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Publishers:
Prof. Dr. habil. Csák Csilla PhD, DHC, dean, csilla.csak@uni-miskolc.hu and
Dr. Hornyák Zsófia PhD, president, zsofia.hornyak@uni-miskolc.hu

Editor-in-chief:
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ede.szilagyi@uni-miskolc.hu

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The Nuclear Future of the Republic of Bulgaria – Trends in the Development of the Regulatory Framework for the Construction and Operation of Nuclear Power Plants, Problems and Recommendations for Improvement[2]

Abstract

In the article, the author conducts an analysis of the national nuclear characteristics of the Republic of Bulgaria, addressing the prospects of nuclear energy in the country, its strategic position in the national energy policy and the envisioned development for the construction of new nuclear power plants. It further considers public opinion on nuclear energy. The composition and institutional positioning of the national regulatory body are delineated, with particular attention paid to the safeguards ensuring its independence within the administrative framework of the state. The legislation in the Republic of Bulgaria that regulates the use of nuclear energy is notably extensive. In addition to the main nuclear law, public relations are also regulated by other laws, further elaborated through an array of subordinate normative acts. The article proceeds to outline, albeit briefly, the principal constitutional provisions, statutory laws, and regulatory by-laws pertinent to the licensing stages of nuclear power plants. Moreover, the analysis extends to the salient characteristics of the nuclear projects planned for implementation, issues arising in the context of contractual arrangements related to construction, as well as the national public procurement procedure for the construction of nuclear power plants. The discourse also encompasses the increasingly salient issue of small modular reactors

1 | Professor of Administrative Law and Procedure, PhD. Academic institution: Varna Free University "Chernorizets Hrabar". ORCID: 0009-0002-5894-3549. e-mail: olga.borisova@vfu.bg
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Olga BORISLAVOVA BORISOVA: The Nuclear Future of the Republic of Bulgaria – Trends in the Development of the Regulatory Framework for the Construction and Operation of Nuclear Power Plants, Problems and Recommendations for Improvement. *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2025 Vol. XX No. 38 pp. 9–46

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with the author present the extent to which the country is interested in their implementation and the challenges facing their licensing and implementation.
Keywords: nuclear legislation, energy legislation, nuclear regulatory authorities, nuclear power plant, licensing, nuclear project, small modular reactors.

1. Introduction

bulgarian nuclear energy possesses a long history. In the 1950s, amid intense debates about the pollution of nature when working with radioactive substances and the attendant risks to human health, the International Atomic Energy Agency (IAEA) was established[3].The Republic of Bulgaria was among its founding members and has remained a full member since the Agency's inception.

By the mid-1960s, following rigorous examinations of the nation's capacity and trends in the development of nuclear technologies in the world, the Republic of Bulgaria decided to embark on the path of nuclear energy development[4]. In pursuance of this policy, the country gradually built the requisite infrastructure—material, technical, regulatory and personnel resources alike—for the construction of six power units at the Kozloduy NPP site – four nuclear reactors of the VVER-440/B-230[5] type and two nuclear reactors of the VVER-1000/B-320 [6]type. Concurrently, preparations for construction and the initial phases of construction were initiated for a second nuclear facility, situated at the "Belene site".

However, the catastrophic incident at the Chernobyl nuclear power station in Ukraine in 1986 marked a shift in public perception. Where once there had been widespread endorsement of the benefits of nuclear energy, public sentiment turned increasingly towards scepticism and apprehension in the wake of this tragedy to establish an international legal regime for protection against potential nuclear risks, and to mitigate damage, four international conventions were adopted after international negotiations – the Convention on Early Notification of a Nuclear

3 | The IAEA is an organisation within the United Nations, without being a specialised agency within the meaning of Article 57 of the UN Charter. Its Statute was approved on 26 October 1956 in the form of a treaty that entered into force on 29 June 1957. It is a classic intergovernmental organisation with a global focus on scientific and technical cooperation in the field of peaceful uses of nuclear technology.
4 | Ayllon Diaz-Gonzalez,1999, 253–350.
5 | The VVER-440/B230 reactors were designed in the late 1960s and their design was found to be inconsistent with modern safety requirements. Therefore, a number of improvements were implemented in the 1980s and 1990s to implement an acceptable level of safety.
6 | The design of the VVER-1000/B-320 reactors (units 5 and 6 of the Kozloduy NPP) generally complies with internationally accepted safety requirements. They have a hermetic containment, triple redundancy of safety systems. They were put into operation in 1987 and 1991, respectively. The basic principle of nuclear power plant safety has been applied to them – defense in depth, using several physical barriers. Based on the analysis of operating experience, comparison with similar PWR reactors and increased international safety requirements, a modernisation program has been developed and implemented to improve the safety of the units.

Accident in 1986, the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency in 1986, the Convention on Nuclear Safety in 1994, and the Unified Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management in 1997.

In connection with the commitments undertaken by the Republic of Bulgaria in the course of its accession to the EU, the operation of the four nuclear reactors of the VVER-440/B-230 type was terminated before the expiration of their designed operational lifespan on account of safety concerns. Units 1 and 2 were irrevocably shut down and entered into decommissioning at the end of 2002, followed by Units 3 and 4 at the close of 2006.

2. National nuclear characteristics of the Republic of Bulgaria

the Republic of Bulgaria, as well as other Member States, incorporates nuclear energy into its national energy mix. Nuclear energy is a proven emission-free resource and as such it is a key element in the structure of the country's energy balance to ensure secure and reliable energy supplies, as well as to effectively combat climate change.

Nonetheless, the prerogative to determine whether or not to include nuclear energy in the national energy strategy remains within its exclusive competence. In this context, Article 194(2) subparagraph (2) TFEU emphasises a Member State's right to determine the conditions for exploiting its energy resources including the selection of energy sources such as nuclear energy and the general structure of its energy supply. This principle of national discretion is reaffirmed by the Court of Justice of the European Union (CJEU), in its Judgment of 22 September 2020, Case-C-594/18 P – Hinkley Point C, at paragraph 32.

2.1. Prospects of the national nuclear energy sector in the context of membership in the European Union and implementation of the European regulatory framework for the use of atomic energy

Following its full accession to the European Union on 1 January 2007, Bulgaria has had to re-evaluate the legal responsibility for maintaining a national legislative, regulatory and organisational framework for nuclear safety of nuclear installations. The Treaty establishing the European Atomic Energy Community (Euratom Treaty) also imposes a number of specific obligations foremost among which is the obligation to transpose into its domestic legislation the basic standards for the protection of health from the dangerous effects of ionising radiation issued on the basis of the EURATOM Treaty, as well as to notify the European Commission.

The existing national legislation is periodically reviewed and synchronised with the European achievements, as well as with the new or amended documents of the IAEA.

Over the past two decades, "nuclear energy" has re-emerged as a subject of considerable attention, both domestically and internationally, attracting the attention of scientists and politicians regarding the benefits of nuclear energy, particularly in its role in the fight against climate change and carbon dioxide pollution.

Yet, notwithstanding the manifest advantages and benefits of using nuclear energy, the events of 11 March 2011 at the Fukushima Daiichi Nuclear Power Plant in Japan prompted renewed scrutiny of the appropriateness and promotion of the use of nuclear energy to meet the growing energy demand. After the accident in Japan, the future of nuclear energy has once again been subject to debate and reassessment by critics and supporters of nuclear energy, due to the danger of its use causing negative impacts on the environment and radiation damaging the health of the population. Germany, Switzerland and the Netherlands adopted resolutely anti-nuclear stances, citing the risks of accidents and radiation pollution as their principal objection. In the immediate aftermath of the Fukushima disaster, the German government announced the closure of seven nuclear power plants, and a few months later the German parliament decided to permanently dismantle the remaining ten German nuclear power plants by 2022. Similarly, in 2011 Italy suspended its plans to construct new nuclear power plants following a referendum, and Belgium decided to phase out seven nuclear power plants, producing more than 50% of its domestic electricity, between 2015 and 2025. Other countries, such as the USA, France, Japan, China, Great Britain, Venezuela, Argentina, are in favour of using this energy source, based on the low price and security of supply of the necessary natural resources over time compared to other energy sources. Global uranium reserves, it should be noted, are estimated to support continued nuclear generation for an operational life of over 200 years and these deposits provide opportunities for security of supply, selection of nuclear fuel sources in terms of price and location.

Subsequent developments, particularly the sharp increase in energy prices, have prompted some countries—even those previously committed to phasing out nuclear power, such as Germany—to reconsider the retention of nuclear capacity. There is talk of a "nuclear renaissance", and the possibilities for electricity from nuclear power plants to be an effective and economical alternative to electricity produced from fossil fuels. In this climate, ten Member States, led by France and Poland (including Bulgaria, Croatia, the Czech Republic, Finland, Hungary, Romania, Slovakia and Slovenia) formed what is known as a "Nuclear Alliance." This coalition has advocated for the recognition of nuclear energy as both a response to the enduring energy crisis and an instrument for achieving a low-carbon future. They expect the EU Commission to propose that nuclear energy be included as

a "green" or "transitional" technology within the EU taxonomy for sustainable finance.

In response to such developments, on 2 February 2022, the European Commission gave its approval in principle to a Supplementary Climate Delegated Act to the Taxonomy Regulation on climate change mitigation and adaptation[7], covering certain activities related to natural gas and nuclear energy.

In order to realise the European Union's ambition of attaining climate neutrality by the year 2050, a substantial influx of private capital is indispensable. To this end, the EU taxonomy has been devised to guide private investment towards activities deemed essential for the achievement of climate neutrality. The taxonomy classification is not prescriptive as to the inclusion or exclusion of specific technologies within the energy mix of Member States. The aim is to strengthen the transition by finding all viable pathways by which the Union's climate goals may be fulfilled. Based on scientific advice and technical progress, the Commission considers that private investment should play its role in gas and nuclear activities during the transition. The selected activities in this area are consistent with the EU's climate and environmental objectives and, as delineated in the relevant documentation, will make it possible to accelerate the transition from more polluting activities, such as coal-fired power generation, to a more climate-neutral future based mainly on renewable energy sources.

In particular, the Supplementary Delegated Act on Climate accomplishes the following:

- It introduces additional energy – related economic activities into the EU taxonomy. The text sets out clear and strict conditions under Article 10(2) of the Taxonomy Regulation under which certain nuclear and gas activities may be added as transitional activities to those already covered by the first Delegated Act on climate change mitigation and adaptation, applicable as of 1 January 2022. As a result, rigorous are now established for nuclear activities to contribute to the transition to climate neutrality, to meet nuclear and environmental safety requirements. Further particularised conditions are foreseen, which are contained in the Supplementary Delegated Act.
- The Act further institutes specific disclosure requirements upon companies engaged in nuclear energy operations . In order to ensure transparency for investors, the Commission has amended the Delegated Act on the disclosure of the taxonomy, thereby enabling investors to clearly identify which investment

7 | COMMISSION DELEGATED REGULATION (EU) 2022/1214 of 9 March 2022 amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors and Delegated Regulation (EU) 2021/2178 as regards specific public disclosure of information on those economic activities.
The draft was formally adopted on 9 March 2022, when the language versions in all official EU languages were made available. It was then transmitted to the co-legislators for the scrutiny period, which ended on 11 July 2022, without objections. Published in the Official Journal on 15 July 2022 and applicable from 1 January 2023.

opportunities include nuclear energy activities and to make investment decisions with full knowledge of the relevant facts.

The text of the Supplementary Delegated Act has been drawn up following consultations with the Member States Expert Group on Sustainable Finance and the Platform on Sustainable Finance. In addition, the Commission has duly taken into account the feedback received from the European Parliament during the course of its deliberations.

On 6 February 2024, the European Parliament and the Council reached a political agreement on the proposal for the Net Zero Emissions Industrial Act[8]. The EU finally adopted the Net Zero Emissions Industry Act on 28 May 2024.

This Act, which stem from the Green Deal Industrial Plan constitutes a cornerstone of the Union's strategy to increase the production of clean technologies in the EU. This means scaling up the EU's production capacity for technologies that support the clean energy transition and emit negligible, zero or even negative greenhouse gases when in operation. The legislation is expected to act as a catalyst for investment and create better conditions and market access for clean technologies in the EU.

The Union has set an ambitious objective: to ensure that, by the year 2030, its overall strategic capacity to produce net-zero emission technologies reaches at least 40% of annual deployment needs. This will accelerate progress towards the EU's 2030 climate and energy targets and the transition to climate neutrality by 2050. In so doing, it is expected to bolster the competitiveness of European industry generate high-quality employment, and support the EU's efforts to become energy independent. Proponents of nuclear energy regard this moment as the right step at the right time. Projections suggest that by 2050, half of the vehicles on the EU's roads will be electrically powered. The idea of „strategic autonomy" is gaining ground in the EU. In practice, this means producing more of the energy we consume and relying as much as possible on technologies we have developed ourselves. The current geopolitical climate, together with persistent challenges of ensuring security of supply have underscored the critical importance of maintaining a dependable source of base load nuclear energy. In this context, nuclear energy presents itself as a viable medium-term solution—capable of ensuring sustainable supplies and balance the energy system.

This legislative act also simplifies the regulatory framework for the production of clean technologies. This reform is anticipated to enhance the competitiveness of the net-zero emission technology industry in Europe, as well as to improve the capacity for carbon dioxide capture and storage. The legislation identifies technologies that will make a significant contribution to decarbonisation. It supports in particular strategic net-zero emission technologies that are available on the

8 | European Commission 2024.

market and have a good potential for rapid deployment. These technologies are viewed not only as tools for clean energy transition, but as pillars of the Union's industrial competitiveness and energy resilience. The Net-Zero Emissions Industry Act identifies sectors for future economic growth that will receive strategic support. It allows the production of nuclear reactors and components for the operation of nuclear power plants to be given priority support, including through faster permitting procedures. Nonetheless, a principal obstacle remains: the insufficient availability of financial resources to underwrite such capital-intensive investments. Several sources of financing are envisaged, including state aid; the allocation of up to 25% of national revenues from the Emissions Trading System and unutilised national allocations under the Recovery and Resilience Plans. While these sources are significant, they will certainly not be enough and the implementation of the Taxonomy could attract private funds from the capital markets.

The foregoing developments are emblematic of a broader shift in attitude towards nuclear energy and investment interest in the construction of new nuclear power plants. In the context of a global energy crisis, nuclear technologies are emerging as one of the best ways to produce clean energy and ensure sufficient power for base load. Nuclear power plants are emerging as a key resource that can guarantee national energy security, independence and affordable electricity. Currently, EU member states are engaged in preparatory work for building about 21 new nuclear reactors – both conventional and innovative small modular reactors.

2.2. National Energy Policy and Strategy for Sustainable Energy Development of the Republic of Bulgaria

In the Republic of Bulgaria, the formulation and execution of state energy policy are vested in the National Assembly and the Council of Ministers.

The principal legislative body—the National Assembly adopts the Strategy for Sustainable Energy Development of the Republic of Bulgaria, acting upon a proposal from the Council of Ministers. This Strategy delineates the main objectives, stages, means and methods for the development of energy.

The implementation of energy policy falls under the remit of the Minister of Energy. The Council of Ministers, upon a proposal from the Minister of Energy and the Minister of Environment and Water, approves an Integrated Energy and Climate Plan of the Republic of Bulgaria and updates to the plan in accordance with Regulation (EU) 2018/1999. The Council of Ministers governs the country's energy sector in accordance with the strategy adopted by the National

Assembly and the current Integrated Energy and Climate Plan of the Republic of Bulgaria[9].

