2022). Research from the National Telecommunications and Information Administration (hereinafter – NTIA) (2016) demonstrates that many finders manage to identify vulnerabilities in the course of their daily online activities. Often, they do not intentionally search for them in IT systems (Kranenbarg et al. 2018). Having found a vulnerability, a finder can choose to do nothing, take advantage of the vulnerability or auction it on the black market, or decide to reveal the vulnerability publicly. Alternatively, the finder can privately disclose the vulnerability under the terms of existing policies. The responses of organizations and the criminal justice system to such a disclosure, as well as the individual motivations of finders, will play a pivotal role in finders' choices (Kranenbarg et al. 2018).

As observed above, IT vulnerabilities may lead to cybercrimes. According to Eurobarometer data, 28% of European small and medium-sized enterprises (hereinafter – SMEs) experienced at

least one type of cybercrime in 2021 (European Commission 2022). Businesses are mostly concerned with hacking online bank accounts, phishing, account takeover, or impersonation attacks, as well as viruses and spyware or malware (European Commission 2022). As reported by the European Union Agency for Network and Information Security (hereinafter – ENISA), the frequency of distributed denial-of-service (hereinafter – DDoS) and ransomware attacks increased in 2020 – the latter by 150% (ENISA 2021), which continued to grow in 2022 (ENISA 2022b). On average, ransomware attacks caused 18 days of downtime for organizations, and the amounts of payment extracted doubled in this period (Group-IB 2021). The threat of leaking the data that was exfiltrated by hackers increased from 8.7% in 2020 to 81% in 2021 (ENISA 2021). Recent actions by Russia have shown that cyberattacks are also used as a measure of hybrid warfare against private and public institutions, seeking harm and the paralysis of their functions. In June 2022, dozens of Lithuanian institutions, such as the State Tax Inspectorate and Lithuanian Railways, were attacked, affecting their ability to perform their functions (Lithuanian National Radio and Television 2022).

The prevention of cyber vulnerabilities is thus a problem that requires immediate attention and concrete solutions. Since the exploitation of network and information system vulnerabilities can lead to serious damage and disruption, the rapid identification and remediation of these vulnerabilities is a crucial factor in reducing cybersecurity risks (Council of the European Union 2021). A framework for the early disclosure of vulnerabilities, particularly before the damage is done, is one such solution currently under development in the EU.

ENISA (2016) summarizes the ways in which vulnerability disclosure can occur. Firstly, non-disclosure marks an event where the discoverer keeps the vulnerability uncovered and does not report it either to the public or to the vendor, having an intention to the sell such a vulnerability to a third party. The second option is full disclosure, where the discoverer publicly reveals the vulnerability. Full disclosure does not provide the entity in question adequate warning and time to tackle the vulnerability, and renders information concerning the vulnerability available to possible attackers seeking harm. It does not differentiate between recipients or audience. Responsible disclosure is the last form of vulnerability disclosure. ENISA (2016) observes that the term itself is regarded controversial since it contains a normative connotation: responsible. Therefore, the use of the term coordinated vulnerability disclosure (hereinafter – CVD) is considered to be preferable due to its more neutral character. Both of these concepts refer to cases where the discoverer reveals the vulnerability directly to the vendor, seeking to assist the vendor in resolving it. Having resolved the issue, the vendor declares the vulnerability together with a patch for users. The fact of the vulnerability only becomes public after a solution is available (ENISA 2016).

The International Organization for Standardization (hereinafter – ISO) describes CVD as a process that allows IT vendors and finders of vulnerabilities to cooperatively discover solutions to reduce the risk associated with public vulnerabilities (ISO 2018). Once a finder who discovers a flaw in a system informs the developer (vendor, provider) of the system about a flaw and potential fixes, this allows the developer to take mitigation measures (patches, traffic monitoring, blocking) to eliminate or reduce the risk that the vulnerability might be used by an attacker (Schmitz-Berndt & Schiffner 2021).

Given the gravity of the problem, the first policies and regulations were introduced over the last decade. Various Member States have approached the question under scrutiny in a different

manner. Some countries (such as France or Poland) assure researchers via legal provisions that they will not face criminal liability, while others do not provide a clear legal ground for such an exemption (for instance, Germany or Denmark). Other countries fear that the inclusion of CVD in national laws may enable hackers to access government systems without being held accountable (CEPS 2018). On the other hand, the lack of clear policy and legal provisions which make sure that researchers will not be criminally liable creates an obstacle for researchers to follow CVD procedures (CEPS 2018). Importantly, it is currently not a crime to fail to report a vulnerability if one is identified by a finder. However, the use of such a vulnerability for criminal hacking is very much illegal, and is regarded as part of the hacking process (Kranenbarg et al. 2018).

A lack of regulation in some states determines that voluntary schemes are brought to life by private companies. Since hackers frequently discover such flaws and, without the vendor's consent, disclose step-by-step instructions regarding the vulnerability to the public, disregarding the possible IT security risk, some vendors have introduced responsible disclosure policies or "bug bounty" programs for the "friendly" offensive security community (Householder & Spring 2022) – so-called "white hat" (and "grey hat") hackers (Kinis 2018). The latter fall under the umbrella term of hacking performed in search of vulnerabilities (such as bugs, or gaps) in IT systems, aiming to alert owners of risks that they are not aware of (TGS Baltics 2022). These activities are exercised for good – to help patch exploits and increase the security of IT systems (TGS Baltics 2022). White hat hacking, i.e., hacking with the system owner's permission to test the resilience of a system, usually raises no critical legal issues (TGS Baltics 2022). In contrast, grey hat hacking without malicious intent creates more legal ambiguity (TGS Baltics 2022). The legal vacuum and other technicalities may subject such individuals to uncertainty: breaching an IT system without the owner's prior approval may, depending on the system and jurisdiction, amount to administrative or even criminal liability (TGS Baltics 2022). Research from ENISA (2018) demonstrates that finders or hackers, also referred to as vulnerability researchers, have generally been discriminated against and subject to mistrust – irrespective of whether their motives are transparent or whether they tend to be malicious. There have been many instances where, having reported vulnerabilities, finders were not listened to or were met with hostility from vendors and threats of prosecution. The number and quality of vulnerabilities identified, disclosed and ultimately mitigated may therefore be adversely affected by the fear of being punished (ENISA 2018). According to the research of the NTIA, three out of five researchers are concerned that they may be legally prosecuted if they reveal their discoveries (NTIA 2016).

This situation leaves hackers in a predicament. On the one hand, they are encouraged by companies to disclose any exploits in exchange for a reward. On the other hand, they risk being prosecuted on the grounds of the formal composition of the crime. The owner of the IT system also suffers: even if a system exploit is found and reported, such an action may formally amount to a data security breach subject to notification, resulting in additional administrative hurdles and even further formalities (TGS Baltics 2022). The clarity of the law governing the activities of vulnerability researchers is undeniably important, as coordinated disclosure is undermined if researchers consider that publishing discovered weaknesses could result in legal risk for them. Therefore, advancing legal certainty is essential for the successful use of CVD and the improvement of systems' resilience (NTIA 2016).

Various computer-related crimes are punishable under the national criminal laws of different countries. The approach towards these crimes in the EU was harmonized by the Cybercrime Directive (Directive (EU) 2013/40/EU). Several other regulatory initiatives were undertaken to fight these crimes and prevent them, where CVD was recognized as one of the more effective means for improving the security of information systems (Directive (EU) 2016/1148). Despite these efforts, cybersecurity experts doubt whether the CVD mechanism may be effective at the EU level without harmonization efforts (YesWeHack 2020; ENISA 2022a). Therefore, it is important not only to understand the added value of EU-wide regulation, but also to identify which EU document is the most suitable for the purpose of ensuring legal certainty for vulnerability finders.

Given the issues mentioned above, the main goal of the following section of the research is to establish the differences in the scope of legal protection provided for vulnerability finders at the national level – particularly considering possible negative consequences once a vulnerability is established and revealed. Further, it discusses legal provisions regulating the process of CVD and criminal law provisions ensuring that vulnerability researchers will not face criminal liability. Analysis is limited to an overview of the legislative perspectives of different EU countries, as the existing regulation is compared with the aim of establishing the scope of a common approach existing among Member States. Furthermore, the following section proceeds with a review of existing regulation in the EU in this field, and continues with a discussion on the possible need and added value of EU-wide regulation obliging Member States to empower CVD by establishing legal regulation protecting vulnerability finders.

National approaches: From policy to legislative efforts

Based on the way in which countries approach the protection of vulnerability researchers – issues related to criminal liability in particular – countries can be split into several groups. The first group is composed of Member States that have established a legislative framework guaranteeing that a researcher who discloses vulnerability following strict conditions set by law will not face criminal liability. For instance, France, Poland, and Lithuania belong to this group of countries. Although the approaches among the countries in this group differ, all of them ensure that if a researcher follows a strictly established national procedure, they will not suffer any legal consequences.

For instance, in France, the law guarantees that a vulnerability discovery will not be prosecuted, even if it usually constitutes a crime. Article L.2321-4 of the French Defence Code (The National Assembly and the Senate of France 2016a) ensures that a researcher or informant acting in good faith and transmitting a vulnerability to the Agence Nationale de la Securité des Systèmes d'information (hereinafter – ANSSI) will not face criminal liability (ANSSI 2022). Article L.2321-4 of the Defence Code was reviewed in Article 47 of the Law for the Digital Republic, which established a CVD policy in 2016 (The National Assembly and the Senate of France 2016b).

Article 17 of the Cybersecurity Law of Lithuania, effective since June 28, 2021, guarantees that the search for and disclosure of vulnerabilities will be considered lawful and will not result in criminal liability for the person who committed such an act only if the search for vulnerabilities is carried out in line with the restrictions provided in the law (Lietuvos Respublikos Seimas 2021). No

respective changes were made along with the establishment of this regulation in the Criminal Code of Lithuania.

Although there is no consistent policy for managing CVD in Poland (ENISA 2022a), to improve the protection of researchers, security breaches in Poland were partially decriminalized in 2017 (ENISA 2022a). Articles 269b and 269c of the Penal Code of Poland establish the conditions where criminal liability does not arise under Articles 269b, 267(2) and 269(a): i.e., if a person acts exclusively for the protection of an information system, an ICT system, or an ICT network, or for developing a method for such protection (in case of both articles), has immediately informed the holder of that system or network of the revealed threats, and their actions did not violate public or private interests or did not do any damage (additionally required by Article 269c) (Radoniewicz 2021).

Latvia intended to change its Law on the Security of Information Systems in 2016 to establish a legitimate background for the responsible vulnerability disclosure process by amending Section 241(3) of the Criminal Code of Latvia (Kinis 2018), but was unsuccessful. The amendment was supposed to guarantee that a person who submits a responsible vulnerability disclosure report to the computer emergency response team (hereinafter – CERT) regarding security flaws in systems which process information related to the political, military, economic, social, and other security of the State and acted in compliance with responsible vulnerability disclosure policy will not be prosecuted (Kinis 2018).

Ireland does not have a policy in place since, according to the Irish government, the issue should be regulated at the EU level (ENISA 2022a). However, legislation partially implementing the Cybercrime Directive leaves some room for the protection of vulnerability researchers. Under the Criminal Justice (Offences Relating to Information Systems) Act 2017 (Department of Justice 2017), which took effect on June 12, 2017, and modernizes Irish law on cybercrime, each of the offenses established in the Act requires that the absence of lawful permission is proven. In addition, the offenses related to hacking and unsolicited penetration testing carry a further qualification: where a person or company had a "reasonable excuse." This term is not defined in the law, and thus its interpretation is left to case-law (Global Legal Group 2021).

A second group represents countries such as the Netherlands and Belgium, which have CVD policies but where the law does not provide any specific guarantee that the person disclosing the vulnerability does not face criminal liability. Here, protection is applied in practice based on the concept that a criminal investigation is not instituted in case of legal rehabilitation between the discloser and the owner of the IT system.

The Netherlands is often presented as a CVD pioneer (Ķinis 2018). Although security researchers in the Netherlands have been able to disclose vulnerabilities in a coordinated fashion since 2008 (Stevens et al. 2021), the first state-level responsible disclosure guidelines were published in 2013 by the National Cyber Security Centre (2019). These guidelines suggested that organizations themselves could agree not to take legal action against a discloser who has followed the disclosure guidelines (Martin 2013). However, if the Public Prosecution Service believes crimes have been committed, it may still bring charges (Martin 2013).

The Dutch legislation does not include ethical hacking, nor does its criminal law contain a provision ensuring that a discloser acting out of ideological or ethical motives will not face criminal charges. Addressing the problem, the Dutch Public Prosecution Service released a framework for

handling coordinated vulnerability disclosure in March 2013 (CEPS 2018). The Prosecution Service emphasized the standard of absolute necessity in the actions taken by a discloser to discover a vulnerability – thus, the focus of the criminal investigation would be on the evaluation of whether the actions were necessary and proportional under the given circumstances (CEPS 2018). The new guidelines of 2018 did not change the rationale behind the Dutch CVD policy – if the researcher acts in line with the procedure established by the Dutch National Cyber Security Centre, they will not suffer legal consequences. Avoiding negative legal consequences is possible only if an organization has a coordinated vulnerability disclosure policy (National Cyber Security Centre 2019).

Since 2018, the Public Prosecution Office, the vulnerability reporter community, the commercial sector, and public agencies worked together with the Centre for Cyber Security Belgium on the creation of a national approach to CVD (ENISA 2022a). The Centre for Cyber Security Belgium has published guidelines which clarify the legal status of researchers. In Belgium, a CVD policy or bug bounty is based on agreements between the responsible organization and the researchers. These agreements outline contractual terms and are typically published on a website (NASK 2021). Adopting such a policy denotes that the responsible organization has given researchers permission to access or attempt to access the necessary IT systems to uncover any potential security flaws or to provide any pertinent information regarding their security. As long as the predetermined rules of CVD are followed, access by researchers to certain IT systems is legal (NASK 2021).

Germany and Luxembourg represent countries where CVD policy is applicable only to the vulnerabilities of software or hardware in the public sector. Researchers must follow the requirements established in this policy when disclosing a vulnerability. There are no specific legal provisions on avoiding criminal liability.

On October 21, 2020, the Bundeswehr (the armed forces of the Federal Republic of Germany) published its Vulnerability Disclosure Policy (Bannister 2020), which is applicable only to the Bundeswehr's IT systems and web applications (Bundeswehr, n.d.). The Bundeswehr undertakes not to inform law enforcement authorities of their findings if the security researcher follows the instructions of the Bundeswehr's CVD policy, unless criminal or intelligence intentions are pursued (Bundeswehr, n.d.).

Similar to Germany, The Responsible Disclosure Policy in Luxembourg addresses the reporting of vulnerabilities occurring in the software or hardware of the public sector (High Commission for National Protection 2021), failing to address the private sector. Currently, the GOVCERT.LU platform is used as a single point of contact to obtain and process vulnerabilities occurring in the software or hardware of national institutions, agencies, or bodies that may have an impact on security (High Commission for National Protection 2021). There is no specific legislative framework enhancing the protection of cybersecurity researchers in Luxembourg; however, the Government consider it strategic to create a platform at GOVCERT.LU which encourages researchers to report vulnerabilities in the future (GOVCERT.LU 2019; ENISA 2022a).

Finland has had a CVD policy since 2010 (CEPS 2018). The CERT of Finland acts as a coordinator in the process of vulnerability disclosure, promoting the responsible handling of vulnerability information during all stages of the vulnerability life cycle (ENISA, 2022).

In some countries, there is no officially approved CVD policy. Instead, respective national authorities provide guidelines to facilitate vulnerability reporting. For instance, in 2019, the SK-CERT

National Cyber Security Centre in Slovakia published a non-normative document entitled "Vulnerability Reporting Guideline" (NASK 2021). The Guideline offers no guarantees for avoiding criminal liability if the procedure is followed; however, the SK-CERT emphasizes that certain activities must be necessarily avoided since they will be considered criminal offences (SK-CERT 2019).

In Spain, there is also no formal national CVD policy. However, CVD policy was developed by INCIBE-CERT, the reference security incident response center for citizens and private entities in Spain, which assists those who want to share information on vulnerabilities found in both in INCIBE--owned CERT systems and in the systems of other people or companies (INCIBE-CERT 2022).

There are also countries that have neither policies nor specific criminal law provisions, thus the vulnerability disclosure process is not standardized or regulated. However, vulnerability disclosure is in place through the different policies of manufacturers. For instance, Portugal has no CVD policy; however, different software developers, hardware manufacturers, and service providers have established their own vulnerability disclosure policies (for instance Webcheck.pt platform) (Webcheck.pt, n.d.). Additionally, a proposal with a comprehensive CVD policy and legislative amendments – prepared by the task force and representing different stakeholders, including amendments to criminal law – was presented to decision-makers (ENISA 2022a). A National Cybersecurity Framework, developed by the Portuguese National Cybersecurity Centre in 2020, provides information on receiving, analyzing, and responding to vulnerabilities disclosed internally or by external researchers (Portuguese National Cybersecurity Centre 2020). While each organization is responsible for the development of internal CVD policy, the national computer security incident response team (hereinafter CSIRT) ensures the coordination of vulnerability response by acting as a mediator (Portuguese National Cybersecurity Centre 2020; ENISA 2022a).

In Sweden there is no official CVD policy at the national level, and the 2017 National Cybersecurity Strategy (Government Offices of Sweden Ministry of Justice 2017) does not include any intentions to develop one in the near future (ENISA 2022a). However, different manufacturers, for instance Swedbank (n.d.), use their own CVD policies or participate in private initiatives such as HackerOne or OpenBugBounty to enable the reporting of vulnerabilities (ENISA 2022a).

Austria does not have a CVD policy in place either; however, some private companies in the country handle vulnerability reporting according to established best practices. For instance, under the conditions of the bug bounty program of A1 Telekom Austria, everyone is eligible to participate in the program subject to its conditions (Open Bug Bounty, n.d.). Similarly, in Italy, where CVD policy is currently being drafted, many private companies use CVD policies for vulnerability disclosure (ENISA 2022a).

In Estonia, it is commonly accepted in information security communities that the person who discovers a security vulnerability informs the owner of the system or service first (Information System Authority 2022). The private sector and researchers are active in vulnerability disclosure; however, there is no formalized cooperation between these actors and respective governmental institutions (ENISA 2022a).

To sum up, national approaches towards the level of coordination of vulnerability disclosure vary from country to country. Only four Member States have a comprehensive CVD policy, which includes different aspects of the protection of vulnerability researchers. Five Member States enhance this protection with the guarantee (at the legislative or practical level) that researchers will not suffer

negative consequences (in particular, criminal liability) if they comply with the strict requirements established in the national policy or with the CVD policies of different organizations. At least two Member States address the reporting of vulnerabilities occurring in the software or hardware of the public sector, and are planning to expand this to the private sector. In a number of Member States where there is no standardized or regulated attitude towards vulnerability disclosure, researchers are exposed to a variety of different policies of manufacturers. This does not stimulate vulnerability discovery and disclosure, but at least reduces the risk that the vulnerability researcher may face criminal liability. In the countries where these policies do not exist, this risk is far higher, and the status of vulnerability researchers remains undetermined.

These unclear and sometimes unwritten rules result in a paradoxical situation where in different countries the same behavior may be prosecuted in some instances, while in other instances someone may be acknowledged or even financially compensated for it, as will be demonstrated further. This could lead to the impression that the rules are not fair or are even unjust, which may determine whether one chooses to disclose a vulnerability and in what manner (Kranenbarg et al. 2018). The newly approved NIS 2 Directive establishes a framework for CVD. The Directive requires Member States to implement a national CVD policy (Art. 12 of the NIS 2 Directive), which may address the current gap (Directive (EU) 2022/2555).

Different aspects of the protection of vulnerability reporters

As observed by Kinis (2018), the generally recognized CVD lifecycle encompasses four phases: discovery, reporting, response, and disclosure. ENISA (2016) adds investigation as an additional phase between response and disclosure. All four (or five) phases are important for ensuring appropriate protection and recognition for security researchers. For instance, the stage of disclosure is usually associated with incentives – the acknowledgment of the vulnerability researcher and the right to receive remuneration for their efforts. However, from the perspective of possible negative consequences, the stages of discovery and reporting are crucial. The discovery process is, firstly, related to the subjective side of crime. The reporting stage is associated with the strict procedure that must be followed for the reporter to avoid criminal liability. The following subchapters disclose the variety of preconditions for avoiding criminal liability and different guarantees at different stages of the vulnerability disclosure process.

Discovering vulnerability

Acting in good faith

The Cybercrime Directive insists that, in all cases, the criminal act must be committed intentionally (Directive (EU) 2013/40/EU). Therefore, it is logical that CVD policies require reporters to have no malicious intent while discovering a vulnerability. Notably, according to research from ENISA (2018), finders have traditionally been viewed with suspicion with respect to their incentives and whether they are acting maliciously.

Often, there is no definition of good intentions in these policies themselves. Good intentions are often presumed if the person who discovers and reports a vulnerability acts in strict compliance with the established procedure and there is no abuse of vulnerability (see subpart 2.1.2.). However, some countries, such as the Netherlands, provide an explanation of this element in the guidelines, emphasizing that the reporting party "wants to contribute to the security of IT systems by having this vulnerability remedied and possibly made public at a later stage" (National Cyber Security Centre 2019).

This element is particularly important in countries where there is a specific legal ground ensuring that a discloser acting out of ideological or ethical motives will not face criminal liability. For instance, Article 47 of the French Law for the Digital Republic creates a safe haven for vulnerability reporters when one out of two criteria are strictly met, constituting a derogation to French criminal law: "Researchers reporting a vulnerability must act in good faith, i.e., either knowing that they act within the boundaries of the legal framework, or that they reasonably ignore that they are acting outside of the legally authorized scope" (ENISA 2022a). Article 40 of the French Code of Criminal Procedure states that: "(…) Any constituted authority, public officer or civil servant who, in the exercise of his duties, acquires knowledge of a crime or misdemeanor is required to notify the public prosecutor without delay and to transmit to this magistrate all information, reports, and acts relating thereto" (The National Assembly and the Senate of France 2022). However, Article 47 of the French Law for the Digital Republic establishes that: "For the purposes of information systems security, the obligation provided for in Article 40 of the Code of Criminal Procedure shall not apply to a person acting in good faith who transmits to the national authority for the security of information systems information on the existence of a vulnerability concerning the security of an automated data processing system (…)" (the National Assembly and the Senate of France 2016b). As can be observed, the legal definition of the term brings more clarity and legal certainty to vulnerability reporters.

The abuse of vulnerability

The list of prohibited actions that researchers may never perform is established by various abovementioned cybersecurity agencies or governmental administrations as part of CVD policies. Different EU member states have different approaches to the actions that researchers can or cannot take; however, some similarities may be observed.

Lithuania (Lietuvos Respublikos Seimas 2014), Germany (Bundeswehr, n.d.), Belgium (Centre for Cyber Security Belgium 2021), the Netherlands (National Cyber Security Centre 2019) and Spain (INCIBE-CERT 2022) prohibit researchers from copying, modifying, editing, or suppressing data from the IT system, modifying the parameters of the IT system, or attacking via DDoS. Another common feature in most of the countries is the prohibition of attacks through social engineering (Germany, Belgium, the Netherlands, Spain) and installing malware (virus, worm, trojan horse, or otherwise) (Germany, Belgium, the Netherlands, Spain, Lithuania). Brute-force attacks to gain access to a system (in the Netherlands, Spain, Lithuania, and Belgium) and repeated access to the system or sharing access to the system with others (in Germany, and the Netherlands) are also mentioned by some countries as prohibited activities.

Reporting vulnerability

Subjects

CVD policies in various countries use multiple terms to describe a subject who discovers and reports a vulnerability. Some countries simply describe the subject by bringing in activity-related words. For instance, paragraph 2 of Article 47 of the French Law for the Digital Republic mentions "the person who originated the transmission" (The National Assembly and the Senate of France 2016b), while Article 17 of Lithuanian Law on Cyber Security refers to a person who "discovered a vulnerability." Other countries, institutions, or organizations use specific terminology. For instance, the Centre for Cyber Belgium security utilizes the terms "CVD policy participant" and "ethical hacker." The Slovakian National Cyber Security Centre refers to a "reporter (researcher, lab)," the EU uses the term "vulnerability researcher" in the reviewed NIS2 Directive, and ENISA mentions "security researchers involved in vulnerability discovery." In its earlier research, ENISA also referred to "discoverers (or finders)" that are described as "reporters" or "researchers" (ENISA 2016). In comparison, the U.S. Department of Health and Human Services also uses the term "security researcher." However, as explained in the policy, the term research is described by a set of desired activities, as well as prohibited actions that would be regarded as illegal if proceeded with (Office of the Chief Information Officer 2022).

Usually, CVD policies or specific legal acts do not provide definitions of the above-mentioned terms. Therefore, based on the general principle of law, these terms should be interpreted using the ordinary meaning of the language of the legal act. There is no commonly accepted normative definition of a researcher, not to mention a security researcher. However, in some jurisdictions, the term researcher may have a normative definition in legal acts that are not directly related to cybersecurity. For instance, the Law on Higher Education and Research of Lithuania defines a researcher as "a person having a higher education." Therefore, the Lithuanian Law on Cyber Security does not use the word researcher since it would leave uncertainty as to the applicability of this procedure to those who are not highly educated. It is doubtful whether the EU legislator or ENISA, in summarizing Members States' efforts in developing CVD policies and legislation, had the intention of

limiting the circle of subjects that can be engaged in vulnerability disclosure. In the view of the authors, this limitation would have no plausible explanation and would certainly not contribute to strengthening cybersecurity resilience.

Reporting procedure

Since there is no common approach to CVD, vulnerability reporting procedures differ from country to country, where in some cases the process is coordinated by a national CERT, and from organization to organization, where different organizations develop their own CVD policies.

Some countries establish precise deadlines by which a vulnerability must be reported, which may also have an impact on the researcher's behavior. For instance, the Lithuanian Law on Cyber Security obliges a person who has performed a vulnerability search to prepare, no later than within 24 hours from the beginning of the vulnerability search (and every 24 hours thereafter if the search continues for more than 24 hours), information about the results of the vulnerability search specified in the national vulnerability disclosure description (Article 17 of the law).

In countries where CVD policy is in place at the national level, national CERTs often, but not always, function as intermediaries. In some jurisdictions, coordinated vulnerability reporting must necessarily be conducted solely by contacting the national CERT. For instance, in Article 47 of the French Law for the Digital Republic, one of the criteria that vulnerability researchers must fulfil in order to avoid criminal liability is that they report exclusively to ANSSI – no other public institution can receive a vulnerability notification. In other countries, regulations provide the possibility to choose to submit the report directly to the organization concerned or, alternatively, to a national CERT. Under the German Bundeswehr's vulnerability disclosure policy, whenever a vulnerability is discovered, reporters should use the contact form to get in touch with the Bundeswehr regarding the security problem, and are asked to send the results via email. They must provide the Bundeswehr with sufficient information so that they can reproduce and analyses the problem and provide a contact option for additional questions (Bundeswehr, n.d.). The Lithuanian Law on Cyber Security obliges a person who has performed a vulnerability search to submit a report to the National Cyber Security Centre, or to the entity whose communication and information system has been searched for vulnerability (Lietuvos Respublikos Seimas 2021). The Dutch CERT may act as a mediator if the reporting of the vulnerability does not go as expected, or if a reporting party would prefer not to report the vulnerability directly to the organization. The National Cyber Security Centre attempts to put the reporter and the organization affected by the vulnerability in contact after its reporting (National Cyber Security Centre 2019).

The newly approved NIS 2 Directive harmonizes existing practice. A new function of CSIRTs is entrenched in the new NIS 2 Directive, which provides that Member States will have to nominate their CSIRT as a trusted intermediary between the reporting researcher and the entities providing ICT services likely to be affected by the vulnerability. The CSIRT will act as coordinator in identifying and contacting the affected entities, assisting researchers reporting a vulnerability, negotiating timelines for disclosure and managing vulnerabilities affecting multiple entities (multi-party CVD). If the reported vulnerability has the potential to significantly impact entities in multiple Member

States, then the CSIRTs designated as coordinators in those Member States should cooperate within the CSIRT network (Directive (EU) 2022/2555).

Incentives for vulnerability reporters

Anonymity vs. visibility

The anonymity of reporters

The protection of the identity of the vulnerability discloser is an essential guarantee. Although the timely reporting of vulnerabilities permits the relevant stakeholders, such as vendors and ICT infrastructure owners, to minimize the negative consequences on users, property, and reputation damage, this does not ensure that the manufacturer or operator of the vulnerable product or service does not undertake unauthorized recourse or intimidate the reporter (SK-CERT 2019).

For instance, paragraph 2 of Article 47 of the French Law for the Digital Republic allows the person at the origin of the discovery of the vulnerability to remain anonymous, and the ANSSI preserves elements of the declaration but also guarantees the confidentiality of their identity (the National Assembly and the Senate of France 2016b). Similarly to the French CVD procedure, the Bundeswehr offers the researcher the possibility to remain anonymous or, if they do not object, to communicate their identity to third parties. The German Bundeswehr's vulnerability disclosure policy ensures confidentiality of the report and will not pass the reporter's personal data on to third parties without their consent (ENISA 2022a). Likewise, in Slovakia, SK-CERT may contact entities concerned – either with the reporter's identity revealed or with the reporter's anonymity ensured (SK-CERT 2019). In Belgium, the confidentiality of the researcher and the exchange of information must also be ensured; however, it is important to note that CVD in Belgium is based on the contractual provisions between the organization and the reporter (ENISA 2022a).

The anonymity of reporters becomes a mandatory guarantee with the adoption of Article 12 of the NIS 2 Directive. The Article states that Member States must ensure that researchers (which so request) can anonymously report a vulnerability to the CSIRT, which is designated as a coordinator. Then, a diligent follow-up action should be executed in respect to the reported vulnerability and the anonymity of the researcher reporting the vulnerability should be preserved by the CSIRT acting as a coordinator (Directive (EU) 2022/2555).

Acknowledgement

The need for the acknowledgment of a researcher that has disclosed a vulnerability is approached differently due to the argument that this may also stimulate illegal hacking. However, among researchers this is considered to be a meaningful incentive. In the research of NTIA (2016), a 53% majority of researchers expressed the expectation of some form of acknowledgement for their achievements, with a 14% minority preferring to remain anonymous (Kranenbarg et al. 2018). Some organizations with CVD policies, as well as the National Cyber Security Centre, indicate that some

security researchers specifically request recognition in order to build their CV and underline their respective skills (Kranenbarg et al. 2018).

Countries address this incentive differently in their policies. The Bundeswehr ensures that reporters with successful submissions are recognized on an acknowledgements page (Bundeswehr, n.d.). In a similar manner, the Spanish INCIBE-CERT can publish the corresponding notice on a webpage (in the section of Common Vulnerabilities and Exposures), and INCIBE has a hall of fame of researchers who have participated in the Common vulnerabilities and Exposures program (INCIBE--CERT 2022). The Dutch National Cyber Security Centre suggests mentioning the name of the reporter, if they wish, in a publication regarding the vulnerability (National Cyber Security Centre 2019). The ANSSI, on the contrary, does not guarantee any acknowledgment for a reporter having disclosed a vulnerability to the agency.