The Strategy for Sustainable Energy Development of the Republic of Bulgaria serves as the foundational national document for the country's long-term energy trajectory. The Strategy and the Integrated Plan in the Field of Energy and Climate of the Republic of Bulgaria outline the documentary framework for the country's energy development, including the prospects of nuclear energy in the national energy policy.

According to the Energy Strategy of the Republic of Bulgaria until 2020,[10]government's vision for energy development comprised-the maintenance of a secure, stable and reliable energy system; the preservation of energy as a leading sector of the Bulgarian economy, with a clearly expressed foreign trade focus; prioritisation of clean and low-emission energy from nuclear and renewable sources; a balanced approach to the quantity, quality and price of electricity produced from renewable sources, nuclear energy, coal and natural gas; and transparent, effective and highly professional management of energy companies.

It is particular relevance that the changes in the geostrategic and political plan, as well as the escalation of the conflict in Ukraine, coincided with the expiration of the Energy Strategy – until 2020. This necessitated the postponement of the public discussion of the Draft Energy Strategy until 2030, originally scheduled for September 2020, and envisaging a planning horizon extending to 2050.

Thus, as of 2020, the Republic of Bulgaria has not had an approved energy development strategy in force that has been adopted by the National Assembly.

In February 2021, the Ministry of Energy published for public consultation a Draft Strategy for Sustainable Energy Development, but the draft was not adopted by the Legislature.

Two years later, on 23 January 2023, the Ministry of Energy published a new draft energy strategy entitled: "Strategic vision for sustainable development of the electricity sector of the Republic of Bulgaria with a horizon until 2053[11]."

The vision was elaborated on the basis of Article 4, paragraph 2, item 1 of the Energy Act and reflects the state's vision for the development of the electricity sector until 2053, consistent with the current European framework of climate and energy policy and global trends in the development of new technologies. It sets out the general European policies and goals for the development of energy and for limiting climate change, reflecting national specificities of the Republic of Bulgaria with regard to its energy resources, production, transmission, and distribution systems.

9 | Act on Energy, promulgated in the State Gazette, issue 107 of 9.12.2003, last amended and supplemented, issue 39 of 1.05.2024, in force from 1.05.2024, art. 3
10 | Council of Ministers 2011, 4.
11 | Council of Ministers 2023

By Decision No. 49 of 20 January 2023, the Council of Ministers formally adopted a Strategic Vision for the Development of the Electricity Sector of the Republic of Bulgaria 2023 – 2053. According to item 2 of this decision, the Minister of Energy should present the adopted strategic vision before the National Assembly[12].

Based on the provision of Article 3, paragraph 2 of the Energy Act, which states that the Strategy for Sustainable Energy Development of the Republic of Bulgaria is adopted by the National Assembly upon a proposal from the Council of Ministers, it follows that the act adopted by Decision No. 49 of 20 January 2023 is not, in itself, a final or binding act. Its legal effect is contingent upon its formal adoption by the National Assembly.

Although adopted by a collegiate body of the executive power within the ambit of its competences, the strategic vision does not have the characteristics of an individual administrative act, nor can it be characterised as a general or normative administrative instrument. Rather, it represents a political and programmatic framework—a declaration of intent outlining government policy, priorities,

12 | Proceedings under Art. 145 et seq. of the Administrative procedure code (APC) were initiated against Decision No. 49/20.01.2023 of the Council of Ministers on a complaint by the Association "For the Earth – Access to Justice". The defendant – the Council of Ministers of the Republic of Bulgaria, presents reasons for the inadmissibility of the complaint, since the decision did not contain the features of a normative act within the meaning of Art. 75 et seq. of the APC, a general one under Art. 65 et seq. of the APC, nor an individual administrative act under Art. 21 of the APC. By Resolution No. 2714/15.03.2023 of the Supreme Administrative Court under adm. d. No. 1894/2023, the three-member panel of the Supreme Administrative Court left the filed complaint without consideration, as procedurally inadmissible and terminated the proceedings in the case on the grounds of Art. 159, item 1, item 4 of the APC. In order to reach this result, the court accepted that the contested decision does not have the character of a normative act within the meaning of Art. 75 et seq. of the APC, it cannot be qualified as a general act within the meaning of Art. 65 et seq. of the APC, since it does not create rights and obligations and does not directly affect the rights, freedoms or legitimate interests of an indefinite number of persons. It also accepted that since the contested act does not create rights and obligations and does not directly affect the rights, freedoms or legitimate interests of certain addressees, it does not have the characteristics of an individual administrative act within the meaning of Art. 21 of the APC. As an additional argument, he stated that the appellant does not have a legal interest in challenging the decision of the Council of Ministers, since this document does not create rules of conduct or regulation, and therefore does not directly affect the rights and legitimate interests of citizens or organisations, including such as the Association "For the Earth – Access to Justice", which aim to protect in court the rights of the affected public and to protect the right to a healthy and clean environment for citizens. Based on the above, and on the basis of Art. 159, items 1 and 4 of the Code of Civil Procedure, the three-member panel of the Supreme Administrative Court left the appeal without consideration, and terminated the proceedings in the case.
On a private appeal filed by the Association "For the Earth – Access to Justice", proceedings were initiated pursuant to Art. 229 et seq. of the Code of Civil Procedure against Resolution No. 2714/15.03.2023 of a three-member panel of the Supreme Administrative Court, issued under adm. case No. 1894/2023 which confirms decision No.2714/15.03.2023 of a three-member panel of the Supreme Administrative Court. The decision is final. (See. Decision No. 7528 of 10.07.2023 of the Supreme Administrative Court in adm. case No. 3483/2023, 5-member panel, rapporteur judge Maria Radeva).

strategies, goals, tasks and measures that the government undertakes in the field of the electricity sector[13]over the defined period.

For the purposes of this study, particular attention is devoted to the vision for the development of nuclear energy in the Republic of Bulgaria during the period 20232053, as outlined in the Strategic Vision.

In Part II, entitled "Current Status of the Bulgarian Electricity Sector", data from the year 2022 indicates that the structure of electricity production is dominated by thermal power plants – TPPs (45%), followed by the nuclear power plant "Kozloduy NPP" (33%). Both NPPs and TPPs constitute the backbone of the electricity system securing its operational stability, governance, and overall balance, while guaranteeing security of supply . In practice, these plants are the leading component for the reliability of the system, respectively, for the vitality of the electricity market.

Unlike the power plants participating in frequency regulation and exchange capacities, Kozloduy NPP is technologically constrained from providing certain ancillary services. This limitation poses challenges in balancing the electricity system—specifically in relation to periods of minimum load and in the presence of forced production from hydroelectric and wind power plants.

With the rapid expansion of renewable energy sources and the lack of significant industrial electricity demand in the country, there is a growing requirement to curtail the operating capacity of nuclear power plants during certain periods of the year. The loss of manoeuvrability and opportunities for balancing the power system should be compensated by creating and introducing innovations in storage, including the development of technologies and processes for converting energy into hydrogen and other alternative gases, which would allow for the storage of energy in times of surplus. According to the Plan for the Development of the Electricity Transmission Network of the Republic of Bulgaria for the period 2022-2030, if by 2031 the newly planned wind and thermal power plants—projected to possess a combined installed capacity exceeding 6,500 MW remain unregulated, the overall balancing capacity of the power system will be reduced. Energy balance assessments show a drastic disproportion in the possibilities for covering domestic consumption and possible export of electricity. The latter is not only impossible in winter conditions, but in some years even implies the use of all available sources of additional services and/or the import of electricity.

In Part III, titled "Electricity Market in the Region and Europe", forecasts predict a doubling of final electricity consumption in Europe over the next three decades from around 3 billion MWh in 2020 to around 6 billion MWh in 2050. Bulgaria is traditionally among the major net exporters of electricity in Europe. According

13 | Decision No. 2714 of 15.03.2023 of the Supreme Administrative Court under adm. case No. 1894/2023, III district, rapporteur Chairman Mario Dimitrov.

to the annual Bulletin on the Status and Development of the Energy Sector of the Republic of Bulgaria for 2023, the gross electricity production in 2023 stood at 40 terawatt-hours (TWh) marking a decline of 21% compared to 2022. The structure of electricity production is dominated by the nuclear power plant Kozloduy and thermal power plants using coal.

The 2024 sectoral bulletin anticipates a further 5% decrease in electricity generation compared to the preceding year. The balance between exports and imports is expected to be positive at around 1.03 TWh, which means that Bulgaria retains its position as a net exporter of electricity. However, compared to 2023, there is a decline of almost 70%, which is likely due to the stabilisation of the energy market in the region and the decrease in prices, which have rendered the operation of coal-fired power plants inefficient. The cessation of electricity exports would lead to financial losses for the state and the wider society. In addition, in times of higher consumption, emergency imports from neighbouring countries will be necessary, which leads to uncertainty in the electricity system and an increase in electricity prices in the country. An example of this is the drop in December 2022. per 1000 MW of production (6th power unit of the Kozloduy NPP), which caused an additional shortage of electricity in the already deficient region of Southeastern Europe and led to imports of about 1500 MW per day from neighbouring countries, as well as higher prices on the market.

In Part VIII of the document, the Ministry of Energy has presented scenarios for electricity development spanning the thirty-year period. These are designed to preserve the energy independence of the Republic of Bulgaria, maintain its status as a net exporter of electricity, while at the same time complying with the European "Fit for 55" [14]package in 2030.

The reform of the EU emissions trading system, as part of the "Fit for 55" energy package, is projected to lead to higher prices for carbon emissions. This in turn will lead to a 58% reduction in coal-fired electricity generation by 2030. In the model, most of the emissions reduction occurs by 2035, when lignite production declines significantly and is replaced by new nuclear generation.

In financial terms, the Strategic Vision for the Development of the Electricity Sector of the Republic of Bulgaria 2023–2053[15], the necessary investments for the sub-sectors Nuclear Energy, Renewable Energy Sources (RES) and Hydropower Plants for the period amount to €46.35 billion. It is planned that 1 billion euros or

14 | The 'Fit for 55' package is the EU's target to reduce net greenhouse gas emissions by at least 55% by 2030 and to align EU legislation with this target. It contains a set of proposals to review and update EU legislation and to introduce new initiatives to ensure that EU policies are in line with the climate objectives agreed by the Council and the European Parliament. The proposals in the package are first presented and discussed at technical level in Council working groups. They are then discussed by EU Member States' ambassadors to prepare agreements between the 27 Member States. EU ministers in different Council formations have exchanged views on the proposals with a view to agreeing on a common position on each of the proposed legislative acts.

15 | Council of Ministers 2023, 18–24.

23% of the total amount will be state participation. Investments in nuclear energy for 2023–2053 are planned for two projects with an estimated value of €22 billion, and are presented in the Table below. International financial institutions and strategic investors are indicated as sources of financing[16]:

Sub-sector	Project	Estimated investment value (million euros)	Source of funding
Nuclear energy	New 2,000 MW capacities at Belene site	10,000	International financial sources and strategic investors
	2,000 MW of replacement capacity by 2045 at the Kozloduy site	12,000	International financial sources and strategic investors
TOTAL:		**22,000**	

2.3. Integrated Energy and Climate Plan of the Republic of Bulgaria

The National Integrated Energy and Climate Plan of the Republic of Bulgaria 2021–2030 has been prepared in implementation of Regulation (EU) 2018/1999 on the Governance of the Energy Union and Climate Action and sets long-term goals for the development of the sectors: "Energy", "Household and Public Sector", "Industry", "Transport", "Waste", "Agriculture", etc. The five dimensions of the Energy Union are covered – decarbonisation, energy efficiency, energy security, internal energy market and scientific research, innovation and competitiveness. The initial version of the Plan was submitted to the European Commission in March 2020, and subsequently received formal approval on 14 October 2020.

An updated iteration of this plan was submitted by Bulgaria and made publicly available on 15 January 2025. [17]

This updated version is in the process of conducting an environmental assessment and, after its successful completion, will be submitted for approval by the Council of Ministers. Given the current state and trends in the development of electricity price levels in the energy markets, it seems that the envisaged reform aimed at the comprehensive decarbonisation of the Bulgarian energy sector by 2026 in the Recovery and Resilience Plan appears increasingly unrealistic and difficult to implement.

It must be emphasised that the proposed timetable is a commitment only under the Recovery and Resilience Plan. The updated National Integrated Energy and Climate Plan, by contrast, is the appropriate strategic framework intended to elaborate the detailed pathways and measures by which decarbonisation and energy transition goals are to be realised. In addition to the Recovery and Resilience Plan, the updated National Integrated Energy and Climate Plan is in line with

16 | According to information from the Ministry of Energy.
17 | European Commission 2025

the climate objectives of the European Green Deal and the European Climate Law, the Fit for 55 package, the REPowerEU plan, etc. One of the main assumptions in its development is the inclusion of energy production from new nuclear capacity in the national energy mix after 2030.

Regarding the domestic energy sector, the updated Integrated Energy and Climate Plan envisages maximum use of the existing potential of domestic coal in the country while complying with environmental requirements.

3. Nuclear regulatory authorities and national nuclear legal framework

3.1. Structure of the national regulatory authority

In the Republic of Bulgaria, state regulation of the safe use of nuclear energy and ionising radiation and of the safe management of radioactive waste and spent fuel is carried out by the Chairman of the Nuclear Regulatory Agency (NRA), which is an independent specialised body of the executive branch and has competence defined by the Act on the Safe Use of Nuclear Energy (SUNEA).[18]

Pursuant to Articles 12 and 13 of the SUNEA, state bodies which finance or otherwise contribute to the implementation and use of nuclear energy or sources of ionising radiation, are expressly prohibited from exercising state regulatory functions with regard to nuclear safety and radiation protection in the implementation of these activities. The Ministers of Health, Environment and Water, Interior, Defence, Agriculture and Food, Transport, Information Technologies and Communications, Education and Science and the Chairman of the State Agency "National Security", all exercise specialised supervisory functions as defined by sectoral legislation.

The powers of the Chairman of the NRA and the regulatory activities are defined in Chapters Two and Three of SUNEA and the Rules of Procedure of the Nuclear Regulatory Agency.

To safeguard institutional independence from the industry and the changing political climate, the Chairman of the Agency is determined by a decision of the Council of Ministers and is appointed by the Prime Minister for a term of 5 years, and may be appointed for another term.

In exercising his powers, the Chairman is assisted by two Deputy Chairmen, who are determined by a decision of the Council of Ministers upon the proposal of the Chairman of the Agency and are appointed by the Prime Minister.

The Chairman of the Agency is assisted in the discharge of his duties by an administration organised within the Agency. The Agency is a legal entity supported

18 | Acton the Safe Use of Nuclear Energy, promulgated, State Gazette, No. 63 of 28.06.2002, last amendments, No. 70 of 20.08.2024, Art. 4

by the budget with its headquarters in Sofia. The Chairman of the Agency is a primary budget spending authority.

The structure, activities and organisation of the work of the agency and its staff are determined in the organisational regulations adopted by the Council of Ministers upon the proposal of the Chairman of the agency. The total number of staff of the agency is 114, including the Chairman and the two Deputy Chairmen.

The administration of the agency assists the chairman of the agency in the exercise of his powers, ensures his technical activities and carries out activities on the administrative service of legal entities and citizens. It is organised into one main directorate and four directorates, divided into general and specialised administration and an internal audit unit.