Renumeration

The question of whether to pay vulnerability reporters is disputable (Stevens et al. 2021). On the one hand, paying vulnerability disclosers can motivate people to share discovered flaws with governments and private organizations instead of using them offensively (Stevens et al. 2021). Paying disclosers might be another method of appreciating the work and dedication of security researchers (Stevens et al. 2021). Kulkarni et al. (2020) mention as a benefit the unique possibility for companies to employ a large number of security researchers and ethical hackers, thus offering protection against the best attackers. Additionally, remediating a cybersecurity incident caused by a vulnerability may often be far costlier to the organization (Hoe, n.d.). Kranenbarg and others (2018) observe that financial compensation has become an important reason to report a vulnerability under bug bounty programs. The number of organizations operating with a CVD program has continued to grow in recent years, and now includes such prominent organizations as the U.S. Department of Defense, IBM, Uber, Atlassian, and Cloudinary (Walshe and Simpson 2022). The financial gain is also substantial – for instance, a VDP coordination service under the HackerOne platform, which connects researchers to various organizations, saw researchers generate close to $40 million in financial rewards in 2019. Six of those hackers managed to surpass $1 million in lifetime earnings. Companies such as Google, Apple, and Microsoft offer more ambitious programs, with individual bounties set as high as $1.5 million for the identification of critical issues (Arooni, 2021).

However, bounties are not always seen as the most crucial incentive for vulnerability finders, since only 15% of researchers in the NTIA (2016) report suggested that they expected a payment (Kranenbarg et al. 2018). Allodi (2017) established that underground prices in Russian cybercrime forums are equivalent to or higher than those in legitimate markets like bug bounties. Moreover, it is possible to sell a single vulnerability more than once in the underground market, while it can normally only be sold once in the legitimate market, making the former more appealing. Having the similarities and differences of markets in mind, Kranenbarg and others (2018) observe that the social costs to an individual's reputation may sometimes be the decisive factor in determining the researcher's choice of market. Additionally, there are concerns about long-term effects, particularly regarding the labor rights of government security researchers and the potential reliance on an

external, distributed workforce for vulnerability discovery and disclosure, as well as the ability of the government to pay remuneration due to administrative challenges related to procurement policies and criteria (Stevens et al. 2021).

Naturally, countries address the question of the renumeration of vulnerability reporting differently. The Latvian CERT suggests that acknowledgment is sufficient reward for reporting a vulnerability; therefore, no compensation is offered (CERT.LV, n.d.). The Bundeswehr does not plan to offer bug bounties, either (Bundeswehr, n.d.). The Spanish CERT reports having no capacity to financially reward the work of reporters (INCIBE-CERT 2022), and ANSSI does not mention any compensation after a disclosure.

On the contrary, the Dutch National Cyber Security Centre rewards every vulnerability report depending on the quality of the report and the severity of the vulnerability (National Cyber Security Centre 2019). The Slovakian SK-CERT even encourages the remuneration of vulnerability reporters to "increase the security of the company's products and services." This reward may be offered by the company. In Belgium, a company can offer an award to a participant, depending "on the amount, importance or quality of the information transmitted" (Centre for Cyber Security Belgium 2021).

The EU legislative approach

Current regulation

Kinis (2018) identifies the Proposal for a Council framework decision on attacks against information systems of 2002 (European Commission 2002) as the origin of the legal framework on responsible vulnerability disclosure. The adopted Council decision set the purpose of approximating criminal law around serious attacks against information systems by contributing to the fight against organized crime and terrorism, and therefore ensuring strong judicial cooperation in the area of criminal offenses related to attacks against information systems (Council Framework Decision 2005). However, it emphasized the "need to avoid over-criminalization, particularly of minor cases, as well as a need to avoid criminalizing right-holders and authorized persons" (Recital 13).

The Cybercrime Directive (Directive (EU) 2013/40/EU), amending and expanding the provisions of the above-mentioned Council decision, introduced a new regulation for the harmonization of the criminalization of a number of offenses directed against information systems and their penalties. Simultaneously, the Cybercrime Directive encouraged Member states "to provide possibilities for the legal detection and reporting of security gaps" (Recital 12). The EU legislator emphasized the importance of the effectiveness of the identification and reporting of the threats and risks posed by cyberattacks and the related vulnerability of information systems for the "prevention of, and response to, cyberattacks and to improving the security of information systems" (Recital 12). The directive left wide discretion to national legislators to choose the way in which vulnerability disclosure is implemented in practice, while emphasizing that criminal liability should not be imposed in case of absence of criminal intent or the mandated testing or protection of information systems (Recital 17).

In 2016, the NIS Directive (Directive (EU) 2016/1148) was adopted by the EU, setting the minimum harmonization rules on vulnerability disclosure. The NIS Directive provided that the announcement of incidents reported to the authorities should properly balance the interests of the public in being informed about threats versus possible damage for the operators of essential services and digital service providers reporting incidents (Recital 59). Under the NIS Directive, competent authorities and CSIRTs should particularly focus on keeping information about product vulnerabilities strictly confidential before the release of sufficient security fixes (Recital 59). At the same time, the NIS Directive was not intended to interfere with Member States' right to safeguard their essential state functions and to maintain law and order by pursuing the investigation of criminal offenses (Art. 1(6)). However, the issue of criminal liability for the illegal breach of information systems was already handled with the Cybercrime Directive. As the directive set only minimum rules on the matter, Member States were left with a wide range of discretion to lead them to divergent practices concerning the criminalization of white hacking, as demonstrated above.

Future legislative developments

Cybersecurity experts cast doubt on whether the CVD mechanism may be effective at the EU level without the harmonization efforts. Therefore, they suggest amending the Cybercrime Directive (YesWeHack 2020; ENISA 2022a). For this purpose, they suggest directing Member States to take the specific case of well-meaning hackers into account in their national legislation (YesWeHack 2020).

As demonstrated in the analysis above, a still relatively small number of EU Member States establish a legal basis for exemption from criminal liability. This is usually done through certain provisions of criminal laws (for instance, in Poland) or by introducing special provisions to the laws governing cybersecurity (for instance, in Lithuania). Although CVD policies in different countries provide the guarantee that researchers will not be prosecuted if they follow strict requirements established in these policies, in the absence of a clear legal background in criminal law there is no certainty for vulnerability researchers that they will not be prosecuted for disclosing vulnerability in certain circumstances.

Finding vulnerabilities may involve breaking the law. In countries where vulnerability disclosure is left to the agreement between the organization and the researcher (for instance, the Netherlands), based on the CVD policy of the organization, the parties may agree that any possible criminal activities will not be reported (National Cyber Security Centre 2019). First, this approach does not guarantee that a prosecutor will not start a criminal investigation ex officio, believing that the policy boundaries were exceeded. Italian legal scholars and judges observe that it would be shocking to leave it up to judges to decide what constitutes unauthorized access to a system, as each judge is free to determine within their scope what should be considered ethical hacking and what should not be considered ethical hacking (ENISA 2022a). Secondly, this procedure is entirely dependent on the organization's policy preconditions that the reporting party must comply with (National Cyber Security Centre 2019), which means that there is no common approach even at the national level since vulnerability researchers must deal with a number of different CVD policies of various organizations.

Additionally, as observed in the Cybercrime Directive, the "transnational and borderless character of modern information systems means that attacks against such systems are often trans-border in nature" (Directive (EU) 2013/40/EU, Recital 27). In relation to this, CEPS scholars accurately express doubt as to whether and how policies such as those allowed in the Netherlands would have a practical impact in the judicial systems of the remaining EU jurisdictions, where such policy documents would not be accepted (CEPS 2018). Another concern is whether the vulnerability researcher can avoid prosecution at all in jurisdictions where the conditions for prosecuting illegal access are stricter (CEPS 2018).

Thus, it is obvious that an unambiguous provision in criminal law ensuring that vulnerability researchers will not face criminal liability would not only ensure more legal certainty, but would also bring more clarity to the legal environment in which vulnerability researchers operate by defining the conditions under which the identification and disclosure of vulnerabilities would not entail a breach of criminal law.

It is obvious that existing legal regulation at the EU level encouraging Members States to provide possibilities for the legal detection and reporting of security gaps, which has already been in place for a decade, has not ensured a common approach towards the guarantees of security researchers. Since EU law has not presented an obligation to introduce the guarantee for not entailing liability in criminal law, Member States have chosen different solutions, sometimes struggling with desirable legislative changes at the national level (for instance, the Latvian example of attempting to introduce changes to Latvian criminal law). Since the EU has already started the enhanced harmonization of legal regulation in this area by introducing common definitions, incriminations, and sanctions, it would be reasonable to include a specific provision imposing the obligation on Member States to define the conditions under which the identification and disclosure of vulnerabilities will not result in incrimination. The remaining question is which EU legal act is the most suitable for this purpose: NIS 2.0 or the Cybercrime Directive.

In the context of this discussion, it is important to observe that Italy proposed to amend the NIS 2 Directive by introducing a rule which was not present in the initial proposal of the revised text of the legal act: that Member States are in charge of defining the conditions under which the identification and disclosure of vulnerabilities will not result in a breach of penal law (ENISA 2022a). As mentioned above, the directive establishes the obligation for Member States to designate a CSIRT in the role of coordinator. The CSIRT would act, where necessary, as an intermediary between the reporting entities and the providers of ICT products or services (Directive (EU) 2022/2555). The CSIRT coordinator should be authorized to identify and contact concerned entities, support reporting entities, negotiate disclosure timelines, and manage vulnerabilities that affect multiple organizations (multi-party coordinated vulnerability disclosure) (Directive (EU) 2022/2555). Additionally, it seems that, under the final text of the revised NIS 2 Directive, Member States are obliged to take measures to facilitate CVD by establishing a relevant national policy and aiming to "address, to the extent possible, the challenges faced by vulnerability researchers, including their potential exposure to criminal liability, in accordance with national law" as part of these policies. The directive encourages Member States "to adopt guidelines as regards the non-prosecution of information security researchers and an exemption from civil liability for their activities. Member States should address, as much as possible, the difficulties faced by vulnerability researchers, such

as potential criminal liability under their national legal order" (Directive (EU) 2022/2555, Recital 60).

From the perspective of national law, it is not essential which EU legal act envisages the requirement to adopt a national law in this area. From the perspective of EU law, the choice is determined by the EU's competence to regulate a specific area and thus the field of the issue. In the view of the authors, considering the legal basis and aim of the NIS 2 Directive, this should not be the legal act where the rules regarding criminal liability in the context of CVD are entrenched. Notably, the legal basis for the NIS 2 Directive is Article 114 of the Treaty on the Functioning of the European Union (TFEU), which provides the procedure for the approximation of laws when seeking to ensure the functioning of the internal market. Article 114 TFEU expressly states that it should not be used if "otherwise provided in the Treaties." On the other hand, the Cybercrime Directive was adopted on the basis of Article 83(1) TFEU, which provides the procedure for establishing minimum rules for "(…) the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis." This expressly refers to computer crime as one of the areas to be regulated under this legal ground.

Given that there is a specific legal ground entrenched in the TFEU for cross-border computer crime and the subject-matter that the directives in question each address, the use of general legal ground intended for the harmonization of internal market laws seems to be an incorrect choice for CVD criminal liability issues. While the inclusion of CVD in the NIS 2 Directive seems wrong from the perspective of a proper legal basis, the latter provides a higher level of harmonization as it is based on Article 114 TFEU, since Article 83(1) TFEU is only intended to provide the minimal standard. However, the inclusion of CVD liability issues in the NIS 2 Directive may not be in line with the division of competences between Member States and the EU. For these reasons, the revision of the Cybercrime Directive, as suggested by YesWeHack and ENISA, would have been a more proper choice.

Conclusions

Given the current state of policies and legislation in the different Members States, it must be concluded that there is no uniform approach toward the protection of vulnerability researchers in the European Union. This is mainly because only a few Member States have a comprehensive CVD policy, which includes different aspects of the protection of vulnerability researchers. Additionally, some Member States address only the reporting of vulnerabilities occurring in the software or hardware of the public sector, and several Member States that do not have a national CVD policy provide CVD guidelines. In some countries, there are still no national CVD policies, although the vulnerability disclosure process is widely practiced in the private sector, with individual vulnerability policies in place. The NIS 2 Directive will clearly change the patchy regulatory landscape at the European level by harmonizing the approach towards CVD, since it requires Member States to implement a national CVD policy (Directive (EU) 2022/2555).

The legal protection of a researcher may incorporate different aspects: first and foremost, the rights and obligations related to vulnerability research, discovery, reporting, and recognition. The right to be acknowledged and the right to stay anonymous are two diametrically opposed interests of vulnerability reporters, and are ensured differently depending on the policy existing in the country. They are usually ensured in countries where a national CERT functions as a mediator, and may be limited in those Member States where vulnerability reporting is based on contractual provisions between an organization and a reporter. The anonymity of reporters will become a mandatory guarantee with the adoption of the NIS 2 Directive; thus, this will have to be ensured at the legislative level in the implementing acts of each Member State. The right to be remunerated is recognized in some but not all countries with a CVD policy in place due to the varying considerations regarding the possible dangers of such a stimulating effect. Considering that bug bounty programs offering renumeration are spreading widely, only a minority of researchers consider renumeration to be the main motivating guarantee.

The obligation of acting in good faith, defined in legal terms only in some jurisdictions, and the duty to strictly follow the procedure established in national or organization CVD policy are requirements that are intrinsic in avoiding criminal liability. Although there are similarities, the list of prohibited activities when discovering a vulnerability, or once it is discovered, differs even in countries with national CVD policies. Even though national laws are harmonized with the European Union in the area of cybercrime based on the Cybercrime Directive, the assessment of the subjective element of any possible crime will be impacted by diverging national case-law. Additionally, the roles of national CERTs differ from country to country – national CERTs often, but not always, function as intermediaries. Their approaches will be harmonized with the new NIS 2 Directive, which provides that Member States will have to nominate their CSIRTs as trusted intermediaries between reporting researchers and entities providing ICT services likely to be affected by vulnerabilities.

Only four Member States have enhanced their protection with the guarantee (at the legislative or practical level) that researchers will not suffer negative consequences (in particular, criminal liability) if they comply with the strict requirements established in the national policy or the CVD policies of different organizations. Avoiding criminal responsibility is mainly approached from two different perspectives: by establishing a particular clause in criminal law or another related legal act, or by establishing the requirement to conclude an agreement on vulnerability disclosure with the manufacturer. In a number of Member States there is no standardized or regulated attitude towards vulnerability disclosure; therefore, researchers are exposed to a variety of different policies of manufacturers. This does not stimulate vulnerability discovery and disclosure; however, it at least reduces the risk that the vulnerability researcher may face criminal liability. In countries where these policies do not exist, this risk is higher, and the status of the vulnerability researcher remains undetermined.

It is obvious that the legal regulation currently in force at the EU level, which encourages Members States to provide possibilities for the legal detection and reporting of security gaps, and which has already been in place for a decade, has not ensured a common approach towards the guarantees of security researchers. Since the EU has already started the enhanced harmonization of legal regulation in this area by introducing common definitions, incriminations, and sanctions, it

would be reasonable to include a specific provision imposing the obligation on Member States to define the conditions under which the identification and disclosure of vulnerabilities will not result in incrimination. Since the need for a common approach toward the exemption from criminal liability of security researchers relates to the harmonization of criminal law provisions, the revision of the Cybercrime Directive would be a more proper choice.

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IV. SUSTAINABILITY IN ACTION: EXAMPLES AND EXPERIENCES OF SUSTAINABILITY FROM THE LEGAL POINT OF VIEW

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IV.1. THE IMPLEMENTATION OF THE SUSTAINABLE DEVELOPMENT PRINCIPLE IN ZONING AND PLANNING REGULATIONS: THE LITHUANIAN CASE

Theoretical background

Sustainable development has been a major area of policy focus since a framework for the principles of sustainable development was laid down at the United Nations (UN) Conference on Environment and Development in 1992. As the major consumer of resources and energy, the construction industry (including spatial planning) has been at the heart of the debate on sustainable development (Opoku *et al.* 2022). Therefore, there are a variety of studies on sustainable development principles in spatial planning. A few of the main findings of the relevant research may be cited.

Sustainable development is a worldwide topic in urban planning legislation. As J. R. Nolon (2009, pp. 3–14) indicated after examining the legal regulation on sustainable development in the USA, the task of creating an integrated system of law to promote sustainable development, manage climate change, and reduce energy consumption is not as complex or novel as it seems. Such a statement is also supported by Zhang *et al.* (2022). These authors, having analyzed the development of urbanization in China, suggested that sustainable urban development could be ensured simply by analyzing and replicating the historical relics of urban spatial structures, urban functional zoning, and the differences and evolutionary characteristics of urban construction sites.

Achieving sustainable development was made even more convenient when the Sustainable Development Goals (SDGs) were presented by the UN (2015). As research (Szetey *et al.* 2021) indicates, the SDGs are a global sustainability agenda intended to be implemented at global, national, and local scales. Local planners developing sustainability plans should make use of the SDGs to produce a consistent and comparable set of goals and targets. Therefore, it is not surprising that the implementation of the sustainable development principle differs in various localities. For example, China is now at a critical stage of rapid urbanization and industrialization, so it pays more and more attention to urban construction and the green and sustainable development of the environment (Wang *et al.* 2022).

However, the SDGs are not the only instrument to help countries achieve sustainable development. Along with the SDGs, different countries or regions take various measures towards sustainability. For example, the African Union, in addition to the 17 SDGs, has established its own system of SDGs called Agenda 2063, which contains 20 Goals. The African Union has identified five principles for the sustainable development of African countries: light up and empower Africa, feed Africa, industrialize Africa, integrate Africa, and improve the quality of life for the people of Africa. This represents the African Union's vision for a more developed, richer and more independent Africa (Wang *et al.* 2020).

Meanwhile in Sweden, high demand for sustainability is ensured by detailed measures, including particularly extensive spatial planning requirements and a long list of individuals and institutions participating in the process (Trygg and Wenander 2021, p. 8). Swedish authors K. Trygg and H. Wenander (2021, p. 9) note that one of the main instruments for sustainable development is the comprehensive plan prepared by the planner, which includes formulated visions and goals. In addition, municipalities often have specific goals that add to sustainable development, such as specific plans (e.g., a bicycle plan, a traffic plan and a green structure plan), guidelines (e.g., a wood construction strategy and guidelines for sustainable building) and programs (e.g., a land and housing program, an energy and climate program, and an urban environment program). Sustainable development is thus achieved through the implementation of complementary local-level principles.

Detailed measures which could be introduced to ensure sustainable development are not confined to the Nordic countries. Specific measures for sustainable development and the mitigation of climate change consequences are analyzed by various researchers in heavily affected regions. For example, Turkish researchers – while analyzing measures to mitigate heat waves, floods and lack of water – indicate that, from the perspectives of massive architectural, spatial, and landscape designs and solutions, climate is among the major factors that play an important role (Toy and Demircan 2019). Researchers from Iran systematically propose some solutions for cooling urban neighborhoods (Ramyar *et al.* 2019). Current planning approaches and policies should effectively deal with environmental challenges, especially when looking at sustainable storm-water management (Pappalardo and La Rosa 2019), which is also topical in Lithuania. Meanwhile, within the Indonesian regulations, flood mitigation systems that work by identifying spatial planning criteria related to housing and settlement planning and disaster mitigation are essential (Mardin and Shen 2019). Finally, the study on *Urban Planning and Water-related Disaster Management* edited by G. Huang and Z. Shen (2019) is worth mentioning, from which the most noteworthy output is the notion that water management is multifaceted. Furthermore, approaches to dealing with water-related issues are diverse, such that wise water governance including the incorporation of wise water management into urban planning should be pursued in order to achieve an integrated solution for sustainability.

To summarize, the studies of other researchers support the observation that sustainable development is a growing global trend, although measures of sustainability are often taken and implemented at the national level.

This paper further presents an analysis of the main legal norms in the Republic of Lithuania which enable sustainable development, with the purpose of demonstrating the legal constraints and finding the exact measures which are under implementation.

An analysis of Lithuanian national regulation

The roots of sustainable development regulation are primarily settled at the international level. In recent years, the European Union and the UN have published two legal instruments to encourage sustainable development.

First, the European Green Deal, established in 2019 by the European Commission. This is a response to the common challenges of poverty, pollution, and other environmental degradation. The European Green Deal aims to transform the EU into a fair and prosperous society, with a modern, resource-efficient, and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use (European Commission 2019).

Second, the 2030 Agenda for Sustainable Development (UN 2015). At the heart of the Agenda there are 17 Sustainable Development Goals (SDGs). The Sustainable Development Goals call for action to end poverty and other deprivations and are intended to go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth (UN 2015). As some authors note, the Sustainable Development Goals provide overarching guidance for the construction industry to promote sustainable development from environmental, social, and economic dimensions (Opoku *et al.* 2022).

These two instruments are left to the discretion of EU Member States to implement through national regulation. In Lithuania, the European Green Deal and the Sustainable Development Goals are firstly implemented through spatial planning regulations. Therefore, in this part of the article, legislation on spatial planning shall be discussed. Firstly, the existing Spatial Planning Law, which introduces the principle of sustainable development and which was followed by the Law on Architecture, is analyzed. Secondly, the main features of later by-laws are assessed. Thirdly, the sustainable development measures which are implemented within the Vilnius Master Plan and other soft law instruments are discussed.

The introduction of the sustainable development principle in the Spatial Planning Law and the Law on Architecture

Despite the existence of numerous papers that analyze what sustainable development is, there is no agreement on one definition which might indicate exactly what constitutes the principle of sustainable development. The term *sustainable development* has a broad meaning, and is defined by such international organizations as the UN and the EU. The term *sustainable developmen*t is also widely discussed in the UN Sustainable Development platform and the European Commission 2030 Agenda for Sustainable Development, which are published online and are free to access.

On June 27, 2013, the Lithuanian government passed the Law Changing the Law on Spatial Planning of the Republic of Lithuania (hereafter – the Spatial Planning Law), which came into force from January 1, 2014. Article 1 of this law indicates that, among others, one target is to ensure the sustainable development of territories alongside rational urbanization by setting out requirements of a systematic nature.

The inclusion of the principles of sustainable development in the new law did not by itself establish clear rules for projects to be considered sustainable. Still, the inclusion of the principles of sustainable development in the Law on Spatial Planning is a tipping point for the future enactments of mandatory guidelines to promote rules related to sustainable development.

The newly adopted Law on Spatial Planning consolidated the concept of sustainable development within a legal framework regulating spatial planning, and did so in a reasonably flexible way. This means that what exactly constitutes sustainable development is open to specialists' interpretation, but at the same time the Spatial Planning Law provides for a legal basis to ensure that the main values of sustainable development are incorporated into the spatial planning process. Municipal authorities and developers have the freedom to meet the requirements of sustainable development during the process of preparing the relevant documents. These requirements depend not only on developers and planners, but also on the public (since public participation is ensured in the planning process).

Even though the Spatial Planning Law identifies the grounds for sustainable development, it does not provide exact and specific instruments to reach this goal. This means that the principles of sustainable development can be implemented through a wide scope of solutions, and these solutions essentially rely on the decisions of the project developer.

Such uncertainty leads to a situation where no specific clear measures for sustainable development are determined, even in case law. Lithuania's higher courts only mention (identify) the existence of the principle of sustainable development, but do not define the substance of this principle. For example, the *Generalization on Judicial Practise Implementing the Legal Norms of Construction Legal Relations* (2010) of the Supreme Administrative Court of Lithuania indicates that the principle of sustainable development is applied to all construction cycles, without elaborating. No further comments or cases are given to analyze sustainable development. Accordingly, lower courts also do not cover the substance of this principle. The sustainable development principle is only mentioned when analyzing the solutions of spatial planning documents (e.g., Supreme Administrative Court of Lithuania decision No. eAS-625-858/2015) or encouraging the developments of infrastructural projects related to renewable energy (e.g., Supreme Administrative Court of Lithuania decision No. A-152-525/2015). To summarize, such mentions do not constitute clear evaluation of the substance of sustainable development. This might be caused by the lack of legal doctrine or evaluation criteria under which a specific project could be acknowledged to meet the requirements of sustainable development. Accordingly, the explanation of the substance of the principle of sustainable development relies on urban planners. This provides a wide range of opportunities for urban planners to interpret that their specific project meets sustainable development criteria, but it does not give any certainty to other confronting parties in the planning process (such as investors and communities).

This legal uncertainty in understanding the substance of the principle of sustainable development led to the necessity of amending the law and creating more specific mandatory rules. Therefore, minimal requirements on green zones in the land plot or other criteria were introduced in by-laws or master plans, and an amendment to the Spatial Planning Law was even adopted.

The Ministry of Environment prepared an amendment to the Spatial Planning Law which was enacted on January 12, 2021. By introducing an amendment to the law, the Ministry of Environment indicated, among the four reasons to amend the law: the target of reaching sustainable de-

velopment; encouraging the coordination of social, economic, and environmental interests; and implementing measures to mitigate the effect of climate change. Accordingly, the climate change elements are mentioned jointly with the sustainable development elements in four different articles of the amendment. All of these changes are related to one essential idea: that climate change is a fact, and its mitigation should become a core tenet of evaluating whether a project fits the requirement of sustainability.

This change should serve to help not only in the evaluation of certain measures, but also in providing clarity to all urban planning participants, including urban planning practitioners working at the lowest level, investors, and communities. The intended changes should also bring a change in judicial practice, where judges currently do not see the necessity of discussing climate change measures while analyzing urban planning cases. Cases referring to climate change have so far been associated with funding climate change initiatives, providing subsidies, public procurement, and the legality of the usage of such funds (Supreme Administrative Court of Lithuania decisions No. eA-2091-1062/2019; No. eA-3415-502/2019, No. A-146-330-14 and etc.; Court of Appeal of Lithuania decision No. 2-1494/2013). Thus, there is clear lack of case law explaining sustainable development criteria.

The process of sustainable spatial planning in Lithuania has strong links with the operation of architects and urban planners. As the decision-makers of the planning process, planners can be considered as central actors for the realization of sustainable development by means of strategic planning (Trygg and Wenander 2021, p.7). Unsurprisingly, alongside the Spatial planning Law, on June 8, 2017, the Government of Lithuania passed the Law on Architecture. Art. 1.1 of the Law on Architecture indicates that the target of this law is to regulate public relations in the field of architecture in such a way as to ensure sustainable environment. The Law on Architecture is obligatory for architects, and sets certain requirements for architects to act in favor of sustainable development.

For example, Art. 3.1(2) of the Law on Architecture establishes that one of the six main principles under which architects must act is the sustainable development principle. This means that it should be observed that architecture, by utilizing creativity and innovations, contributes to the creation of the environment between the state and people, and is important for the development of economic and social relations. Art. 11.(2) of the Law on Architecture indicates the sustainable development principle as one of ten architectural quality criteria. To ensure the highest sustainability standards of architectural activities, Art. 13.2 of the Law on Architecture stipulates that municipal councils are obliged to establish and approve, in accordance with the criteria specified in the Law on Architecture, lists of architectural, urban-planning, or nationally significant objects or objects of public interest, for the planning or design of which architectural competitions will have to be held.

As an example, the Rules on architectural competitions were originally established on April 21, 2021, and were later replaced by the March 9, 2022, decision of the Vilnius City Council. According to Art. 1 of the current version of the rules, in order to ensure coherent, seamless and sustainable development, architectural competitions must be held for the development of high-rise buildings, hotels, and administrative, commercial, medical, recreational, sporting, residential and special-purpose buildings that exceed a gross floor area of 5,000 m^2, and other essential objects in the central area of the city. Such a demand in the by-laws helps to ensure that the work of architects for sites of major importance complies with sustainable development requirements.

However, this is not the only way to show how architects and municipal planners work under the legislative principles. The spatial planning procedure is subject to a wider range of by-laws and even soft law instruments, as discussed below.

Changes in the by-laws regarding sustainable development in urban planning

The main by-law regulating the preparation of complex planning documents is the Order of the Minister of Environment on Complex Planning Documents Preparation Rules. This order was amended on December 17, 2019.

Two main changes related to sustainable development were introduced without waiting for the adoption of the amended Spatial Planning Law.

First, an additional requirement was added to the planning works program for master plans at the municipal level. Paragraph 83.8 indicates that planners should foresee the complex renovation (modernization) of territories and an increase in the energy efficiency of city blocks. The same requirement was additionally included in paragraph 112, which names the general planning solutions, and paragraph 116, which provides the details of planning solutions.

Second, the wording of subparagraph 117.2.4 was amended to include a requirement to specify structural parts of the natural frame system, where the ecological chain and separate greeneries should be analyzed. In addition, the natural frame, and the ecological chain as part of it, should also be foreseen within the scheme of the present situation, as the amendment of subparagraph 105.1 indicates.

After the adoption of the amended Spatial Planning law, on May 5, 2021, the Complex Planning Documents Preparation Rules were adjusted accordingly. The amendment extends the requirements for the scope and content of the spatial planning work program. Additional requirements for improving the quality of the environment have been introduced and are reflected in Articles 83 and 84 of the Rules. The amendment also increases the focus on landscape character, compact development and energy efficiency. However, even with these amendments, the definition of sustainable development has not been clearly defined. The scope of the requirements for architects has been broadened, though the list of objectives and means of implementation remains incomplete, with "other requirements" at the end.

Taking advantage of the incomplete list of spatial planning requirements, Vilnius City Municipality has introduced "other requirements" into the legal framework, which are enshrined in soft law. This soft law focuses on architectural rules and street standards, which are enforced through the implementation of the Vilnius City Master Plan. These soft law rules work alongside the abovementioned legislation and by-laws, and act as a guide for the planner and developer.

The Vilnius City Master Plan and the soft law rules accompanying its implementation are analyzed next.

The course of sustainability in the Vilnius Master Plan

Vilnius is the capital city of Lithuania. According to data from the website of the Lithuanian Department of Statistics, the population of Lithuania is 2,830,097, while the population of the Vilnius area is 833,190 (official data of the year 2022; Official Statistics Portal, n.d.). Vilnius is by far the largest city in Lithuania, and its population is growing.

The city's previous master plan (adopted back in 2007) already at the time of its adoption indicated that a policy of sustainable development is a key objective for the city (Part 2.1: "Development tendencies"). The principles of sustainable development were therefore being applied in the capital long before they became enshrined in national law under the Spatial Planning Law of 2014. In some jurisdictions, sustainable development has to date been the most important discourse informing planning, and a powerful rhetoric for solving environmental problems (Gazzola *et. al.* 2018) – Vilnius is no exception.

Dissatisfied with some of the vague wording of the Spatial Planning Law, the city council resolved (in 2015) to revise and update the existing Vilnius master plan. Target 5.1 of the revised plan aimed to supplement the previous master plan with new criteria and indicators for the long-term sustainable development of the city. The revised plan introduced new criteria to measure the sustainability of new developments and actively encourage climate change mitigation measures. Approaches by local legislators can also be noted in other jurisdictions, as local adaptation policy and planning is critically important (Vogel *et al.* 2018).

The revised plan (*Vilnius Master Plan. Solutions. The Material Explaining the Solutions* 2021), which came into force in June 2021 (hereinafter – the Master Plan), shapes the city's "green infrastructure" as a tool to increase its ecological potential and mitigate the effects of climate change. This goal shall be achieved by setting up additional limitations on the green areas of the city (limiting the possibility for construction in the most vulnerable green territories), as well as by implementing several measures (policies). These include: promotion of the use of renewable energy sources; reduction of greenhouse gas emissions; channeling rainwater near trees in the preparation of technical projects for streets, squares, parking lots and other hard surfaces; increasing the number of artificial water bodies, parks, and other green areas; etc. According to the Master Plan, each of these measures shall be covered differently in the intertwining spheres of lower level spatial planning and construction processes by means of promotion and prohibition.

The use of renewable energy sources is promoted by foreseeing possibilities to use agricultural land that is not intended for urbanization to produce renewable energy (solar energy), as well as by the promotion of the development and application of renewable energy sources for heating purposes.

The reduction of greenhouse gas emissions shall be attained by implementing solutions aimed at reducing the usage of private automobiles and the promotion of the usage of public transportation, or private transportation which uses renewable energy sources. In addition, the revised plan foresees the conversion of industrial territories near the city center to other purposes of use (residential, commercial, etc.) and the development and application of renewable energy sources for heating purposes. These methods are expected to help reduce greenhouse gas emissions. As *Lithuania's Greenhouse Gas Inventory Report 2021* (issued in 2021) indicates, in 2019 transport and

energy categories composed 30.9% and 11.2% of total national greenhouse gas emissions, respectively.

The Master Plan addresses climate change as a global phenomenon. Therefore, additional measures regarding the protection of the city's residents are foreseen in case of heat waves. The plan indicates the necessity of increasing the number of artificial water bodies, parks, and other green areas, and the installation of fountains in public spaces whilst ensuring their uninterrupted operation during heat, as well as the installation of free water dispensers in the city.

The above-mentioned measures are introduced without the prior establishment of such requirements in the Spatial Planning Law. The importance of including climate change mitigation measures in the Vilnius Master Plan is highlighted by the fact that Article 50 of the Spatial Planning Law establishes a rule, under which the solutions of lower-level spatial planning documents must not contradict higher-level spatial planning documents. The same rule is applied countless times in court cases (Supreme Administrative Court of Lithuania decisions No. A-4660-556/2017; No. P-5-502/2018). Thus, every detailed plan which is a lower-level spatial planning document in Vilnius city will have to be in accordance with the Vilnius Master Plan, and will have to adopt climate change mitigation measures in some form.

In addition to the newly revised Master Plan, with clear measures for sustainability, Vilnius is known for its soft law regulations, which are analyzed in section 2.4 of this article. Therefore, the Vilnius city municipality is at the forefront of the introduction of meaningful and impactful norms regarding climate change mitigation measures.

Soft law regulations encouraging sustainable urban development

Despite the advancement of hard law regulations that are applicable in the country, municipalities still bear the greatest responsibility and the burden of decision-making. National regulations only set out the principles for spatial planners, and it is left to local governments to make final decisions on what exact measures may be introduced for the purpose of ensuring sustainable development via spatial planning. This is a cause for concern, as the evaluation of the sustainability of certain projects is realistically left unregulated. Still, municipalities use soft law instruments. As an example, the Vilnius Master Plan actively encourages the introduction of measures which could help in ensuring sustainable development via spatial planning. Therefore, to facilitate decision-making and ensure integrity, the municipality issued 12 Vilnius street standards (*Vilnius streets standards* 2021) and 10 Urban Planning and Architecture Rules (*Vilnius Urban Planning and Architecture Rules* 2020).

The Vilnius street standards are a set of principles establishing guidelines for designing street layouts. The aim of these standards is to make streets safe and convenient, prioritizing people over transportation (e.g., lighting for pedestrians first). These standards extend the approach to the established legal regulation, allowing for experimentation and improvement of the existing rules based on the best solutions found in Vilnius, Lithuania and abroad.

The Vilnius Urban Planning and Architecture Rules are principles formulated by the city administration in the context of monitoring the needs of modern society and assessing expectations for urban development. The application of these rules is important for the future image of the city

and the quality of life in the city – for planning changes in the city's public spaces, streets, and residential districts, for continuing the conversion of industrial districts, and for the creation of new public green spaces.

All ten rules ensuring sustainable development shall be analyzed further.

The first rule is to ensure urbanistic context. This means that solutions for the layout of buildings on a site and the development indicators must be in accordance with both the typology of development that has developed or is being purposefully developed on the site and the development indicators that are characteristic of this typology, such as intensity, density, or height.

The second rule is to fulfill the principles of perimeter development. That is: buildings, plantings and landscaping elements shall separate public spaces (streets, squares, squares) from private courtyard spaces; and courtyard spaces shall be shaped by creating boundaries between spaces belonging to a specific community, encouraging the involvement of the community in using and maintaining the space.

The third rule is to maintain multifunctionality: streets and public spaces shall be shaped to accommodate a wide range of interests, concentrations of services and modern mobility. This should ensure the livability of the city.

The fourth rule establishes that the best architectural ideas, the most rational functional solutions and the most aesthetic architectural expression shall be sought through architectural competitions. This requirement is implemented through the obligation to perform architectural contests in larger scale projects.

The fifth rule sets a requirement of harmony with the urban architectural context. On this ground, every new building or structure must fit into its context. At the same time, it must be contemporary in its urban design and architectural expression.

The sixth rule is to ensure the use of natural – and, preferably, local – building materials, such as bricks, wood, concrete, metal and glass. This should reduce carbon emissions in the transportation of goods and again positively influence the fight against climate change.

The seventh rule is aimed at encouraging and supporting the conversion and adaptation of existing buildings and public spaces, making the most of authentic buildings or elements of their structures.

The eighth rule speaks of heritage site enhancement. According to this rule, the intrinsic qualities of a heritage asset must be preserved when reconstructing or altering its setting, while non-intrinsic elements of the asset and its setting may alter.

The ninth rule establishes the primacy of factual content. This means that in project appraisal, the principle of factual content over bureaucratic form is applied. The actual use of the building, the type of construction, the number of dwellings, etc., are assessed.

The tenth rule is aimed at protecting the landscape and expanding green spaces. Therefore, when developing the area, the established landscape shall be protected, not obscured, not destroyed, and emphasized by architectural means.

Whilst the principles of sustainable development are in the open in terms of their specification in hard law, soft law instruments, such as the above-mentioned Vilnius Urban Planning and Architecture Rules, lend a hand to decision makers. Although soft law rules are non-mandatory regulation, they undoubtedly create transparency and clarity for designers and developers in implementing sustainable

development. With existing examples of good practice from Vilnius city municipality, it is likely that other municipalities in Lithuania will follow the principles that have already been laid out.

Conclusions

The sustainable development principle is widely accepted in spatial planning. Although certain measures for sustainable development are set out at an international level, it is up to each country to decide how to implement these measures. In Lithuania, the sustainable development principle was introduced in the Spatial Planning Law of the Republic of Lithuania in 2014. However, the definition of sustainable development was not explicitly provided. The Spatial Planning Law has, until recently, lacked specific mandatory norms explaining what should be done to ensure sustainability in new developments. Meanwhile, city planners are left with the difficult task of introducing certain legal requirements to ensure sustainable development without any guidance and without the requirement to set up indicators for the measurement of the effectiveness of certain measures.

The current master plan for the development of Vilnius strongly introduces climate change mitigation measures as a feature of sustainable development. Evaluating the specific measures mentioned in this paper, three main groups of sustainable development measures to mitigate climate change and ensure sustainability can be identified: measures to strengthen green areas; measures to reduce greenhouse gas emissions; and measures to promote the use of renewable energy sources.

Sustainable zoning and planning criteria are mainly being left to the competence of municipalities, without any direct regulations to accept such criteria or rules. Such a vacuum in the regulation calls for the use of soft law instruments, which make a major contribution to building the sustainable cities of tomorrow. Currently, only the municipality of the capital of Lithuania has any kind of soft law basis for sustainable development. Although soft law is not currently mandatory, law tends to catch up with life. Therefore, it is likely that these soft law rules will become part of the decision-making processes of all municipalities in no time. Having achieved this, soft law will become part of the regulatory framework.

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IV.2. THE PROBLEM OF SUSTAINABLE LEGAL REGULATION OF ELECTRIC VEHICLE INFRASTRUCTURE

European Union policy for the development of electric transport for the sustainability of air pollution reduction

Sustainability challenges for European transport policy

European transport policy faces many sustainability challenges in order to achieve the European Union's climate goals. The European Commission is constantly improving directives on reducing air pollution. Directive 2014/94/EU on the deployment of alternative fuels infrastructure determines that, based on the consultation of stakeholders and national experts, electricity and hydrogen were identified as the current principal alternative fuels with the potential for long-term oil substitution (The European Parliament and the Council of the European Union 2014). In 2016, The European Commission published a communication on "A European Strategy for Low-Emission Mobility." This communication indicates that the best prospect for reducing transport pollutant emissions is the use of electric cars (e-mobility).

The strategy supporting the process of decarbonization sets out market rules that should contribute to the integration of electric vehicles and publicly accessible and private recharging points in the electricity grids. Therefore, the Communication states that a "Large part of alternative fuels (including electricity) requires specific infrastructures. Member States will design policy frameworks for rolling-out publicly available electric recharging points" (European Commission 2016). However, the use of electric vehicles still poses a number of challenges. These include limited range, long charging times, high cost of electricity (Saleeb *et al.* 2018, p. 65), expensive energy storage, and the underdeveloped infrastructure of charging points (Andwari *et al.* 2017). There are also security issues of use (Barelli *et al.* 2021).

Electric cars are considered to be one of the most eco-friendly vehicle types, with little or no use of fossil fuels and relatively low running costs as they have fewer components that require

maintenance. However, the development trends of electric cars cannot be assessed unambiguously. The technical and legal regulation of infrastructure adaptation is required. A weak point from the point of view of environmental protection is the production and disposal of electric car batteries. Lithium-ion batteries are considered the standard for modern electric vehicle batteries and are considered more durable and energy efficient. These batteries still face difficulties due to the risk of fire or explosion and the lack of production resources, and may have negative effects on public safety and health and the environment in the future (Vaccari *et. al.* 2019). To date, there is no universally accepted legal regulation of proper reuse and recycling.

The European Parliament welcomes the upcoming strategy for sustainable and smart mobility; all modes of transport will have to contribute to the decarbonization of the transport sector in line with the objective of reaching a climate-neutral economy (The European Parliament 2020).

The EU common position on the legal regulation of the transport sector

Sustainability in business is defined as a responsible relationship with the environment. A sustainable business looks at its activities through the prism of the smallest possible impact on the environment, carefully evaluating the very important social and economic aspects. Ensuring adequate environmental quality for Lithuanian residents is one of the strategic goals of the Government which is aimed at introducing certain obligations or encouraging the transition to more sustainable solutions (Sadauskas 2021).

In 2017, the Law on Environmental Air Protection of the Republic of Lithuania was supplemented with the following definition: an electric vehicle is an exclusively electrically powered motor vehicle that has at least one non-external electrical energy converter and to which electrical energy can be supplied in various ways – contact wires (trolleys), using pantographs, rechargeable batteries, induction and other methods, or using any combination of these methods (Seimas of the Republic of Lithuania 1999). The Law of the Republic of Lithuania on Alternative Fuels defines an electric vehicle as "a motor vehicle equipped with a powertrain that has at least one non-external electrical energy converter with an electric chargeable energy storage system that can be charged externally" (Seimas of the Republic of Lithuania 2021a). This corresponds to the definition of Directive 2014/94/EU (The European Parliament and the Council of the European Union 2014). This law also includes the concepts of hybrid electric vehicles and clean vehicles. In electric cars, energy is stored in chemical form in batteries, and released during a chemical reaction in the engine. Due to the operation of such an electric car, no fuel is burned, so air pollution by CO_2 and other substances is zero. Hybrid electric vehicles have an internal combustion engine powered by fuel (gasoline or diesel) and an electric motor powered by electricity stored in a battery.

The sustainable development of electric mobility faces problems. These are not only in the development of electric car infrastructure, but also in the production of electric car batteries and spent battery waste. During the transition to electric vehicles, electric car batteries have been in the spotlight due to the high costs of raw materials, the risk of their supply from non-EU countries, as well as the energy requirements and environmental issues associated with production. There is increasing research on battery reuse and recycling, but this still does not address the cost of the

power supply resources and the issue of proper waste disposal in order to consolidate the marketability of such cars (Nicoletti *et al.* 2021). Therefore, legal regulation of these areas is required at the level of EU law and Lithuanian national law.

"Although a majority of e-mobility related issues has already been regulated in the European Union by related directives and regulations, still there is possibility for member states to introduce different national market models and describe the role of electric vehicle ('EV')" (The Energy Community Regulatory Board 2021). On 2 June 2022, European transport ministers adopted a common position ("general approach") on *legislative* proposals of the Fit for 55 package that relate to the transport sector. This is an important step, which should enable the EU to meet its climate objectives (Council of the European Union 2022).

The need for the sustainable development of electric mobility

The relationship between electric mobility development and climate pollution

Climate change and environmental degradation threaten Europe and the world. The European Green Deal must help overcome these challenges. The European Union has committed to achieving climate neutrality by 2050 and adopted a set of proposals aimed at reshaping EU climate, energy, transport and tax policies **(**European Commission 2019a).

In 2013, the European Commission's communication on "Clean Power for Transport: A European alternative fuels strategy" stated that the influence of dependence on oil in the European economy was too great. The EU must adopt a transport sector strategy aimed at gradually replacing oil with alternative fuels and creating the necessary infrastructure. Electric vehicles powered by highly efficient electric motors can be supplied with grid electricity, which is increasingly produced from low-CO_2 energy sources. Electric cars do not emit any pollutants and do not make noise, so they are especially suitable for urban areas. Hybrid configurations combining internal combustion engines and electric motors can save oil and reduce CO_2 emissions by improving the overall efficiency of the energy used for propulsion (by up to 20%), but without external charging capabilities, they are not an alternative fuel technology (European Commission 2013).

Regulation (EU) 2021/1119 of the European Parliament sets out a binding objective of climate neutrality in the Union by 2050. This Regulation also sets out a binding Union target of a net domestic reduction in greenhouse gas emissions for 2030. The 2021 regulation of the European Parliament and of the Council sets obligations for member states to reduce the annual amount of greenhouse gas emissions during the 2021–2030 period. One of the main aims in the transport sector should be a greater proportion of more environmentally friendly vehicles. The introduction of vehicles with alternative fuels can significantly improve the quality of urban air and consequently the state of public health.

Electric cars are presented as a way of reducing environmental pollution. States are developing systems of encouragement to switch to a more sustainable transport model. However, it should

not be forgotten that fossil fuels are still often used for electricity production. The environmental impact of batteries used in electric vehicles, which is related to the hazardous components contained in them, needs to be assessed. The substances contained in the battery and released into the environment pose a risk and affect human health. In order to achieve the sustainability of the development of the electric vehicle network, the Directive on Batteries and Accumulators and Waste Batteries and Accumulators (The European Parliament and the Council of the European Union 2006) envisages the reduction of the amount of dangerous components in batteries, and measures are established to ensure the proper management of battery waste.

The need for and promotion of electric mobility in Lithuania

In 2019, according to Eurostat data, Lithuania ranked 14th out of 27 EU countries in terms of particulate matter pollution (PM2.5), and 20th in terms of PM10 (National Audit Office of Lithuania 2022). Lithuania's National Agenda for Climate Change Management (Seimas of the Republic of Lithuania 2021b) envisages, by increasing the number of electric cars, a situation where by 2025 the number of M1 class electric cars will be at least 10 percent of annual purchases, and N1 class electric cars will be at least 30 percent. By 2030, the number of M1 class electric cars will make up at least 50 percent of annual purchase transactions, and N1 class electric cars will constitute 100 percent. From January 1, 2030, class N1 vehicles with internal combustion engines, with the exception of class N1 vehicles powered by alternative fuels, will not be registered. However, the State Audit Report states that the means of the transport sector may not be sufficient to achieve the goals of the plan (National Audit Office of Lithuania 2022). It was found that the calculations for the promotion of the use of electric cars were performed inaccurately, and 31 percent the transport sector measures have not yet commenced implementation – although their implementation was planned to start in 2018–2021. It is recommended to prepare amendments to the provisions of environmental monitoring of economic entities (Minister of the Environment of the Republic of Lithuania 2009) and other legal acts regulating environmental monitoring of economic entities, clarifying the requirements for the implementation and accounting of environmental monitoring of economic entities.

A survey of Lithuanian residents conducted by the company Spinter Research showed that people tend to choose more sustainable cars, and only the higher price and somewhat limited technical infrastructure prevent them from buying them en masse, especially when it comes to the lack of charging points for electric cars in the country (Spinter research 2022). Measures to promote the growth of electric cars are many and varied, but the distribution of electric cars in countries remains uneven. Compensation for the purchase of electric cars is applied in Lithuania (Minister of the Environment of the Republic of Lithuania 2019), and further compensation from the Modernization Fund is planned (Minister of Transport and Communications of the Republic of Lithuania 2022). Lithuanian residents and companies can submit applications for compensation for purchased pure electric cars; funds will be allocated to them from the Modernization Fund. Residents will be able to receive compensation for purchased new (up to 6 months old) or used (up to 4 years old) light pure electric vehicles. Those who purchase a new vehicle will receive €5,000, and those who purchase a used electric vehicle will receive €2,500. When applying, residents will have to in-

dicate that they will not use these electric cars for economic or commercial activities. Legal entities and residents carrying out economic or commercial activities will receive compensation only for purchased new (up to 6 months old) pure electric cars. Compensation of €4,000 will be given for one electric car. Compensation will be provided for pure electric cars purchased from March 23, 2022, until December 31, 2026. Applications for compensation have been accepted by the Environmental Project Management Agency of the Ministry of the Environment since June 2, 2022 (Ministry of Transport and Communications of the Republic of Lithuania 2022). It is important that private and public institutions abandon polluting cars and choose environmentally friendly, sustainable electric car alternatives.

Legal regulation of the sustainability of electric vehicle infrastructure

The need for the sustainability of electric vehicle infrastructure

The sustainable growth of the EV market and the level of infrastructure deployment are interrelated. In order to continue the rapid growth of the electric car market, it is very important to create a wide, dense and easy-to-use network of charging access points. In a recent article, Wellings *et al.* (2021, p. 871) claimed that the electric vehicle market has been influenced by a variety of elements: economic, e.g., changes to the overall size of the passenger vehicle market; political, e.g., reduced subsidies for electric vehicles in key markets; and technological, e.g., customer expectations as to improvements to the technology. Electric vehicles are dependent on charging infrastructure. There are three main ways to charge an electric car: mains charging, battery swapping and wireless charging. The vast majority of electric car users in Europe use the possibility of charging from the grid.

The European Parliament directive establishes that "Member States should ensure that recharging points accessible to the public are built up with adequate coverage, in order to enable electric vehicles to circulate at least in urban/suburban agglomerations and other densely populated areas, and, where appropriate, within networks determined by the Member States" (The European Parliament and the Council of the European Union 2014). In Lithuania, the planning and development of electric vehicle charging infrastructure is regulated by the Law of the Republic of Lithuania on Alternative Fuels (Seimas of the Republic of Lithuania 2021a).

The Alternative Fuels Law of the Republic of Lithuania broadly describes the concepts of electric vehicle charging, access to different power, and electric vehicle charging station. Private charging access for electric cars, semi-public charging access for electric cars, and public charging access for electric cars are distinguished (Seimas of the Republic of Lithuania 2021a). The recommendations for the development of public electric vehicle charging infrastructure have been prepared in the implementation of the Government-approved National Communication Development Program for 2014–2022 (The Government of the Republic of Lithuania 2014).

Regulation and realization of the installation of charging accesses in Lithuania

It is planned that by 2030, 60,000 electric car charging points will be installed in Lithuania, of which 6,000 will be public and semi-public electric car charging points. Public and semi-public high- and very-high-power charging access points for electric cars must first be installed in the big cities of Lithuania, as well as near roads belonging to the main road network. Medium-power electric car charging access points are installed in the big cities of Lithuania near multi-apartment residential buildings, enabling electric car users living in them to charge their electric cars around the clock (Seimas of the Republic of Lithuania 2021a). Municipalities, in agreement with the Ministry of Transport and Communications, had until 2022 to prepare or update plans for public and semi-public electric vehicle charging access plans to be installed on local roads in the municipality's territory until 2030, which must be updated at least every three years and published publicly **(**Ministry of Transport and Communications of the Republic of Lithuania 2022). The Ministry of Energy, together with the Ministry of Transport and Communications, prepares and approves an action plan for the use of electric vehicles and the development of electric vehicle charging infrastructure. When planning, designing and installing electric vehicle charging access points for public use, the procedure established by the Minister of the Environment must be followed. The documents for the planning and development of the electric vehicle charging infrastructure must be prepared in consultation with the operators of the distribution networks to which the electric vehicle charging access points planned to be installed will be connected (Seimas of the Republic of Lithuania 2021a). Electric vehicle charging access points are installed according to Order **of** the Minister of Energy (Minister of Energy of the Republic of Lithuania 2016).

It is possible to notice the complex regulation of the installation of charging access points. This results in a lack of legal regulation and funding sustainability. The resources, funding and legal framework for setting up such points differ. In Lithuania, both the Ministry of Transport and Communications and entrepreneurs are expanding the charging infrastructure for electric cars. Funds from the 2021–2027 EU investment program, The Recovery and Resilience Facility, the Sustainable Mobility Fund and other sources are targeted for the achievement of the development goals of Lithuania's public electric vehicle charging infrastructure. According to the Ministry of Energy, it is mainly planned in Lithuania to install private charging access points, the power of which would not exceed 22 kW. However, the development of private EV charging infrastructure in and around apartment buildings, especially in quiet urban areas where there is a constant shortage of parking spaces, has not yet been resolved. However, currently, the draft action plan for the development of electric vehicle use and electric vehicle charging infrastructure is being finalized, which will provide for measures and actions that will increase the use of electric vehicles and ensure the effective development of the electric vehicle charging infrastructure in Lithuania (Ministry of Transport and Communications of the Republic of Lithuania 2022). The current legal regulation itself already has practical drawbacks because of the rapidly growing numbers of EVs and the fact that charging places are poorly managed. An increasing number of problems arise when an electric car is additionally charged with electricity, because electricity resources are becoming more expensive in Lithuania and costs are increasing. There will be no more free charging stations for electric cars

on Lithuanian state roads until the end of 2023. According to the Ministry of Transport and Communications, 5 years was quite enough for the popularization of electric cars. The additional tax burden on consumers will be another drawback in the direction of purchasing an electric car.

Problems of the impact of electric cars on the sustainability of climate change

Questions still arise among researchers due to decarbonization policies. Under consideration are the issues of what vulnerabilities low-carbon transitions can exacerbate and what policy reforms need to be implemented. The impact on the environment and human health has still not been clearly investigated from the perspective of implementing a full decarbonization strategy. In the global perspective, contemporary decarbonization is neither sustainable nor renewable (Sovacool *et al.* 2020, 2021). The European Parliament calls on the Commission and the Member States to implement the "energy efficiency first" principle in all sectors and policies, which is fundamental to reducing the EU's energy dependency and emissions from energy production (The European Parliament 2020).

The development of electric vehicles may not in all cases be seen as an effective means of sustainably controlling climate change. The cost of investing in so-called preparatory measures – including the upgrading of local transformers and electricity infrastructure to meet the increased electricity demand of charging stations, and the cost and feasibility of dealing with the increased volume of e-waste – may well be considered a cost-benefit measure. The cost-effectiveness and environmental benefit of electric vehicles may well be seen as a dichotomy.

When it comes to electric cars, their advantages are usually discussed. Thanks to the electric motor, electric cars work quietly, and emit no CO_2 during driving (on an electric-only trip). However, scientists agree that emissions must be monitored and evaluated throughout the life cycle – from raw materials to production, from the first to the last kilometer driven, and from the registration of an electric car to recycling. The life cycles of cars are divided into three stages: production, use and recycling. A closer look at the life cycle stages reveals that EVs emit more CO2 than fuel-powered vehicles at certain stages. "Although electric vehicles basically are emission free, at least when they are powered by electricity from renewable sources, they still cause a climate impact which derives from the manufacturing of the car and not least the battery. Mining and refining of battery materials, and manufacturing of cells, modules and pack requires significant amounts of energy which could generate GHG emissions so high that the marginal climate benefit by using electric vehicles instead of ICE vehicles is reduced. This would mean emissions are only moved from one pipe to another which most probably would require new regulations" (Melin 2019).

The legal regulation of placing electric car batteries on the market

The development of electric cars as a challenge for sustainability

With the rise of EVs, battery exchange technology has gradually developed into a business model, which provides a convenient, efficient and economical way to replenish electric energy for electric vehicles (Karale *et. al.* 2020). Rechargeable batteries are seen as a key technology for cost-effective and safe energy storage in electric vehicles (Goop *et al.* 2021). During the transition to electric vehicles, electric car batteries have been in the spotlight due to the high costs of raw materials, the risk of their supply from non-EU countries, as well as the energy requirements and environmental issues associated with production. The greatest environmental impacts realized in manufacturing EVs result from battery production and the extraction and processing of high impact metals, such as aluminum, copper, cobalt, lithium, manganese, and nickel, which are used in the battery pack (Bowyer 2019).

Therefore, it should be considered that the ongoing development of EVs should be seen not only as an opportunity, but also as a challenge to sustainability due to the growing consumption of critical metals in the battery electric vehicle (BEV). The continuation of this supply will cause serious risks to the environment and human health, so the development of substitute materials should be evaluated with concerted attention and an open mind towards searches for alternative measures. According to Zhao and Baker (2022, pp. 5–6), in an average EV, the battery pack is usually the most expensive single component, constituting around 35%–45% of total manufacturing cost. Raw material prices fluctuate violently due to the unpredictable supply and demand relationships worldwide. BEVs are the most common form of EV, and the Li-ion battery the most widely used. EVs based on Li-S batteries are expected to become the most commercially used transport sector product. The European Parliament Regulation on type-approval of hydrogen powered motor vehicles refers to the fact that hydrogen is considered a clean way of powering vehicles for the future, on the way towards a pollution-free economy based on the reuse of raw materials and on renewable energy resources, as vehicles propelled with hydrogen emit neither carbon-based pollutants nor greenhouse gases (The European Parliament and the Council of the European Union 2009).

Ensuring the sustainability of battery production throughout the value chain

In 2009, the United Nations Economic Commission for Europe adopted a rule to harmonize the approval provisions for battery electric vehicles, considering specific requirements for construction, functional safety and hydrogen emissions. It was defined that "*Battery electric road vehicle* means a vehicle with bodywork intended for road use, powered exclusively by an electric motor whose traction energy is supplied exclusively by a traction battery installed in the vehicle" (Economic Commission for Europe of the United Nations 2009). In 2017, the Commission announced the launch of the European Battery Alliance. The aim of this cooperation structure is to ensure the sustainability of

battery production in all links of the value chain: extraction and processing of raw materials (primary and secondary); design and production of battery cells and battery packs; and their use, reuse, recycling and disposal (European Commission 2018). In 2018, together with the European Commission Communication "Sustainable Mobility for Europe: safe, connected, and clean," the "Strategic Action Plan on Batteries" was published. It is established that "batteries production and development is a strategic imperative for Europe in the context of the clean energy transition and a key component of the competitiveness of its automotive sector." The Commission encourages a cross-border integrated European approach covering the entire value chain of the battery ecosystem. In the context of a circular economy, sustainability must be ensured in the sourcing and processing of raw materials, the design and manufacture of battery cells and battery packs, and their use, reuse, recycling and disposal.

In 2020, the European Commission (2020b) presented a proposal setting out the basic requirements for battery manufacturers and importers. As the European industry expands battery production capacity, it may become more dependent on critical raw materials such as cobalt or lithium. Therefore, the European Commission has published several communications on particularly important raw materials. Those raw materials that are important for the EU economy, and the risks to their supply, were announced. In 2020, a further Communication examined increasing the resilience associated with key raw materials (European Commission 2020a).

The application of EU legal norms of sustainable battery production in Lithuania

Lithuania has integrated EU legal norms on battery supply, installation in devices, and labelling at the national level. The Waste Management Law (Seimas of the Republic of Lithuania 2003) regulates the supply of batteries used in electric cars to the market. It defines the concepts of manufacturer and importer, battery labelling procedure, and features of battery waste management. The compatibility of EU law for manufacturers regarding battery supply, installation in devices and labelling has been transferred to the Order of the Minister of Economy and Innovation and the Minister of the Environment for the approval of requirements for market supply of batteries and accumulators (Minister of Economy and Innovation and Minister of the Environment 2004; Minister of Economy and Innovation of the Republic of Lithuania, Minister of the Environment of the Republic of Lithuania 2020). The description of the requirements for the supply of batteries and accumulators to the market establishes the rules for the supply of batteries and accumulators to the market of the Republic of Lithuania, the requirements for the installation of batteries and accumulators in devices, and the labelling procedure. Regulation is mandatory for persons whose activities are related to production, import, and supply to the market of the Republic of Lithuania, and the distribution and export of all types of batteries. Manufacturers, importers and distributors of batteries and accumulators are prohibited from supplying to the market for business purposes batteries and accumulators that exceed the amount of mercury and cadmium determined by the order of the Minister of Economy and Innovation of the Republic of Lithuania. The Order of the Ministry of Economy and Innovation sets the mercury and cadmium content limits for manu-

facturers, importers and distributors of batteries and accumulators (Minister of Economy and Innovation of the Republic of Lithuania 2019). It can be said that the Lithuanian legal acts applicable to manufacturers and importers define only provisions related to battery labelling and battery installation devices. Only the content of mercury and cadmium in batteries is limited. There are no established provisions that would help reduce the impact on the environment in the production or import process and help implement the goals of the Green Deal. Waste batteries and accumulators are treated as municipal waste and treated using a waste collection system that complements the municipal waste management system. A battery recycler or user of industrial batteries lacks information about the composition and properties of the battery, causing problems in the recycling process.

Legal regulation of sustainable BEV waste utilization

Requirements for the sustainable management of battery and accumulator waste

In their study, Seeberger *et al.* (2016) emphasized the need for sustainable waste management: "Electronic waste (e-waste) generation is increasing worldwide, and its management becomes a significant challenge because of the many toxicants present in electronic devices. A large amount of toxic metals, flame retardants, and other persistent organic pollutants exist in e-waste or can be released from the disposal of e-waste. Recycling of e-waste is an increasing trend in the past few years."

The European Commission's (2020c) communication "A new Circular Economy Action Plan For a cleaner and more competitive Europe" emphasizes waste prevention, where waste and resource use are reduced through advanced product design, reuse and repair. The communication also foresees better sorting of waste, a greater share of recycled materials, safety and cleanliness of waste streams, and high quality recycling.

The appropriate implementation of the *Directive on Batteries and Accumulators and Waste Batteries and Accumulators* (The European Parliament and the Council of the European Union 2006) is also important for the sustainability regulation of electric vehicles. The primary objective of this Directive is to minimize the negative impact of batteries and accumulators and waste batteries and accumulators on the environment, thus contributing to the protection, preservation and improvement of the quality of the environment. It promotes a high level of collection and recycling of waste batteries and accumulators and the improved environmental performance of all operators involved in the life cycle of batteries and accumulators. The report of the European Commission (2019b) concludes that the Member States have adopted the measures needed to implement the directive's provisions. The evaluation demonstrates that the directive has delivered positive results in terms of a better environment, the promotion of recycling and better functioning of the internal market for batteries and recycled materials. Only lead and cadmium recycling was assessed. Other materials such as lithium and cobalt, which are included in the composition of lithium-ion batteries used in electric cars, were not considered. Further work should aim to identify and assess the feasibility of

measures to improve the directive's impact on environmental protection, the proper functioning of the internal market, the promotion of a circular economy and low carbon policies, and the ability to adapt to technological and economic developments (European Commission 2019b).