The "General Administration" Directorate coordinates and participates in the preparation or independently prepares opinions on draft regulatory acts sent for coordination, including draft international treaties and positions on draft acts of the institutions of the European Union. It also coordinates and participates in the development of a plan for the development of the regulatory framework on nuclear safety, radiation protection, physical protection, emergency planning and preparedness, etc. In addition, it prepares and conducts procedures under the Public Procurement Act, gives opinions on the legality of contracts, draft individual administrative acts and makes proposals for resolving issues of a legal nature. Furthermore, it carries out the procedural representation of the agency before the courts and proposes the assignment of procedural representation to the agency. Furthermore, it organises and carries out the clerical and archival activities, financial and accounting services, draws up the draft budget of the agency and reports on its implementation. The functions of the directorate are detailed in Article 16 of the Agency's organisational regulations.

The specialised administration of the NRA is structured into four directorates, each responsible for distinct aspects of regulatory oversight and international engagement: Directorate General "Nuclear Safety", Directorate "Safety Analysis and Assessment", Directorate "Radiation Protection" and Directorate "International Cooperation".

Collectively, these directorates support and ensure the implementation of the statutory powers vested in the Chairman of the agency under the SUNEA. Integral to the structure of the Directorate General "Nuclear Safety" is the territorial unit situated in Kozloduy, which enjoys the status of a departmental body and exercises oversight of nuclear safety and radiation protection of the facilities at the Kozloduy NPP site within the competence granted to it by the Chairman of the agency in accordance with the regulations.

The General Directorate for Nuclear Safety assists the Chairman of the Agency in carrying out his regulatory and control functions with regard to activities with nuclear power plants, research reactors and facilities for managing spent fuel and nuclear material, emergency preparedness activities in the event of a nuclear or

radiation accident, activities with regard to the qualification and legal capacity of personnel in nuclear facilities and sites with sources of ionising radiation, as well as other activities specified in Article 18, paragraph 2 of the Organisational Regulations.

The Directorate "Safety Analysis and Assessment" assists the Chairman of the Agency in carrying out his regulatory and control functions with regard to the review and assessment of the documentation submitted by the applicant, respectively by the holder of a licence or permit, for issuing permits and licences for carrying out activities with nuclear facilities, with the exception of facilities for radioactive waste management. The functions performed by the Directorate are prescribed in Article 19, paragraph 2 of the Organisational Regulations.

The "Radiation Protection" Directorate assumes responsibility for the preparatory and decision-making processes concerning the issuance, grounds for refusal, termination, renewal or revocation of licenses and permits for activities with sources of ionising radiation, as well as licences or permits for the safe management of radioactive waste and the decommissioning of nuclear facilities and sites with radioactive substances; plans and conducts inspections, assesses and takes measures to optimise radiation protection in nuclear facilities, sites with sources of ionising radiation, sites with an increased content of natural radionuclides and in the management of radioactive waste and the decommissioning of nuclear facilities and sites with radioactive substances, as well as other activities pursuant to Article 20, paragraph 2 of the Organisational Regulations.

The "International Cooperation" Directorate renders assistance to the Chairman of the Agency on issues related to international relations. It is charged with the organisation and conduct of negotiations on the signing of international cooperation agreements with other countries or regulatory bodies, organises and coordinates the cooperation, preparation and participation of the Bulgarian delegation in the sessions and meetings of the governing bodies of international organisations. Its mandate is further delineated in Article 21, paragraph 2 of the Organisational Regulations.

A nuclear safety and radiation protection control inspector is an official employed within the administration of the NRA, appointed pursuant to an employment contract and duly authorised by an order issued by the Chairman of the Agency. This authorisation empowers the inspector to perform regulatory oversight in accordance with the provisions of the SUNEA, and in accordance with the functions of the unit to which he is assigned, as defined by the regulations. The control inspector shall identify himself with an official card or present an act on the basis of which he is authorized to carry out the inspection. The criteria and qualifications required for appointment to this position are set forth in Article 22, paragraph 2 and paragraph 3 of the Organisational regulations.[19]

19 | On the authorisation of extensions to the operating life of nuclear power plants, see the practice in the US and Hungary: Paulovics 2020, 344–359.

3.2. Nuclear legislation

The significant socio-economic transformations experienced by the Republic of Bulgaria, particularly in view of its aspiration to attain a full membership of the EU, together with the need to bring the use of nuclear energy in line with good European practices necessitated a comprehensive review and modernisation of the domestic legal framework, including the national nuclear legislation. This culminated in the adoption, in June 2002, of the SUNEA, which now stands as the principal and most important source of nuclear legislation in the country.

SUNEA, a lex specialis in the sphere of nuclear regulation, superseded the previous Act on the Use of Atomic Energy for Peaceful Purposes[20]and undoubtedly introduces a new quality into the legal framework.

With its promulgation, the statutory obligations arising under the Constitution of the Republic of Bulgaria[21] have been duly fulfilled, notably the constitutional requirement that nuclear energy fall under a state monopoly, and that the conditions and procedure under which the state grants permits for activities be regulated by law. Thus, the state, through its regulatory framework, regulates the basic legal institutions that guarantee the performance of the activity in a safe and secure manner.

Central to this framework is the creation of an autonomous regulatory body-the Nuclear Regulatory Agency (NRA) – whose supervisory functions have been regulated in detail under the Act. SUNEA provides for a mandatory licensing regime covering the construction and operation of nuclear power plants, management of radioactive waste and activities with sources of ionising radiation. Administrative and criminal liability has been established for violations of the law and by-laws, the regime of ownership of nuclear material and nuclear facilities has been eased, with an emphasis on safety, protection of health, life and safety of people and the environment. Restrictions have been provided for monitoring the radiation characteristics of the environment. In addition to the mandatory nature of these activities for licensees/permit holders, the law provides for the withdrawal of the issued licence or permit for failure to comply with the requirements. Furthermore, the Act addresses civil liability for nuclear damage in a manner consistent with international legal practice, specifically with reference to the Vienna Convention on Civil Liability for Nuclear Damage.

The regulatory framework for the safe use of nuclear energy is characterised by dynamism and continuous updating of the main nuclear regulatory act, in accordance with the development of international standards, European and

20 | Acton the Use of Atomic Energy for Peaceful Purposes, promulgated in the State Gazette, No. 79 of 11.10.1985, amended in No. 80 of 15.10.1985, amended and supplemented in No. 69 of 4.08.1995, amended in No. 71 of 23.06.1998, repealed in No. 63 of 28.06.2002, repealed by the SUNEA (2002)
21 | CONSTITUTION of the Republic of Bulgaria, promulgated, SG, No. 56 of 13.07.1991, in force from 13.07.1991, last amended and supplemented, No. 66 of 6.08.2024, Art. 18, para. 4 and para. 5

national legislation[22]. Since the adoption of the SUNEA in 2002, the statute has undergone more than thirty amendments and supplements. Due to the fact that public relations in the use of nuclear energy such as design, construction, commissioning of nuclear facilities, licensing, radiation protection, preventive protective measures, etc. are regulated both in the SUNEA and in other acts (Environmental Protection Act, Energy Act, Spatial Planning Act, Health Act, etc.), and the details are further developed in a large number of subordinate regulatory acts, nuclear legislation is extremely voluminous, and the legal norms are technically detailed.

The act defines the areas that must be regulated by ordinances—more than twenty in number—as well as by organisational regulations, such as the organisational regulations of the Nuclear Regulatory Agency and regulations on the organisation and activities of the State Enterprise Radioactive Waste. In addition, a tariff framework is established for the fees levied by the Nuclear Regulatory Agency.

Notably, the Chairman of the Nuclear Regulatory Agency does not possess the authority to issue subordinate regulations in the field of nuclear safety. Pursuant to Article 5, paragraph 17 of the SUNEA, the Chairman of the Nuclear Regulatory Agency develops and proposes for adoption by the Council of Ministers regulations on the implementation of the law and proposes amendments and supplements to them, when necessary to improve the regulatory requirements, taking into account operational experience, conclusions drawn from safety analyses and the development of science and technology.

Following the enactment of the SUNEA in 2002, a number of European and international acts came into force, requiring legislative measures to be taken at the national level for the implementation and enforcement of these acts. In practice, in the period between 2002 and 2005, in the process of developing and adopting the regulations to the basic act, the implementation of the European standards for nuclear safety, radiation protection and safety in the transport of radioactive waste was carried out. At the same time, amendments were adopted in order to implement the requirements of ratified international treaties that were not taken into account when the act was adopted in 2002.

With the Republic of Bulgaria's accession to full membership of the European Union on 1 January 2007, the legal responsibility for maintaining a national legislative, regulatory and organisational framework for nuclear safety of nuclear installations has acquired renewed significance. From the Treaty establishing the European Atomic Energy Community (Euratom Treaty) for our country, a certain number of specific obligations arise, among which, with direct relevance to the subject of the study, is the obligation to incorporate into its domestic legislation the basic standards for the protection of health from the dangerous effects of

22 | Lamoureux 2022, 328–459.

ionising radiation issued on the basis of the EURATOM Treaty, as well as to notify the European Commission thereof. In the conditions of our full membership in the European Union, the existing national legislation is periodically reviewed and synchronised with the European achievements, as well as with the new or amended documents of the International Atomic Energy Agency.

3.3. Licensing rules for activities related to the use of nuclear energy

A substantial portion of the nuclear legislation—most notably within the framework of the Safe Use of Nuclear Energy Act (SUNEA)—is devoted to the regulation of activities, respectively, obtaining a permit or licence to carry them out[23]. In Chapter Three of the Act entitled "Regulation of Activities", the legislator has provided for three sections, which set out the general conditions, fees and nuclear facilities for which the Chairman of the Nuclear Regulatory Agency issues permits or licences, and in general terms present the requirements and the procedure for their issuance. Licences and permits under the law are individual administrative acts.

Pursuant to the provisions of SUNEA, a licence shall be required for the following activities:

1. The operation of a nuclear facility;
2. The utilisation of sources of ionising radiation for economic, medical, veterinary, scientific purposes or for the performance of control functions, except for cases where registration or notification is required;
3. The manufacture of sources of ionising radiation;
4. The production of consumer products, including medical devices within the meaning of the Medical Devices Act, by adding radioactive substances;
5. The transportation of radioactive substances;
6. The provision of specialised training;
7. The decommissioning of a nuclear facility;
8. The operation and technical liquidation of sites for mining and processing of ore containing natural uranium or thorium.

A permit, as defined by the Act, shall be issued in respect of:

1. The determining the location of a nuclear facility (site selection);
2. The designing a nuclear facility;
3. The construction of a nuclear facility;
4. The commissioning of a nuclear facility;
5. Modifications giving rise to alterations in: a) structures, systems and components important for the safety of the nuclear facility; b) limits and conditions for the operation of a nuclear facility, on the basis of which the licence

23 | Beatrix & Coin 2023, 7–145.

for operation or decommissioning was issued; c) internal rules for carrying out the activity, including instructions, programs, technological regulations and other documents attached to the licence for the operation of a nuclear facility or to the licence for decommissioning;
6. The transport of nuclear material;
7. The construction, installation and preliminary testing of a facility with a source of ionising radiation, except for cases subject to notification;
8. Alterations to the structures, systems and components provided for in the design, related to radiation protection at sites with sources of ionising radiation;
9. The decommissioning of a site with radioactive substances;
10. The temporary storage of radioactive substances obtained during the performance of activities with sources of ionising radiation or related to such activities;
11. One-time transport of radioactive substances;
12. The import and export of sources of ionising radiation;
13. Transactions with nuclear facilities and nuclear materials;
14. The import and export of nuclear material;
15. The transit transport of nuclear material, radioactive waste, spent fuel or other radioactive substances;
16. The remediation of sites contaminated with radioactive substances.

Licences are, as a rule, granted for a term not exceeding ten years, except for licenses for the operation of nuclear facilities in which nuclear material is used, handled or stored. Such licences are not subject to any time limitation.

The extension of a licence is contingent upon an assessment of nuclear safety and radiation protection, as well as an appraisal of the actual condition of the nuclear facility and the site with a source of ionising radiation. An extension may be granted for a period not longer than the term for which it was issued, if the licensee fulfils all obligations and requirements under it and has made a written request for extension before the expiration of the term of the initial licence or the relevant extension.

The procedural requirements governing the issuance, amendment, renewal, suspension, withdrawal, and supervision of licences and permits are regulated in detail in the Regulation on the Procedure for Issuing Licenses and Permits for the Safe Use of Nuclear Energy[24].

24 | REGULATION on the procedure for issuing licenses and permits for the safe use of nuclear energy, adopted by Council of Ministers No. 93 of 4.05.2004, promulgated in the State Gazette, issue 41 of 18.05.2004, last amended and supplemented by issue 53 of 5.07.2019.

4. Stages of licensing of nuclear power plants in the Republic of Bulgaria

4.1. Decisions for the implementation of nuclear projects in the Republic of Bulgaria and procedure for justifying the proposal

The specific rules governing the construction and operation of nuclear power plants are regulated in Section IV, Article 45-47 of the SUNEA.

Pursuant to Article 45 of the Act, the construction of a nuclear power plant may only proceed upon the adoption of a decision to that effect by decision of the Council of Ministers. The proposal for the construction of a nuclear power plant is submitted by the Minister of Energy with an assessment of:

1. Nuclear safety and radiation protection, environmental impact and physical protection;
2. The socio-economic significance of the construction of a nuclear power plant for the country or for certain regions;
3. The radioactive waste [25]and spent nuclear fuel resulting from the operation of a nuclear power plant, and their management[26].

The Minister of Energy is required to organise a public discussion of the proposal for the construction of a nuclear power plant, in which state bodies and local self-government bodies, representatives of public organisations and interested individuals and legal entities participate. Notification shall be made through the mass media or in another appropriate manner at least one month before the discussion. The assessment of the results of the discussion shall be attached to the Minister's proposal.

In accordance with Article 46 of the SUNEA, the use of a power unit of a nuclear power plant for its primary purpose may commence only after the entry into force of an operating licence issued in accordance with the Act and in the presence of an effective licence for the production of electricity and/or heat, issued in accordance with the Energy Act.

The experience of the Republic of Bulgaria with the development of new nuclear projects and licensing the construction of new nuclear power plants has been marked by inconsistency and contradiction. Over the past twenty years, the projects for "Belene NPP" and new nuclear builds at the "Kozloduy NPP" site are an indicative example of this.

25 | Montjoie, 2011, 20–152.
26 | Amiard 2022, 45–80

As previous stated, the principle decision to proceed with the construction of a nuclear power plant is made by the Council of Ministers upon a proposal from the Minister of Energy.

By Decision No. 259 dated 8 April 2005, the Council of Ministers, on the basis of §5, item 62 of the Additional Provisions of the Spatial Planning Act, designated the energy facility "Nuclear Power Plant at the Belene Site" as a facility of national importance. By Decision No. 260 of the same date and year, the Council of Ministers, on the basis of Article 45, paragraph 1 of the SUNEA, approved the proposal of the Minister of Energy and Energy Resources for the construction of a nuclear power plant at the Belene Site with a maximum installed electrical capacity of 2000 megawatts electric (MWe), based on an evolutionary project using approved technical solutions with a pressurised water reactor and gave its consent in principle to the construction of the nuclear power plant at the same site after obtaining licenses and permits. The Minister of Energy and Energy Resources should prepare and submit for approval by the Council of Ministers a report on the legal and organisational form for the establishment of a company for the development of the Belene NPP project.

Seven years later, with Decision No. 250 of 29 March 2012, the Council of Ministers repealed its above-cited Decisions No. 259 and No. 260. In turn, on the same day, the National Assembly adopted a decision supporting the actions of the Council of Ministers to terminate the construction of a nuclear power plant at the Belene site.