Legal regulation of sustainable battery and accumulator waste management in Lithuania

Regulation of accumulators and battery collection

In Lithuania, the supply of batteries, including batteries used in electric cars, to the market is regulated The Waste Management Law (Seimas of the Republic of Lithuania 2003). The entire eighth section "Specifications of disposal of batteries and accumulators" is dedicated to this. This shows the special importance of these products. Manufacturers and importers of batteries and accumulators must organize a system for the collection, treatment and recycling of waste batteries and accumulators that meets the environmental protection and public health and safety requirements set out in the information documents of the best available production methods of the European Union. They must ensure that all collected waste batteries and accumulators are processed and recycled in accordance with the requirements of environmental protection, public health safety and waste management established in the legislation of the European Union and the Republic of Lithuania, and that the efficiency of battery and accumulator recycling determined by the Government is achieved. Manufacturers and importers of batteries and accumulators are prohibited from supplying to the internal market of the Republic of Lithuania for business purposes batteries and accumulators that exceed the amount of mercury and cadmium determined by the Minister of Economy and Innovation. Manufacturers and importers of batteries and accumulators must label batteries and accumulators supplied to the domestic market of the Republic of Lithuania for business purposes in accordance with the procedure established by the Minister of Economy and Innovation. Manufacturers and importers of automotive batteries and accumulators must organize a waste collection system for automotive batteries and accumulators, so that waste batteries and accumulators used in private non-commercial vehicles can be collected free of charge and without the need to purchase a new battery or accumulator. The government or its authorized institutions must educate and inform the public in accordance with the procedure established by the battery and accumulator waste management issues regarding: the substances contained in the batteries and accumulators and the harm to the environment and human health of improper battery and accumulator waste management; battery and accumulator waste management systems; and collection points.

The description of requirements for the supply of batteries and accumulators to the market (Minister of Economy and Innovation and Minister of the Environment 2004) states that batteries or accumulators must be installed in devices supplied to the market in such a way that waste batteries or accumulators can be easily removed. If waste batteries or accumulators cannot be easily removed by users of devices placed on the market, batteries or accumulators must be installed in devices placed on the market in such a way that the waste batteries and accumulators can be easily removed by a specialist performing maintenance and repair of the device or a waste handler independent of the manufacturer. Devices placed on the market with built-in batteries or accumula-

tors must be accompanied by instructions indicating how the batteries or accumulators can be safely and easily removed by the user of the device, a specialist performing technical maintenance and repair of the device, or a waste manager independent of the manufacturer.

Regulation of sustainable disposal of accumulators and batteries

The rules for the management of battery and accumulator waste are established by the order of the Minister of the Environment (2008). The rules for the management and waste of batteries and accumulators determine the requirements and procedure for assigning batteries and accumulators to certain types, informing users, organizing waste collection systems, and monitoring the performance of waste management and collection tasks. The provisions of the rules implement Directive 2006/66/EC of the European Parliament and of the Council of September 6, 2006, on batteries and accumulators and waste batteries and accumulators (The European Parliament and the Council of the European Union 2006). The rules are mandatory for persons whose activities are related to the production, import, export, distribution and management of batteries and accumulators of all types, as well as holders of batteries and accumulators. Industrial batteries or accumulators are defined as batteries or accumulators intended for use only in industrial or professional activities or used in all types of electric vehicles. It is stated that companies handling battery and accumulator waste must comply with the Law of the Republic of Lithuania on Waste Management (Seimas of the Republic of Lithuania 2003), the Waste Management Rules (Minister of the Environment of the Republic of Lithuania 2017), and the other waste requirements established in the legal acts regulating processing. Waste batteries and accumulators must be collected separately in designated containers, barrels, boxes or other containers and not mixed with other waste. The Waste Management Rules establish requirements for waste sorting, temporary storage, collection, transportation, processing, as well as requirements for product distributors accepting product waste from consumers. They also provide additional requirements for hazardous waste management, waste trade and mediation when organizing the use or disposal of waste, the requirements for the technical regulation of waste use or disposal, and the procedure for storing waste accounting and handling documents.

The Environmental Protection Department under the Ministry of Environment controls the requirements of the rules for the management of battery waste and the rules for the management of vehicles unfit for use. Persons who have violated the requirements of the aforementioned rules shall be liable in accordance with Articles 252 and 255 of the Code of Administrative Offenses of the Republic of Lithuania (Seimas of the Republic of Lithuania 2015).

Conclusions

At the beginning of the 21st century, the problems of climate warming and air and land pollution have attracted particular attention from scientists, politicians, and the public. There has been a desire to move away from the consumption of most petroleum products. In Europe, the issue of sustainable mobility (safe, connected, and clean) has arisen. In 2017, the European Commission presented legislative proposals and initiatives to implement the low-emission mobility strategy and ensure

a sustainable transition to clean and competitive connected mobility for all. This has become particularly relevant in recent years, as global conflicts and the deterioration of relations with Russia, which has always been one of the main sources of these products, have led to thinking about decarbonization issues.

The European Commission found that one of the ways to reduce emissions is the sustainable use of vehicles with electric motors. However, the future of the electric car market is currently not conclusively defined due to the competition of alternative vehicle technologies, the uncertainty regarding the development of the technical parameters of electric cars, and the costs for electric car users. These vehicles are not yet sophisticated enough to cover a shorter distance without additional charging. A new network of charging stations is needed, and electricity is becoming more expensive. Furthermore, the car itself is not cheap. Culture has a strong influence on BEV sales, which is more pronounced in countries where cultural values are more in line with the functional, innovative and environmental benefits of buying and using EVs. These countries are more likely to adopt BEVs. The legal regulation of the expansion of the network of charging stations is complex and does not solve the sustainability of financing.

Compensation for the purchase of electric cars applies in Lithuania, but the sources and size of this compensation vary greatly, and there are many additional conditions.

However, the main problem of electric transport is the sustainable production and disposal of batteries. Whilst the electric motor itself is environmentally friendly, the production of the battery, and especially the handling of used batteries, can cause significant damage. These problems have not yet been sufficiently analyzed and resolved. In order for electric cars to become more widespread in the market, it is necessary to improve battery technology. The sustainable production and development of batteries in Europe is a strategic necessity in the transition to clean energy and one of the main factors for the competitiveness of the European automotive industry. These activities are also inseparable from the objective set by the Commission in the new industrial policy strategy for the European Union to become a world leader in innovation, digitalization and decarbonization. One of the reasons for the focus on the collection and proper recycling of battery waste is mentioned in the discussed strategies: recovering part of the useful materials reduces dependence on limited resources. Today, China is the main supplier of lithium-ion batteries, so in the future, especially considering the current geopolitical situation, fundamental changes should occur in the supply chain. This will be a challenge not only for Lithuania but also for other countries in achieving the goal of fully electrifying the transport sector by 2050. The legal framework of the EU and Lithuania still requires better compatibility, the elimination of contradictions, and adaptation to new conditions and new technologies.

Sustainable technological solutions and the use of ecological materials require more financial resources. The participation of lawyers in the sustainability processes of organizations is very important, because the legal and regulatory environment is changing rapidly. It is necessary not only to have knowledge of the legal acts related to sustainable activities, but also to follow their changes and respond promptly.

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IV.3. THE LINKS BETWEEN SUSTAINABILITY AND ELECTRIFICATION IN THE REGULATORY FRAMEWORK OF EU AND LITHUANIA

Peculiarities of the regulatory framework of sustainability and electrification

The EU goal to achieve net-zero emissions by 2050 has become the main purpose of the regulatory framework considering sustainability matters. Therefore, requirements and legal restrictions are mostly linked to the transport sector and its electrification strategies. The analysis of the reduction of the emissions of battery electric vehicles (BEVs) and fuel cell electric vehicles became the most relevant topic after the announcement of the 2050 goal of achieving net-zero emissions, reducing harmful CO_2 emissions, and applying different regulatory framework scenarios in various countries. The results of study by Breuer *et al.* (2021) showed that "light and heavy-duty vehicle traffic produces up to 50% of present CO_2 emissions on federal highways and 30%–40% of harmful air pollution in urban areas." It is also implied that "that diesel-hybrid overhead catenary technology could, but not necessarily would, effectively reduce air pollution" (Breuer *et al.* 2021). Kacperski *et al.* (2022) also indicate that with renewable energy occupying a 35% share of total electricity consumption due to the increasing capacity for intermittent renewable energy production around the world, an increasing share of BEVs on the roads should be expected which could lead to other issues related to the implementation of the electrification of the transport sector. Kacperski *et al.* (2022) point out that "policy makers should ensure that it does not increase road traffic, and lead to potential grid issues as a consequence." Once net-zero emission targets have been set, the scientific community intensively looks for new ways and strategies to achieve the set goals. A detailed assessment of the technical specifications of EVs, battery design, and alternatives for electricity storage are very important for achieving the set targets of sustainability. Therefore, scientific research results, as well as modelling and forecasting indicators of the negative sides of the development of the EV, should be investigated and evaluated with the utmost accuracy to prevent irreversible impact on the environment and societal well-being.

The first steps towards regulating the issues relating to energy efficiency in the EU regulatory framework appeared in 2005. Legal regulations were oriented towards the usage of alternative fuels and the promotion of the use of energy from renewable sources, focusing on common rules for the internal market in electricity and creating unified guidelines for trans-European energy infrastructure by setting CO_2 emission performance standards for new passenger cars and new light commercial vehicles (Directives 2005/64/EC, 2012/27/EU, 2014/94/EU, 2018/2001, 2019/944, and Regulations 2019/631, 2022/869). The 2005 Directive on the type-approval of motor vehicles with regard to their reuse, recycling and refurbishment specifies that, with regard to the reuse, recycling and refurbishment of motor vehicles, Member States shall ensure that the manufacturer, when applying for type-approval of a type of vehicle in the European Community, shall use the models for the presentation of the particulars specified in the provisions of this Directive. The Directive also strengthened the enforcement of motor vehicle production with a view to sustainability and to increasing the focus on recycling, reuse and refurbishment. The main problems with the implementation of such strategies appeared in manufacturing businesses. According to the legislation, Member States may not grant any type-approval on a compulsory basis without first satisfying themselves that the manufacturer has followed the appropriate procedures and practices, so the procedures shall specify the requirements for the production of vehicles belonging to the relevant categories in such a way that at least 85% of their mass is reusable and/or recyclable, and at least 95% of their mass is reusable and/or refurbished. Thus, in spite of the fact that EU legislation was already directed towards technological development, energy efficiency and resource reuse (Directive 2005/64/EC) almost two decades ago, the set goals have still not have been fully exceeded and implemented in all EU countries even today.

Therefore, questions remain as to whether the legislation and its implementation strategies are the most useful tools for achieving results in climate change management. Perhaps the whole perspective and direction towards climate change should managed by a different approach. The holistic point of view and approaches from different angles could be key elements in achieving results, combining the areas of legal regulation, cultural, behavior, social, educational and accountability management.

The importance of energy efficiency in EU legislation

Further analysis of the legal framework considering the matter of electrification in the EU indicates that the 2012 European Commission Directive 2012/27/EU raised the importance of energy efficiency with utmost urgency at the time of its implementation. This legal instrument addresses the challenges posed to the Union by increasing dependence on energy imports and scarce energy resources, as well as the need to limit climate change and overcome the economic crisis. Strangely enough, the issues of energy efficiency, dependence and scarce resources that were discussed a decade ago are still very relevant in today's geopolitical context, where EU Member States are taking more and more urgent and result-oriented legal decisions for the implementation of energy efficiency plans. In spite of this, legal decisions to reduce energy dependence were, as the legal framework shows, already discussed 10 years ago and could have been implemented more efficiently (Directive

2012/27/EU). This might have reduced the risks of energy crises emerging, which are a common topic of today's conversations.

It should be noted that in addition to promoting energy efficiency and setting targets for the development and use of alternative fuels, the EU has also issued parallel directives for the prevention and improvement of the system for the prevention and treatment of waste from such products. In 2002, legislation was also addressed towards the managing of e-waste, recycling and disposal via the approval of Directive 2002/96/EC on waste electrical and electronic equipment and Directive 2002/95/EC on the restriction of the use of certain hazardous substances in electrical and electronic equipment, which were introduced as mandatory to European Union Member States, including Lithuania. Still, it is one step to confirm the regulation requiring that certain hazardous substances not be used in electrical and electronic equipment; without providing real practice, alternative and possibilities, the question of how to achieve these purposes is another issue. It can be stated that BEVs – as their fuel batteries require similar elements for production, utilization, sorting and re-use – have a similar issue.

Energy efficiency is seen as a valuable tool for addressing the problems of security of energy supply by reducing primary energy consumption and energy imports. Therefore, today's situation and the measures taken to bring the energy sector under control are still not effective enough and have to be combined with different disciplines and sectors to achieve more efficient practical results in future.

The customizability of the regulatory framework for managing probable challenges regarding the electricity consumption of BEVs

Energy efficiency also contributes to cost-effective reductions in greenhouse gas emissions, thereby mitigating climate change. It has already been stressed that the transition towards a more energy-efficient economy should also accelerate the diffusion of innovative technological solutions and enhance the competitiveness of the Union's industry by stimulating economic growth (Cervantes, Copeland and Žarnic 2018). However, today's situation shows that the Directive's intentions have not been fully implemented. The question is whether electrification of the entire transport sector will be the key to achieving results, and whether the real objective is to reduce climate change or to achieve energy independence.

It can be assumed, given the further development of the industry with only a change in the end product (electricity-powered batteries instead of fuel-powered batteries), that these objectives are not solely focused on improving the environment and sustainability, since the development and the further growth of the industry is likely to have a large and substantial impact on the environment. The issues which could appear due to the matter of electricity consumption should also have been evaluated with more thorough analysis. The capabilities of the EU and its Member States to implement such a requirement set out in the EU legal framework regulations should have been considered. Before setting the mandatory goal of achieving net-zero emission by focusing on the electrification of the transport sector, the real physical possibilities of implementing such strategies in seeking the targets should firstly have been evaluated using critical thinking tools. Questions such as "Will it be

possible to fully change all aspects of the transportation sector in two decades?" were not asked, thus after the appearance of this regulation almost two decades ago no sufficient results were achieved.

The main question arises as to whether all Member States will have the necessary tools, capabilities and financial resources to implement such a set of goals as those in the EU legal regulation framework, and whether these goals will really have a maximal impact on climate change. Conversely, might they become another legal and practical liability, for a country such as Lithuania, due to problems in management, maintenance, control and development if we cannot adequately deliver and obtain the efficiency of this system without the support of the EU? If not adequately delivered, will this expose us to additional threats – or worse, will the search for new solutions lead to deeper co-dependency on EU decisions?

In the following EU policy guidelines, it is possible to see consistency in the pursuit of energy independence and the reduction of climate change drivers in the production sector. Directives 2014/94/EU and 2018/2001 on the deployment of alternative fuel infrastructure and the promotion of the use of renewable energy discuss the legal instruments that can serve as regulatory and administrative tools to support the development of alternative fuel infrastructure, such as building permits, parking permits, certification of the environmental performance of companies, and petrol station concessions. Already in the 2014 specifications, policy measures were identified to support the implementation of the national policy framework through instruments such as: direct incentives for the purchase of alternative fuel vehicles or the development of infrastructure; the availability of tax incentives to promote alternative fuel vehicles and related infrastructure; parking policies and dedicated lanes; and support for the deployment and production of the National Budget, which is allocated annually to the deployment of the infrastructure for the development of alternative fuel vehicles to support companies involved in the production of the technology and to the research, development and demonstration of research and development activities. So, taking into consideration that targets were already set in 2014 for the number of alternatively fueled vehicles to be achieved by 2020, 2025 and 2030, Lithuania has initiated and legally implemented these requirements since 2016. However, as can be seen, the pace of achievement of these targets up to today has not been rapid, and additional difficulties are still being encountered in meeting such targets. There is a reasonable doubt as to whether it is likely that the expected replacement of vehicles by the full electrification of the transport sector is achievable in the remaining 18 years, mainly in such EU countries as Lithuania.

Therefore, the main problems for implementing these set targets in the EU legal framework are not only economic issues (such as budget and financial scarcity), but also production capabilities, the supply of materials, the development of infrastructure, the availability of tax incentives to promote alternative fuel vehicles and related infrastructure, the increasing price of electricity and its availability, as well as the utilization of replaced cars and their batteries. These are only the obvious issues related to the probable upcoming issues to be faced by the electrification of the whole of the transportation sector.

Consumers' right to detailed information according to the requirements set out in the legal framework of energy efficiency

Directive 2018/2001 requires Member States to avoid market-distorting situations leading to intensive imports of resources from third countries. In this respect, a life-cycle approach should be considered and encouraged. The main objective is to achieve the widest possible use of alternative fuels for transport while ensuring technological neutrality, and to promote sustainable electro-mobility throughout the Union. The Directive emphasizes that consumers should be provided with comprehensive information when planning the infrastructure needed to generate electricity, including information on the energy efficiency of the heat supply system and the lower running costs of electric vehicles, in order to enable them to make an individual choice between renewable energies and not to be bound by technological constraints. In practice, however, consumers who have already chosen to use electric vehicles to date have in some cases been misled. In accordance with the Directive 2019/944, Member States shall ensure that suppliers fully inform end-users of the opportunities, costs and risks of such dynamic electricity pricing contracts, and shall ensure that suppliers are required to provide end-users with appropriate information, including on the need for the installation of appropriate electricity meters.

The Directive refers to the need to inform consumers, but does not mention the need to inform them of the drawbacks of the choice of such vehicles, such as the possible explosion of such batteries, the charging time, the availability of charging infrastructure, the distance that can be travelled, and of course the rising cost of electricity today, which in the end results in dissatisfaction with the choices made by the consumers of such vehicles. From a legal point of view, consumers who choose such vehicles may face insurance problems, as an explosion in a household loading car can lead to problems in obtaining insurance cover, and there have been echoes in the digital space of cases concerning tax problems and other risks associated with such vehicles (Allianz 2022, Baldursson 2021, Coltura 2020). Therefore, in 2021 Lithuania implemented legal requirements due to the positive results that could be expected when integrating new regulatory concepts and areas into national law (active consumer and citizen energy communities, energy storage, charging access for electric vehicles, variable electricity pricing contracts, balancing services, flexibility services, ancillary services not related to frequency regulation, comparison tools, etc.) (Amendments No. VIII-1881, 2021). The integration of these new provisions must first include the definition of the relevant new concepts. It is indicated that it is "proposed to add to new concepts and definitions related to the regulatory areas, which are described in more detail in the explanation of the regulatory developments in the relevant area" (Amendments No. VIII-1881, 2021). The implementation of the transposition of the provisions of the Directive into Lithuanian national law and the new legal provisions proposed by the Draft Laws are difficult to implement in Lithuania. To date, consumers have been confused as to the implementation and reform of energy sector regulation itself, and the mere provision of definitions, concepts, information posts or individual notices to the public is not enough – citizens should be educated, enlightened and made aware of the innovations, changes and possible problems of their implementation.

Further analysis of EU directives and regulations identifies that in recent years, in terms of legal regulation, the focus has been on the guidelines for trans-European energy infrastructure (Regula-

tion 2022/869), improving the common rules for the internal market in electricity (Directive 2019/944), as well as the CO_2 emission standards for new passenger cars and new light commercial vehicles (Regulation 2019/631). The European Commission's Communication on the European Green Deal (2019) sets out a new growth strategy to transform the EU into a just and prosperous society; a resource-efficient and competitive economy with zero net greenhouse gas emissions and the decoupling of growth from resource use in 2050.

The main focus in legislation should not be addressed only to restrictions, or mandatory goal achievement, but also to developing the right attitudes in society itself, and to finding ways to approach more technical industrial solutions to achieving such goals. Currently, the focus is not on promoting behavioral and habitual change per se, but on increasing consumption, with the only focus being on renewable production. There is no precise strategy for decoupling economic growth from resource use, but resource use and economic development are currently correlated – without disconnecting one from the other, and without separating the impact of consumerism in the context of these interactions.

The regulatory impact of EV industrialization on managing CO_2 emissions

The transport sector has been reducing CO_2 emissions since 1990. Therefore, European legislation has set progressively stricter emission limits for air pollutants from vehicles by applying mandatory tests since 2019 (European Union emission inventory report 2020). Statements suggesting that the use of electric vehicles reduces CO_2 emissions, and that a move towards full electrification in the transport sector will therefore greatly reduce the impact of these emissions in air pollution, should be interpreted with caution. Thus, the Environmental Protection Agency of the United States (US EPA) indicates that "Greenhouse gas (GHG) emissions from transportation account for about 29 percent of total U.S. greenhouse gas emissions, making it the largest contributor of U.S. GHG emissions. Between 1990 and 2019, GHG emissions in the transportation sector increased more in absolute terms than any other sector" (US EPA 2021a). According to the data of the EPA, the transportation sector has an influence on only 14 percent of global emissions by economic sectors; therefore, the largest part of emissions is caused by electricity and heat production, such as the burning of coal, natural gas, and oil for electricity and heat – which is the largest single source of global greenhouse gas emissions in the industry (US EPA 2022). Although they primarily involve fossil fuels burned on site at facilities for energy, this sector also includes emissions from chemical, metallurgical, and mineral transformation processes (US EPA 2022).

The effect of the implementation of regulatory proposals regarding EV industrialization on the total amount of CO_2 emissions

According to EPA (2021c) report data, "Electric vehicles produce zero tailpipe emissions; however, weight, horsepower, and vehicle size can still impact the vehicle fuel economy." The trend towards more powerful vehicles has offset some of the fleet-wide fuel economy and CO_2 emission benefits that otherwise would have been achieved through improving technology; therefore, estimated new vehicle real-world CO_2 emissions are at a record low and fuel economy is at a record high (US EPA 2021c). In 2020, greenhouse gas emissions from transportation accounted for around 27% of total United States greenhouse gas emissions (US EPA 2021a). As for global emission rates by countries, in 2014, the top CO_2 emitters were China, the United States, the European Union, India, the Russian Federation, and Japan. These data include CO_2 emissions from fossil fuel combustion, as well as cement manufacturing and gas flaring, and come not only from transportation sectors. Therefore, together, all of these sources represent a large proportion of total global CO_2 emissions (US EPA 2022).

Furthermore, in taking steps to reach the full implementation of the goals of zero-emission strategies, decisions must firstly be focused on the sectors and countries that are most responsible for high CO_2 emission rates in general. Thus, according to data from the Department of Statistics of the Republic of Lithuania, a slightly different situation is observed. Considering the analysis of situational atmospheric emission factors (Official Statistics Portal 2021), total emissions of CO_2 (excluding from biomass) have not decreased from 2017 to 2020 in all economic activities. In 2017, emission rates amounted to 13.22 million metric tons per year, while by 2020, for all economic activities assessed in 2019, the figure rose to 14.69 million metric tons per year. Therefore, although sales of electric and hybrid cars have been increasing since 2018, this has not contributed to an overall improvement in the CO_2 emission rate in Lithuania. According to the statistics, land transport and pipeline transport are the main contributors to CO_2 emissions, accounting for 4.44 million metric tons in 2017 and rising to 6.06 million metric tons in 2019, while other sectors – such as telecommunication, the manufacture of motor vehicles and equipment, the manufacture of key metals, the manufacture of pharmaceuticals, and the manufacture of non-metallic mineral products – are all, in total, below the level of 10,000 metric tons annually. However, taking into consideration Unites States data, from 2019 to 2020 transportation sector emissions decreased by 13%. As a result of the COVID-19 pandemic and restricted traveling, emissions from passenger transportation decreased by 16%, while emissions from domestic freight transportation decreased by 6% (US EPA 2021c). It should be taken into account that a typical passenger vehicle emits around 4.6 metric tons of CO_2 per year. This number can vary based on a vehicle's type of fuel, fuel economy, and the number of miles driven per year (US EPA 2021b).

Taking into consideration the not so significant numbers behind the decrease of CO_2 emissions after increasing the production of EVs – and comparatively evaluating the decrease in this number after restricted consumption and traveling due to the COVID-19 pandemic – an accurate answer to the question of what kinds of measures are productive in seeking the goal of net-zero emissions can be produced. Thus, prioritizing environmental clearness, narrowing health risks, as well as repairing fauna and flora by pushing manufacturing, production, supply, profit, and consumption

lower down the list of priorities and returning to fundamental existential habits will have the most relevant impact on future environmental repair.

EV industrialization in the context of the geopolitical reality

Today's realities in the context of geopolitics and the consequences of the COVID-19 pandemic, which significantly reduced the supply of raw materials for the production of electric vehicles, must be taken into consideration. Russia's invasion of Ukraine and the imposition of new Western sanctions against Russia also have to be taken into account; thus, supplies of key commodities produced and exported worldwide were disrupted, so companies will have issues implementing efficient EV development strategies. According to some data, Russia produced 7,600 metric tons of cobalt last year, more than 4% of the global total; 3.8 million metric tons of aluminum, around 6% of estimated global production; and 920,000 metric tons of refined copper, around 3.5% of the global total (Reuters 2022).

For example, in Lithuania, according to Lithuanian statistical data of the Ministry of Transport and Communications of the Republic of Lithuania (2022), a total of 2,502 M1 pure EVs were registered in 2021, of which 46% were new pure EVs. As of January 1, 2022, a total of 8,255 M1 and N1 electric cars were registered in Lithuania, including 5,045 pure electric cars and 3,210 externally recharged hybrid cars, as well as 39,147 hybrid cars, indicating that the number of such vehicles has almost quadrupled in a year. In line with the guidelines set out in the EU Communication on the European Green Deal (2019) and the EU Directive 2019/944 on common rules for the internal market in electricity, Member States should take the necessary measures to protect vulnerable and energy-poor consumers in the internal market for electricity. Such measures may vary according to the specific circumstances of the Member States concerned, and may include social or energy policy measures related to the payment of electricity bills, investments in energy efficiency in residential buildings, or consumer protection, such as disconnection protection. This is currently quite difficult to implement in Lithuania, and has not yet been evaluated in the context of the geopolitical situation, during war time, and in view of probable future supply chain problems for such implementation, which will affect the achievement of the higher rates of consumption and usage of electric cars.

Therefore, the requirement to ensure non-discriminatory access to the distribution network is also not adequately implemented in Lithuania, nor is the objective of creating a level playing field at the retail level, whereby distribution system operators are prevented from taking advantage of their vertically integrated competitive position on the market, adequately ensured. In a small country like Lithuania, it is quite difficult to implement competitiveness, non-discrimination and non-domination of distribution system operators in a market where there is one main supplier, which also influences the activities of other operators, for the distribution of electricity to consumers. The implementation and monitoring of the requirement that "for the proper functioning of the internal market in electricity, regulators must be able to take decisions on all relevant regulatory issues and be fully independent from the influence of any other public or private interest" (Directive 2019/944) are also difficult to ensure, especially when the Directive only states an aim and an objective, but

does not give any realistic means of achieving it. Under the Directive, Member States shall ensure that the national regulatory framework allows suppliers to offer dynamic electricity price contracts, ensure that end-users who have installed a smart meter are able to request that at least one supplier offer them a dynamic electricity price contract, and ensure that each supplier with more than 200,000 end-users is able to do so. As can be seen, under the references for the implementation of directives, there are a lot of requirements set out, but no specific guidance on how to achieve these goals. It is too difficult for all EU countries to achieve the proper functioning of the internal market in electricity when it is not sufficiently regulated, because the main practical steps for implementing legal regulation and achieving this goal are not pointed out. The existing regulatory framework has not been efficient, so far, in achieving a situation where regulators are able to take decisions on regulatory issues and be fully independent from the influence of any other public or private interest. Instead, public and private interests still remain in the picture of Lithuanian regulatory framework implementation tactics.

In accordance with the provisions of the Directive, Member States or their regulatory authorities shall monitor and report annually on the main developments in such contracts, including market offers and the impact on consumer bills, and in particular on the level of price volatility, for a period of at least 10 years after the emergence of dynamic pricing contracts for electricity (Directive 2019/944). Such charges shall be proportionate and shall not exceed the direct economic loss incurred by the supplier or the pooling market participant as a result of the termination of the consumer's contract, including the cost of any bundled investments or services already provided to the consumer under the contract (Directive 2019/944). Member States shall ensure that the right to switch is granted to consumers on a non-discriminatory basis in terms of cost, effort and time, and that any regulatory or administrative barriers to collective switching are removed, while at the same time affording the highest level of protection to consumers in order to avoid any abusive practices (Directive 2019/944). Thus, specifically how these goals are to be implemented and controlled is not indicated in detail. Therefore, each member state can act at their own discretion when it comes to decision-making to achieve these objectives, which can cause dysfunction in implementation and gaps in controlling and evaluating compliance with the EU regulations and guidelines set out, especially in smaller countries such as Lithuania. Therefore, without a unified legal framework adopted equally in all EU Member States, there is still a possibility that some room for abuse could be left, and that the division and adaptation of systems might not only be inefficient, but also not transparent and not in full compliance with the requirements.

Therefore, the targets set to regulate the further reduction of CO_2 emissions from transport vehicles by 2030 – in order to realize the possibility of revising the 2030 targets for the EU fleet as a whole, and to ensure the transformation of the transport sector towards net-zero emissions, in line with the objectives of the Paris Agreement – are not only set out in the Communication, but are also contained in the directives that have been ratified by all EU Member States (Directive 2019/944). However, whether the current outcome justifies the realistic possibility of achieving the set objectives remains an open question. A key element in the monitoring of implementation is the foreseeable penalties if the CO_2 reduction targets are not met. According to the Directive, if, in any calendar year, a manufacturer's average specific emissions of CO_2 exceed the specific emission limit set for that year, the Commission shall impose a charge on the manufacturer or, in the case of

a pool, on the pool manager, as appropriate, in respect of the exceeded emission limit (Directive 2019/944).

The question is whether such measures are sufficient to ensure implementation, whether the analysis and monitoring of the evaluation of the indicators presented is properly controlled, and whether the development and focus of such measures – rather than a holistic approach to the development and focusing of consumer and societal behavior, the reduction of consumption, and the formation of habits oriented towards reducing consumption – would be an appropriately effective means of achieving the intended objectives. However, whether the promotion of consumption, through a shift in resource sources, and more specifically through the promotion of production, trade, supply and consumerism, is the right direction to take towards achieving the desired changes in climate change and towards sustainability still remains in question.

The proper functioning of economic and environmental systems implementing electric vehicle development strategies in Lithuania

According to the Law of the Republic of Lithuania on Alternative Fuels (2021), the definition of three types of vehicles are notified as the most promising vehicle types to be used now and in future by customers. Net electric car: a vehicle without an internal combustion engine in which the energy for mechanical motion is supplied solely by an electric energy storage system which is charged externally. Hybrid vehicle: a vehicle in which the energy for mechanical motion is supplied by two or more sources of stored energy in the vehicle – the fuel consumed and an electrical energy storage system (battery, capacitor). Electric vehicle: a motor vehicle equipped with a powertrain having at least one non-external electrical energy converter with an electrically rechargeable energy storage system that can be charged externally. According to the Law on Alternative Fuels, which is implemented according to the standards of the EU Directive 2014/94/EU, the main goal should be reached by consistently increasing the diversity of energy sources in the transport sector, imposing obligations on fuel suppliers to supply fuels from renewable energy sources, increasing the use of advanced biofuels, promoting the use of electricity in transport, developing infrastructure for alternative fuels, and increasing the number of clean vehicles. Article 2 of the Law defines alternative fuels as "fuels from renewable energy sources, and energy sources that can at least partially replace petroleum fuels in the transport sector, such as: electricity, hydrogen gas, synthetic fuels and paraffinic fuels, and compressed and liquefied natural gas." The main aspects of the Law's applicability that are intended to achieve its objectives are the imposition of obligations on suppliers of natural gas to the fuel and transport sector, the establishment of a system of accounting units and the monitoring of the activities of participants, the evaluation and control of the materials used in the production process, and the promotion of the use of electricity in transport. The availability of alternative fuel infrastructure is to be implemented during planning to ensure accessibility to all sections of the public and individuals and the establishment of a Sustainable Mobility Fund (2021). Therefore, Kurniawan *et al.* (2021) indicate that "in policy spheres, countries need to incorporate

economic instruments, adherence to the rule of law and resource recovery initiatives as key-drivers of their approaches, along with other programs on waste reduction, resource conservation, or environmental education." Therefore, prices and costs of BEVs are controversially discussed as products in the transport sector. High prices are not the only drawback of electrical vehicle production: in comparison to conventional vehicles, which are a strong barrier against the adoption of the development of electrical vehicles in the Lithuanian market, the upside could be considered the lower costs for maintenance, insurance, and tax, in addition to lower energy costs and reduced operational costs (Burs *et al.* 2020). For Lithuanian customers, the availability of price is one of the most relevant indicators when it comes to buying an electrical car.

All of the above measures are in line with the policy-making provisions of the EU Directives, but there are doubts as to whether the implementation of the Law will have an impact on reducing the final amount of pollution in the atmosphere and whether it will be possible to measure it properly and consistently by establishing the reason for pollution. The Law consistently mentions all of the EU's mandatory requirements for Member States, but the technical, organizational and financial measures, problems, risks and critical assessment of implementation are not presented and addressed in each case. The envisaged changes and their implementation will require not only significant financial resources, but also human resources, wood resources, and the application of technological innovations, which Lithuania is not fully capable of providing at present.

Electrical vehicle usage from an ecological point of view

Fuel prices also have to be evaluated, and the electric car will have to recharge more times on a longer route. Lachvajderová and Kadarova (2021) point out that "from an ecological point of view, the option of an electric car seems to be the best alternative, as we know from theoretical knowledge that emissions from transport are constantly rising and it is necessary to look for new, more environmentally friendly ways to gradually reduce emissions." One of the disadvantages of electrical cars is the time consumption of battery charging at electric power stations, as well as the number of stations in comparison with fuel station availability. Therefore, the question of whether electrical vehicles can replace conventional engines in the Lithuanian market remains open. Lachvajderová and Kadarova (2021) also indicate the fact that "most charging stations draw energy from non-ecological power plants. In addition, in the results of the ICCT study, the production of electric cars and batteries is more environmentally demanding compared to the production of ICEV. So, what is presented as a way out of the hell of emissions could probably do us more harm than good." Hence, all of the variables, obstacles and future indications should be properly investigated and evaluated before jumping to adopt a strategy of electrification of the transport sector.

BEVs have long charging times and limited charging infrastructure – according to Chew and Yong (2016), even with super chargers, it still takes around 20 minutes to charge a BEV to 80% capacity, and charging stations are not as widely available as they are for ICVs. Battery swapping could be as fast as refueling a vehicle, but "the method is not fully implemented and there are still questions on the implementation of the system as the battery systems of BEVs are not standardized and depend on the car manufacturers. These disadvantages hinder the implementation of BEVs

on a larger scale" (Chew and Yong 2016). According to the National Energy and Climate Action Plan (2021) and National Progress Plan (2021) approved in Lithuania, it is foreseen that the transport sector will replace the old car fleet (currently the average age of passenger cars in Lithuania is 15 years) with newer and more efficient models, will use alternative fuel vehicles, will promote innovative transport technologies, will use non-polluting vehicles, and will use electric mobility in all modes of transport. Relying on the data of November 1, 2019, according to the State Enterprise REGITRA, 1,313 pure M1 and N1 class electric vehicles were registered in Lithuania. This represents less than 1% of the total fleet (~1.5 million) in the country. The number of electrical vehicles is growing, but by an average of around 30 units every month, so the majority of electrical vehicles registered in the country are used electrical cars, which is considered a drawback when it comes to the evaluation of the life cycle of the batteries of electrical vehicles. Currently, there are two main incentives for choosing an electrical vehicle indicated in the National Energy and Climate Action Plan (2021) and the National Progress Plan (2021): access to specially marked shuttle lanes in Vilnius, and parking and entry fee reductions in Lithuanian cities. According to the National Progress Plan (2021), between 2014 and 2019, 25 public charging stations for high-capacity electric vehicles were installed on the Vilnius–Klaipėda motorway, the Vilnius–Panevėžys motorway and other roads of national importance; the small number of these stations still appears to be a huge disadvantage for the EV user. Many Lithuanian municipalities have included charging points for electric vehicles in their Sustainable Urban Mobility Plan. According to the National Progress Plan (2021), 17 Lithuanian municipalities had benefited from European Union investment opportunities to install electrical vehicle charging bays by the end of 2020 (a total of 56 EV charging bays are planned – 33 high-power and 23 normal-power). It should be taken into consideration that this public electrical vehicle charging infrastructure (near national roads and in municipalities) is designed and developed in accordance with approved European Union standards. Therefore, the infrastructure plan should be more efficient if Lithuania seeks the goal of net-zero emissions from the electrification of the transport sector in future. EU standards and legal frameworks should be created in respect of each Member State's capabilities and resources to implement them. Therefore, the adaptation of one regulation cannot be effectively applied in all 27 countries due to their different development rates. Even now, these numbers already indicate future shortages in view of the efficiency of charging station infrastructure. Thus, there are already claims and concerns from electrical vehicle users considering the problems of the limited availability of charging stations in Lithuania. This issue, if progress continues according the approved National Energy and Climate Action Plan (2021) and National Progress Plan (2021), could be magnified after the large increase of EV adoption.

It should be pointed out that in the National Energy and Climate Action Plan (2021) and the National Progress Plan (2021) it is also planned to achieve 50 percent EV M1 usage and 100 percent EV N1 usage across the total transport fleet in Lithuania by 2030. This is not rational in view of the above mentioned problems with the usage of electrical vehicles, such as: energy consumption; long charging times; intensive planning for recharging on long-distance trips; cost of electrical cars; concerns of weak safety measures of changing; future cost of electricity; and the lack of charging stations and poor infrastructure. Thus, according to the priorities for ambient air protection indicated in the Law on Environmental Air Protection of the Republic of Lithuania (2021), reducing vehicle emissions by reducing the use of internal combustion engine vehicles and increasing the use of

electric vehicles are the main goals of the Lithuanian strategy. By implementing the National Energy and Climate Action Plan (2021) and the National Progress Plan (2021), Lithuania aims to achieve the goal of net-zero emissions, to attract an EV battery or other high value-added manufacturing investor to Lithuania, and to create preconditions for the establishment of a manufacturing plant in Lithuania by 2025. The objective of the implementation of the National Energy and Climate Action Plan is to encourage the development and integration of new energy generation and storage technologies, including renewable energy sources, distributed energy sources, smart grids, and the integration of new energy generation and storage technologies in the grid, attracting investment in the production of these technologies in Lithuania. Unfortunately, these are not seen as likely achievements of the implementation of the strategy, and could be seen as representing superficial planning that does not foresee and assess all threats. The strategy focuses on economic expansion, consumption, and distribution – not on reducing consumption, production, or sales. Nor does it focus on educating the public about reducing consumption, forming different habits and, in general, looking for ways to implement a general change in social culture, which could have a huge impact on the future of sustainability and climate change.

The demand for financial resources in the development of the industrialization of electrical vehicles

It should be pointed out that reducing emissions requires significant investment across the whole sector. According to the National Energy and Climate Action Plan (2021), the most significant investments are planned to implement the measures set out in the Sustainable Urban Mobility Plans, as well as to promote: the use of electric vehicles, alternative fuels and the expansion of their infrastructure; the electrification of rail; the use of low-emission vehicles; and other transport sector policies. The National Energy and Climate Action Plan indicates that the fund should receive all funds from targeted pollution taxes and should be used to promote less-polluting transport (incentives for the installation of charging points for electric vehicles, purchase of zero-emission vehicles, parking of zero-emission vehicles, social dissemination and the creation of sustainable mobility habits), which only looks promising on paper. According to the National Progress Plan (2021), it is presumed that the total resource requirement for the sector amounts to €3,752.66 million, of which public funds amount to €2,798.96 million and private funds to €953.7 million. The public funds portfolio will mainly consist of European Union funds for the 2021–2027 period, LIFE IP, state and municipal budgets, the Climate Change Programme, and others.

The question is emerging as to what determines the cost of battery upgrades. Therefore, what are the benefits and concerns of the development of the industrialization of electrical vehicles? Sahle-Demessie *et al.* (2021) note that "the main drivers of battery refurbishment costs are: the logistics of assembling the batteries, checking their remaining useful life, and the physical disassembly and repackaging of cells, modules and packaging." Sahle-Demessie *et al.* also point out that the diversity of BEV material composition is increasing; therefore, sustainable management is critical to achieving a circular-economy and minimizing environmental and public health risks. Thus, Burs *et al.* (2020) mention that BEVs are only able to exploit their full potential when charged with

renewable energy. These studies also suggest that the development and adoption of electrical vehicles can be linked to technologies, consumer characteristics, and the context of population density, as well as charging infrastructure, policies, energy mix, and electricity/gas prices, taking into account the critical link between EV adoption and critical consumption, the politics of purchasing, ethical consumption and political consumerism (Brückmann, Willibald and Blanco 2021). However, the drawbacks of the implementation and development of electrical vehicles in the transportation sector should be also taken into account, because being fully electrified and relying only on electricity or the consumption of renewable energy sources will result in major financial and economic losses worldwide – both to ICEV manufacturers and fuel providers. For example, Steadman *et al.* (2019) indicate that "the major uncapped cost, which affects every state, is the reduction in fuel tax revenues resulting from increased BEV ownership. The estimated costs as of 2018 were $44.0 million annually in federal fuel tax revenue. This expands up to $5.157 billion annually in the 25 percent modelled scenario." Therefore, all of the advantages and disadvantages of the chosen strategy have to be equally evaluated, considering the impact on the environment and public health due to the waste disposal involved in BEVs and other future uncertainties of their development and implementation which could arise and which may have unpredictable outcomes.

Conclusions

According to the goals set out in the regulatory framework for the electrification of the transport sector, the total usage of electrical vehicles in the transport fleet in Lithuania has not yet been fully implemented. Furthermore, EVs are not in high demand in comparison to non-electrical vehicles. Therefore, if the predicted results set out in the regulatory framework for the full implementation of the electrification of the sustainable transport sector do not meet the expected targeted requirements, the electric vehicle industry may not only fail to reduce atmospheric emission rates, but may also have negative consequences for the environment and public health.

It should be pointed out that statistical data analysis of Lithuania – as well as other indicators such as emission rates for the recycling, disposal or reuse of BEVs and the impact of air pollution by lowering CO_2 emissions rates by developing an EV strategy – showed that efforts to achieve sustainability goals may not be as efficient as expected, and may not lead to significant results. The adaptation of the EV strategy – taking into consideration obstacles for the effectiveness of implementation such as grid issues, charge queue times, battery temperature, charging mode, gear ratio, consumption predictions, and disposing BEVs in landfills – raises more uncertainties as to whether the global optimum, indicated in the EU regulations, will be met.

It could be argued that the main guidelines for the regulatory framework are generally oriented towards the end-user, seeking to regulate the supply of their needs by replacing the means of production and technical means with alternative sources that are less polluting, less harmful to the environment and to health, and more affordable. The goal of increasing the energy independence of countries set out in 2005, which is admirable and to be considered appropriate, still has not met the targets set out in legislation.

From a general global socio-cultural and psychological point of view, in terms of modelling and changing habits, no guidelines or regulatory policies are provided. There is no developmental adjustment of value-based, societal models of behavior formation and habit change. Legal frameworks for sustainability mainly focus on economic financial decisions to maintain consumption, purchasing power, income and power.

Decision making in the perspective of legal regulations aims to further increase the scale of economic growth by offering consumers alternative means of transport or equipment for the continued use of resources. However, this proceeds without aiming to reduce production in general, to reduce market development, or to seek to educate people towards appropriate habit formation in the development process, all of which could be appropriate responses to climate change.

However, economics, finance, income, power and influence still outweigh the need to make fundamental decisions on behavior formation and habit change, as this would have implications for the formation and maintenance of the principles of power, money and authority in the long term. Profit, power and influence remain key indicators when looking at decision making for sustainability – even in the context of globally important goals such as managing climate change.

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IV.4. CONTRIBUTION TO THE SUSTAINABLE DEVELOPMENT AGENDA BY CALCULATING AND REDUCING GREENHOUSE GAS EMISSIONS FROM THE WASTE MANAGEMENT SECTOR

The main international and regional agreements and/or acts on climate change mitigationand implementation of the sustainable development goals

On 9 May 1992 the United Nations Framework Convention on Climate Change (hereinafter – the Convention or UNFCCC) was adopted in New York and was signed by 155 parties at the United Nations Conference on Environment and Development (also known as the Rio Earth Summit) in June of that year (O'Riordan and Jäger 1996, p. 361). Currently, there are 199 parties to the UNFCCC. The Convention entered into force on 21 March 1994. Currently, there are 199 parties to the UNFCCC. The ultimate objective provided in Article 2 of the Convention is "to achieve (…) stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system (…)" (United Nations [UN] 1922, p. 9). The Kyoto Protocol was adopted on 11 December 1997, but entered into force only on 16 February 2005. The Kyoto Protocol "operationalizes the [Convention] by committing industrialized countries and economies in transition to limit and reduce greenhouse gas (GHG) emissions in accordance with agreed individual targets. The Convention itself only asks those countries to adopt policies and measures on mitigation and to report periodically" (UN, n.d.-a).

With the Paris Agreement – which was adopted on 12 December 2015 and entered into force on 4 November 2016, and is often referred to as an essential international instrument for combating climate change because it is a legally binding international treaty – the parties agreed that "enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by: (a) Holding the increase in the global average temperature to well

below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change (…)" (UN 2015a, p. 3). As far back as 1987, the United Nations Commission on the Environment and Development's report "Our Common Future" defined sustainable development as "development that meets the needs of society today and does not diminish the ability of future generations to meet their own needs" (UN 1987, p. 54).

In 2019, in pursuit of the objectives of the Convention and the Paris Agreement, the European Commission presented the European Green Deal (European Commission [EC] 2019) – in other words, guidelines for action to promote resource efficiency in the transition to a clean circular economy, halt climate change and biodiversity loss and reduce pollution. Another important document is Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ("European Climate Law"). This was adopted on 30 June 2021, and set a legally binding objective for the European Union to reach climate neutrality by 2050 (European Parliament [EP] and the Council of European Union [CEU] 2021, p. 8). This directly applicable regulation also sets an intermediate target, which is also binding on Member States, to reduce net GHG emissions by at least 55% compared to 1990 levels by 2030 (EP and CEU 2021a, p. 8).

The legally binding objectives to reduce GHG emissions by 2030 to an appropriate extent and to become a climate-neutral region by 2050 stem from a sound understanding of the environment, climate change and the resulting and potential future consequences not only for the environment but also for human health. The idea of the need to preserve a healthy and clean environment for future generations is not new; the preamble of the Stockholm Declaration emphasized the need "to defend and improve human environment for present and future generations [..]" in 1972 (UN 1972, p. 2), but the importance of this idea is much greater today. In order for future generations to be able to exercise their right to a healthy and clean environment, and in order to achieve the ambitious goal of a climate-neutral region, today's societies need to make a major change in environmental protection, including waste management.

In 2000, the United Nations signed the Millennium Declaration, which set out eight goals to be achieved by 2015, such as supporting gender equality, reducing child mortality, and eradicating extreme poverty and hunger. One of the goals was also to protect the environment (UN 2000, p. 6) – to "ensure environmental sustainability" (UN, n.d.-b). At the end of the Millennium Development Goals, the United Nations adopted a new declaration for the period up to 2030, during which even more (seventeen) goals should be achieved. These goals in the new declaration were identified as the Sustainable Development Goals (UN 2015b, p. 14). The European Union has also contributed to the above-mentioned United Nations Declaration on the Sustainable Development Goals until 2030 (EC, n.d.-a), and the Sustainable Development Goals have been defined by 169 targets that further refine them (UN 2017).

The goals of sustainable development and the 169 targets that refine them cover many important areas, but in the case of GHG emissions, the thirteenth sustainable development goal (SDG13) on climate change mitigation must be emphasized. One of the SDG13 targets (13.2) is to "integrate climate change measures into national policies, strategies and planning" (UN 2017, p. 17). The mentioned target has two indicators, one of which is the "total greenhouse gas emissions per year"

(UN 2017, p. 17). As for the waste management sector, the twelfth sustainable development goal (SDG12) must ensure sustainable consumption and production patterns. Target 12.5 of SDG12 seeks to "(…) substantially reduce waste generation through prevention, reduction, recycling and reuse" (UN 2017, p. 16), and the indicator of target 12.5 is "national recycling rate, tons of material recycled" (UN 2017, p. 16). The connections and interlinkages between all the sustainable development goals and targets that can be seen visually (EC, n.d.-b) show that there is synergy between targets 13.2 and 12.5.

Addressing one goal could help to address some others at the same time (Mensah, 2019, p. 12), but "climate action [SDG13] is a critical pillar to achieving sustainable development, and all 17 Goals require efforts to address climate change. In its absence, it is virtually impossible to achieve them" (UN Global Compact, n.d.). Coenen, Glass, and Sanderink (2022) concluded that "the strongest links exist between TCIs [transnational climate actions] and SDG13 (*climate action*), followed by SDGs 12 (*responsible consumption and production*), 9 (*industry, innovation and infrastructure*), 7 (*affordable and clean energy*), and 17 (*partnerships for the goals*). (…) Thus, climate actions around sustainable production and consumption, energy, and industry and infrastructure appear to be key for combating climate change while simultaneously fostering sustainable development" (p. 1504).

The implementation of the interconnected sustainable development goals and the objectives of the international and regional documents related to combating climate change requires the calculation of GHG emissions and the evaluation and implementation of policies and measures (hereinafter – measures) to reduce GHG emissions. Therefore, measures (e. g. scope, efficiency) depend on the amount of calculated GHG emissions. In light of this, it is important to examine the specifics of GHG emissions from the waste management sector. Having in mind the intertwining of the waste management and energy sectors (especially when it comes to GHG emissions' estimation and reporting to the Intergovernmental Panel on Climate Change (IPCC)), it is also important to answer what can be done to reduce the negative environmental impact of the waste management sector – in particular, to reduce GHG emissions and thus contribute to the sustainable development goals, climate neutrality and resource efficiency in the transition to a clean circular economy.

Greenhouse gas emissions: calculation, reporting and statistics

The Member States of the European Union use the following key documents to calculate and report their GHG emissions: the 2006 Intergovernmental Panel on Climate Change (IPCC) Guidelines for National Greenhouse Gas Inventories (hereinafter – IPPC Guidelines) (IPCC 2006a); and Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action (hereinafter – Regulation (EU) No 2018/1999) (EP and CEU 2018a), which was amended by the European Climate Law on 30 June 2021 (EP and CEU 2021b). Regulation (EU) No 2018/1999 does not establish specific methodologies for the calculation of GHG emissions, but directs the Member States to the Convention and Paris Agreement. For example, the preamble (41) of Regulation (EU) No 2018/1999 states that

"under the UNFCCC, the Union and its Member States are required to develop, regularly update, publish and report to the Conference of the Parties national inventories of anthropogenic emissions by sources and removals by sinks (hereinafter – GHG inventories) of all GHGs using comparable methodologies agreed by the Conference of the Parties. The GHG inventories are key to enabling the tracking of progress with the implementation of the decarbonisation dimension and for assessing compliance with the legislative acts in the field of climate, in particular Regulation (EU) 2018/842 of the European Parliament and of the Council (16) and Regulation (EU) 2018/841 of the European Parliament and of the Council" (EP and CEU 2018a, p. 7). Regulation (EU) No 2018/1999 also emphasizes cooperation between the Member States of the European Union, reporting frequency and other aspects. For example, in paragraph 1 of Article 1 of Regulation (EU) No 2018/1999 there is the objective to "c) ensure the timeliness, transparency, accuracy, consistency, comparability and completeness of reporting by the Union and its Member States to the UNFCCC and Paris Agreement secretariat" (EP and CEU 2021b, p. 2). Thus, Regulation (EU) No 2018/1999 directs Member States to follow *inter alia* the above-mentioned IPPC Guidelines, which provide a methodology for calculating GHG emissions and removals for different sectors (Energy, Waste, Industrial Processes and Product Use, Agriculture, Forestry and Other Land Use (AFOLU)).

The IPCC, which was established by the World Meteorological Organization and the United Nations Environment Programme in 1988, prepared the IPCC Guidelines. The main objective of the IPCC was to assess scientific, technical and socio-economic information relevant to the understanding of human-induced climate change, the potential impacts of climate change and options for mitigation and adaptation (IPCC 2021). The IPCC has 195 Member countries, including Lithuania (IPCC, n.d., p. 3). Anthropogenic emissions and removals mean that GHG emissions and removals included in national inventories are a result of human activities (IPCC 2006b, p. 4). It is said that it is *good practice* to use a calendar year for reporting GHG emissions (IPCC 2006b, p. 6). The IPCC Guidelines group GHG emissions into four main sectors (Energy, Waste, Industrial Processes and Product Use, and AFOLU) (IPCC 2006a).

Eurostat statistics show (Eurostat, 2022) that in 2020, twenty-seven Member States of the European Union emitted 3,354,115.06 thousand tonnes of GHG emissions. In the same year, Lithuania emitted 20,346.48 thousand tonnes of GHG emissions (without removals). GHG emission statistics are also provided in detail, i.e., the total sum of GHG emissions is divided into emissions of the five specific areas (energy, industrial processes and product use, agriculture, land use, land use change, and forestry (LULUCF) and waste management). For example, in the same year (2020) in Lithuania, 11,816.75 thousand tonnes of GHG emissions were emitted in the energy sector, 3,093.5 thousand tonnes of GHG emissions were emitted in the industrial processes and product use sector, 4,450.72 thousand tonnes of GHG emissions in the agriculture sector, and 821.58 thousand tonnes were emitted in the waste management sector (incidentally, in 2019 the number was higher – 838.6 thousand tonnes). In 2020, the LULUCF sector absorbed 5,407.39 thousand tonnes of GHGs.

Under the methodology of the IPCC Guidelines, member countries, including Lithuania, estimate that the Waste sector generates the least GHG emissions (e.g., the Waste sector in Lithuania accounted for 4.0% of the total GHG emissions in 2020). The percentage of emissions in 2020 in other sectors in Lithuania was as follows: Energy sector ~58%, Agriculture ~22%, Industrial Processes ~15%.

Information and data that make it possible to calculate the level of GHG emissions in a given Member State of the European Union or in a particular sector are becoming particularly important in implementing the change towards climate neutrality. Data and information are important in calculating the extent to which GHG emissions could be reduced if appropriate measures were taken in the relevant Member State, and are also important for projections and decision-making. According to Yin and Kaynak (2015, p. 2), "by the proper interpretation of big data, more efficient risk management systems can be created to help company management to make better-informed decisions and improve corporate governance." This statement can be addressed not only to the companies of the public sector, but also to public institutions that make important decisions related to climate change, for example. However, without knowing the current level of GHG emissions, it cannot be clear how much GHG emissions need to be reduced by in order to achieve the objectives to reduce GHG emissions to an appropriate extent by 2030 and achieve climate neutrality by 2050. In order to make the calculations comparable, it is essential that different Member States use the same methods. It is also important that the relevant GHG emissions are not included in several different sectors, which would lead to higher calculated GHG emissions than they are in reality.

Intertwining of the waste and energy sectors may distort the public's view and lead to smaller measures on reducing GHG emissions than are necessary

Statistics on reported GHG emissions from the waste management sector show that this sector generates the smallest amount (~4 %). Nevertheless, it is still necessary to emphasize that the methodology for calculating GHG emissions under IPCC Guidelines and the calculated GHG emissions in the Waste sector lead to a somewhat distorted public image – i.e., that the waste management sector is low-polluting and a very low contributor to climate change. As a result, ostensibly no substantial changes in the legal framework for waste management are required and / or no additional measures are required to manage waste at the highest possible levels in the waste hierarchy and / or to start waste management (operations, services) in a more sustainable, sound way. This is why it is necessary to analyse the existing methodology, the scope of the waste management sector, the connections and interactions between different sectors, especially the Waste and Energy sectors, and to assess the situation and suggest possible solutions.

Directive 2008/98/EC of the European Parliament and of the Council, which was amended by Directive (EU) 2018/851 (hereinafter – Waste Framework Directive), establishes a waste management hierarchy (EP and CEU 2018b, p. 6), which ranks waste management options according to what is best for the environment. It gives top priority to preventing waste in the first place. When waste is created, it gives priority to preparing it for re-use, then recycling, other recovery and last of all disposal (e.g., landfill).

The communication of the European Commission "The role of waste-to-energy in the circular economy" provides that "waste-to-energy processes encompass very different waste treatment operations, ranging from 'disposal' and 'recovery' to 'recycling'. For example, processes such as

anaerobic digestion which result in the production of a biogas and of a digestate are regarded by EU waste legislation as a recycling operation. On the other hand, waste incineration with limited energy recovery is regarded as disposal" (EC 2017, p. 4). Moreover, reprocessing of waste into materials that are used as fuels (solid, liquid or gaseous fuels) is classified in the waste management hierarchy not as "recycling" but as "other recovery" (EC 2017, p. 4), i.e., at a lower level in the waste management hierarchy.

It should be emphasized that, according to the communication of the EC, "waste hierarchy also broadly reflects the preferred environmental option from a climate perspective: disposal, in landfills or through incineration with little or no energy recovery, is usually the least favourable option for reducing greenhouse gas (GHG) emissions; conversely, waste prevention, reuse and recycling have the highest potential to reduce GHG emissions" (EC 2017, p. 4). For example, "operations throughout the plastics recycling chain require energy consumption in the form of diesel fuel, grid electricity and thermal energy, which contributes to GHG emissions as well as fossil resource depletion. On the other hand, the materials recovered as a result of recycling enable environmental benefits from the avoided production of virgin plastics and related impacts" (Hestin, Faninger and Milios 2015, p. 30). It is said that "recycling plastics releases only a fourth or even less of the GHG emitted by producing plastics from fossil-based primary feedstock" (EC 2017, p. 9), and that "the circular economy has the power to shrink global GHG emissions by 39% and cut virgin resource use by 28%" (Circle Economy 2021, p. 8). Therefore, it is essential to evaluate not only direct but also avoided GHG emissions, in this case resulting from the extraction and (or) production of primary raw materials.

The Waste Framework Directive also contains a definition of waste management. Waste management means "the collection, transport, recovery (including sorting) and disposal of waste, as well as the supervision of such operations and the follow-up of disposal sites, including such actions taken by the dealer or broker" (EP and CEU 2018b, p. 4). In order to clarify the definitions of *recovery* and *disposal*, the Waste Framework Directive refers to its annexes that set out non-exhaustive lists of recovery and disposal operations.

Aulakh and Thorpe, following a consultation programme with industry representatives, proposed a revision of the 2008 European Waste Framework Directive's description of the waste management sector (A. Turner, Kemp and Williams 2011, pp. 677–678), whereby the waste management sector is defined as consisting of local authorities and businesses engaged in one or more of the following activities: (i) re-use of products to divert waste at source; (ii) collection and transport; (iii) brokerage of waste; (iv) sorting and storing; (v) disposal through landfill; (vi) disposal through incineration; (vii) treatment of waste; (viii) recycling and processing of recyclate; (ix) composting; and (x) energy recovery (Aulakh and Thorpe 2011, pp. 18–19). As can be seen, *treatment of waste* is distinguished as a separate waste management activity (for example, separate from recycling, energy recovery and others), but in fact can be understood very broadly; this term could be used for both recovery and disposal operations. This can be confirmed by the definition in Article 3 (14) of the Waste Framework Directive, which provides that "treatment" means "recovery or disposal operations, including preparation prior to recovery or disposal" (EP and CEU 2018b, p. 5).

IPPC Guidelines describe "in detail how to model greenhouse gas emissions from waste management (composting, anaerobic digestion in biogas facilities, incineration without energy recovery,

landfilling and waste water treatment)" (Bakas *et al.* 2011, p. 31), but "the Waste sector [under IPCC Guidelines] excludes several waste management activities like recycling or energy recovery of waste" (Bakas *et al.* 2011, p. 31). In the light of the provisions of the Waste Framework Directive, this statement regarding the exclusion of some waste management activities is partially accurate.

First of all, it should be mentioned that under the IPCC Guidelines the Waste sector is detailed by the following waste management operations: solid waste disposal (4A); biological treatment of solid waste (4B); incineration and open burning of waste (4C); and wastewater treatment and discharge (4D) (IPCC 2006b, pp. 33–34).

According to the waste management activities provided in the report prepared by Aulakh and Thorpe, "solid waste disposal" under the IPCC Guidelines can be specified as "disposal through landfill." Since the IPCC Guidelines provide that "Incineration of waste and open burning waste, not including waste-to-energy facilities. Emissions from waste burnt for energy are reported under the Energy Sector, 1A. Emissions from burning of agricultural wastes should be reported under AFOLU (3C1). All non-CO_2 greenhouse gases as well as CO_2 from fossil waste should be reported here for incineration and open burning" (IPCC 2006b, p. 33), "incineration and open burning of waste" under IPPC Guidelines can be equated to the waste management activity of "disposal through incineration" provided in the mentioned report.

The IPCC Guidelines provide that the biological treatment of solid waste contains "solid waste composting and other biological treatment. Emissions from biogas facilities (anaerobic digestion) with energy production are reported in the Energy Sector" (IPCC 2006b, p. 33). However, anaerobic digestion in the light of the waste hierarchy is understood as one of the recycling operations. Also, the IPCC Guidelines (Chapter 6) provide that "if sludge is incinerated, landfilled, or spread on agricultural lands, the quantities of sludge and associated emissions should be reported in the waste incineration, SWDS [solid waste disposal sites], or agricultural categories, respectively" (IPCC 2006c, p. 18).

From the comparison of the scope of the waste management sector according to various documents (the Waste Framework Directive, the report prepared by Aulakah and Thorpe, the IPCC Guidelines), it is clear that the Waste sector under the IPCC Guidelines does not include such waste management operations as the collection, transport, and supervision of relevant waste management operations and the follow-up of disposal sites, including actions taken by the dealer or broker, as well as preparing for re-use, sorting and storing. The comparison also confirmed that the scope of the Waste sector under the IPCC Guidelines does not equally match the scope of waste hierarchy or waste management under the Waste Framework Directive, but since composting under the Waste Framework Directive is understood as one of the waste recycling activities, it cannot be said that the Waste sector under the IPCC Guidelines excludes recycling entirely. Nevertheless, it should be noted that the majority of waste recycling activities are excluded, and that energy recovery of waste is excluded from the Waste sector under the IPCC Guidelines entirely.

A question may arise as to whether the emissions generated in the waste management sector – as they are understood according to the Waste Framework Directive, and that are not attributed to the Waste sector under the IPCC Guidelines – are calculated at all, and if so, to which sector they are attributed. It can be argued that almost all emissions from the waste management sector are calculated, but most of the emissions that are not attributed to the Waste sector, as it is understood

according to the IPCC Guidelines, are attributed to the Energy sector (for example, GHG emissions from waste incineration plants that can produce both heat and electricity according to IPCC Guidelines should be reported under the Energy sector, but not the Waste sector) and some attributed to other sectors (for example, AFOLU).

As can be understood from the IPCC Guidelines, some emissions are being reported not under Waste but under a different sector, in order to avoid double counting or misallocation. This is understandable, but it means, at the same time, that if GHG emissions from the waste management sector, as it is understood according to the Waste Framework Directive, were calculated for the Waste sector (for example, if GHG emissions from waste incineration plants were calculated for the Waste sector), then the percentage of emissions from the Waste sector would be higher than it is now (as mentioned earlier, ~4 %). It also means that it is possible to reduce GHG emissions from the Waste sector by simply starting to recover energy from waste (for example, by incinerating (R1)). However, it is questionable whether the reduction of GHG emissions from the Waste sector by transferring such emissions to another sector is sustainable, because on the whole GHG emissions may not decrease. A different methodology that relies on life-cycle thinking to calculate GHG emissions can help answer this. Such transferring also could negatively affect the pursuit of resource efficiency in the transition to a clean circular economy and the achievement of the targets of SDG12 (for example, target 12.5: to "substantially reduce waste generation through prevention, reduction, recycling and reuse").