By virtue of that decision, the National Assembly mandated the then Minister of Economy, Energy and Tourism to carry out the necessary work to build a new nuclear power plant at the Kozloduy NPP site, making use ofthe nuclear equipment previously acquired and paid for by the Republic of Bulgaria.

Separately, on 11 April 2012, the Council of Ministers adopted a decision pursuant to Article 45, paragraph 1 of the SUNEA, granting consent in principle for the construction of a new nuclear capacity at the Kozloduy NPP. In item 2 of the same decision of the Council of Ministers, the Minister of Economy, Energy and Tourism is assigned to submit to the Council of Ministers a report under Article 45, paragraph 2 of the Act, with a view to making a decision on the merits and a report on the legal and organisational form for the implementation of the project.

Subsequently, on 12 January 2023,the National Assembly, acting pursuant to Article 86 of the Constitution of the Republic of Bulgaria and Article 85, paragraph 1 of the Rules of Procedure for the Organisation and Activities of the National Assembly, resolved[27] to mandate the Council of Ministers to conduct negotiations with the Government of the United States of America regarding the conclusion of

27 | DECISION of the National Assembly of 12.01.2023 on assigning the Council of Ministers to conduct negotiations with the US government regarding the conclusion of an Intergovernmental Agreement for the construction of a new nuclear capacity at the Kozloduy NPP with AP1000 technology, Promulgated, State Gazette, issue 6 of 20.01.2023.

an intergovernmental agreement for the construction of a new nuclear capacity at the Kozloduy NPP with AP1000 reactor technology.

The decision takes into account the existing bilateral framework, notably the Interstate Agreement between the Republic of Bulgaria and the United States of America on the Peaceful Uses of Nuclear Energy, concluded on 21 June 1994, and the Agreement between the Nuclear Regulatory Agency and the US Nuclear Regulatory Commission from 2018, as well as the Memorandum of Understanding between the two countries on strategic cooperation in the field of the use of nuclear energy for peaceful purposes from 2020.

It was also taken into account that the country's energy security is an element of national security. The Kozloduy NPP is acknowledged as a proven guarantor of ensuring energy security and nuclear energy as a clean low-carbon energy source is an opportunity and a tool for achieving the goals of the energy and climate policy of the European Union. In addition, the extension of the operating life of the existing units of the Kozloduy NPP together with the construction of a new nuclear capacity at the site is part of the economic life of the nuclear power plant and contributes to increasing the country's energy security. It is noted that there is a Decision of the Ministry of Environment and Water (Decision No. 1-1/2015 dated 27 January 2015) to approve the investment proposal for the construction of a new nuclear capacity at the Kozloduy NPP on site No. 2 and the same site has an Order for an approved site for the deployment of a nuclear facility – a nuclear power plant, from the Nuclear Regulatory Agency.

On 18 December 2023, the National Assembly, acting in accordance with Article 86, paragraph 1 of the Constitution of the Republic of Bulgaria, adopted a decision whereby it[28]:

1. Instructed the Minister of Energy, in his capacity as the sole owner of the capital of the "Bulgarian Energy Holding", to take action to increase the capital of "Kozloduy NPP" with a cash contribution in the amount of BGN 1,500,000 thousand in order to increase the capital of "Kozloduy NPP – New Builds" PLC by an equivalent amount;
2. Mandated the Minister of Energy to allocate all future revenues from the sale of long-life equipment owned by the National Electricity Company, intended for the Belene NPP Project, solely for the construction of Units 7 and 8 on Site No. 2 of the Kozloduy NPP;
3. Obliged the Council of Ministers, acting through the Minister of Energy, to undertake all requisite measures by 31 March 2024 for the adoption of a decision under Article 45 of the SUNEA for the construction of Unit 7 on Site

28 | DECISION of the National Assembly of 18.12.2023 to take action on the construction of units 7 and 8 on site No. 2 of the Kozloduy NPP with AP1000 technology, published in the State Gazette, issue 105 of 19.12.2023.

No. 2 of the Kozloduy NPP with AP1000 reactor technology in accordance with an indicative implementation schedule;

4. Instructed the Council of Ministers, acting through the Minister of Energy, to take action by 2 February 2024to implement item 4 of the Decision of the 48th National Assembly of 12 January 2023(State Gazette, issue No. 6 of 2023) to launch the necessary procedures for the construction of a second unit with identical technology to the Site No. 2 (8th unit) approved by the Nuclear Regulatory Agency.

On 25 October 2023, the Council of Ministers of the Republic of Bulgaria granted its consent in principle, pursuant to Article 45, paragraph 1 of the SUNEA for the construction of Unit 8 of the Kozloduy NPP.

In furtherance of the Decision of the National Assembly of 18 December 2023, actions have been taken to launch the licensing procedure under the Act and the procedure for the assessment of the environmental impact of the implementation of the investment proposal under the Environmental Protection Act. The investment proposal is for the design, construction and commissioning of a new nuclear facility – Unit 8 on the Kozloduy NPP site.

On 8 March 2024, acting on the basis of Article 15, paragraph 1 and Article 25, paragraph 1 of the Act on International Treaties of the Republic of Bulgaria, the Council of Ministers, by its decision, approved the Agreement, signed in Sofia on 12 February 2024, and proposed to the National Assembly to ratify it by law.

According to the explanatory memorandum to the draft Act on Ratification of the Agreement, as submitted by the Minister of Energy, the principal aim of the Agreement is to establish a framework for enhanced cooperation in the execution of the Project for the design, construction and commissioning of a new reactor with an installed capacity of at least 1,000 megawatts at the Kozloduy NPP (unit 7 of the Kozloduy NPP). The Agreement further supports the broader development of Bulgaria's civil nuclear programme, guided by the principle of mutual benefit and taking into account the common interests and goals of both parties.

Under the terms of the Agreement, the two parties affirm their intention to cooperate in a wide range of activities, including: consultations and exchange of expert and technical contributions to achieve progress in the overall development of our country's nuclear program, participation of entities from third countries (subject to the applicable national laws of the respective states) in the design, construction and commissioning of a new nuclear capacity at the Kozloduy NPP; the identification of potential financing and economic structures that will support the financing of the implementation of the nuclear project; the promotion of nuclear energy for civilian purposes within the European Union; and the exploration of the development and implementation of innovative nuclear technologies, including advanced reactors and technologies for radioactive waste management.

On 22 March 2024, the National Assembly ratified the Agreement[29].

4.2. Environmental licence

In compliance with the provisions of the Environmental Protection Act, the project company "Kozloduy NPP – New Builds" PLC, immediately after its establishment in May 2012, promptly initiated the procedure for conducting an environmental impact assessment (EIA) in respect of an investment proposal for the construction of a state-of-the-art nuclear power facility at the Kozloduy NPP site.

As recorded in the company's annual report[30] for 2013,on 19 June 2012—at the earliest practicable juncture in the formulation of the investment proposal—"Kozloduy NPP", in its capacity as the sole owner of the capital of the project company, notified the Ministry of Environment and Water of the investment intention in accordance with the Environmental Protection Act and Article 4, paragraph 1 of the Regulation on the conditions and procedure for conducting an environmental impact assessment[31].

In this regard, in accordance with Article 4, paragraph 2 of the Regulation, steps were taken to inform the local population via appropriate mass media channels. In response to the instructions received from the Ministry of Environment and Water, on the basis of Article 10, paragraph 1 of the Regulation, the company commissioned the preparation of a report delineating the scope and content of the environmental and water impact assessment of the investment proposal. To this end, consultations were held with the Ministry of Environment and Water, Regional Inspectorate for Environment and Water – Vratsa, Basin Directorate for Water Management, Danube Region (with its administrative centre in Pleven), as well as with other specialised departments and the affected public.

The implementation of the impact assessment, which includes the preparation of a report on the scope and content of the assessment, has been assigned to the international consortium Deacon – Axion Engineering, selected among seven candidates as a result of a competitive procedure. The deadline for implementation is 25 November 2013, which has been extended by the time needed for a decision by the Supreme Expert Ecological Council until 31 March 2014.

The EIA report is mandated to provide a comprehensive evaluation of the environmental impact of the construction of a nuclear power plant at the

29 | Acton Ratification of the Agreement between the Government of the Republic of Bulgaria and the Government of the United States of America for Cooperation on the Project for Construction of Nuclear Power at the Kozloduy NPP Site and the Nuclear Program for Civil Purposes of the Republic of Bulgaria, signed in Sofia on February 12, 2024, Promulgated, State Gazette, No. 29 of 2 April 2024.
30 | NPP Kozloduy New Builds PLC 2013, 9–10. Prepared on 27.03.2014, certified according to the audit report of "Grant Thornton" dated 22.04.2014.
31 | REGULATION on the conditions and procedure for conducting an environmental impact assessment (Title amended – SG, issue 3 of 2006), adopted by Council of Ministers Decree No. 59 of 7.03.2003, promulgated, SG, issue 25 of 18.03.2003, last amended, issue 9 of 30.01.2024, in force from 1.02.2024.

Kozloduy NPP site, by studying and analysing the possible causes, sources and degrees of impact during the implementation of the project on the environmental components[32]. The report must also ascertain any foreseeable risks to the environment and human health during construction, normal operation and possible design basis and potential incidents falling within or beyond the design basis of the installation. Moreover,it is required to put forward recommendations and specify remedial measures aimed atmitigating adverse impacts and addressing environmental concerns during the construction and operation of the new nuclear unit.

In general, the results of the independent analyses and the assessment carried out for all stages of the development of the investment project—namely, the construction, operation and decommissioning of the nuclear power plant—are encapsulated in the following findings of the Environmental Impact Assessment (EIA) report:

- No non-radiation impact on the components and factors of the environment is anticipated;
- No radiological effects are foreseen upon water bodies, land and soil, geological formations, subsoil structures, land use, mineral diversity, biological diversity, ecological systems or cultural assets; nor upon areas inhabited by protected, important and sensitive species of flora and fauna; landscapes of natural beauty; areas and sites of historical and cultural significance, sites protected by international or national law, as well as on human health;
- No adverse impact is expected from radioactive waste, provided that the plans for decommissioning of the nuclear facility and all applicable Bulgarian and international legal requirements and practices are observed;
- The contribution of the new facility to the ambient radiation levels in the vicinity of the town of Kozloduy—arising from external radiation exposure—is assessed as negligible, even in cumulation with the existing nuclear facilities at the Kozloduy NPP site. The cumulative radiological impact on the environment is assessed as insignificant and no cumulative impact in terms of non-radiation is expected;
- No transboundary impact is expected in the territories of neighbouring countries.

The EIA procedure concluded on 27 January 2015with the issuance of Decision No. 1-1/2015 bythe Minister of Environment and Water, by which the competent authority approved the implementation of the investment proposal for the construction of a new nuclear power plant of the latest generation on Site No. 2 of the Kozloduy NPP.

32 | Russo 2024, 50–82.

The administrative act was subsequently subject to judicial review before the Supreme Administrative Court. The annual report[33] on the activities of "Kozloduy NPP – New Builds" PLC for 2019 contains information on the progress of administrative case No. 3947/2015 during the period 2016–2019.The Supreme Administrative Court, serving as a first instance on the case, annulled No. 1-1/2015 by Judgement No. 6524 of 17 May 2018of the Supreme Administrative Court, issued in administrative case No. 3947/2015.

By Judgement No. 4904 of 2 April 2019, renderedin administrative case No. 12369/2018, a five-member panel (Second Panel) of the Supreme Administrative Court overturned the earlier ruling Judgement No. 6524 of 17 May 2018of the Supreme Administrative Court. Along with annulling the decision of the lower instance, the cassation instance also ruled to reject all appeals against the Decision on the assessment.

From the chronology and procedures presented so far in obtaining an environmental licence for the construction of a new nuclear power plant at the Kozloduy NPP site, it is clear that the appeal of the Environmental Impact Assessment Decision by representatives of non-governmental environmental organisations on the grounds of "incorrectly conducted procedure" and the initiation of administrative cases before the Supreme Administrative Court has delayed the licensing process and the implementation of the project by more than five years.

As previously noted, on 25 October 2023, the Council of Ministers of the Republic of Bulgaria gave its consent in principle under Article 45, paragraph 1 of the SUNEA for the construction of Unit 8 of the Kozloduy NPP. Subsequently, by Decision adopted on 18 December 2023, the National Assembly resolved that actions must be taken to launch the licensing procedure for the environmental impact assessment of the implementation of the investment proposal under the Act, namely – "The Investment Proposal for the Design, Construction and Commissioning of a New Nuclear Facility – Unit 8 at the Kozloduy NPP Site".

According to the Bulgarian legislation, the decision on environmental impact assessment is an individual administrative act of the competent environmental authority, which at the earliest stage approves the admissibility for the implementation of the investment proposal. In this regard and in view of the abovementioned decision of the Council of Ministers, activities have been undertaken by the project company "Kozloduy NPP – New Builds" PLC to notify the existence of a new investment proposal, followed by activities to carry out an environmental impact assessment of the implementation of the investment proposal, including taking into account the cumulative effect of the joint operation of all existing and upcoming facilities on the Kozloduy NPP site.

33 | NPP Kozloduy New Builds PLC 2015, 4–5. Prepared on 18.03.2020, certified according to the audit report of "HLB Bulgaria" dated 26.03.2020.

On 19 February 2024, pursuant to Article 95, paragraph 1 of the Act and Article 4, paragraph 1 of the Regulation, "Kozloduy NPP – New Builds" PLC announces an investment proposal for "Construction of Unit 8 of Kozloduy NPP".

A notification of the investment proposal for the construction of Unit 8 of Kozloduy NPP was sent to the Minister of Environment and Water.

Subsequently, on 12 March 2024, the Ministry of Environment and Water sent instructions[34] for the preparation of activities related to the environmental and water assessment procedure[35].

4.3. Installation level licence under the Safe Use of Nuclear Energy Act and issuance of a construction permit under the Spatial Planning Act

In accordance with Section III of the SUNEA, the procedure for licensing a new nuclear capacity includes the issuance by the Chairman of the Nuclear Regulatory Agency of individual administrative acts, through which compliance with the safety requirements of the nuclear facility is controlled.These acts include:

- the granting of asite selection permit;
- the issuance of an order approving the selected site;
- the granting of adesign permit;
- the issuance of an order approving thetechnical design;
- the granting of a construction permit;
- the issuance of a commissioning permit; and
- the granting of anoperating licence.

It is to be observed that, pursuant to Article 44 of the SUNEA, the issuance of permits by the Chairman of the Nuclear Regulatory Agency in connection with the construction of a nuclear facility does not obviate the requirement to obtain the necessary permits under the Act on Spatial Planning. In addition, Article 33, paragraph 6 and paragraph 7 of the SUNEA provide that the permit for site selection and the order for approval of the selected site serve as a legal basis forthe issuance of permits for the development of a detailed development plan, respectively, grounds for approval of the plan, under the Spatial Planning Act. In light of these statutory requirements and in parallel with the activities conducted under the licensing procedure, "Kozloduy NPP – New Builds" PLC has taken actions to develop the plan and a procedure for regulating the territory of Site No. 2.

An important stage of the permitting regime concerns the stagecommonly referred to as *Engineering*, which is presently underway. For the new nuclear capacity at the Kozloduy NPP site, design is pending and, accordingly, preparation

34 | Ministry of Environment and Water 2024b.
35 | Penchev 2023, 380–405.

and submission to the Nuclear Regulatory Agency of the necessary documents for issuing a design permit, within the meaning of Article 15, paragraph 4, item 2 of the SUNEA. This will be followed by a procedure for selecting a designer, preparation of a technical design and issuance of an order for approval of the technical design by the Chairman of the Nuclear Regulatory Agency.

The third stage of the permitting regime under the SUNEA – concerns Construction and commissioning. This encompassestheissuance of (i) a Permit for the construction of a nuclear facility, within the meaning of Article 15, paragraph 4, item 3 of the Act; and (ii) a Permit for the commissioning of a nuclear facility, within the meaning of Article 15, paragraph 4, item 4 of the Act. The same are issued before the licence for the operation of the nuclear facility. For the issuance of both permits, the applicant must be a legal entity registered in the Republic of Bulgaria, in accordance with Article 33, paragraph 2 of the Act. Furthermore, the applicant must possesssufficient financial, technical, material, human resources and an organisational structure to fulfil its obligations to ensure the requirements, norms and rules for nuclear safety, radiation protection and physical protection.

Recent amendments toArticle 33, paragraph 9, paragraph 10 and paragraph 11 of the SUNEA (SG, issue 27 of 2024)provide that, save for the cases under Article 33, paragraph 8, following the issuance of a site selection permit by the Chairman of the Nuclear Regulatory Agency to determine the location of a nuclear facility (site selection), a construction permit may be issued after approval of a preliminary investment project pursuant to Article 142, paragraph 2 of the Spatial Planning Act. In such instances, the applicant is obliged tonotify the Chairman of the Agency of the submitted application requesting approval of a preliminary investment project pursuant to Article 142, paragraph 2 of the Spatial Planning Act. These legislative amendments serve to streamline the licensing procedure and are anticipated to expedite the overall implementation of the project by about four to five years.

Following the issuance of a Nuclear Facility Construction Permit, as defined in Article 15, Paragraph 4, Item 3 of the SUNEA—thus prior to the physical realisation of the energy installation—a procedure for issuing a licence for the production of electricity and thermal energy may be initiated, in accordance with the Energy Act[36]. For the implementation of the project for new capacity at the Kozloduy NPP site, this licence is expected to be issued on 30.11.2034, after the end of the functional tests at the site.

The various stages for the commissioning of a nuclear power unit of a nuclear power plant are presented in the table[37] below:

36 | Acton Energy, promulgated in the State Gazette, issue 107 of 9.12.2003, last amended and supplemented, issue 39 of 1.05.2024, in force from 1.05.2024, art. 39, para. 1 and para. 3

37 | According to Art. 44, para. 3 of the Regulation on the procedure for issuing licenses and permits for the safe use of nuclear energy

Stages	Stage description
Stage №1	Initial storage of nuclear fuel at the nuclear power plant site.
Stage №2	Initial loading of the nuclear reactor core with nuclear fuel and subcritical tests
Stage №3	Initially introduced into criticality of nuclear reactor and low power tests
Stage №4	Energy start-up and phased absorption of the power of the power unit
Stage №5	Trial operation – for a new type of nuclear reactor

Pursuant to Article 10, paragraph 1 of the Regulation governing the procedure for issuing licences and permits for the safe use of nuclear energy, licences are issued for a term of up to 10 years. With the amendments in 2024 to Article 20 of the Act (State Gazette, issue 27 of 2024), a licence is issued for a term of up to 10 years, except in the cases under Article 20, paragraph 4, which refer to licenses for the operation of nuclear facilities in which nuclear material is used, manipulated or stored, which are not limited by term. The term of the licence may be extended based on an assessment of nuclear safety and radiation protection and an assessment of the actual condition of the nuclear facility and the site with a source of ionising radiation. The term of the licence may be extended for a term not exceeding 10 years.

4.4. The preparation and submission of information to the European Commission, in accordance with the obligations under the Euratom Treaty

Pursuant to Decision No. 847 of the Council of Ministers of the Republic of Bulgaria,dated 29 December 2008, the Minister of Economy and Energy or an official authorised by him is designated as the competent authority to manage, coordinate and control the preparation and submission of information in the required form to the competent authorities and institutions of the European Communities for the fulfilment of the obligations under Chapter IV "Investments" – Articles 41 and 42 of the EURATOM Treaty;

In accordance with the provisions of the EURATOM Treaty and applicable European and national legislation[38], the formal notification of the project should contain, in particular, a detailed description of the activities, information regarding the operator and designer of the future nuclear facility, the envisaged financing methods, the precise geographical location, a succinct summary of the overall development plans, the proposed construction schedule, a description of the decommissioning plans, the type of reactor, the principal characteristics of the facility, including details concerning the fuel, moderator, and the coolant systems within both the primary and secondary circuits.

38 | Commission Regulation No 1209/2000 of 8 June 2000 laying down the procedures for carrying out the communications provided for in Article 41 of the Treaty establishing the European Atomic Energy Community

The earliest stage at which the Kozloduy NPP – New Builds PLC can officially notify the project under Article 41 of the Euratom Treaty is after a substantive decision by the Council of Ministers concerning the construction of the new capacity, the determination of the technology to be deployed, and the final selection of the site.

4.5. Administrative procedural rules in nuclear law

Administrative acts issued under the SUNEA, including the tacit refusal to issue the relevant act, are subject to appeal before the relevant administrative court under the procedure of the Administrative Procedure Code, except where otherwise expressly provided bythe SUNEA. Appealing the acts does not have a suspensive effect and does not stop their implementation, according to Article 24 of the Act.

In matters involving the limitation of access to judicial protection in relation to certain administrative acts, legislative expediency is limited in the sense that the necessity cannot affect the realization of the fundamental rights and freedoms of the citizen, unless it is necessary for the protection of higher constitutional values, related to particularly important interests of society (Decision of the Constitutional Court No. 1 of 2012 in constitutional case No. 10 of 2011; Decision of the Constitutional Court No. 5 of 1007 in constitutional case No. 25 of 1996).

In contrast to civil litigation, where appellate recourse is limited or conditional, the principle of two-instance judicial review is a cornerstone of administrative justice, as enshrined in Article 131 of the Code of Administrative Procedure. Regular judicial proceedings are conducted before the relevant first-instance administrative court in accordance with the rules of generic (functional) jurisdiction, and the second, final instance for challenging the decisions of the first-instance court is the Supreme Administrative Court.

Exceptions to the rule of two-instance of judicial proceedings, namely the consideration of cases by one court, are established in a special law for a specific category of administrative cases that are issued under it.

A prominent example in the domain of nuclear law is found in the Environmental Protection Act. As amended in 2017, Article 93, paragraph 10 there of stipulates the finality of the court decisions of the court of first instance on appeals against decisions of the Minister of Environment and Water on investment proposals, their extensions or amendments, which are designated as sites of national importance by law or by an act of the Council of Ministers and are sites of strategic importance, such as projects for nuclear power plants, radioactive waste storage facilities, power lines, etc.

This restriction on appellate review has provoked opposition from environmental non-governmental organisations, who contend that such limitations under minetheequilibrium between investment interests and environmental protection. The protection of a right – both the possibilities of access to justice and the intensity of judicial control according to the principle of proportionality – should

grow in accordance with its importance, not decrease. According to environmental advocates, when a project is considered so important that it is declared a national priority, the legislator should even expand the circle of persons with the right to appeal, and the number of instances that can establish possible defects.

Simultaneously, Article 3(3) of the Treaty on European Union does not impose an explicit requirement for a two-instance procedure in appeals against decisions concerning the protection and improvement of the quality of the environment. The national legislator retains operational autonomy to assess what measures to take in this regard.

The generic jurisdiction determines the allocation of cases between the administrative courts as first instance. The legislator has provided that administrative courts possess jurisdiction over all administrative cases, with the exception of those subject to the jurisdiction of the Supreme Administrative Court as first instance. The generic jurisdiction is an absolute procedural prerequisite for the admissibility of the judicial proceedings.

In this regard, Decision No. 5948 of 9 May 2018of the Supreme Administrative Court rendered in administrative case No. 5123/2018is of particular interest. The decisionaddresses a jurisdictional dispute between the Sofia City Administrative Court and a three-member panel of the Supreme Administrative Court regarding the competent forum to hear an appeal against an Order issued by the Chairman of the Nuclear Regulatory Agency, which denied the renewal of a licence for work with sources of ionising radiation.

The dispute arose because the provision of Article 132, paragraph 2, of the Administrative Procedure Code enumeratesthe categories of cases subject to thefirst-instance jurisdiction of the Supreme Administrative Court. Challenges to orders issued by agency heads are not explicitly included in the list, leading to the initial conclusion that the appeal should be heardby the Administrative Court Sofia – City.

However, the competent adjudicatory authority, which was referred to resolve the issue of jurisdiction, determined that this initial assumption was erroneous in that the order of the Chairman of the Nuclear Regulatory Agency does not fall within the hypothesis of Article 132, paragraph 2 of the Administrative Procedure Code. In accordance with Article 132, paragraph 2, item 8 of the Administrative Procedure Code, the Supreme Administrative Court is empowered to adjudicate appealsagainst other acts specified in bylaw. The court held thatthe Safe Use of Nuclear Energy Act (SUNEA) constitutes such a law, thereby establishingthe Supreme Administrative Court, sitting as a three-member panel, as the competent first-instance court to hear the appeal.

The issue of *locus standi* in challenging administrative acts within the nuclear regulatory sphere also merits careful examination. Articles 147 and184 of the Administrative Procedure Codejointly provide that the right to challenge individual and general administrative acts is conferred upon citizens and organisations

whose rights, freedoms, or legitimate interests are infringed or threatened by the act, or upon whom the act imposes obligations. Article 186 further extends the possibility of challenging normative administrative acts again to citizens, organisations and public bodies whose rights, freedoms or legitimate interests are affected or may be affected by them, or who incur obligations as a result. The public prosecutor also holds the capacity to challenge some of the three types of administrative acts.

The existence of a legal interest—conditioned upon a direct effect on the rights or legitimate interests of citizens or legal entities—is a necessary basis for the state's obligation to provide the relevant judicial protection. However, when the individual legal sphere of a specific person is not affected, there is no legal interest in challenging the act.

In connection with the aforementioned issue of legal interest, the final decision No. 15645 of 26 November 2013 of the Supreme Administrative Court in administrative case No. 12075/2013, concerning a dispute related to an issued decision on environmental impact assessment of the Minister of Environment and Water, which approved the implementation of an investment proposal for the construction of a National repository for the disposal of short-lived low- and intermediate-level radioactive waste with the contracting authority State Enterprise "Radioactive Waste".

The court is categorical that the applicant—a natural person residing outside the municipality in which the construction of the disputed repository was planned—possessed the requisite legal interest to lodge a challenge against the environmental impact assessment (EIA) decision. The court's reasoningrested on the statutory recognition of the public's right to participate in matters involving the approval of investment proposals with significant environmental implications.

Pursuant to Article 3, item 11 of the Environmental Protection Act, environmental protection is founded upon the principle of access to justice in matters relating to the environment. Article 97 of the Environmental Protection Act provides for the organisation and conduct of a public discussion of the environmental impact assessment report, and all interested individuals and legal entities, including public organisations and citizens whose interests are affected or are likely to be affected by the implementation of the investment project, may participate in the discussion. In this case, individuals fall within the scope of the concept of "public" within the meaning of § 1, item 24 of the Supplementary Provisions of the Environmental Protection Act. To ensure public awareness, the decisions on EIA reportsare required underArticle 99, paragraph 4, item 2 of the Environmental Protection Act to be disseminated via national media, the relevant authority's website, or other appropriate means. The right to appeal against the EIA decision belongs, according to Article 99, paragraph 6 of the Environmental Protection Act of the interested parties, including individuals whose rights and legitimate interests in maintaining a healthy environment are directly affected or are likely

to be affected by the implementation of the investment proposal. In the case at hand, the specific investment proposal may have a significant and lasting adverse impact on the environment not only on the territory of the Kozloduy municipality, where the construction of the repository is planned, but potentially across the broader national territory, including the locality in which the complainant resides. As a representative of the "affected public" within the meaning of § 1, item 25 of the Supplementary Provisions of the Environmental Protection Act, the complainant was considered to have standing to challenge the decision under Article 99, paragraph 2 of the Environmental Protection Act without the need to provide specificevidence of his subjective rights and interests related to the investment proposal for the construction of a National repository for the disposal of short-lived low- and intermediate-level radioactive waste.

Nuclear projects are inherently protracted and complex in terms of licensing[39]. The legal issues related to ensuring the safety of nuclear power plants are determined by the need for the radiation impact of the nuclear facility in all operational states to be lower than the regulatory limit for internal and external exposure and at the same time to be at a reasonably achievable low level. In this sense, activities for the implementation of nuclear projects are associated with radiation and environmental risk and it is necessary to obtain public approval at the earliest possible stage of the investment proposal, and to demonstrate openness and transparency when making decisions about the activity[40].

Regarding the applicable national public procurement framework governing nuclear power plant projects, it should be clarified that the Kozloduy NPP, currently operating in the Republic of Bulgaria, conducts the procedures for selecting a public procurement contractor, in accordance with the provisions of the Public Procurement Act and its Implementing Regulations. The plant's operating company qualifies as a sector contracting entity under the Public Procurement Act with its main activity being electricity generation.

Conversely, the project company "Kozloduy NPP – New Builds" PLC, which is engaged in the construction of a new nuclear capacity—specifically Units 7 and 8 on the site of the existing Kozloduy NPP—is not a sector contracting authority within the meaning of the Public Procurement Act. Accordingly, the company conducts the procedures for selecting a contractor in accordance with the Procurement Rules (an internal company document adopted and registered in accordance with the established procedure in the company). Invitations to prospective participants in procurement proceduresare announced on the company's website, where all documentation necessary for applying for the procedure are attached there as a link.[41]

39 | Lujan Iacomini 1988, 12–100.
40 | Jaeger, Pontier & Roux 2018, 20–250.
41 | For the international, EU and Hungarian systems of administrative licensing, see: Flekácsné Kocsis 2020, 202–229.

4.6. Latest developments with the new build projects in Bulgaria

The study found that the public procedure with preliminary selection of candidates has been mainly used over the pastyear by "Kozloduy NPP – New Builds" PLC for the selection of a contractor for public procurement. In June 2024, the company issued an open invitation to all interested parties to apply for their participation in a preliminary selection, part of a public procedure for the selection of a contractor to be awarded a contract with the subject: "Provision of a service for the implementation of complex activities when conducting an environmental impact assessment procedure for an investment proposal for the construction of a second identical unit on Site No. 2 (Unit 8 of "Kozloduy NPP") approved by the Nuclear Regulatory Agency."

Subsequently, on 4 November 2024, the Ministry of Energy formally announced that "Kozloduy NPP – New Builds" PLC and the company under the Obligations and Contracts Act "Westinghouse HD&C" have signed an engineering contract for Units 7 and 8 of "Kozloduy NPP".

The contract signing ceremony was attended by several high-ranking dignitaries, includingthe acting Prime Minister of the Republic of Bulgaria, the US Ambassador to Bulgaria, the Head of Mission of the Embassy of the Republic of Korea in Bulgaria and other distinguished officials.

As a consequence of the execution of the contract, within the next 12 months the Ministry will have a clear commitment to the schedule and financing of the new capacity. According to the official announcement, the signing of this contract constitutes a pivotal milestone in the advancement on the implementation of the project for the construction of a new nuclear capacity in the Republic of Bulgaria. The collaborative effortsof the two global companies – "Westinghouse" and "Hyundai" – to provide an integrated service in Bulgaria will guarantee the implementation of the project within the previously set deadlines and budget.