The report prepared in 2013 by Tamas Kallay from the Regional Environmental Centre for the European Environment Agency provides information on municipal waste management (MSW) in Lithuania until 2010, including GHG emissions from MSW management in Lithuania, which were calculated using a life-cycle approach (Kallay 2013, pp. 9–10). In the report, GHG emissions from MSW are distinguished into direct and avoided emissions from various waste management activities, and there is also a conclusion regarding the very low level of recycling of MSW in Lithuania, which does not contribute substantially to the reduction of GHG emissions (Kallay 2013, pp. 9–10). After 2010, there were many positive changes in the waste management sector in Lithuania, including an increase in the amount of waste recycling, so the picture today would look different. Nevertheless, there are a number of challenges regarding the re-use and recycling of waste in the territory of the Republic of Lithuania. For example, the National Waste Prevention and Management Plan for 2021–2027, approved by Resolution of the Government of the Republic of Lithuania No.573, provides that: (i) the main motives and reasons for the export of waste from Lithuania to foreign markets are insufficiently developed infrastructure for processing certain wastes and a lack of capacity (…); and (ii) there is too little incentive to create and develop recycling facilities (Government of the Republic of Lithuania 2022, para. 19 and 201).

The pathway towards neutrality in the waste management sector

It is clear that it is necessary to continue promoting waste management activities at the highest possible levels in the waste hierarchy, because such activities are directly related to the reduction of GHG emissions – for example, generating less waste and re-using and recycling as much as possible. Nevertheless, when it comes to sustainability in the waste management sector and GHG emissions from it, it is necessary to consider not only the methods of waste management at the higher levels of the waste management hierarchy, such as re-use and recycling and avoiding disposal, but also the improvement of waste management activities. For example: in waste recycling operations, this entails using energy that has the smallest negative impact on the environment, such as by consuming electricity from renewable resources instead of fossil fuels; in waste collection, this means using non-diesel-fuelled vehicles in favour of other, less polluting or zero-emissions vehicles, etc. These topics (renewable resources and energy, types of fuel) come from the different field of environmental law, but this once again proves the interconnectedness of environmental law, environmental protection, and the process which is called sustainable development.

It is worth mentioning that even though there is no separate transport sector according to the IPCC Guidelines, the Environmental Protection Agency of the Republic of Lithuania provides information on the amount of GHG emissions in the transport sector (Environment Protection Agency, n.d.). Thus, it is conceivable that, if necessary, information about GHG emissions provided to the public could be refined, such as by providing information on the amount of GHG emissions that is actually generated in the waste management sector (of course, subtracting the amount from the specific sector to avoid double counting). Or indicate that GHG emissions in the waste management sector are only partial, that other parts of GHG emissions are in other sectors, for example, indicate that waste incineration with energy recovery is classified into the Energy sector, and so on.

Considering the extent, established practice, and targets of the IPCC and its Guidelines, it is apparently impossible to amend the IPCC Guidelines drastically (for example, to define the scope of the Waste sector under the IPCC Guidelines as it is understood under the Waste Framework Directive). However, this does not mean that other regulatory measures cannot be taken at the national level. Having in mind the concepts of sustainability and sustainable development, other methodologies (for example, the life-cycle approach) could be used in order to truly understand the extent of GHG emissions from the waste management sector and possible ways to reduce these GHG emissions.

At the same time, the Urgenda Climate Case against the Dutch Government (Urgenda 2019) should be mentioned. This was the first case in the world in which citizens established that their government has a legal duty to prevent dangerous climate change. On 24 June 2015, the District Court of The Hague ruled that the government must cut its GHG emissions by at least 25% by the end of 2020 (compared to 1990 levels). The ruling required the government to immediately take more effective action on climate change (Urgenda 2019). The government responded by closing coal plants early, investing billions of dollars in renewables, putting solar panels on the roofs of all schools, lowering speed limits and more (R. Boyd 2021). Maxwell, Mead, and van Berkel (2022), in their article

entitled "Standards for Adjudicating the Next Generation of Urgenda-Style Climate Cases," provide information about the many climate cases around the world. This proves that the climate crisis is real and that societies are asking their governments to do more and take action. A good start always comes from clear legal regulation, and it is for good reason that one of the SDG13 targets is to "integrate climate change measures into national policies, strategies and planning."

Having in mind the expanding public interest in the climate crisis, the provisions of the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) (UNECE 1998) and the target of the sixteenth sustainable development goal (SDG16) to "16.6 develop effective, accountable and transparent institutions at all levels" should be cited. Target 16.6 has synergies with the above-mentioned targets 13.2 and 12.5 and in a way reflects the possibility of the public to participate in decision-making. Without having important information, the public cannot adequately participate in the decision-making process and contribute to the creation of measures that could help achieve goals and objectives related to climate change.

Therefore, it is essential for societies as well as all entities that operate in the waste management sector not only to have information about reported GHG emissions from the Waste sector under the IPCC Guidelines, but also to understand the extent of the waste management sector and its GHG emissions under the Waste Framework Directive. For this reason, it is necessary to integrate measures *inter alia* into legal regulation on the reduction of GHG emissions from the waste management sector as it understood not only under the IPCC Guidelines, but also the Waste Framework Directive. Such clarity *inter alia* could contribute to avoiding situations where the concept of sustainability is being manipulated. Many efforts of the European Commission are aimed at controlling this – for example, new rules to empower consumers for the green transition (protection against greenwashing etc.) (EC 2022a) and corporate sustainability due diligence (EC 2022b).

Conclusions

The scope of the waste management sector under the IPCC Guidelines is narrower than under the Waste Framework Directive, because some GHG emissions from waste management activities are not included into the Waste sector under the IPCC Guidelines at all (for example, energy recovery from waste attributed to the Energy sector), and some only partly (for example, GHG emissions from composting, as one of the recycling operations, are included in the Waste sector under the IPCC Guidelines, but other GHG emissions from recycling activities are not). This proves that the waste management sector is highly intertwined with the energy sector.

The amount of GHG emissions would be higher if all emissions from the waste management sector, as it is understood under the Waste Framework Directive, were accounted to the Waste sector as it is understood under the IPCC Guidelines. Despite the purpose of avoiding double counting or misallocation, it is noteworthy that this leads to a somewhat distorted public image – i.e., that the waste management sector is low-polluting and is among the lowest contributors to climate change. As a result, ostensibly no substantial changes in the legal framework for waste management are required and / or no additional measures are required to manage waste at the highest possible

levels in the waste hierarchy and / or to start waste management (operations, services) in more sustainable, sound way, when in fact the opposite is the case.

The intertwining of the waste management and energy sectors could negatively affect or contribute to the complexity of the implementation of interconnected sustainable development goals and the objectives of the international and regional documents related to combating climate change. This is because measures to reduce GHG emissions depend on both the amount of calculated GHG emissions and on the possibility for the public to effectively participate in decision-making processes and contribute to the selection of measures that could help achieve goals and objectives related to climate change. It is also important that the selected measures are accepted positively in society and implemented.

It is questionable whether the reduction of GHG emissions from the waste management sector – as it is understood under the IPCC Guidelines, through waste management activities from which generated GHG emissions are attributed to different sectors (for example, Energy) – is sustainable, because on the whole GHG emissions may not decrease. Such a form of reduction could also negatively affect the pursuit of resource efficiency in the transition to a clean circular economy, and the achievement of the targets of SDG12.

Therefore, the pathway towards the reduction of GHG emissions from the waste management sector as it is understood under the Waste Framework Directive and in the context of climate neutrality has two directions. One is to promote waste management activities at the highest possible levels in the waste hierarchy, because such activities directly relate to the reduction of GHG emissions – for example, generating less waste, and re-using and recycling as much as possible. The second, having in mind the concepts of sustainability and sustainable development, is to improve waste management activities as they are understood under the Waste Framework Directive. The integration of measures into legal regulation on the reduction of GHG emissions that come not only from the waste management sector as it is understood under the IPCC Guidelines but also from the Waste Framework Directive is needed.

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IV.5. SUSTAINABILITY: BRIDGING THE GAPS BETWEEN LAW, FINANCE, AND TECHNOLOGY

The state of play

Today, the demand for sustainable solutions has become more significant than the supply due to the increasing impact of climate change, twin transitions, and social inequality. Turmoil on many fronts, such as the ongoing hot war in Ukraine and the global inflation and upcoming recession, energy, and food crises, pushes the rethinking of many aspects of resilience to respond promptly. Finally, the EU and many regulators direct stakeholders in pursuing seventeen United Nations Sustainable Development Goals (UN SDG17). Many stakeholders, researchers, lawyers, financial experts, and engineers follow these outputs as a call for action and study metrics, even though this path is much harder than the obsolete business-as-usual strategy.

Researchers have begun to include externalities when considering sustainability, helping to underpin the notion that stakeholders should ensure sustainability without damaging the ability of future generations to live and prosper. People cannot live at the expense of the next generations anymore. The author explores the gaps between law, finance, and technology (LFT) by transferring autonomy within the so-called "LFT triangle" via integral cooperation to seek positive outputs. The system approach and holistic thinking are distinctive methods of this work.

The system approach includes classifying objects and tasks, input analysis of characteristics, thinking over models and simulating solutions. Since sustainable development is multidisciplinary, the author examines literature and data sources from different disciplines. Governments, the public and private sectors, and civil society have contributed, each on their own, to possible solutions for a more sustainable future in the framework of the EU taxonomy and the European Green transition. The needs of countries and public and private institutions are considered by dealing with: (i) regulation and deregulation; (ii) sustainable finance; and (iii) incumbent, trendy, and disruptive technologies. The applied methodology provides for the gender dimension, inclusivity in research and innovation content, and the quality of open science practices, including sharing and managing research outputs and engagement of stakeholders, university, academia, civil society, and end users where appropriate.

The sustainability, emergency response, resilience and recovery strategy is a vital priority today and is not optional. The existential threat of climate change overlapping with energy, food, the COVID-19 pandemic, a global supply chain crisis, inflation and the upcoming recession drive stakeholders to rethink and launch numerous international policy, regulatory and business measures.

The United Nations (2015) Sustainable Development, the EU Green and Tweens transition (European Commission 2019), and the Paris Agreement (European Commission 2015) have set the tone for sustainability and a green agenda. A solid scientific foundation stands behind these measures: the Triple Bottom Line principles were elaborated by John Elkington (2015); the "SDG wedding cake" was explored by the Stockholm Resilience Centre (2016); an understanding of planetary and social boundaries was produced by Kate Raworth (2017) and Meadows *et al.* (2004); and Tim Jackson (2016) argues for "prosperity without growth." Furthermore, Mariana Mazzucato (2011) proved that governing missions produce positive results, and Bill Gates (2021) drew attention to the crucial innovations that are needed. Time is of the essence, and is waiting for no one.

The practical toolkit for stakeholders has to include an objective transition from short-term to long-term values and to ensure the internalization of environmental, social, and governance (ESG) externalities. This represents a true paradigm shift for better sustainability.

Education for sustainability is essential through all levels of formal and non-formal education, including university, organizations (private and public) and lifelong learning. The effective incorporation of sustainability concepts and principles through all levels of the education system may pose specific challenges. Universities play a central role in developing knowledge, including many domains, such as engineering, sciences, architecture, law, management and economics. The extensive range of disciplines and backgrounds requires different approaches to consider the main aspects of sustainability in the curricula comprehensively. A multidisciplinary and interdisciplinary approach is also needed because sustainability encompasses several technical and scientific areas.

EU legal framework

The minimum EU safeguards support the United Nations Guiding Principles on Business and Human Rights (2011) and the International Bill of Human Rights; the ILO Fundamental Principles and Rights at Work include working rights, consumer rights, and communities (ILO Declaration 1998); and the Bribery and Corruption Laws and Regulations ensure that taxation respects both the spirit and the letter of the law, guaranteeing fair competition (Miralis *et al.* 2022). These instruments evaluate sustainable development from a social, governance, and environmental perspective as a frame of reference for regulation. Often, this might cause the state to become a better fit for both entrepreneurial and human rights. Good governance takes care of compliance and abiding by the rule of law. Meanwhile, this is a minimum requirement for what is acceptable for development and risk management. While high-income countries have enough capacity to meet new challenges, low-income countries are typically not self-sufficient, nor are they able to foresee future risks and respond to scenarios. This is why the role of international institutions and platforms is crucial.

This situation is not black and white, by definition. For instance, the seventeen United Nations Sustainable Goals have internal conflicts between social, environmental, and economic goals, and stakeholders need to manage them. There is also a competition between major countries, such as the USA, China, and the EU, G20, and G7 members. Like the European Union, each country and its unions should have access to strategic toolkits that can be adjusted towards gaining sustainable capital and innovation policy and practice. Good governance implies obtaining and disseminating skills to steer, accelerate or brake policy regulation, which is complementary to financial needs and technological capacity.

The European Green Deal (European Commission 2019) is the EU regulatory framework. The Climate Law (2021), a political commitment and plan to make Europe a climate-neutral continent by 2050, is the main legislative package and is a legally binding commitment to reach net zero by 2050 and reduce GHG emissions by 55% in 2030, together with Fit for 55 (2021). Some legislative actions implementing the EGG commitments in specific areas include: The European Climate Law (Regulation (EU) 2021/1119); The European Climate Pact, December 2020; The 2030 Climate Target Plan, March 2020; and The EU Adaptation Strategy, December 2019. An overview of the European Green Deal can be found in ERCST (2022).

Sustainable finance

Mark Carney, former Governor of the Bank of England and a special envoy to the UN, said that climate change is the most significant risk and the most prominent commercial opportunity globally; we cannot reach net zero without significant capital. The question is how to support a transition to net zero by covering the gap between access to capital and its needs (United Nations 2021). More than 70% of this financial requirement must come from private capital. Spending towards net zero by 2050 will reach around $9.2 trillion annually on average, or $275 trillion in total from now (Kumra and Woetzel 2022). The world thus faces a double challenge linked to climate change and energy. The fact that over 1 trillion dollars will be spent on electricity in Europe in 2022/23, unlike the usual $100–$150 billion annually, is a result of severe energy crises and side effects of the war in Ukraine. Compared with the global total of $80–$100 trillion per year, Daniel Yergin points out that sizable demand makes the energy transition more difficult and time extensive (Tirschwell 2022). Financing net zero and meeting energy demands are rigid goals, and may be feasible only if there is access to sustainable finance. This is especially hard for middle- and low-income countries who need help (Columbia Energy Exchange 2022). War and Industrial Policy (Pozsar 2022), War and Interest Rates (Houses and Holes 2022), and "Bretton Woods III" (Equedia 2022) have become hot topics, where no country can stand aside.

Sustainable finance comprises sustainable, green, social, and sustainability-linked bonds, equity, loans, insurance, allocation issues and impact by bonds. It supports carbon, climate, green, and environmental finance (Sachs *et al.* 2019) and is connected to the policies of industrial and central banks. The ultimate goal of its infrastructure (the ecosystem) is to increase sustainability and resilience by achieving climate neutrality. EU Regulation identifies the core components of sustainable, green, social, and sustainability-linked bonds and standards (GBS) as follows: (1) green projects

should meet at least one of the environmental objectives as defined in the EU Taxonomy regulation, should "not have significant harm" on any of the other objectives, and should meet the Technical Screening Criteria; (2) green bonds fall within the voluntary alignment framework; (3) annual allocation and impact reporting are required; and (4) an external verifier and publicly available reports must be provided. High political risks, among others, could prevent investors from actively supporting any project, and public finance alone will not be enough to cover these needs. Financial leverage is powerful but insufficient because the eligibility of technology and affiliated criteria, such as being bankable and investable, impact the technology sector, and vice versa.

Technology

"Technology has become a commodity," (De Bono 1992, p. 72). Regarding the maturity of technology, Edvard De Bono was mostly fair, except when underlining the energy transition that we do not yet have (BBC News 2021). Following John Kerry, 50% of carbon emission reduction technology has not yet been invented. Initially, we can classify two groups: (1) mature technologies in sectors such as electricity, transport, buildings, industry, low-emission fuels, agriculture, and land use; and (ii) technologies needed (Gates 2021). The latter includes: producing hydrogen without emitting carbon; grid-scale electricity storage that can last an entire season; electro fuels; advanced biofuels; zero-carbon cement; zero-carbon steel; plant- and cell-based meat and dairy; zero-carbon fertilizer; next-generation nuclear fission; nuclear fusion; carbon capture; underground electricity transmission; zero-carbon plastics; geothermal plastics; pumped hydro; thermal storage; drought-and flood-tolerant food crops; zero-carbon alternatives to palm oil; and coolants that do not contain F-gas.

The energy transition impacts different nations differently. Recent McKinsey research has shown ten technologies on which Europe's future competitiveness and prosperity will depend (Smit *et al.* 2022): next-level automation; next-gen robotics; the future of connectivity; distributed infrastructure; next-generation computing; applied AI; trust architecture; the bio revolution; next-gen materials; and the future of cleantech.

Middle and low-income countries should greatly rely on mature and maturing technologies, with conservative investment into those that are developing and emerging. The Glasgow Financial alliance (Glasgow Financial Alliance for Net Zero 2021) devised four archetypes of decarbonization investment, but slightly omitted the prospective potential of states.

Recent severe energy crises have confused the plans of even high-income countries. The European Union, the United Kingdom, and the United States again turned to nuclear power, oil, and gas. Some countries accumulate coal stocks before winter, which means that clean technologies do not cover the existing demand to be resilient. In wartime, Ukraine used feedstock and wood fires to heat the population. These processes slow down a transition to net zero, but they must proceed in the absence of alternatives.

Examples of bottlenecks and opportunities

Cultivating cross-system interactions should be a norm. Some examples from practice include:

1. At the policy level, using gas and fossil fuels in the transition to net zero. Keeping the focus on renewable trends by ignoring fossil fuels, nuclear power, and gas as a transition resource to meet net zero could lead to negative consequences for SDG7, "Ensure access to affordable, reliable, sustainable and modern energy for all."
2. At the policy level, the Lithuanian government subsidizes industry because of geopolitical and energy shock (2022). The next step is to help companies with new markets and raw materials suppliers.
3. In terms of energy efficiency, boundaries for recurrent cash flow are relevant because energy-efficient buildings do not meet technical requirements and standards (Reeder 2010). Sophisticated storage, IoT (Internet of Things), and modern concepts of prosumerism might give rise to cost deductions. The legislation, regulation, and technical standards are reluctant to support innovations with positive cash flow.
4. Emergency responses with cumbersome procurement. Winterization is problematic during a war or climate disaster; citizens cannot live without water, electricity, and heating. Rarely do municipalities have enough money, but if they do, procedures are inflexible and long-lasting. Lawmakers must adopt procurement with options "in kind" or "fast-tracked" in an emergency.
5. Sustainable finance. Policy-based projects offer a contrast to those that are return based, such as green tariffs vs insolvency of the energy markets resulting from wishful thinking. Attempts to accelerate renewable energy have come to be at odds with diligent macro-financial calculations and risk assessment.
6. ESG vs promoting greenwashing. To protect 348 specific pension funds, the Texas Comptroller (Glenn Hegar) initiated divesting against BlackRock and nine other asset management companies that promote ESG. At first glance, the subject is an anti-ESG campaign, but researchers have assumed political motives because of the blacklisting of relatively small European financial institutions except for BlackRock (Rajgopal 2022).
7. Immature vs mature technology. Hydrogen is a prospective source, but investing 100% of capacity into its development is questionable. as a country could be vulnerable in case of a delay with hydrogen technology (Smil 2020).
8. The education bottleneck includes problems with disseminating knowledge and information about climate change, emergency, recovery, resilience, EU reporting, technology, and financial and non-financial risk assessment to receive capital, guarantee and insurance.
9. Nexus between Supply chain disruption and GHG protocol. Several megatrends heavily influence the supply chain in all sectors, including raw materials, logistics, procurement and end users. Pressure to reduce carbon emissions stems from three Scopes according to the GHG Protocol, scope-3-standard: Scope 1: direct GHG emissions from operations that are owned or controlled by the company; Scope 2: indirect GHG emissions from the consumption of purchased electricity, heat, steam and cooling; Scope3: all indirect GHG emissions (not included in scope2) that occur in the value chain of the reporting company. The supply disruption has caused socio-

economic consequences that impacted inflation, energy, food, and water crises, and even hot and cold wars.

10. The EU bottlenecks. The Climate policy in the EU is too far to be holistic in terms of how supply chain emissions are managed and calculated. The EU climate policy and corporate compliance mainly focus on Scope 1 emissions and, to some extent, on Scope 2 emissions linked with energy efficiency and renewable energy. The EU Sustainable Finance Taxonomy, The EU Climate Law, capital needs, and changing demography also led to the stress that the supply chain faces.
11. The Ukraine bottlenecks. Ukraine obtains full support from European institutions. The country specifically addressed speeding up emergency response against attacks and repairing critical energy infrastructure for functioning systems by ensuring supply chain recovery, speedy procurement, creating databases, and the transition from post-Soviet to modern equipment and EU standards.

Bottlenecks are known as signposts for future opportunities, but what is the institutional way to engage professional advice and seize an opportunity?

Solutions and innovations

As defined above, there are legal, financial, and technical gaps in the market, but is the market in these gaps? If so, how can stakeholders manage capital, technology, and governance? If not, can stakeholders hedge against the consequences? Can the state shape the market? What is the impact on the planet and people? Sustainability is still evolving regarding methodology, legislation, and data availability. Gradually growing sustainable financial ecosystems have provided a tailwind to better strategic conditions. These ecosystems have access to or comprise data providers, knowledge hubs and academia, patents, project accelerators, public, private, and blended capital providers, insurance, ESG-rating and verification agencies, emission trade systems, and green (sustainable) stock and commodity and raw minerals exchanges.

This works in the coalition between public and private non-profit and for-profit stakeholders (Schoenmaker and Schramade 2018). Ecosystems, adaptation, and disaster risk reduction research (Sushchenko *et al.* 2020) continue in Germany. The United Nations Development Programme in Ukraine supports emergency response and recovery, non-financial risks, and green taxonomy studies (United Nations Development Programme 2022). Professional platforms accelerate access to capital providers and low-carbon technologies to support sectors as part of these ecosystems. Private stakeholders often do not have the capability or resources, or are too risk-averse, to delve into start-ups and innovation. The role of the government becomes exceptional in shaping incentives, markets, and innovation. Energy, climate change, supply chain, or raw materials disruption can be priorities in a different order on the specific situation – political instability, insecurity and inflation, access to finance, quality of human capital, policy, standards, and technology readiness level (TRL) are impactful. Even highly developed countries can rarely execute large projects. Although it is time extensive, human-centric activity can increase capacity for all. So, high-quality education and internalisation of R&D become a focus. The sustainable solutions will embrace the topics of Sustainable

Finance Platforms, Access to Sustainable Capital, Artificial Intelligence for Supply Chain, and Supply Chain Sustainability Management by applying the analyzed case studies and the theories used for research.

From "Silos" to the "System"

Sustainability is multidisciplinary, so it implies integrity, not an isolated mono-disciplinary mode of law, finance, and technology. Conventional shareholder silos mean privatizing gains and internalizing losses. A conflict between "silos" and "systems" must be accepted and actively managed (Serrat 2017). An expert partnership to meet the EU taxonomy and SDG17 criteria should be a holistic and flexible platform for a more sustainable future as a shared value. This platform cannot simply maximize output from each element because system properties, or shared values, are not equal to the sum of the properties of their elements.

Since systems are complex and resources are limited, experts prioritize legal, financial, and technological means via binary considerations. Binary integration (LF, LT, FT) is better than mono-disciplinary but is still limited, and it needs to move closer towards the integrated system and shared values. As such, it is correct to move along two axes and even more; the first is a "bottom-up" process where stakeholders, not only shareholders, and the government react at the top in a doubly effective manner – both from a financial perspective and concerning the magnitude of impacts. The second axis mirrors upstream and downstream value and supply chains, in scopes of one, two, and three. Experts can propose recommendations that initiate further development.

When it comes to the supply chain, there are gaps between Sustainable Finance Principles and the demands of the Supply Chain. Stakeholders and companies face growing pressure from asset owners, customers, employees, lawmakers, and activists to reduce emissions across the entire value chain. The environmental and non-financial risks associated with Scope 3 emissions become access to credits, ESG ratings, and blended capital. Another problem is poor automation of supply chain sustainability management. The supply chain function ensures integrated operations from customers to suppliers with a necessity to secure data collection, validation, analysis, and reporting of how Artificial Intelligence (AI) and Data processing, Internet of Things (IoT), and Robotic can impact the supply chains for better sustainability and resilience with recommendations. To meet these trends and cope with the changed requirements for financial, IT, and material-procurement flows, supply chains need to become much faster, granular, and more precise.

Policy and EU taxonomy

Platforms should make it a mandatory policy to align the following: EU Taxonomy article 20 Platform (Regulation (EU) 2020/852); the triple bottom line principles for the planet, people, and profit; the ethics and culture code; UN SDG17; the Principles of Responsible Investment (PRI); the Task Force on Climate-Related Financial Disclosures (TCFD); the Sustainability Accounting Standards Board (SASB); the International Integrated Reporting Council (IIRC); the Global Reporting

Initiatives (GRI); ESG disclosure, regulation, and standards; and the European Commission advisory body. The sector-specific case studies will include EU Taxonomy, ESG and SDG metrics. Typically, ESG is more input-driven, and SDG17 is more output and outcomes. It is mainstream for sustainable finance, leading to rethinking supply chains. The case studies will consider energy, buildings, environment and resources, industry, transport, and food sectors. The results of the case studies will serve as stepping stones in raising awareness of implementing the measures for improvement. Policy provides a compact guide to help design an effective strategy, leaving room for flexibility, creativity, and competition. A bias that EU Taxonomy is scientific and somewhat cumbersome, while the China catalogue or the United Kingdom taxonomy is relatively flexible and bold (Climate Bonds Initiative 2021), may be an exaggeration. We can identify the differences across Europe and between states, and facilitate harmonization worldwide. This concept can be instrumental in the law by slowing, steering, or accelerating changes (Soininen *et al.* 2021). The entrepreneurial state confronts myths against financing innovation. Mariana Mazzucato (2011) has shown that the public sector can solve problems and shape markets. The Defense Advanced Research Projects Agency's (DARPA) flexible structure assumes a mix of university-based researchers, start-up firms, and businesses, suggesting that governments should invest, not only spend (2022). This policy provides a principal impetus and direction for revising rules and regulations, but a transition to net zero is specified in it.

Platforms to Bridge Gaps

According to EU Taxonomy Article 20 (Regulation (EU) 2020/852), the Platform of Sustainability incorporates the Task Force and Working Groups; experts could find cohesive solutions to enhance sustainability in the multidisciplinary framework and opt for long-term values. Stakeholders from private and public sectors adjust charters to meet individual needs, such as GHG, water consumption and sewage, biodiversity, minerals, and land use. They want to understand projects' bankability and investability criteria. Balancing resilience and efficiency must include non-financial factors such as ESG externalities.

The advisory process obtains many forms that each have something in common. McKinsey identified three ways of cooperation (McKinsey & Company 2022) in decision-making, creative solutions, and coordination and information sharing. Because success depends on ability and diversity, experienced US researcher Scott E. Page (2018) recommends that multi-modelling platforms look through many windows. Collaboration mechanisms from (Serrat 2017), with author additions, include: 1. appreciative inquiry; 2. working in teams; 3. drawing mind maps; 4. collaborating with wikis; 5. wearing six thinking hats; 6. managing virtual teams; 7. learning in strategic alliances; 8. improving sector and thematic reporting; 9. a primer on corporate values; 10. bridging organizational silos; 11. organizational configuration; 12. fighting corruption with ICT and strengthening civil society's role; 13. policy-driven, market-driven approaches; 14. hybrid and social driven approaches; and 15. facilitation, involving mediation, litigation, arbitration, and conflict resolution. Examples of platforms include: 1. the European Commission – the Platform on Sustainable Finance (European Commission 2021); 2. the European Roundtable on Climate Change and Sustainable

Transition (ERCST 2022); 3. the Green Growth Knowledge Partnership – UNEP, UNIDO, the OECD, the World Bank, the Green Policy Platform, the Green Industry Platform, and the Green Finance Platform (2012); 4. the cloud-based SaaS collaborative platform Persefoni (n.d.); and 5. BlackRock's Aladdin platform, which supports enterprise reporting for the EU's Sustainable Finance Disclosure Regulation (Kerencheva 2022).

The Platform framework can help cope with the abovementioned problems and bottlenecks. For instance: The Problem: Nexus between Supply chain disruption and GHG protocol. Solution. Education for sustainability raises awareness of the need to identify how ESG externalities (scope 1,2,3) impact Supply Chains with the recommendations. This way, finding and applying the proper solutions. The Problem: Gaps between Sustainable Finance and demands from Supply Chain. Solution. Education for sustainability enables the device of a toolkit to bridge gaps between Sustainable Finance and the Supply Chain. The Problem: Poor automating supply chain sustainability management. Solution: Education for sustainability, raising awareness and promoting research on how Artificial Intelligence (AI) and Data processing, Internet of Things (IoT), and Robotic can impact the supply chains for better sustainability with recommendations. The sustainability course applies multidisciplinary and interdisciplinary approaches to analyze the present problems and possible solutions. Sustainable Finance Platforms during poly-crises will engage multidisciplinary expertise. SDG17, ESG approach to tackle Climate change, Adaptation, and Mitigation in Supply Chain transition to net zero.

The skills gap and education

Prioritizing sustainability, resilience, emergency, and recovery has become imperative and mandatory. Hence, sustainability managers, board members, and public servants will provide leadership. Experts foresee the solvent demand for education and retraining services, with the unique role of education, academia and universities in partnership with financial practitioners and changemakers (Waygood 2022; https://www.sustainability.ei.columbia.edu/).

The global green energy market will exceed $1.1 trillion by 2027. Demand for jobs will rise 8% annually until 2030, with up to 14 million jobs by 2030 (Haanaes 2022). The regulatory landscape means that corporate reporting has become mandatory. The EU drives the Sustainable Finance Disclosure Regulations (SFDR); the UK the Task Force on Climate-Related Financial Disclosures, TCFD (UN Environment Programme Finance Initiative 2015); and the US the Securities and Exchange Commission (SEC). The extension of board members' fiduciary duties for listed companies is common in many countries. Being aware of the historical pioneer role of Europe in the Green Deal, Twin Transition, EU Taxonomy, and sustainable finance, education aims to teach how to access Sustainable Capital by raising awareness of the subject. Here raising awareness through education for sustainability also enables the stakeholders to implement adequate policies which ensure a Sustainable Finance Platform for better supply chains.

Savvy sustainability managers will be able to manage climate risks, natural disasters, and other emergencies, including wars. Emotional awareness is part of the job description for managers to build a more sustainable future (Caruso and Salovey 2004).

Conclusions

Sustainable solutions are demand-driven. The planet, people, and profit concept; the fact that governing can be progressive; the understanding of 'growth without growth' and economic boundaries; the transition from short-term to long-term shared values; and the necessity of internalizing ESG externalities – all of these form the basis of a paradigm and mindset shift for a more sustainable future. With toolkits and advice based on system thinking and simulation, this transition can work, in which the role of education for sustainability managers and leaders overwhelmingly increases. The designed sustainability course will aim to educate managers with a broad multidisciplinary and interdisciplinary upskilled and reskilled approach.