4.7. Small modular reactors in the Republic of Bulgaria

Small modular reactors (SMRs) represent an emergent class of advanced nuclear technology, each with an output capacity of up to 300 megawatts—approximately one third of that generated by conventional large-scale nuclear reactors. In recent years, SMR shave become established as a promising and widely applicable nuclear technology. According to the International Atomic Energy Agency, more than 70 commercial SMR projects are currently being developed around the world. Compared to conventional reactors, small modular reactors have a number of advantages: they are factory-assembled, easily transportable, they are designed universally, not for a specific site, their safety concept is "passive" (i.e. they rely more on systems that do not even require human intervention or external force

in emergency situations), and they have reduced fuel requirements[42].Plants built using this technology may require less frequent refuelling, every 3-7 years, compared to 1-2 years for traditional nuclear power plants. Some small modular reactors are designed to operate continuously for up to 30 years without refuelling.

The Bulgarian Nuclear Regulatory Agency takes a proactive position regarding the implementation of small modular reactors in the country. In 2019, the agency's management held a meeting with representatives of the US Department of Energy and the US Department of State, and one of the topics was the future development of small modular reactors, as well as cooperation between the regulatory authorities of the two countries. Immediately afterwards, a meeting was held at the Nuclear Regulatory Agency with American specialists in the field of security and physical protection in nuclear energy, which was attended by representatives of the agency and Kozloduy NPP from the Bulgarian side. The Bulgarian regulatory framework and practice in the field of physical protection of sources of ionising radiation, during their transportation and the physical protection of nuclear facilities were discussed.

As is known, at its meeting on 14 October 2020, the Council of Ministers resolved to initiate preparatory measures and to examine the feasibility of constructinga new nuclear power plant at the Kozloduy NPP site. This resolution was adopted within the broader context of the European Union's objective of achieving climate neutrality by the year 2050, and in pursuit of the diversification of energy sources. The competent Minister was duly mandated to undertake the necessary actions and authorise the Bulgarian Energy Holding to enter into negotiations with companies from the United States of America developing new nuclear technologies for peaceful purposes, including small modular reactors, in order to study the possibilities for building a new nuclear power plant at Site No. 2 at the Kozloduy NPP.

In implementation of the decision of the Council of Ministers, Kozloduy NPP – New Builds PLC and NuScale Power LLC concluded a Memorandum of Understanding at the end of 2020, the purpose of which was to explore the feasibility of deploying nuclear technology based on small modular reactors in the Republic of Bulgaria[43]. The signed document seeks to facilitate the exchange of requisite information to substantiate the possibility of building a new nuclear power plant at the Kozloduy NPP site, in the context of achieving the European Union's goals for climate neutrality by 2050 and diversification of energy resources. NuScale Power is an Oregon-based developer of small modular reactors – NuScale SMR. With the memorandum, NuScale Power and Kozloduy NPP – New Builds PLC agree to work together to evaluate NuScale's innovative technology as a long-term clean energy solution in Bulgaria and the potential for implementing NuScale's small modular reactor project in Bulgaria.

42 | AtomInfo.Bg 2023
43 | Independent Nuclear News 2021

Subsequently, on 5 and 6 April 2023, a working meeting of the Western European Nuclear Regulators Association (WENRA) was held in Helsinki, Finland, with the Chairman of the Bulgarian Nuclear Regulatory Agency in attendance as the national representative.

During this meeting, WENRA issued a formal statement[44]concerning the development of small modular and other innovative reactors, according to which more and more countries support their development to meet their decarbonized energy needs in the context of climate change, with a strong expectation from stakeholders that national licensing processes will be completed quickly.

The commercial viability of small modularreactors is predicated on standardised mass production, with the intention that uniform designs may be licensed in several countries without significant changes. As a result, regulators are being encouraged by suppliers, licensees and some governments to increase the harmonisation of their regulatory requirements, streamline their licensing processes and promote mutual recognition of safety reviews carried out by their partners to facilitate the national licensing process for these designs.

In recognising the expectations of stakeholders, WENRA highlights the key role of industry in ensuring that these are met, while preserving the principle of national responsibility for safety.

5. Conclusion

The analysis of Bulgaria's national nuclear policy demonstrates that nuclear energy is a cornerstone of the country's energy mix. Notwithstanding the persistentchallenges related to international regulations, public opinion, and financial investments, nuclear energy continues to be regarded as a strategic asset for ensuring the nation's energy security. This study has highlightedthe significance of the current regulatory framework and the need for its alignment with European standards. Moreover, the analysis of planned investments in new nuclear capacities and the development of small modular reactors highlights Bulgaria's ambitious goals to strengthen its position as a regional energy producer of note. However, the realisation of these ambitions hinges on various factors, including the financial sustainability of projects, public support, and the geopolitical landscape. A successful transition to a cleaner and more sustainable energy system will require continued collaboration between governmental bodies, energy sector stakeholders, and civil society.

44 | WENRA 2023

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Miklós Vilmos MÁDL[1]

Hungary's Nuclear Legislation in Light of a Nuclear Renaissance[2]

Abstract

In recent years, the notion of a renaissance in nuclear energy has garnered increasing attention, as it is one of the few electricity-generating means that can supply stable, base-load electricity whilst concurrently aligning with the pressing imperatives of climate protection. In such a prosperous climate for nuclear development, it is worth looking into national nuclear law frameworks and analysing their adequacy for increased deployment of nuclear power plants. Among the paramount considerations from the perspective of a successful nuclear renaissance stands the issue of notoriously protracted and complex licensing procedures. There is no international licensing authority, nor there is a common licensing framework, licensing is in the remit of national authorities, resulting in a diverse array of regulatory approaches to licensing. In an era characterized by heightened interest in nuclear new build initiatives, it is incumbent upon us to examine our current regulatory frameworks—acknowledging both their merits and their deficiencies—as such inquiry is indispensable to any further developments that aim to make these systems more conducive to a nuclear renaissance, whilst upholding nuclear safety as the foremost priority. This article aims to present the nuclear licensing framework applicable to new build nuclear power plants in Hungary. To understand the licensing process, the article will address the position of the nuclear regulatory body within this process, alongside the principal statutory instruments governing the deployment of new nuclear power plants. The core of the article will focus on the licensing stages leading up to the operation of a new nuclear power plant, illustrated with recent practical insights gleaned from the Paks II project. Furthermore, recognising that advanced nuclear technologies form a prominent subject within the contemporary discourse of the nuclear renaissance, the article will also address their prospective deployment. In doing so, it will address the licensing challenges associated with them, and how these could be potentially resolved. The central

1 | PhD Student, Ferenc Deák Doctoral School of Law, University of Miskolc; Researcher, Central European Academy, Hungary. ORCID: https://orcid.org/0009-0003-9645-5594
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hypothesis advanced herein is that a thorough understanding of our existing licensing frameworks—together with their attendant advantages and shortcomings—constitutes a necessary precondition for participation in the nuclear renaissance. Only by engaging in such critical reflection, and by drawing upon the experiences of other states, can one aspire to establish licensing procedures that are not only more efficient and effective but also unwavering in their commitment to the maintenance of nuclear safety.
Keywords: Licensing, nuclear new build, SMRs, nuclear law, Paks II, nuclear safety

1. Introduction

In recent years, nuclear energy has once again assumed a position of heightened prominence within public and policy discourse. This resurgence of interest, often described as a 'nuclear renaissance,' stems largely from the growing recognition that the ambitious climate goals[3] we set for ourselves, are, for most countries, unattainable through reliance on renewable sources alone. While renewable energy sources remain crucial to the green transition, they still have their limitations—chief among them being their volatile nature and consequent inability, in many cases, to supply consistent base-load power.[4] Few energy sources possess the dual capacity both to be carbon neutral and to provide base load power. It is thus unsurprising that nuclear energy has re-entered the strategic calculus of numerous states. This renewed focus on nuclear power as a solution to our energy needs was further catalysed by by geopolitical developments, most notably the Russian-Ukrainian crisis, which has brought into sharp relief the imperatives of self-sufficiency and elevated the importance of resilient, nationally controlled generating capacities. Hungary, in line with this tendency, in its 2024 National Energy and Climate Plan[5] articulates an unequivocal commitment to nuclear energy, recognising it as a key contributor to the country's energy security while advancing its climate goals.[6] At present, this dedication is set to be realized by further life-extension of the existing Paks I nuclear facility and constructing the Paks II plant. Parallel to these developments, Hungary is also investigating the potential integration of advanced nuclear technologies, including small modular reactors (SMRs).[7]

Amidst this context of a potential nuclear renaissance, it becomes critical to analyse existing legal frameworks to understand their functioning, as any future developments driven by the renaissance aiming to modernise must inevitably build upon these frameworks.

3 | Such as the Fit for 55 package.
4 | Of course certain exceptions do exist—most notably hydroelectric power—but that requires favourable geographic attributes which are not uniformly available across all national territories.
5 | Regulation (EU) 2018/1999 of the European Parliament and of the Council
6 | National Energy and Climate Plan 2024, 18.
7 | Ibid. 80

This article thus endeavours to present a thorough analysis of the legal regulation of the nuclear energy sector in Hungary. In doing so, it offers a sound basis for comparative evaluation from which valuable conclusions may be drawn regarding the benefits and shortcomings of the current legal framework.

Particular emphasis is placed upon licensing issues, as these procedures are crucial in materializing a nuclear renaissance.[8] Throughout this analysis, the author begins by delineating the role of nuclear energy in Hungary and its projected trajectory, before examining the institutional framework, including the regulatory authority entrusted with oversight of the sector, as well as the principal legislative instruments that govern it. The core of the article is dedicated to an exploration of the licensing framework of the sector, outlining the stages leading up to the operation of a new nuclear power plant. Throughout this discussion, the author will attempt to showcase the practical implications of the different licensing stages through the example of Paks II. Since the previously portrayed nuclear renaissance also encompasses the potential deployment of next-generation nuclear technologies such as SMRs, the author will dedicate the last section of the article to discussing the prospects of these novel plants in Hungary.

2. Hungary and its history with nuclear energy

Hungarians have played a significant and distinguished role in the global history of nuclear science. Although a detailed exposition on their contributions lies beyond the scope of this article it would be remiss not to mention two eminent figures: Ede Teller[9], who emigrated to the United States and took part in the Manhattan Project—thereafter becoming known as the "father of the hydrogen bomb"—and Leó Szilárd,[10] likewise an émigré to the United States, whose discovery of the nuclear chain reaction stands as a foundational breakthrough in the field.

Hungary's relationship with nuclear installations dates back to the 1950s, when the Central Physics Research Institute[11] of the Hungarian Academy of Sciences proposed the construction of a research reactor in cooperation with the Soviet Union.[12] This proposal led to the conclusion of an interstate agreement between Hungary and the USSR, delineating the respective obligations of each party.[13] The research reactor was envisaged to be a crucial source of information to preparing for electricity-generating reactors, which were expected to become viable within a

8 | Kiser & Otero 2024, 1–2.
9 | Teller & Brown 1962,
10 | Lanouette & Szilárd 2024,
11 | Central Research Institute for Physics (Központi Fizikai Kutatóintézet).
12 | Government Proposal No. 4081/1955 concerning the construction of an experimental nuclear reactor, at pp. 3 (4081/1955. A kísérleti atomreaktor építéséről, Előterjesztés, 3.)
13 | Jéki 2000, 16.

15- to 20-year horizon.[14] The first Hungarian nuclear reactor was built in the Buda Hills in 1959 with an initial capacity 2 MW, subsequently increased in 1967 to 5 MW as part of its overhaul.[15] In 2023, the operating licence of the research reactor was extended for further 10 years with specific conditions.[16]

The success of the research reactor soon catalysed a broader vision: that of constructing a nuclear power plant for electricity generation. In pursuit of this goal, educational programmes were established at Hungarian universities to train future professionals in the sector, leading to the idea of building a university reactor. Ultimately Budapest University of Technology was selected as the best place to construct it.[17] In this period, the first legislation governing the sector was also adopted,[18] including rudimentary provisions on licensing. In practice, however, these procedures were largely informed by the regulatory practices of other nations and the International Atomic Energy Agency (IAEA) guidelines. Under these provisions, a licence was granted in 1966 for the construction of a domestically designed training reactor, which reached first criticality in 1971.[19] True to its intended purpose, professionals educated in the reactor proved pivotal to the Paks I project.

The subsequent milestone in Hungary's nuclear development was establishing a power-generating nuclear plant. In 1966, pursuant to a resolution of the Council of Ministers,[20] an interstate agreement was signed between Hungary and the Soviet Union,[21] regarding the construction of two blocks, each with an output of 800 MW. The first unit was scheduled for commissioning in 1975.[22] Under the terms of the Convention, the Soviet party undertook responsibility for the design, fuel supply, and provision of major components, while the Hungarian side assumed responsibility for selecting the site and for construction and assembly works. The agreement further addressed financing, with the Soviet Union extending a loan of 50 million roubles at a 2% interest rate, repayable over ten years via importing Hungarian goods to the Soviet Union. This arrangement was

14 | Government Proposal No. 4081/1955 concerning the construction of an experimental nuclear reactor, at pp. 1 (4081/1955. A kísérleti atomreaktor építéséről, Előterjesztés, 1.)
15 | OAH 2023, 6.
16 | BKR-HA0074, határozat Energiatudományi Kutatóközpont Budapesti Kutatóreaktor üzemeltetési engedélye.
17 | Institute of Nuclear Techniques of the Budapest University of Technology and Economics (BME Nukleáris Technikai Intézet)
18 | 10/1964. (V.7.) Korm. rendelet a sugárzó (radioaktív) anyagokról és készítményekről
19 | Institute of Nuclear Techniques of the Budapest University of Technology and Economics (BME Nukleáris Technikai Intézet).
20 | A Magyar Forradalmi Munkás-Paraszt Kormány 3397/1966. számú határozata a magyarországi atomerőmű megépítése tárgyában a Szovjetunió kormányával kötendő együttműködési megállapodásról
21 | Magyar Népköztársaság területén létesítendő atomerőmű építése során folytatandó együttműködésről szóló, 1966. december 28-án kelt Egyezmény
22 | Ibid. Section 1–2.

considered quite beneficial from a Hungarian perspective, as it enabled repayment through the export of products that would have faced difficulty competing on the open market.[23] In the following year a resolution[24] was issued, which stated that the plant would provide around 15-16% of Hungary's electricity needs and it would be sited somewhere in Tolna County, close to the Danube. Ultimately, the decision was made[25] to select Paks as the location, and despite underlying political motivations, nuclear safety considerations prevailed as the decisive factor in the location decision.[26] Notwithstanding initial progress, a policy debate emerged regarding the economic viability of the nuclear project suggesting supplementing it with other types of power plants based on their perceived better economics.[27] In the course of this debate of energy generation, nuclear power lost favour and project was formally postponed.[28] Owing to Hungary's obligations under its treaty with the Soviet Union, the Hungarian Government sought clarification as to whether the postponement would be acceptable. In its communication to the Soviet side, Hungary reaffirmed its commitment to the project and argued that a deferral could be mutually beneficial, as it could result in installing a more modern plant.[29] Soon the answer came back from the Soviet side that they had nothing against the modification of the Convention.[30] In 1970, the formal decision was made to postpone the project to the period of 1980-1985.[31] The Ministry of Heavy Industry later issued a decision confirming the new timeline for the project's implementation.[32] Based on this mutual agreement the Interstate Convention had to be modified. The Hungarian delegation was entrusted[33] not only to set a later implementation date, but also to modify the project's scale to four 500 MW units.[34] In July of 1970, the Convention was amended by an additional protocol envisaging the construction of a nuclear power plant with an aggregated capacity of 1900-2000 MW. The first two 440 MW units were scheduled for commissioning

23 | Bosák 2016
24 | 3004/1967. MT. határozat
25 | Paksi Atomerőmű üzemidő hosszabbítás Előzetes Környezeti Tanulmány 2004, 14.
26 | Jegyzőkönyv az Erőmű és hálózattervező Vállalat Vállalati Zsürijének 1967. február 16-i üléséről. Tárgy: 800 MW atomerőmű telepítési hely vizsgálata
27 | Szabó 2004, 103–162.
28 | Ibid. 140–162.
29 | Apró Antal levélváltása M. A. Leszecsko szovjet miniszterelnök-helyettessel az atomerőmű építésének elhalasztásáról MOL XIX-A-2-gg-21-338-1969 (349. d.)
30 | MOL XIX-A-2-gg-21-343-1969 (Doc. No. 349)
31 | A Magyar Forradalmi Munkás-Paraszt Kormány 3009/1970. számú határozata a szovjet segítséggel történő első magyar atomerőmű létesítésére kötött egyezmény határidejének módosításáról
32 | Resolution No. 3068/1970 of the Ministry of Heavy Industry, See: Szabó 2004, 220–225.
33 | Szabó 2004, 194–209.
34 | This during the negotiations it was corrected by the soviet party that there is no such reactor as 500 MW one. They can either offer the 440MW or the 1000MW. Interestingly this increase of capacity was not intentional on the side of Hungary which is also visible by lack of technical knowledge on the reactors. See: Szabó 2004, 200–209.

by 1980, with the remaining units to follow with the entire 2000 MW plant until 1985.[35]

Legislative reforms accompanied the project's advancement. In 1976, a resolution was made by the Council of Ministers,[36] expressing that the nuclear safety licensing has to be determined by the President of the National Atomic Energy Commission in coordination with the Minister of Heavy Industry, and based on Soviet regulatory standards.[37] From a modern perspective—particularly in relation to the principle of regulatory independence—it is noteworthy that the nuclear safety provisions were adopted by the Ministry, which was itself the key stakeholder in the building of the plant. However, one might contend that in the political and industrial context of the time, the Ministry's interest extended beyond mere economic considerations.[38] The substantive safety regulations adopted during this period took the form of what are known as Blue-Books—essentially Hungarian translations of Soviet standards orignially issued by the State Mining Technical Inspectorate and the State Atomic Energy Committee of the USSR.[39]

The first comprehensive legislative instrument governing the nuclear sector in Hungary was enacted in 1978.[40] This decree delineated the respective responsibilities of state authorities in relation to the nuclear power plant. It vested the Minister of Heavy Industry with the authority to establish the safety requirements applicable to the plant's implementation, commissioning, operation, and licensing. Meanwhile, the National Atomic Energy Commission was tasked solely with the coordination of inter-authority activities in relation to the plant.[41] Mirroring broader development in international nuclear law, the decree also codified fundamental nuclear law principles such as the responsibility of the operator.[42] Based on this decree, the Minister of Heavy Industry issued a decree in the following year covering the assigned areas.[43] Much like our contemporary legislation, this ministerial decree has set out detailed rules in the form of annexes covering the implementation, commissioning, operation and licensing of the plant.[44] While these provisions were already being applied in practice, the decree served to codify their

35 | Jegyzőkönyv A Magyar Népköztársaság Forradalmi Munkás-Paraszt Kormánya és a Szovjet Szocialista Köztársaságok Szövetségének Kormánya között 1966.december 28-án, atomerőműnek a Magyar Népköztársaságban történő létesítésében való együttműködésről kötött Egyezményhez. 1970. július 3-án
36 | A minisztertanács 3296/1976. sz. határozata a paksi atomerőmű 1760 MW teljesítményű első kiépítésének beruházási javaslatáról
37 | Ibid.
38 | Szabó 2004, 567–585.
39 | Tóth 2024, 146.
40 | 10/1978. (II.2.) MT rendelet az atomerőművel kapcsolatos egyes feladatokról
41 | Ibid. Section. 13.
42 | Ibid. Section 1. (3).
43 | 5/1979. (III. 31.) NIM rendelet az atomerőmű biztonságtechnikai kérdéseiről
44 | Ibid. art 2.

use.[45] Under this framework, two distinct nuclear safety licences were introduced for new nuclear facilities: the implementation licence and the operating licence, the latter also covering the commissioning stage.[46] The State Energy and Energy Safety Inspectorate acted as the first-instance authority, while the Ministry of Heavy Industry's National Energy Authority served as the appellate body.[47]

A further milestone came with the adoption of the first Act on Atomic Energy in 1980,[48] which which remained in force until it was superseded in 1996 by the current legislation. The Act, together with its implementing decree, introduced broader regulation of the sector, covering areas that had hitherto remained unaddressed—most notably, third-party nuclear liability.[49] This represented a significant innovation, as such liability had previously been treated under the general regime of strict liability for hazardous activities, as provided in the 1959 Civil Code. Although at the Act's adoption, Hungary was not yet party to the principal international conventions of the sector,[50] the legislator nonetheless sought to align the domestic framework with emerging global standards. In the domain of regulation and licensing, the implementing decree conferred upon the Minister of Heavy Industry the power to establish safety requirements and issue the relevant licences. These licences were to be supplemented[51] with the opinion of the State Commissioning and Handover Committee.[52] It was under these provisions that the plant's first reactor received its licence and commenced commercial operation in 1983.[53]

For over 40 years, the Paks I Nuclear Power Plant has been a cornerstone of Hungary's electricity mix, consistently accounting for more than 40% of national electricity generation. Following the expiration of their initial 30-year operational lifespans—beginning with the first unit in 2012,[54] shortly in the wake of the Fukushima accident—their operating licences were extended for another 20 years, thereby reinforcing Hungary's energy security. Given the delays associated with the construction of the Paks II and the renewed emphasis on national energy autonomy in the wake of the Russian-Ukrainian crisis,[55] the prospect of

45 | Szabó 2004, 567–585.
46 | 5/1979. (III. 31.) NIM rendelet az atomerőmű biztonságtechnikai kérdéseiről, Section 4.
47 | Ibid. Section 3.
48 | 1980. évi I. törvény az atomenergiáról
49 | Ibid.
50 | Hungary acceded to the 1963 Vienna Convention and the Joint Protocol in the year of the regime change 1989.
51 | 5/1979. (III. 31.) NIM rendelet az atomerőmű biztonságtechnikai kérdéseiről, Section 24.
52 | An intermediary position was filled in by the „Állami Indító és Ellenőrző Átvételi Bizottság (AIB)" which was not a licensing authority but looked at crucial points of safety before the actual licensing steps. See: Szabó 2004, 567–585.
53 | 1983 Állami energetikai és energiabiztonságtechnikai felügyele, Paksi Atomerőmű I. blokk meghatározottt időtartamra szóló üzemeltetési engedélye
54 | OAH, HA5601 határozat, Parksi Atmerőmű 1. blokkjának a tervezett üzemidő lejártát követő további működése tárgyában
55 | See more: Hartvig et al. 2024,

further extending the operational lifespan of Paks I appears not only rational but also prudent. Although the Hungarian Parliament passed a resolution in 2022 in support of such a course,[56] the ultimate decision lies with the competent regulatory authority.

3. Regulatory authority

As evidenced by the foregoing analysis, regulatory functions in the sector in Hungary were initially distributed among various ministerial bodies. Nonetheless, authorities with sector-specific mandates—albeit with primarily advisory roles—have existed since the inception of nuclear energy in the country. Notably, the National Atomic Energy Commission was established in 1955[57] to oversee matters regarding the peaceful utilisation of nuclear energy. Over time, its remit steadily expanded. The implementing decree of the 1980 Atomic Act only prescribed that the safety requirements for the use of atomic energy have to be developed by the relevant minister in agreement with the Commission's president.[58] However, a significant shift occurred following the political transition, embodied in Government decree 104/1990.[59] In its philosophy, this instrument entailed a departure from this centralised approach by entrusting the authority with regulatory functions which was not directly involved in promoting the use of nuclear energy. The Commission itself was composed of a president appointed by the Prime Minister and other members appointed by respective ministers, thereby theoretically retaining a degree of political influence. In order to empower the Commission to exercise its new public administrative mandate, the Hungarian Atomic Energy Authority (HAEA) was established under the management of the Commission's president.[60]

Subsequently, the 1996 Atomic Energy Act led to the reregulation of both the Commission and the Authority in 1997.[61] This reform enhanced the authority's independence—an evolution that was no mere coincidence, as Hungary had acceded to the Convention on Nuclear Safety earlier that year, thereby assuming the obligation to ensure an effective separation[62] between the regulatory body and entities engaged in the promotion or utilisation of nuclear energy.[63]

56 | 56/2022. (XII. 8.) OGY határozat
57 | 4621/XII.15/1955 MT határozat az országos atomenergia bizottság létrhozásáról
58 | 12/1980. (IV. 5.) MT rendelet az atomenergiáról szóló 1980. évi I. számú törvény végrehajtásáról, Section 5.
59 | 104/1990. (XII. 15.) Korm. rendelet az Országos Atomenergia Bizottság, valamint az Országos Atomenergia Hivatal feladatáról és hatásköréről
60 | Kádár & Majoros 2024, 690.
61 | 87/1997. (V. 28.) Korm. rendelet az Országos Atomenergia Bizottság feladatáról, hatásköréről, valamint az országos Atomenergia Hivatal feladat- és hatásköréről, bírságolási jogköréről
62 | See more: MacKenzie 2010, 50., Burns et al. 2022, 190–191., Stoiber et al. 2003, 27–28., Sexton 2015, 39–41., Michel 2021, 14–16.
63 | Convention on Nuclear Safety 1994, Section 7–8.

In anticipation of accession to the European Union, Hungary further strengthened the independence of its regulatory framework in 2003 by removing the Commission[64] from its supervisory position over the HAEA.[65] The competences and tasks of the authority were accordingly revised,[66] ensuring that it could neither be instructed in the exercise of its regulatory functions, nor have its decisions altered by any superior administrative power.[67] This then newly adopted independent decision-making power was a crucial step in ensuring effective regulatory autonomy.[68]

In 2004, Hungary acceded to both the European Union and the Euratom Community. Within the latter framework, significant strides were made in bolstering the independence of the regulatory authorities particularly following the adoption of the 2014 revised Nuclear Safety Directive,[69] which incorporated the lessons drawn from the stress tests[70] conducted after the Fukushima Daiichi accident.[71] Reflecting the directive's commitments to strengthening the independence of regulators from undue governmental influence,[72] the final major structural reform took place regarding the HAEA in 2021.[73] Under this reform, the HAEA was restructured from a central governmental agency into an independent regulatory body. Since 2022, the HAEA has operated in this format, reporting directly to the National Assembly,[74] and its president has been vested with decree-making authority.[75] This structure of the regulatory organ compared to other national structures entails a level of autonomy which goes beyond the generally accepted measures of ensuring effective independence.[76] Regulatory independence, though often invoked to prevent interference from pro-nuclear interests, is equally vital—if not more so during a time of nuclear renaissance—in safeguarding against undue influence from unfounded anti-nuclear agendas. By reporting to the National Assembly and provided with the authority to effectively regulate in the sector, the regulator gained stability, ensuring its decisions are driven by expertise rather

64 | 2003. évi XLII. törvény a földgázellárásról
65 | OAH 2006, 33. Nevertheless, under the Act on Atomic Energy the HAEA was still to be supervised by a minister. This, in practice, was the Minister of Interior and the authority's budget was included in the budget of the ministry.
66 | 114/2003. (VII. 29.) Korm. rendelet az Országos Atomenergia hivatal feladatáról, hatásköréről és bírságolási jogköréről, valamint az Atomenergia Koordinációs Tanács tevékenységéről
67 | OAH 2006, 33.
68 | OECD NEA 2014, 14–15.
69 | Council Directive 2014/87/Euratom,
70 | Aradszki & Borsos 2024, 331. The stress test did not reveal significant shortcomings in the case of the Paks plant.
71 | See more: Burns 2012,
72 | Florea 2022, 75.
73 | 2021. évi CXIV. törvény az atomenergia-felügyeleti szerv jogállásával összefüggésben egyes törvények módosításáról
74 | Fundamental Law of Hungary, Art. 23.
75 | Ibid. art T.
76 | Cook 2022, 115.

than shifting political oscillations on nuclear. This sense of stability and impartiality also strengthens the credibility of the authority's decisions. Financial autonomy constitutes a cornerstone of effective regulatory independence, for without adequate and independent financial provision, the Authority would be unable to discharge its statutory functions with efficacy. The HAEA's finances are managed as a separate chapter within the central finances of the National Assembly. This arrangement ensures that any changes to its budget may only be approved by the National Assembly itself,[77] thereby insulating the Authority from executive influence and securing its fiscal independence from the Government. In addition to this appropriated budgetary support, the HAEA is endowed with supplementary revenue streams derived directly from the exercise of its regulatory functions.[78] These include annual regulatory fees remitted by licensees,[79] charges levied for the conduct of licensing procedures,[80] and fines imposed by them.

The institutional architecture of nuclear regulatory bodies exhibits considerable variation across jurisdictions,[81] but in practice, there are two predominant models. The first is a commission-based structure, such as the US Nuclear Regulatory Commission, wherein regulatory authority is vested in a collegiate body. The second model vests regulatory powers in a singular executive authority—typically a director or president—who acts as the head of the regulatory institution. The HAEA adheres to this latter model, being headed by a president appointed by the Prime Minister for nine years.[82]

As is the case in other jurisdictions, the principal mandate of the authority is to ensure the safe and secure utilisation of nuclear energy and of nuclear and radioactive materials, while simultaneously safeguarding against the proliferation of nuclear weapons.[83] In pursuit of these overarching objectives, the functions of nuclear regulatory authorities customarily cover three core domains: licensing, inspection and enforcement. Licensing involves evaluating whether an activity complies with the regulatory requirements prior to the granting of authorisation. Once a licence has been issued, inspections are conducted to ascertain continued compliance with those requirements. Where non-compliance is detected, enforcement measures are employed to compel a return to conformity with the regulatory framework.[84]

In light of the constraints of brevity, the present discussion shall be confined to the regulator's new nuclear power plant licensing functions. In accordance with the internationally recognised permission principle, the licensing of nuclear

77 | 1996. évi CXVI. törvény az atomenergiáról, art. 6(6).
78 | Kádár & Majoros 2024, 690–691.
79 | 1996. évi CXVI. törvény az atomenergiáról, Section 19.
80 | Ibid. Section 8(1c).
81 | Burns et al. 2022, 169.
82 | 1996. évi CXVI. törvény az atomenergiáról, Section 6/A.
83 | Kádár & Majoros 2024, 692.
84 | This task is enshrined in the CNS, the JC and the Nuclear Safety Directive.

power plants follows a cradle-to-grave approach, covering every lifecycle stage of the plant. The major installation-level licences for new nuclear power plants in Hungary are the site, implementation, commissioning, and operation licences. At each of these stages, the foremost priority of the regulator revolves around nuclear safety. While the authority evaluates the licence application and grants authorisations accordingly, such approval does not absolve the licensee of its primary duty to ensure nuclear safety. The grant of a licence does not in any way attenuate the enduring applicability of the responsibility principle.[85] The procedural regime governing these licensing activities is grounded in the General Administrative Procedural Code,[86] which functions as *lex generalis*. Nevertheless, owing to the sector's technical and legal particularities, the Act on Atomic Energy introduces special provisions serving as *lex specialis*. These tailored procedural rules, which will be considered in greater detail in the subsequent section, reflect the distinctive regulatory demands of the nuclear field.