Sustainable ecosystems and platforms embrace all aspects of regulation, financial mechanisms, and modern trends in technology to choose strategic priorities to meet existential threats and act in many sectors and geopolitical arenas. Mapping takes ESG data inputs and reworks them into pieces of advice to obtain UN SDG17 as an output. This bridges the gaps between law, finance and technology, and enhances the transfer from "silos" to "systems." Stakeholders like to see metrics on their dashboards to pursue interim and ultimate objectives, and in this sense middle and low-income countries can adapt ecosystems and platforms to meet specific needs.

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IV.6. THE SUSTAINABILITY OF THE LEGAL PROFESSION: LAWYERS' ROLE IN THE FUTURE REGULATION OF PANDEMIC AND WAR RESPONSES

Sustainable development goals and the anchor of human dignity

The Sustainable Development Goals and the 2030 Agenda for Sustainable Development have provided an ambitious roadmap for improving lives across many areas in society.

The role of the legal profession is to set the benchmarks against which the above-mentioned improvements to life are measured. The search for these standards, their articulation and implementation in legal practice, and the creation of barriers against the erosion of such standards are among the main tasks facing the modern legal community.

The Agenda adopted in 2015, designed to create a world of welfare and prosperity, has faced considerable challenges in recent years. The Risk Society that Ulrich Beck wrote about has become a reality. The COVID-19 pandemic and Russia's large-scale war in Ukraine, waged right in the heart of Europe – these shocks affect all areas of life. We are all members of a global community in danger, where fear determines the sense of life and the value of security overrides the value of equality (Beck 1992).

Staying anchored amidst these destructive waves is difficult, but possible. Lawyers who work with social conflicts and social wounds retain the ability to make the most optimal decisions amidst intense struggles between different ways of thinking and social ways of life. The law is backed by broad social practice, complex social interactions, judicial practice, and legal understanding. The task of lawyers is to find opportunities to overcome social gaps, ensure justice, and restore peace.

The role of lawyers in sustainable development can be enhanced by developing the concept of human dignity in legal argumentation and practice. In particular, agenda Goal No. 16 ("Peace Justice and Strong Institutions – Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels") can be achieved by countering the impunity of those responsible for the most serious war crimes

and crimes against humanity, protecting the victims of war, and ensuring due respect for their human dignity. The prohibition of human instrumentation and objectification – considering the specific victimhood of victims and ensuring that their voices are heard, which is a manifestation of respect for the human dignity of victims – can develop through the legal argument for human dignity.

The historical development of the idea of human dignity is based on the understanding of human dignity as an intrinsic value status of a person per se, regardless of their other characteristics. To have dignity means to outvalue any possible price and reject any equivalents. Human dignity is the vision of people as the ultimate goals of human intentions and actions. The main meaning of dignity is respect and recognition of a person as having a special value that is inherent in everyone. This concept significantly influenced the development of international law and national legal systems after the Second World War. The purpose of the provisions of the 1948 Universal Declaration of Human Rights regarding human dignity was to emphasize the values and systematic approaches in which human rights are rooted.

The victim-centered approach and the possibilities and limitations of criminal justice

Russia's full-scale invasion of Ukraine on February 24, 2022, and bloody attacks on the lives and dignity of thousands of Ukrainians called into question the rules-based international order and stressed the importance of not only a transcendent dimension of dignity as a key human attribute but also an understanding of human dignity as something embodied and implemented.

The treatment of victims of war is important for the development of the concept of human dignity because, despite the existence of relevant international standards, the perspective of the victim is sometimes ignored or, according to some researchers, becomes embedded in the business logic of international criminal law (Schwöbel-Patel 2016). The point here is that the image of the victim used and created inside and outside the courtroom of the international criminal tribunal is the same image of the victim used by aid agencies and the media in the Western world to appeal to donors and stakeholders. The court focuses on legalizing the suffering of victims, and the courtroom itself focuses on overcoming impunity and spectacle rather than on the victim. Those affiliated with the international criminal justice system – prosecutors and judges – are portrayed as rescuers, while victims contrast sharply with them, being portrayed as weak, emotional, and unskilled. Such an image of victimhood is not new, and it is widespread within so-called "humanitarianism" discourse; in addition to war, humanitarian organizations often focus on other complex contexts, such as poverty, disease, natural disasters, and emergencies. The speeches of the prosecution during the administration of criminal justice demonstrate a panorama from predator to passive victim, and the aesthetics of almost all trials are built on such stereotypical contrasts. Such a simplistic portrayal of victims and disregard for their traumatic experiences actually deprives victims of their voice and stigmatizes them, while humanitarian actors receive dividends from such fundraising, capturing new spheres of influence and emphasizing the importance of their activities which, in fact, may be far from true humanism. Similar risks persist at the level of national persecution.

There are experts who state that the disclosure of traumatic experiences is useful for the process of psychological recovery of those who have experienced gross human rights violations. However, the belief in a therapeutic effect within the paradigm of transitional justice must be critically considered, considering both the possibilities and the limitations of litigation (Henry 2009). The psychological healing and reconciliation of society after genocide, war crimes and crimes against humanity through transitional justice mechanisms needs to be critically assessed in the light of the diverse experiences of survivors, sensitivity to their suffering, and respect for their human dignity, which should be treated not as an abstract feature but as a particular embodied dignity. The role of the professional legal community in creating such a sensitive environment can be very significant. It is important to avoid "judicial romanticism," with its view that criminal justice can solve all problems, because a simplistic view of victims and witnesses as a homogeneous group with the same expectations and experiences only leads to disappointments. Justice cannot erase the physical and emotional scars of war, nor can it bring back loved ones. However, at the same time, trial can provide the necessary emotional distance where victims can talk about their experiences, and the trial space can become a space where victims' suffering is acknowledged, victims are treated with respect for their dignity, and perpetrators receive proportionate punishment. The task of lawyers is to remind victims and witnesses of the value of their contribution to the restoration of justice. Judges, prosecutors and lawyers should make every effort to make victims and witnesses feel the importance of their participation, as during pre-trial and trial proceedings they often feel a lack of control over the process. Models of restorative justice built on the desire to give victims a sense of autonomy in their own lives, to discover their experiences anew, and to reintegrate into society are important for the fundamental restoration of human dignity and the promotion of the integrity of future generations. While it is clear that full justice goes beyond criminal proceedings and the punishment of perpetrators, the participation of victims and witnesses in such trials is an important aspect of justice, and for them such participation is borne not only out of a desire for retributive justice but also as a way to recognize and restore their dignity. The suffering of victims can be offset not only by the sense of retribution that has befallen the perpetrators, but also by the fact that the suffering of the victims has been listened to with due respect.

In order to acknowledge the dignity of the victim, they must not be molded into the image of the "ideal victim." Avishai Margalit (2011), a philosopher who wrote an outstanding essay entitled "Human Dignity between Kitsch and Deification," argued that kitsch and sentimentality are closely linked, and that kitsch is not just a conversation about bad taste, but a term of criticism that can be used for understanding approaches to human dignity. Sentimentality is a superstructure over cruelty, and kitsch sentimentality seeks to endow marginals with spiritual traits to compensate for their lack of power and portray them as innocent targets attacked by the powerful of this world. However, such kitsch sentimentality creates a culture of victimization. Margalit emphasizes that the idea of respect for human dignity is such that marginals do not need to be precious, pure or sincere to be treated as human beings.

The sensitivity of cases of sexual violence and the dignity of victims

Issues of human dignity are particularly sensitive in cases of sexual violence. Feelings of shame and psychosocial stigma from which survivors suffer are a form of re-victimization. That is why the International Criminal Court (Rules 70, 71 of the ICC Rules of Procedure and Evidence) and other international tribunals and courts have developed rules to protect victims of sexual violence. These rules are as follows:

- prosecutors do not need to provide evidence of the use of force or threat of force to prove the lack of consent;
- sufficient evidence to prove the existence of coercive circumstances already precludes the possibility of giving genuine consent;
- silence or lack of physical resistance does not mean consent;
- victims (witnesses) cannot be asked any questions about consent unless the court holds a closed session, with the prior direct consent of the parties, considering the arguments of the parties, and such an interview will be held during closed session.

In accordance with the principles of international criminal procedure in cases of sexual violence, confirmation of additional facts is not required. In practice, this means that the testimonies of victims, provided they are reliable and credible, can be sufficient evidence of a sexual violence crime, in the absence of any other additional evidence from other witnesses, documents, medical documents, photographs or any other potentially corroborating evidence.

International criminal tribunals prohibit asking questions about the previous and subsequent sexual behavior of victims. Such questions can be particularly derogatory and, in the context of war crimes, crimes against humanity and acts of genocide, are considered unnecessary and inappropriate. Relevant questions relate to the circumstances and whether or not they allowed victims to freely consent to sexual intercourse with a suspected offender in a particular case.

Other protective mechanisms are aimed at ensuring that victims, their family members and close relatives, and witnesses are not exposed to the risk of retaliation or re-traumatization. Such mechanisms can include both structural (in particular, equitable gender representation in the judiciary, staff with experience in dealing with sexual violence trauma, with legal experience in prosecuting gender crimes) and organizational and procedural security (in particular, personal protection, protection of housing and property, issuance of special personal protective equipment and notification of danger, replacement of documents and change of appearance, change of place of work or study, relocation to another place of residence, ensuring the confidentiality of personal information, etc.).

An important emphasis in combating conflict-related sexual violence is the understanding that sexual violence during war is the result of the radicalization of everyday sexist behavior in society. Covert sexist ideas spread in peacetime only intensify during war (Houge 2014; Crawford 2017; Matusitz 2017). Women and girls are the primary target, as gender-based violence is deeply ingrained in everyday life, and such violence is quickly "normalized" in conflict situations. Serious attention has been paid to the study of the links between conflict-related sexual violence and the broader model of sexism in society since the 1970s. Accordingly, Susan Brownmiller (1975) wrote that war

gives men the perfect psychological background to unleash their contempt for women; that the very masculinity of the military, with the brute force of their weapons, with the masculine discipline of giving and carrying out orders, and with the simple logic of hierarchical command, confirms the masculine notion that women are peripheral, that they are passive observers of actions happening at the center of events. These misogynistic subtexts of war emphasize not only the painfulness of sexual violence for the individual lives of victims, but also the construction and perpetuation of gender inequality, which, like a hidden and coiled spring, is contained in the surviving society and in post-war reconstruction, poisoning its potential.

Rosalind Dixon (2002) also offers a noteworthy view of the misogynistic world order, arguing that women do not have their own authority or importance in the criminal justice system, that the whole system works to recreate the existing patriarchal status quo, and that justice in such processes is limited because such justice is not so much for the benefit of the female victims, but to preserve existing norms aimed at maintaining the patriarchal order.

That is why attention to the specific victimhood of female victims is very important, as the prosecution of conflict-related sexual violence must not only address the issue of recognizing it as an act of war deserving of punishment and preserve it in the collective historical memory as a crime that attacks the foundations of the modern international legal order, but must also provide space for victims who have been deprived of their voice to speak about the atrocities committed against them. Etymologically, listening is always a prerequisite for obedience – according to psychoanalyst Mladen Dolar (2006), one of the most renowned modern philosophers who deals with the phenomenon of voice – and therefore listening to the voices of victims destroys the situation of hierarchy and verticality. Ears have no eyelids, as Jacques Lacan repeated, so it is impossible to distance oneself from the sound. Thus, listening to victims becomes synonymous with humanity.

Researchers of victims' participation in trials note that women are often given a passive role, while men are positioned as being actively involved in the conflict. This model, reproduced in the practice of litigation, supports traditional models of active masculinity and passive femininity (Henry 2009). A serious barrier for victims is also the legalization of their suffering during trials, when there is a terrible gap between experience and its linguistic representation, and victims are required to describe the facts legally rather than express their emotions. Therefore, an authoritative institutional atmosphere of criminal justice can be a positive space only if the suffering of victims is acknowledged, the voices of victims are heard and perpetrators are properly punished. The professional legal community is able to do a lot in this area.

The vision of poverty and human dignity in legal reasoning

The argument of human dignity can be no less significant in achieving Goal of Sustainable Development No. 1: "No Poverty – End poverty in all its forms everywhere." While analyzing the perspective of a "decent society," Avishai Margalit (1996) argues that poverty degrades human dignity, focusing on a detailed analysis of how poverty is stigmatized in society by attributing to it the quality

of complete failure of a person. This emerges when poverty is seen as a condition that implicitly includes judgment about a person as one who cannot secure even the minimum necessities for their existence, and under the pressure of stigmatization from others becomes accustomed to this status and loses self-esteem. A society where human dignity is attacked cannot be dignified.

An important decision recently emerged in the case law of the European Court of Human Rights, which took a position on poverty and its impact on human vulnerability and dignity. The relevant judgement in *Lăcătuș v. Switzerland* (2021; European Court of Human Rights) concerned Switzerland's violation of Article 8 of the European Convention on Human Rights. The applicant, a Romanian citizen from the Roma community, illiterate, unemployed, and without social assistance, lived as a beggar during her stay in Switzerland. She was found guilty in the canton, where begging in public places is prohibited by the criminal code, and was sentenced to a fine of 500 Swiss francs. After non-payment, she was sentenced to up to five days in prison.

For the first time, the court had to determine whether a person sanctioned for begging could benefit from the protection of Article 8. To this end, it resorted to the concept of human dignity which underpins the spirit of the Convention. According to the Court, human dignity is seriously violated if a person does not have sufficient means of subsistence. By begging, a person leads a life in such a way as to overcome an inhuman and unstable situation. Therefore, it is necessary to consider the specifics of a particular case, in particular the economic and social circumstances of the individual. While agreeing with the Swiss tribunal that the act of begging is a form of solicitation of others, the Court noted that the right to seek assistance from others is the basis of the rights protected by Article 8 of the Convention. By banning begging altogether, the Swiss authorities prevented her from contacting other people in order to receive help – one of her chances to meet her basic needs.

The Court rejected Switzerland's objection that such a ban was aimed at effectively combating trafficking in human beings and, in particular, the exploitation of children. Firstly, there was nothing in the case to suggest that the claimant belonged to such a network or that she was a victim of the criminal activities of others. Secondly, the Court questioned the punishment of victims of these networks as an effective measure against this phenomenon, noting that the criminalization of begging could make victims of forced begging even more vulnerable.

Finally, the Court did not accept the federal court's argument that less restrictive measures would not have achieved the same or a comparable result. Therefore, the sanction imposed on the claimant was not a measure proportionate to the aim of combating organized crime and protecting the rights of passers-by and residents. The extent to which the claimant, who was extremely vulnerable, was punished for her conduct in a situation where she had no other means of subsistence and, therefore, no other way to survive than begging, affected her human dignity and the very essence of her rights that are protected by Article 8.

As for the claimant's demands under Articles 10 and 14 of the Convention, the court majority ruled that there was no need to consider them separately. However, the judges in some of their opinions drew attention to the need for their separate consideration. The case drew human rights activists' attention to the problem of discrimination, especially given the vulnerability and marginalization of the Roma people. In addition to the issue of discrimination on the basis of ethnicity, there is also the issue of inter-sectional discrimination on the grounds of poverty and/or class.

This judgment demonstrated the development of a policy framework for addressing issues of poverty and human rights in the future, and emphasized the role of legal reasoning in the development of respect for human dignity. A significant part of the modern concept of law is that the legal positions of the parties are supported or refuted by the court as a result of the struggle of the parties' arguments, and are not just an imperative decision of the court, but, in fact, its arguments in response. According to Jeremy Waldron (2011), legal reasoning makes a significant contribution to respecting the right to human dignity. The point is that due to legal reasoning, the law is perceived by the actors as something that can be understood as a holistic "big picture," where the regulation of one set of actions is rationally correlated with the regulation of another, and where the actors of the law dispute are thought of as being able to reflect on and interpret norms, rather than simply apply them mechanically. In this respect, courts, hearings and legal arguments are an integral part of such governance, where respect for human dignity is at the heart of any activity.

Resistance to the anthropocene and the dictates of necropolitics

At the same time, understanding the holistic picture of the world shows that the concept of human dignity based on the ideas of anthropocentrism and Eurocentrism has recently faced considerable challenges. The COVID-19 pandemic, caused by excessive human interference in the ecological balance and life of many species, has significantly exacerbated the urgency of climate issues. Sustainable Development Goal No. 13 ("Climate Action – Take urgent action to combat climate change and its impacts") in its modern interpretation covers the desperate attempt of mankind to find new alternative ways to create a common space where our planet will be a real home for all inhabitants of the Earth.

American biologist Eugene Filmore Stoermer coined the term *anthropocene* in the 1980s, and Dutch chemist Paul Jozef Crutzen popularized it in the early 2000s. Scientists have pointed out that due to anthropogenic influence the Earth began to move from the state of relative equilibrium of the Holocene. Changes in the planet's parameters as a result of human influence have become so significant that researchers at the Stockholm Resilience Centre have identified planetary limits – nine critical indicators, which, if exceeded, will make our Earth uninhabitable. Mankind has already crossed four limits – climate change, land cover change due to land use, biodiversity loss due to species extinction and biological changes associated with nitrogen and phosphorus cycles. The Anthropocene is a hypothesis about a new geological epoch, when human activity has become a force that leads to biogeophysical changes on a planetary scale, changing the face of the planet.

The term *anthropocene* contains the Greek word *anthropos* (man). However, the Swedish researcher Andreas Malm (2018) believes, for example, that this term should be adjusted to call this era the "capitalocene," because the intersection of planetary boundaries is not caused by any one person but by the way of life of the Western world and its socio-economic model. The fact that many experts say "we," naming humanity as a whole as the cause of these processes, does not negate the

fact that the risks are unevenly distributed and affect the most vulnerable, forcing them to suffer from environmental injustice (Chakrabarty 2009). This alarming tone is also felt in the works of the famous French sociologist Bruno Latour, who has been addressing environmental issues since the early 2000s, fighting environmental skepticism, and emphasizing that humanity needs four or five planets like Earth to reach the standard of living of Americans. However, as Latour says, we have only one Earth.

Climate change leads to the deterioration of natural and anthropogenic systems. The anthropocentric way of thinking, strengthening the binaries of "nature/culture" and "nature/society" and placing man in the center of the world, have led to the fact that "nature" has become an "environment," areas of "collision" between man and nature are considered sources of danger, and apocalyptic sentiments permeate the entire social fabric. The COVID-19 pandemic was the point of singularity where ontological gaps were exposed completely and fully.

Michel Foucault (2004), who introduced the concept of biopolitics in 1976, described it as being composed of political goals and strategies related to the fact that certain phenomena inherent in the human race have entered the realm of political methods. Control of abortion and infant mortality, implementation of health policies, eugenics and "racial hygiene" to "improve the quality of the population," technical and political opportunities to regulate the life of species as such – all of this is how governments manage the population, living the political dream of comprehensive biopolitical discipline and control. The COVID-19 pandemic dictatorship which governments imposed on the entire population under the guise of "care" and "conditions for survival" was a long-awaited dream of the authorities that came true. The government, which constantly produces "bare life" and "exceptional position" (Agamben 1998), replaces politics with biopolitics. Necropolitics, as a kind of biopolitics, studies the mechanisms of mortality control and is manifested in the radical actions of the government to devalue and eliminate "extra" people and decide who lives and who dies. Achille Mbembe (2003), introducing the concept of necropolitics, outlines how democracy began to manifest its dark side – a "nocturnal body" – based on the fears and violence that ruled colonialism. He emphasizes that this has led to growing inequality, hostility, terror and militarization, and a resurgence of racist, fascist and nationalist forces aimed at exclusion and destruction. However, despite his horrific diagnosis, Mbembe promotes the idea of caring as a shared vulnerability to explore how new conceptions of humanism that go beyond existing boundaries may emerge and allow us to treat the Other not as a thing to be excluded but as a human being with which we can build a fairer world.

In particular, Mireille Delmas-Marty – an honorary professor at the Collège de France and author of fundamental works on human rights and the globalization of law, who passed away in early 2022 – proposed the development new humanism. She studied ways to lead people to mutual humanization considering ways of confronting relativism and imperialism, such as the pluralization of the universal (i.e., bringing order to pluralism without destroying it) through dialogue (the reconciliation of differences), translation (the harmonization of differences) and creolizing (the unification of differences through merging the general definition). Delmas-Marty believed in the creative power of law and in the power of the human imagination, capable of creating new legal forms and models in the face of increasingly complex reality. Furthermore, she points out that the forces of imagination live within the creative ability of lawyers, who always operate in a system of certain

values. In her opinion, despite all the recent failures and frustrations in the area of human rights, the path of today's legal civilization is marked by two fundamental values: humanism as a recognition of human dignity, understood as the diversity and irreducibility of people and their cultures; and sustainable development as respect for future generations and the planet. This system of views remains within the anthropocentric paradigm.

Transhumanism also still puts a person at the center, but it is a person with improved physical and cognitive characteristics – a cyborg who exists in a world of technology sewn into the basic "order of things." At the same time, this center is already a transit zone – a border where dualistic ontological boundaries are shifted and the natural and artificial, organic and cybernetic are combined. This cyborg is not just a thought experiment, it is a new political myth connected with other ontologies which reconstructs the old nature/culture connection and undermines the logic of trying to reduce everything to either one or the other (Haraway 1991).

Posthumanism already exists in the coordinates of the non-anthropocentric world, where subjectivity is radically rethought. The theory of agent realism, developed by queer theorist and quantum physicist Karen Barad (2012), stems from the position that the world is constantly developing and is engaged in dynamic intra-action; this world is not closed, it is constantly open. Based on quantum ontology, Barad states that wave and particle do not exist outside of certain practices, and that vacuum is not emptiness but quantum fluctuations associated with virtual particles on the verge of being/non-being. From this point of view, materiality is thought about in a new way. Individuals do not exist as separate entities, but materialize in certain intra-actions in constant reconfiguration. The very difference between them is constantly changing – it is not a constant but a bunch of agency. That is, certain entities are formed and have significance only in the creative act of interaction.

Therefore, human existence today is an attempt to resist the anthropocene and the dictates of necropolitics by reinventing oneself in relations with others in such a way as to go beyond one's own thoughts – to see the world in all its multiplicity and depart from anthropocentric discrimination. Most importantly, Rosi Braidotti (2020) concluded that the human race needs to stop practicing humanity as a quality that is distributed according to a hierarchical scale based on the assumption of the predominance of masculine, white, Eurocentric, heterosexual, reproductive, able-bodied, and urbanized actors speaking one of the main languages. The task of lawyers is to expose the government's presumptions about the existence of a dominant category of human – that some may be "less human," dehumanized, and excluded from "real" humanity compared to others.

Decolonization and new legal solidarity

Since one of the most important influences on modern legal reality is colonial thinking, the issues of decolonization in law, the maintenance of equality and diversity, and legal protection against discrimination in modern social discourse require special attention. Obviously, sustainable development Goal No. 10 ("Reduced Inequalities — to reduce inequalities, policies should be universal in principle, paying attention to the needs of disadvantaged and marginalized populations") cannot be achieved while ignoring these legal aspects.

The colonization of existence – as a system of knowledge creation that supports the division of people by declaring some of them insufficiently subjective and insufficiently legitimate – reinforces and reproduces inequality and non-discrimination. Rosi Braidotti (2020) writes that viruses caused by human interference in the environment commit acts of discrimination using human trajectories and their force. COVID-19 was an indicator of strong social inequality, which the ruling neoliberal political classes would like to deny. However, it was neoliberal governance that contributed to the spread of the infection, exacerbating social and economic power inequalities.

Therefore, it is critical to understand that consciously countering apocalyptic thinking is possible only by rethinking the question of who "we" are on a global scale and how pandemic experiences we lived through can become a reliable alternative to discriminatory unitary categories based on Eurocentric, masculine, anthropocentric and heteronormative assumptions. We are united – that is, we are ecologically connected through numerous relationships that we share within the natural and cultural continuum of our earthly environment. However, we are very different in terms of our location and access to social and legal rights, technology, security, prosperity and quality health care.

COVID-19 has exposed the systemic nature of inequality that structures our society. We have seen that the majority of coronavirus deaths were people whose lives, even outside of epidemics, are in constant danger due to discrimination in all aspects of their existence. The pandemic has shown how the destruction of the natural environment – the pollution of air, water, and food, exacerbated by various forms of social discrimination – weakens humanity, makes it vulnerable to disease and leads to a catastrophic process: Planeticide (Glikson and Groves 2016). Therefore, the time has come for the diverse and collective "we" to go beyond the Eurocentric humanistic skills of representation that once formatted it, and to express the understanding that "we" – all living things – live in one common planetary home (Braidotti 2020). In this regard, decolonial theories and indigenous theories are an important source of understanding, as for most people on earth the difference between nature and culture does not matter, and fear of death and extinction, epidemics, deprivation of property and environmental destruction have been and continue to be characteristics of colonial conquests as well as integral parts of colonized cultures.

In view of the above, it is essential to understand that efforts to decolonize thought and existence sometimes fail, and instead help to reproduce colonial behavior and colonial attitudes. Decolonization is a direct and honest challenge to the dominance of the usual actor in power and the destruction of the systems of thought that treat it as a standard. This is the value of talking about what Others have done. This is a major overhaul of the entire system, not the exploitation of certain images without due respect and authority.

This caveat is linked to the fact that the modern human rights movement lacks political momentum. Human rights initiatives are increasingly depleted, and communication on the issues of combating injustice, inequality and discrimination is often based on the rules of branding, advertising and building business models, where celebrity and consumption logic are used to raise awareness and expand markets. Creating media content with a slogan against violence or taking selfies at a human rights event has become a fashionable and important part of self-presentation, but while supposedly aimed at supporting victims of violence, increasing solidarity, care and recognition, such actions mostly support platforms and genres focused on the inner self rather than on objective conditions that give rise to inequalities and stratification. The civic sector is increasingly becoming

involved in corporate logic, is concerned about finding ambassadors among celebrities, is becoming increasingly depoliticized, is losing its human rights impulse, and cares less for large-scale political initiatives than its own digital projections with the "proper" tags and slogans. This situation is reminiscent of the concept of "greenwashing" created in fashion law to distinguish between sustainable brands and brands that only call themselves eco-friendly, but do not actually operate in accordance with environmental requirements, following them only superficially. Tags, selfies, and likes with support from global human rights initiatives are in fact becoming a manifestation of colonial thinking, where self-presentation combined with caring for "distant others" is an easy step within the mainstream that is taken without actually participating. The creeping alienation that keeps the right actors in a state of "measured" activism and keeps political apathy hidden behind the external façade of activity are typical manifestations of colonialism, where the transparent cultivation of oppression and domination impoverishes the political space and produces pornographic political dialogue. A reality without meaning, a simulacrum that communicates but does not change, leads to the formation of impenetrable zones of power, where alienation from real problems grows and a powerful potentially active political spectrum is suppressed.

It is possible to counteract these tendencies by restoring true solidarity, which will create new frames for interaction policies. Velvet triangles – a heuristic concept developed by Alison E. Woodward (2003) to describe the interactions between policy makers, academia, and the feminist human rights movement to coordinate and influence the political process – could be important experiences in this regard. Although significant changes have taken place since the development of this concept, its aspects may nevertheless be relevant to the current situation. Certain things may be reborn in new forms such as rejecting bureaucratization, co-opting important issues with colonial approaches, insensitivity to local contexts, and increasingly organized violence. It is possible to overcome numerous forms of exhaustion and build various platforms of new formation together, provided that we feel a sense of belonging to the common world.

Global Judicial Dialogue can play an important role in creating this unity. Authors who study this phenomenon (Frishman 2013; Slaughter 2003; L'Heureux-Dube 1998) emphasize the importance of the global conversation in finding solutions to the global complex of human rights issues. At the same time, the awareness of the limitations of the language of human rights and the understanding that no court has universal authority to interpret certain rights gives rise to a constant process of challenging and contextualizing the universalist claim regarding rights. While judges around the world seek each other for convincing authority, cross-pollination and trans-legal communication between courts is taking place. Such a dialogue is quite capable of becoming a generative force that will open the horizon of possible actions and create a multitude of alternatives to overcome the symptoms and causes of necropolitics, colonialism, discrimination and inequality on planet Earth.

Conclusions

The role of the legal profession in sustainable development in the light of the challenges of the COVID-19 pandemic and Russia's full-scale war in Ukraine can be enhanced by developing

the concept of human dignity in legal reasoning. UN Sustainable Development Goal No. 16 ("Peace, Justice and Strong Institutions") can be achieved by combating impunity for the most serious war crimes and crimes against humanity and protecting victims of war and ensuring due respect for their human dignity.

A no less important argument of human dignity can be embodied in Sustainable Development Goal No. 1: "No Poverty." The current debate over how the welfare society and poverty are related and whether poverty degrades human dignity is answered with the link to current legal practice which has faced this challenge.

Sustainable Development Goal No. 13 – "Climate Action," which covers an attempt to resist the anthropocene and the dictates of necropolitics – is creating an impetus for lawyers to expose the presumptions that someone may be "less human," and may be excluded from "real" humanity compared to others. The practices of decolonization in law, the promotion of equality and diversity, and legal protection against discrimination support the struggle against colonial thinking. Obviously, Sustainable Development Goal No. 10 ("Reduced Inequalities") cannot be achieved by ignoring these legal aspects.

The task of lawyers is to restore true solidarity and find legal instruments for legal communication that will preserve the commitment to fundamental legal values and meanings.

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CONCLUSIONS

National and international public law: The establishment of conditions for a sustainable development

The potential of AI to be unleashed for sustainable development is hindered by a fragmented approach to sustainability frameworks and standards, uneven State development and priorities, and a lack of global rules surrounding sustainability and AI. The goals outlined in the UN 2030 Agenda are at risk of not being significantly impacted by global efforts toward sustainability. In this regard, the EU may lead the world in sustainability by bringing European compliance and AI standards to a global scale. It is necessary to elaborate on AI standards in order to better protect people and define the roles of AI users and providers. However, in terms of maintaining a balance between the protection of fundamental human rights, these criteria in the EU are best-in-class. Different AI system standards could result in a global division between safe and hazardous technologies. By participating in sustainability and related activities as compliance stakeholders, large firms, which are targets in the key regulatory programs of the EU, may help to reduce this risk.

National constitutions, along with the corresponding constitutional justice institutions, could be seen as strong defenders of sustainability, which is a constitutional value. These institutions have the important mission of implementing constitutional justice and defending constitutional values. In tandem with the idea of sustainable development, sustainability refers to both short- and long-term national goals for environmental protection and highlights the importance of maintaining a suitable balance between them. Constitutional sustainability can be seen as being intimately tied to a person's right to a clean environment, as well as being expressed in many economic or social constitutional characteristics. Finally, the need for constitutional stability and endurance is clear. These elements could be viewed as minimal foundations (or standards) for the concept of sustainability, but not as a complete conceptual framework. The concept of sustainability is most prominently expressed in the official constitutional doctrine of the Constitutional Court of the Republic of Lithuania when interpreting various constitutional norms and principles, such as the State's responsibility to protect the environment and, in particular, a person's right to a healthy and clean environment. This idea can be identified in the understanding of the Constitution as a social contract, intended for current and future generations. In order to ensure constitutional stability and endur-

ance, the Constitutional Court, like other European institutions of constitutional justice, has a responsibility to fairly balance all constitutional values, including those that are particularly protected by their non-amendability under the Constitution.

Regarding the efficiency of green public procurement regulation in Lithuania as an element of achieving the objectives of sustainable development, contracting authorities are prohibited from designating as a green public procurement a public procurement process where the successful supplier has offered goods, services, or works that fully satisfy the criteria for such a procurement. For a public procurement process to qualify as a green public procurement, a minimal set of environmental requirements must be met. These requirements are exact and extremely well-formulated. This means that suppliers have to meticulously carry out the requirement to present a significant amount of supplementary documentation, confirming that their products or services comply with these basic environmental requirements during the execution of a green public procurement. The fulfillment of this obligation will undoubtedly result in more irregular tender offers. However, the procedures outlined in the Law on Public Procurement and the Supreme Court of Lithuania that govern the rectification of erroneous tenders now permit more significant revisions of the tender offer, in addition to the remedy of straightforward technical errors. Because of this, even though the extremely specific nature of the minimum environmental requirements will significantly limit the efficiency of green public procurement, errors frequently presented in the tender offer may be corrected, provided that such grounds for rejecting tenders are established in the procurement conditions.

On the issue of sustainable development and international investment law, the conclusion is formed that international investment law is one of the most dynamic international regimes, despite the fact that it is a relatively new field of study. Early investment agreements had a linear, one-dimensional structure, and their only objective was to advance and defend private economic interests at the expense of the state. Generally, changing foreign investment governance is not a radical task. There is no contradiction between the notion of ensuring investment protection and taking sustainability into account. The integration of sustainable development into international investment law remains insufficient since many of the rules relating to sustainable development can still be found in model investment agreements. As a result, the latest investment agreements continue to have a limited impact on the accomplishment of sustainable development goals. To align with national policies that support sustainable development, international investment law must continue to grow.

The growth of sustainability has a significant impact on personal data. In order to monitor and achieve the SDGs, processing massive volumes of data has been suggested as a potential solution to societal problems. Data are seen as a resource for social growth and improvement as well as a way to enhance societal well-being. In light of this, the question arises as to whether the ideals of sustainability, for which data and data analysis technologies are used, and the rights of individuals to their privacy and the protection of their personal information are compatible. Legal analysis demonstrates that there are legal standards connected to personal data processing that must be followed when processing personal data in order to respect the human rights to privacy and personal data protection. The implementation of these principles includes a dedication to protecting personal information and privacy, and this may have an impact on data processing operations throughout the

whole data life cycle. The application of legal principles relating to the processing of personal data may have a direct impact on sustainability, which is strongly backed by the growing need for data processing for societal well-being.

The concept of decent labor may be criticized for its political background, relatively restrictive definition, and the lack of defined obligations and duties for putting it into practice. A growing number of people are engaging in new forms of modern slavery, such as working without benefits and informally, creating serious new obstacles for the promotion and realization of the decent work concept. Other issues include the imbalance between free time and working activity, disregard for the right to be disconnected from the employer, and changes in subordination at work. In order to address these disparities in the labor market and during working lives, more concrete responses and novel policies are currently needed. Sustainable work must become a generally accepted notion that is backed by law, protected, and enforced through public policies, labor legislation, and best practices at the corporate level in order to give decent employment possibilities for everyone in the new world of work.

Sustainability and private law

The issue of long-term agency is also discussed, with the authors coming to the same legal conclusions as if the agent had actual authority – namely that perceived authority is sufficient. The most long-lasting norms, ensuring harmony between the interests of the parties involved in such intricate relationships, are provided by legal systems that allow for the application of apparent authority to both the principal and a third party. Some legal systems interpret the principal's obligation to indemnify the third party for the loss suffered to be the full extent of the content of ostensible authority. In the event of apparent authority, the affected third party should be given the option to select the appropriate remedy. The third party should be able to make a reasonable decision between utilizing this concept and suing the falsus procurator for damages if the prerequisites of apparent authority are met in their specific case. Both the primary and the third party must be able to assert apparent authority in order for it to be used.

The modern corporate world is also committed to sustainability ideals. The inclusion of sustainability clauses in business contracts should be seen as a departure from the standard principles of contract law. The relational and social contract law theories more fundamentally diverge in their approaches to contract terms, purposes, privacy, and negative repercussions for non-compliance with sustainability clauses. Accordingly, this diversity raises the possibility of challenges in enforcing legal instruments based on the theory of classical contract law. As sustainability duties become more commonplace in business contracts, they will have a greater influence on contract regulation through instruments developed by most modern national legal systems and soft law standards such as the UNIDROIT Principles, PECL, and DCFR. Contractual requirements pertaining to sustainability are rarely part of the fundamental goals of a contract. In most cases, only express contract terms stating that a breach of sustainability contractual obligations will be considered to be a material breach of contract will guarantee, at least to some extent, that non-compliance will be qualified as significant non-compliance, as long as sustainability contractual obligations are incidental. There is

no reason to presume that the current customs and practices of contract parties have progressed to the point where sustainability objectives can be considered a universally accepted custom and established business practice.

According to Lithuanian experience, the function of product quality assurance in promoting sustainable consumption is discussed. In Lithuania, consumers for a long time had the flexibility to select the appropriate remedy for a breach of their rights – as long as it did not violate the proportionality principle, considering the case law of the court of cassation. The court must determine in each individual case whether the consumer's desire to exercise the right of contract termination is permissible after finding a violation of the consumer's right to have the goods correspond to the quality requirements. The consumer is no longer free to select the appropriate course of action for the infringement of their rights; instead, they must adhere to the two-step legal process for enforcing their rights. In accordance with case law, the court or non-judicial authority hearing the dispute must evaluate the specific factual circumstances of the reasonable time and the serious inconvenience caused to the consumer in each case, and then make a reasonable determination as to whether the consumer's right to quality assurance has been properly exercised.

Businesses typically adhere to methods that prioritize shareholders by driving up share values, as seen in the outlook for corporate sustainability in general and in the issue of shareholder activism in particular. In this regard, the discussion surrounding shareholder activism has regained prominence, with many arguing that businesses should instead balance the interests of all stakeholders, including creditors, employees, customers, and the general public, as opposed to their sole goal being to increase the individual interests of shareholders. The shareholder structures of organizations are now influenced by contemporary consumer culture, or so-called consumerism. Whether they are shareholders or consumers, today's stockholders are involved in this because they view their shares as disposable. Shareholders are currently behaving like customers when purchasing a share, even though they are essentially entities that should be viewed as investors or traders. Shareholder approximation has the power to influence and change a company's investment preferences. In particular, the environmental preferences of shareholders are likely to inspire corporations to use incentives to encourage more ethical and sustainable activities.

The new Lithuanian legal rules on remote shareholder participation in general meetings as adopted in November 2022 had sufficiently promptly considered the most problematic issues as far as they related to inclusive shareholder participation and have dealt with the shareholder's attendance and voting at the general meetings by electronic means in a balanced way. Although there is some space for improvement, in overall, the new legal rules by minimising challenges that shareholders can face in light of the judicial approach endorsing protection of collective interest over the interest of the particular shareholder when decisions of general meeting are challenged on the procedural grounds should contribute to more inclusive shareholder engagement in private companies.

Regarding reorganization in Ukraine, it is possible to put an end to an economic organization using a manner that calls for the existence of certain regulations aimed at ensuring the proper implementation of the transparency of this phenomenon in all of its manifestations. The provisions of part 1 of Article 107 of the Ukrainian Civil Code, which aim to protect the interests of creditors, are found to have resulted from the private law method of regulation, which places the private interests of a particular group of creditors ahead of public interests (via the creation of legal condi-

tions for the effective enlargement of national commodity producers as a competitive link in the economy – not only in domestic but also in foreign markets). In the Law of Ukraine on Joint-Stock Companies, the possibilities exist to (1) file a lawsuit regarding the cancellation of a decision about reorganization and (2) file a lawsuit on the nullity of a reorganization procedure in order to increase the effectiveness of the protection of both private and public interests during the reorganization of economic entities, in particular joint-stock companies. In light of the aforementioned, it is essential to reconsider methods for comprehending reconstruction as an economic and legal phenomenon, its socioeconomic core, and the achievement of its goals in order to revitalize the reorganization process based on European perspectives and foreign laws. Such legislative improvements will help the reform of Ukraine's legal regulation evolve in a sustainable way.

Moreover, the 2030 Sustainable Development Agenda highlights the importance of fairness for global progress. The awareness that numerous avenues to justice is the most significant advance in the ongoing access to justice campaign. ADR procedures can be utilized to accomplish justice and peacefully resolve conflicts outside of state courts. Recent study shows that many countries have a justice gap, exposing unjust civil justice restrictions for regular people. Specific solutions must address personal, jurisdictional, temporal, financial, procedural, and practical hurdles to justice. Creating UN-level instruments to measure civil justice access is crucial. Thus, ADR growth is essential for "justice for everyone". However, the sustainable development goal of justice for all should not be limited to procedural justice. Substantial justice matters. The former is an unrestricted opportunity to apply to the court, have a case heard in court, receive a court decision, and have it executed, while the latter includes not only the possibility of initiating proceedings in court but also the trial results, which should be evaluated according to established standards.

Transformation of criminal law in the context of sustainability

Because of the abstract nature of the consequences in both the EU's Directive on this issue and the Lithuanian Civil Code, case law tends to narrowly construe the nature of environmental damage, limiting the scope of criminal culpability. The case law requires an economic assessment of both the environmental threat and the environmental harm, but the financial magnitude of the damage is no longer a deciding factor in the seriousness of the criminal charges. Non-custodial penalties are prioritized in Lithuania's sentencing guidelines under Article 270 of the Criminal Code, and fines are almost non-existent. The overall findings of this study show that Lithuania has implemented the provisions of the Directive, both in terms of making the activities specified by the Directive illegal and of the penalties associated with such violations. However, it is also worth noting that in actual Lithuanian case law, administrative (in terms of criminalization) and civil (in terms of sanctions) liability takes precedence over criminal liability.

It is concluded that concerns sustainable criminalization that the principle of criminal law subsidiarity means that the legal measures of this branch of law are supplementary to the regulation of other branches of law. Compliance with this principle in criminal legislation is a necessary condi-

tion for ensuring the sustainability of the legal regulatory system and its compatibility with criminalization. In terms of the principle of the independence of subsidiarity from other principles limiting criminalization, as well as its applicability and significance in legislation, the provision that criminalizing norms must be harmonized with the regulation of other branches of law and must not create any competitive legal protection is the most productive and methodologically significant aspect.

The analysis of the decriminalization of small-quantity drug possession and the long-term reduction of drug consumption reveals that various studies offer contradictory arguments for decriminalizing small-quantity drug possession for non-distribution purposes. There are no solid grounds to argue unequivocally that such acts must be decriminalized until the proportion of drug users in the state reaches a critical threshold, at which point the criminalization of such acts becomes inappropriate due to their high prevalence. The use of narcotic drugs has a negative impact on both the individual and society. The decriminalization of small amounts of drugs for non-distribution purposes does not solve the problem of reducing drug use. Decriminalization benefits organized crime by increasing the number of users and improving opportunities for the drug trade. The research findings and the arguments of both supporters and opponents of criminalization do not support the conclusion that decriminalizing the illegal possession of small amounts of drugs for non-distribution purposes is a long-term solution that reduces drug consumption, threats, and harm to society and the environment. The decision to criminalize or decriminalize the illicit possession of narcotic drugs for non-distribution purposes is not solely based on research.

On the subject of accessible and sustainable criminal justice, it is concluded that the right of people with disabilities to access justice and its implementation should be regarded as an important factor in the long-term development of society. This chapter assumes that, due to the uniqueness of criminal proceedings, the functional approach model, with appropriate adjustments, should be applied to the issue of the fitness to stand trial of a defendant with a mental disability and of a person who has committed a criminal offence while insane. The criteria of intellect and will are included in the content of fitness to stand trial for both a mentally disabled defendant and a person who has committed a criminal offence while insane. The intellect criterion determines a person's ability to comprehend the nature and significance of an offense, as well as their procedural position. The will criterion determines a person's ability to independently exercise their procedural rights and obligations. The overall idea is that having the capacity to understand the process is not enough for a person with a mental disability; the defendant must also be able to participate effectively in the process. These procedural rights can only be limited or denied if the case data shows that the person's mental state prevents them from exercising their rights in-person for an extended period of time, rendering the person's participation meaningless. Courts must provide reasons for their decision to limit an accused person's right to participate in court, and they cannot rely solely on the opinions of medical experts.

The EU's vulnerability researcher protection policies and laws are inconsistent. A researcher's legal protection includes vulnerability research, discovery, reporting, and recognition rights and obligations. Vulnerability reporters have two opposing rights: to be acknowledged and to remain anonymous. Each country's policy protects these rights differently. In countries where a national CERT acts as a mediator, they are usually guaranteed, but in Member States where vulnerability

reporting is contractual, they may be limited. With the NIS 2 Directive's adoption, reporters' anonymity will be guaranteed by law in each Member State's implementing acts. Due to the potential risks of such a stimulating effect, some countries with CVD policies recognize the right to compensation. Only a minority of researchers see remuneration as the main incentive, even though bug bounty programs are growing.

Avoiding criminal liability requires acting in good faith, defined in some jurisdictions, and following national or organization CVD policy. Even in countries with national CVD policies, the list of prohibited activities after discovering a vulnerability differs. Even though the Cybercrime Directive harmonizes national cybercrime laws with the EU, diverging national case-law will affect the subjective element of any possible crime. National CERTs also act as intermediaries, but not always. The new NIS 2 Directive requires Member States to nominate their CSIRTs as trusted intermediaries between reporting researchers and entities providing ICT services likely to be affected by vulnerabilities, harmonizing their approaches.

Only four Member States have guaranteed (legislatively or practically) that researchers will not face negative consequences (including criminal liability) if they follow the strict national policy or CVD policies of different organizations. Establishing a clause in criminal law or another legal act or requiring the manufacturer to sign a vulnerability disclosure agreement are the main ways to avoid criminal responsibility. Researchers are exposed to a variety of manufacturer policies because vulnerability disclosure is unregulated in many Member States. This does not encourage vulnerability disclosure, but it reduces the risk of criminal liability for vulnerability researchers. This risk is higher in countries without these policies, and the vulnerability researcher's status is unknown.

The EU's decade-old legal regulation encouraging Members States to provide legal detection and reporting of security gaps has not ensured a common approach to security researchers' guarantees. Since the EU has started harmonizing legal regulation in this area by introducing common definitions, incriminations, and sanctions, it would be reasonable to include a specific provision requiring Member States to define the conditions under which identifying and disclosing vulnerabilities will not result in incrimination. The Cybercrime Directive should be revised to harmonize criminal law provisions and provide security researchers with a common exemption from criminal liability.

Sustainability in action: examples and experiences of sustainability from the legal point of view

The sustainable development principle is widely accepted in spatial planning, as can be seen in the part of this chapter that considers its implementation in zoning and planning legislation. While there are worldwide guidelines for sustainable development, it is ultimately up to individual nations to determine their own plans of action. As of 2014, the Spatial Planning Law of the Republic of Lithuania includes the sustainable development principle. Without any direction or the need to establish indicators for the measurement of the efficacy of specific measures, city planners are left with the challenging task of implementing certain legal standards to ensure sustainable growth.

Measures to reduce the effects of climate change are prominently included in the present master plan for the expansion of the city of Vilnius. Measures to strengthen green areas; measures to reduce greenhouse gas emissions; and measures to promote the use of renewable energy sources are the three main groups of sustainable development measures to mitigate climate change and ensure sustainability that emerge from an evaluation of the specific measures mentioned in this paper. The only place in Lithuania where sustainable development is supported by soft legislation is the capital city.

The future of the electric car market is currently not definitively defined due to competition from alternative vehicle technologies, uncertainty regarding the development of the technical parameters of electric cars, and costs for electric car users, according to an analysis of the problem of the sustainable legal regulation of electric vehicle infrastructure. In Lithuania, consumers can receive financial assistance when they purchase an electric vehicle; however, the amount of this assistance, as well as the sources from which it can be received, vary widely. The safe and responsible manufacturing of batteries is the biggest challenge faced by the electric transportation industry. While electric motors have a minimal impact on the environment, battery production and especially recycling can be harmful. Better battery technology is essential for the broad adoption of electric vehicles. One of the most important aspects of the ability of Europe's automotive industry to remain competitive is the continent's commitment to the long-term sustainability of both battery production and research and development.

As for the connections between sustainability and electrification in the EU and in the Lithuanian regulatory framework, the goals set out for the electrification of the transport sector and the total usage of electrical vehicles in the transport fleet in Lithuania have not yet been fully implemented. The electric vehicle industry risks failing to reduce atmospheric emission rates and producing negative consequences for the environment and public health if the predicted results set out in the regulatory framework for the full implementation of the electrification of the sustainable transport sector fall short of the target requirements. While it is commendable and entirely reasonable to work toward improving national energy independence, the goals set out in 2005 have not yet been attained. Value-based, sociocultural models of behavior creation and habit change have not been modified for development. Sustainability law typically mandates a concentration on monetary and fiscal policy choices that keep levels of consumption, wealth, and influence stable. As making such judgments would have long-term ramifications for the establishment and maintenance of the concepts of power, money, and authority, economics, finance, income, power, and influence continue to take precedence. Even in the context of globally important goals such as managing climate change, profit, power, and influence remain key factors when looking at decision-making for sustainability.

This chapter also declares that the scope of the waste management sector under the IPCC Guidelines is narrower than under the Waste Framework Directive, because some greenhouse gas (GHG) emissions from waste management activities are not included, or are only partially included, in the waste sector under the IPCC Guidelines. The amount of GHG emissions would be higher if all emissions from the waste management sector, as defined by the Waste Framework Directive, were accounted for under the IPCC Guidelines. As a result, ostensibly: no significant changes in the waste management legal framework are required; no additional measures are required to manage waste at the highest possible levels in the waste hierarchy; and no additional measures to begin waste manage-

ment in a more sustainable, sound manner are necessary. In fact, the opposite is true. The path to reducing GHG emissions from waste management, as defined by the Waste Framework Directive and in the context of climate neutrality, has two directions. One strategy is to promote waste management activities at the highest levels of the waste hierarchy, because such activities are directly related to GHG emission reductions – for example, generating less waste and reusing and recycling as much as possible. The second step is to improve waste management activities as defined by the Waste Framework Directive, keeping in mind the concepts of sustainability and sustainable development. It is necessary to incorporate measures into legal regulation to reduce GHG emissions from the waste management sector, as defined by the IPCC Guidelines as well as the Waste Framework Directive.

The advancement of sustainability is also linked to the advancement of finance and technology. The concept of planet, people, and profit; the understanding of growth without growth and economic boundaries; the transition from short-term to long-term shared values; and the necessity of internalizing ESG externalities all form the foundation of a paradigm and mindset shift for a more sustainable future. This transition is possible with toolkits and advice based on system thinking and simulation, and the role of education for sustainability managers and leaders thus grows significantly. Sustainability courses will aim to educate managers through a broad multidisciplinary and interdisciplinary upskilling and reskilling approach. Sustainable ecosystems and platforms incorporate all aspects of regulation, financial mechanisms, and modern technological trends in order to select strategic priorities to address existential threats and act across multiple sectors and geopolitical arenas. Mapping reworks ESG data inputs into pieces of advice to produce UN SDG No. 17 as an output. This helps to bridge the gap between law, finance, and technology, as well as accelerate the transition from silos to systems. Stakeholders prefer metrics on their dashboards to pursue intermediate and long-term goals, and middle and low-income countries can adapt ecosystems and platforms to meet specific needs.

On the role of lawyers in future pandemic and war response regulation, it is concluded that by advancing the concept of human dignity in legal reasoning, the legal profession may play a greater role in sustainable development in light of the challenges posed by the COVID-19 pandemic and Russia's all-out war in Ukraine. Combating impunity for the most heinous war crimes and crimes against humanity, as well as protecting war victims and ensuring their human dignity, will contribute to the achievement of UN SDG No. 16. The first SDG, "No Poverty," makes an equally compelling case for human dignity. The connection to current legal practice, which has addressed this issue, responds to the current debate regarding how the welfare society and poverty are related, and whether poverty diminishes human dignity. SDG No. 13 – "Climate Action" – encourages lawyers to challenge assumptions that some people are less human and are excluded from real humanity in comparison to others. This goal encompasses a fight against the anthropocene and the dictates of necropolitics. Legal decolonization methods, the promotion of equality and diversity, and legal protection against discrimination all contribute to the fight against colonial thought. Ignoring these legal considerations will obviously not help to achieve SDG No. 10. – "Reduced Inequalities." Lawyers must find ways to communicate legally while restoring true solidarity in order to maintain their commitment to core legal values and meanings.

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SUMMARY

The first part of this book focuses on national and international public law as the legal areas that allow the conditions for sustainable development to be established.

The first chapter ("Sustainable development and artificial intelligence: Is AI4ESG a key driver to reach the objectives of UN Agenda 2030?") deals with the regulation of AI with specific reference to sustainability, advocating for a more reliable legal framework for AI with a view to achieving the UN Agenda 2030 SDGs. The author specifically argues that the EU plays a major role in setting proper rules, and large companies might also help in mitigating risks linked to new technologies by involving themselves and their stakeholders in sustainability initiatives.

The second chapter ("The concept of sustainability in national Constitutions: Insights from constitutional jurisprudence") comparatively analyses many European national constitutions to consider the strong relationship between many of them and sustainability. This is intended to consider both environmental sustainability and people's rights, assessing the long-term stability of constitutions but generally perceiving the absence of a comprehensive pattern within the topic. The author then moves to the constitutional doctrine of the Lithuanian Constitutional Court regarding sustainability, which helps to understand the constitution as a social (and therefore intergenerational) contract.

In the third chapter ("The efficiency of green public procurement regulation in Lithuania as an element of achieving objectives of sustainable development"), the author describes the requirements present in Lithuanian law regarding the qualification of a public procurement as a green public procurement in detail. They also point out that the current rules allow a more accessible possibility for correcting mistakes present in tenders if the conditions laid down in the procurement are met.

The fourth chapter ("Sustainable development and international investment law: A look at the new generation of international investment agreements") addresses the issue of sustainability from the perspective of international investment law. After describing the chronological development of the trend in international investment agreements, the author highlights the fact that States currently include references to sustainable development in IIAs, introducing social and environmental elements in an essentially neo-liberalist framework. Nevertheless, the author also notes that only very few of the most recent IIAs include features of sustainability, and that in many cases these features exist solely within models. On this basis, the author advocates for a shift of paradigm by strengthening the idea of investor accountability beyond soft law.

The fifth chapter ("Privacy-friendly personal data processing and sustainability: Is there mutual support?") points out how the massive processing of big data related to SDG-linked issues might be in contrast with people's right to privacy. The author discusses the different principles involved in this trade-off – with a specific focus on the principle of purpose limitation and the possibility that its application damages the environment in the long run – and advocates for further investigation in the field in the coming years.

The sixth chapter ("Sustainable work over the course of life. A new paradigm for decent work") considers the topic of social sustainability, with specific reference to the issue of decent work. The authors highlight the fact that the notion of decent work is extremely vague, and advocate for a more comprehensive principle of sustainable work that should serve as the foundation for the promotion, protection, and enforcement of work and working conditions – with protection offered to workers, notwithstanding their specific employment status. They propose the use of hard-law measures for the enforcement of sustainable work and to enhance employees' participation in the workplace management, thus making the voices of workers more audible.

The second part is devoted to sustainability and private law.

The first chapter ("The legal consequences of apparent authority for sustainable agency relationships") deals with a classic issue of private law with a view to its interaction with sustainability: apparent authority. The author argues that the application of sustainability to a transaction marked by apparent authority should lead to the right of the affected third party to freely choose the remedy between the compensation of damages and the performance of the obligation in kind. The same should also be the case for the principal and the fourth parties involved in the agency relationship.

The second chapter ("The change of commercial contractual relations influenced by sustainability clauses") describes the impact of sustainability on commercial contractual relations, in particular with the inclusion of sustainability clauses. The author analyses the interaction between sustainability clauses and the doctrine of classic contract law, finding difficulties in applying to the former the legal instruments proper to the latter. However, sustainability-related contractual obligations are usually ancillary, and, in general, sustainability objectives are not yet considered trade custom or established business practice – even if the current trend leaves open the idea that they will become increasingly relevant in the near future.

The third chapter ("The role of the product quality guarantee in promoting sustainable consumption: Lithuanian experience") considers how the product quality guarantee might serve as a driver for the promotion of more sustainable consumption. The author emphasizes the role of the legal framework in this field, as it indirectly promotes the more sustainable consumption choices of the consumer. In particular, the author focuses on recent amendments to the Lithuanian Civil Code (2022) that promote both the circulation of longer-lasting products and a longer period of use.

The fourth chapter ("Corporate sustainability and the shareholder activism problem") analyses the issue of shareholder activism, in particular with reference to the Corporate Sustainability Reporting Directive. The obligation for directors to consider the longer-term impacts of a company's activities is considered as a means of overcoming the short-term (often unsustainable) approach that many shareholders, being interested mainly in profit maximization, possess.

The fifth chapter ("The remote participation of shareholders in the general meetings of private companies as a tool for more inclusive shareholder engagement") refers to a topic that was extremely relevant during the recent COVID-19 pandemic: remote shareholder participation and voting in the general meeting. The author in particular analyses the most recent (November 2022) Lithuanian legislation on this topic by highlighting its advantages, both from a substantive and a procedural point of view, in terms of the enhancement of real shareholder engagement.

The sixth chapter ("The main directions in the sustainable development of legal regulation of reorganization in Ukraine") focuses on the concept of reorganization in Ukrainian legal experience, defining it as a multidimensional phenomenon. The key sustainability issue in the contribution lies in the observation that reorganization is likely to affect creditors' interests. The author advocates for the reconceptualization of reorganization so as to have it considered from a socio-economic perspective, with a view toward Ukraine's relationship with countries in Europe and around the world.

In the seventh chapter ("Access to justice in civil cases: Filling the gap in the sustainable development agenda"), which concludes Chapter II, the authors focus on access to justice as a specific topic included in Goal 16 of the UN Agenda 2030 SDGs. Such an observation puts access to justice, in particular by means of ADRs and specifically with reference to civil cases, in the field of social sustainability. Furthermore, the authors – pursuant to the UNDP – point out that access to justice is to be defined not just as a procedural, but also as a substantive right, guaranteeing just and equitable legal and judicial outcomes.

The transformation of criminal law in the context of sustainability is the topic of the third part.

In the first chapter ("Environmental crime: Lithuanian criminal policy in the context of European regulation"), trends in the interpretation of the concept of environmental damage are considered from both the European and the Lithuanian perspective by highlighting the limited acknowledgment of criminal liability. At present, despite the implementation of the European rules by Lithuania, administrative and civil remedies are preferred over criminal liability when it comes to environmental offences.

The second chapter ("The principle of subsidiarity of criminal law as a condition prerequisite for sustainable criminalization") considers a classic criminal law topic in terms of its interaction with sustainability: the principle of subsidiarity. In particular, the author uses the concept of sustainability in order to define the room left to criminal law – and in general to criminalization – when a certain offense is considered with a view toward other legal areas. In this sense, sustainability in the law-making process would guarantee the persistence of criminal law as an *extrema ratio*.

The third chapter ("Decriminalization of the illicit possession of small quantities of drugs and the sustainable reduction of drug consumption") is also related to the criminalization threshold, with specific reference to the possession of small quantities of narcotic drugs for non-distribution purposes. The author questions the most appropriate policy between the criminalization and non-criminalization of such a form of possession, as research carried out on the topic does not offer clear evidence that decriminalization is a sustainable solution for reducing drug consumption. At the same time, the author acknowledges that the final decision is a political and value-driven assessment that is made by the legislator.

The fourth chapter ("Accessible and sustainable criminal justice: The right of an incapacitated accused person to be present at a court hearing") focuses on the social sustainability naturally embedded within the possibility of actual participation in criminal trials for people with disabilities. The authors present the models that are most widespread classically and more recently in dealing with this topic, advocating for the use of a modified functional approach and for a system in which actual participation in the trial – not just understanding – is guaranteed to the incapacitated defendant. They also focus on the specific duty of care that the State must have towards incapacitated people with reference to their right to have proper legal assistance, and the necessity of particular care in assessing the meaning and awareness of their testimonies.

In the chapter's final subchapter ("Encouraging coordinated vulnerability disclosure: The protection of vulnerability reporters"), the authors comparatively discuss the situation of vulnerability reporters in the EU in the general framework of cybersecurity and the recent European NIS 2 Directive (2022). The contribution discusses the ways in which legal protection takes place and the specific obligations that enable vulnerability reporters to avoid criminal liability, observing that only four Member States have adequate guarantees to protect these researchers. The authors therefore advocate for the revision of the Cybercrime Directive to guarantee the more harmonized and effective protection of vulnerability reporters.

Part Four is devoted to providing several examples and experiences of sustainable activity and conduct, with the subsequent legal fallout discussed.

The first chapter ("The implementation of the sustainable development principle in zoning and planning regulations: The Lithuanian case") considers the impact of sustainability in spatial planning in terms of the so-called sustainable development principle. The author points out that the Lithuanian Spatial Planning Law has not encompassed mandatory rules for a long time, while more concrete actions are taken by local planners. The author specifically refers to the master plan of the city of Vilnius, where specific environmentally friendly measures are outlined. They also argue that Vilnius' example and its establishment of specific soft laws might eventually be followed by other cities, and might even become a regulatory framework in the future.

The second chapter ("The problem of sustainable legal regulation of electric vehicle infrastructure") considers one of the most-discussed topics regarding mobility: the use of electric vehicles. The author points out that while electric mobility is far less polluting per se than traditional vehicles, many problems arise when it comes to the cost of electric vehicles, and in particular when we consider the manufacture and disposal of exhausted batteries. They support the efforts of the EU in its policy regarding the circular economy in the field of batteries, not least in order to reduce dependence on China, and advocate for the increased attention of legal scholars in assisting in the development of a more effective legal environment for promoting sustainable technological solutions.

The third chapter ("The links between sustainability and electrification in the regulatory framework of EU and Lithuania") again considers electric vehicles, showcasing research that demonstrates that the environmental benefits derived from the increased number of electric vehicles in Lithuania are substantially offset by the increased emissions required for the recycling, disposal, and reuse of their batteries. The author argues that the correct way to pursue sustainability should perhaps involve

a model that does not presuppose the maintenance of the current level of production, and that might also include a shift of paradigm in education.

The fourth chapter ("Contribution to the sustainable development agenda by calculating and reducing greenhouse gas emissions from the waste management sector") focuses on climate change mitigation in waste management sector, the intersection between the waste management and energy sectors, with specific reference to greenhouse gas emissions reporting to IPCC. The author argues that GHG emissions from the waste management sector, as it is understood under the Waste Framework Directive, at large are attributed to other sectors (mainly energy sector). This creates the appearance that the waste management sector is low-polluting and is among the lowest contributors to climate change, affecting the public debate and potentially leading to a lack of policy changes within the legal framework of the sector. The author advocates for measures that should be in the waste management sector towards climate neutrality.

In the fifth chapter ("Sustainability: Bridging the gaps between law, finance, and technology"), the author considers the legal, financial, and technological frameworks of sustainability together in order to create a consistent approach by providing several examples of bottlenecks. In addition, they point out that academia has a key role to play – both in terms of sustainability education and by means of retraining services.

The final chapter ("The sustainability of the legal profession: Lawyers' role in the future regulation of pandemic and war responses") highlights the role of legal professions in the promotion of sustainability, with a particular focus on human dignity. The author considers the fight against impunity for war crimes in Russia's invasion of Ukraine (with reference to SDG 16); the no-poverty goal stated in SDG 1 and how it is dealt with in current legal practice; and the promotion of decolonial and anti-discriminatory thinking by legal professionals in their activity (SDG 10). They also refer to environmental sustainability, and in particular climate actions (SDG 13), as a way to promote equality among human beings.

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INDEX OF NAMES

Law fostering sustainability and sustainable development is one of the fastest-developing, most challenging legal disciplines globally. Sustainability has many different definitions, but its essence was articulated by the Brundtland Commission, tasked by the UN in 1987 to formulate a global agenda for change: "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs." The edited volume Law and Sustainability analyses the ways on how law and legal profession should change and contribute to sustainability.

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