The language employed in the documentation pertaining to the licensed design constitutes a matter of critical importance, especially for countries which do not have indigenous nuclear technology. Variations in technical terminology, coupled with the inherent difficulties of translation, may present significant hurdles during the licensing procedures. To address this, the Act on Nuclear Energy[87]—distinctly diverging from the General Administrative Procedural Code—permits the submission of technical documentation in the English language for procedures involving the nuclear safety of nuclear installations. While this approach could be quite beneficial in mitigating translation-related challenges, its practical utility remains questionable in instances where the technology originates from a non-English-speaking country.

A further point of divergence lies in the limited concept of the party to public administrative proceedings, more commonly known in the Hungarian legal terminology as "client" within the context of licensing procedures for new nuclear power plants. Under the prevailing domestic framework, this designation is limited to the licensee,[88] individuals whose property lies within the affected zone, and those whose rights are recorded in the land registry.[89] Such a formulation is markedly more restrictive than that found in the model provisions of the International Atomic Energy Agency (IAEA), which adopt a broader interpretation encompassing 'other persons substantially impacted.'[90]

Another salient distinction is that, unlike in general administrative procedures, summary and automatic decision-making procedures are expressly

85 | Responsibility principle enshrines the primary responsibility of the operator.
86 | 2016. évi CL. törvény az általános közigazgatási rendtartásról
87 | 1996. évi CXVI. törvény az atomenergiáról, Section 11/A(3a)
88 | Defined as a 'user of nuclear energy who carries out an activity subject to a licence.'
89 | Kádár & Majoros 2024, 703.
90 | Stoiber et al. 2010, 45.

precluded due to the complexities and risks associated with the field. However, recent amendments to the Atomic Energy Act have introduced simplified licensing procedures during the implementation stage, specifically for systems and components deemed to pose lower risk. These new procedural avenues—namely the 'notification acknowledgment' and the 'derogation notification acknowledgment'[91] mechanisms—seek to alleviate regulatory burdens by obviating the need to duplicate licensing efforts at the manufacturing or procurement stages. Historically, such components were subject to repeated evaluations up until the commissioning or operational phase of the plant, placing a significant burden upon the regulatory authority without yielding commensurate gains in nuclear safety.[92] The notification acknowledgment procedure enables the authority, through providing information, to review a component before its manufacture commences. The process is subject to a strict 15-day timeframe, during which no possibility for a deficiency clearance may be undertaken, and it may result in one of five determinations: the authority may acknowledge the notification; decline it; impose conditions for acknowledgment; set hold-back and inspection points; or combine conditional acknowledgment with such hold-back and inspection points.[93] In practice, this new procedural construct is designed to provide the regulator with timely insight at an early stage, without the lengthy initial licensing procedure, while recognising that the relevant components will eventually undergo formal licensing during the commissioning and operation licensing stages.[94] Accordingly, the integrity of the permission principle remains intact. This amendment is based on the HAEA's new supervisory concept program, which also expanded the role of authorised inspection organisations which are independent form the authority and the licensee and assigned responsibility for their registry to the HAEA. The participation of these authorized inspection organizations in verification of conformity are either prescribed under law or they can also be involved by the licensee and or with the consent by the licensee by the vendor, moreover their verifications may be accepted by the authority without further review.[95] These organizations are also involved in the 'notification acknowledgment' procedures, either when required by law for certain components, when engaged by the licensee, or when the authority mandates inspection and hold points as part of the procedure, in such cases, the activity may only proceed after approval by the authorised inspection organization.

The final procedural divergence – highlighted here – embedded within the Atomic Energy Act relates to the temporal dimension of regulatory proceedings. This deviation is not without justification, as the procedures in question

91 | 1996. évi CXVI. törvény az atomenergiáról, Section 15
92 | Kádár & Majoros 2024, 710.
93 | 1996. évi CXVI. törvény az atomenergiáról, Section 15
94 | Kádár & Majoros 2024, 711.
95 | 1/2022. (IV. 29.) OAH rendelet a nukleáris létesítmények nukleáris biztonsági követelményeiről és az ezzel összefüggő hatósági tevékenységről, Section 29/A.

necessitate the submission of voluminous technical documentation, which must undergo comprehensive scrutiny prior to the issuance of any licensing decision. The precise duration of these procedures shall be considered in connection with the individual licences in a subsequent section. Interestingly, despite the explicit procedural timeframes prescribed within the Act, there exist no tailored provisions addressing instances in which the HAEA fails to meet the procedural deadlines. Consequently, the general administrative procedural rules apply. Pursuant to these general provisions, where an authority exceeds the procedural deadline, it becomes liable to pay the client a due fee, in case there is no such fee, 10,000 forints (approximately 25 EUR) has to be paid.[96] The standard fee in administrative procedures is 3,000 forints (less than 8 EUR),[97] a sum wholly negligible when juxtaposed with the enormous cost of a nuclear project where delays can lead to extra costs in the millions of euros. While it is self-evident that the authority must not be unduly hastened at the expense of nuclear safety—which must at all times remain paramount—this framework offers minimal incentive for the authority to adhere rigorously to procedural deadlines.

The final procedural element warranting clarification regarding the procedures of the authority concerns the scope of legal remedies. In this regard, the Atomic Energy Act includes special provisions: decisions rendered of the HAEA may be challenged only through administrative proceedings by those parties formally recognised as clients, there exists no right of administrative appeal against such decisions.

4. The legislative framework governing the nuclear sector

At the constitutional level, there exist no provisions that make explicit reference to nuclear energy. However, naturally certain provisions, particularly those related to fundamental rights, remain inherently relevant from a nuclear perspective. These rights have been invoked in past legal challenges[98] and may well re-emerge in future proceedings, particularly amid a prospective nuclear renaissance.

As previously mentioned, the first Act in the sector was adopted in 1980. This statute marked a significant milestone in the evolution of Hungary's nuclear legal architecture. Despite its limited scope —confined to the safe use of nuclear energy and liability issues—it was considered, for its time, a forward-looking and progressive piece of legislation.[99] Despite efforts after the regime change to update the legislation in line with international developments and address existing lacunae,[100]

96 | 2016. évi CL. törvény az általános közigazgatási rendtartásról, Section 51.
97 | 1990. évi XCIII. törvény az illetékről, Section 29.
98 | See more on the fundamental right aspects of nuclear energy in Hungary: Kocsis 2016, 137–156.
99 | Lamm 1997, 160.
100 | Lamm 1997, 162.

it became evident that a new Act was required—one that would comprehensively reflect Hungary's international obligations. Owing to a confluence of factors,[101] this legislative renewal did not materialise until 1996.

Hungary follows a *single nuclear law* model, whereby a single Act governs several areas, including liability, safeguards, and security. This stands in contrast to the *separate-law* model, where these areas would be addressed individually.[102] As a result the Act is a comprehensive and wide-ranging piece of legislation, albeit one whose treatment of individual subject areas varies considerably in depth and detail.[103] Article 1 of the Act delineates its scope, stating that it governs the peaceful use of nuclear energy, the attendant rights and obligations, as well as the protection of both the public and the environment from the hazards posed by ionising radiation, whether of natural or artificial origin.

From the perspective of the licensing, the Act sets out the overarching framework rather than the detailed provisions. Chapter III of the Act enumerates the principal installation-level licences which must be secured prior to a new nuclear power plant commencing power generation. These are as follows::

- a site inspection licence,
- a site assessment licence,
- an implementation licence,
- a commissioning licence, and
- an operation licence.[104]

In addition to these nuclear-safety related licences issued by the HAEA, the Act also requires the preliminary consent of the National Assembly for preliminary works on a new plant.[105] It further references other requisite licences, such as those issued by the Hungarian Energy and Public Utility Regulatory Authority.[106] Although the Act contains only limited provisions on licensing, it grants the president of the authority to develop detailed rules governing licensing.[107]

Consequently, based on the mandate conferred by the Act, the HAEA adopted a decree setting forth the nuclear safety requirements applicable to nuclear installations and the related regulatory activities.[108] This decree is structured in two principal parts, the first of which comprises a relatively concise general part. This portion lays down provisions of general applicability to nuclear installations, among them the basics of licensing.

101 | Ibid. such as the negotiations on the revision of the Vienna Convention.
102 | Cook 2022, 108.
103 | See more on the areas covered by the act: Kocsi Fekácsné 2020, 202–229.
104 | Ibid. Section 17.
105 | Ibid. Section 7.
106 | Ibid. Section 33.
107 | Ibid. Section 68(12).
108 | 1/2022. (IV. 29.) OAH rendelet a nukleáris létesítmények nukleáris biztonsági követelményeiről és az ezzel összefüggő hatósági tevékenységről

More importantly, however, the decree also has ten annexes, collectively designated as the 'nuclear safety rules,' which contain the detailed mandatory provisions on licensing. Initially these rules, annexed to Decree No. 5/1979 NIM of the Ministry of Industry, were referred to as 'nuclear power plant safety regulations,' At that time, the rules applied exclusively to nuclear power plants and were predominantly grounded in Soviet regulatory models.[109] The term 'nuclear safety rules' was subsequently introduced[110] in the wake of the adoption of the new Act on atomic energy, reflecting a marked philosophical shift. No longer based on Soviet precedents, these rules began to align with the standards promulgated by the IAEA.[111] New government decrees on which the 'nuclear safety rules' were based were adopted in 2005[112] and 2011,[113] in this latter iteration, the current ten-annex structure of nuclear safety rules was established. Following a structural reorganisation of the regulatory authority, which provided it with legislative power in the sector, provisions had hitherto been issued as government decrees were reissued in the form of HAEA decrees such as Decree 1/2022. HAEA, which now contains the 'nuclear safety rules.' However, one notable shortcoming of this reissuance arises from its lower position in the hierarchy of legal norms, Unlike its predecessor in the hierarchy of legal norms, an HAEA decree cannot be contrary to Government, prime ministerial, and ministerial decrees, or those of the president of the Hungarian National Bank either. Although the issuance of the decree by the sector's most technically competent authority enhances its regulatory credibility, this demotion in the legal hierarchy from the level of government decrees arguably undermines the overall effectiveness of this structural change.

The requirements contained in the nuclear safety rules are reviewed every five years, designed to ensure their alignment with the most recent national and international developments, including those emanating from relevant international organisations.[114] This revision process is rooted in international obligations and to some extent it mirrors the peer-reviews conducted under the Convention on Nuclear Safety (CNS), the Joint Convention (JC), and the Nuclear Safety Directive. Since other countries also follow similar procedures, incorporating the recommendations of international organisations, this practice contributes to a certain degree of regulatory harmonisation.

The system of nuclear safety rules constitutes a notably intricate regulatory framework. Certain annexes are drafted with broad applicability, extending to a

109 | Tóth 2024, 147.
110 | 87/1997. (V.28.) Korm. rendelet az Országos Atomenergia Bizottság feladatáról, hatásköréről valamint az országos Atomenergia Hivatal feladat- és hatásköréről, bírságolási jogköréről
111 | Tóth 2024, 148.
112 | 89/2005. (V.5.) Korm. rendelet a nukleáris létesítmények nukleáris biztonsági követelményeiről és az ezzel összefüggő hatósági tevékenységről
113 | 118/2011. (VII. 11.) Korm. rendelet a nukleáris létesítmények nukleáris biztonsági követelményeiről és az ezzel összefüggő hatósági tevékenységről
114 | Kádár & Majoros 2024, 703.

range of nuclear facilities—including nuclear power plants, research reactors, and storage facilities—while others are specific to particular types of installations. From the perspective of licensing new nuclear power plants, the most pertinent annexes are the following: NSR-7, which covers the site inspection and assessment, NSR-3a, that regulates the design requirements of new power plant units, and NSR-9, which regulates the requirements applicable during the design and implementation stages.

The final set of instruments to be considered within the framework of nuclear licensing are the guidelines issued by the HAEA. These guidelines outline methods for complying with the requirements contained in the 'nuclear safety rules.' While these methods in the guidelines are not binding on the applicant, following them has significant practical implications. Where an applicant chooses to follow the methods in the guidelines, to demonstrate compliance with the 'nuclear safety rules' then the authority is naturally not going to evaluate the adequacy of the method,[115] as it was recommended by them. However, since the guidelines are not mandatory, applicants may opt for alternative methods, but in this case, the authority will extensively evaluate the correctness, appropriateness and completeness of the alternative method,[116] which evaluation has to be financed by the licensee.[117] In this regard, guidelines offer a useful degree of flexibility within the licensing system—particularly in respect of the assessment and integration of advanced technologies. However, this flexibility comes at a price: deviation from the established guidance may lead to protracted procedures and increased financial burden, rendering the guidelines a double-edged sword in regulatory practice. It is also noteworthy that the guidelines are subject to regular revision. In addition to periodic reviews, licensees may also initiate requests for updates.

5. Licensing stages of New Build Nuclear Power Plants

Licensing a nuclear power plant constitutes a procedure of exceptional complexity. In Hungary a new nuclear power plant requires several thousands of licences before the facility may lawfully commence operations.[118] Given the sheer number of licences, it is neither practicable nor meaningful to enumerate—let alone analyse—each one in detail. Therefore, the ensuing sections shall be confined to the discussion of the installation-level nuclear safety[119] licensing stages of new

115 | 1/2022 (IV. 29.) OAH rendelet a nukleáris létesítmények nukleáris biztonsági követelményeiről és az ezzel összefüggő hatósági tevékenységről
116 | Ibid. Section 3.
117 | Aradszki & Borsos 2024, 344.
118 | In the case of Paks II. it will be around 7000-8000 licences until the operation of the plant can begin. A large number of these licences are manufacturing, construction and installation licences.
119 | Naturally, there are not only safety-related licences issued by the authority, but also physical protection of the plant, dose limits, etc.

nuclear power plants, as administered by the HAEA. This will be supplemented, where relevant, by reference to other key licences which, though issued by other authorities other than the HAEA, exert a material influence on the trajectory of the nuclear safety licensing. Practical insights from the Paks II project will be interwoven where appropriate.

As is the case with national nuclear legal frameworks more broadly, the architecture of nuclear safety licensing systems varies across jurisdictions. Some states adopt a single-step licensing model whereby a unified licence encompasses the siting, construction and initial operation of the plant. Others opt for a segmented or staggered regulatory approach, issuing distinct licences at each significant stage of the project's progression. Hungary falls in the latter category requiring individual licences corresponding to each critical milestone in the development of the plant. Although no universally applicable model can be prescribed, the IAEA generally supports the staggered approach to licensing, recognising that it affords enhanced regulatory oversight and enables the competent authority to engage in a continuous evaluative process.[120] Nevertheless, proponents of the single-step model argue that the holistic assessment of all relevant factors within a consolidated procedure permits a more integrated and potentially better-informed regulatory determination.

5.1. Decision in principle or justification stage

The prerequisite to any other licensing step in the deployment of a nuclear power plant is the justification stage. While not, in the strict sense, a licensing phase, justification is more akin to a policy decision on the given country embarking on the deployment of a nuclear power plant, as such, it is heavily influenced by the current political climate.[121] Within the legal order of the European Community, the justification stage is prescribed by the Basic Safety Standards Directive (BSS Directive), requiring that nuclear practices shall be justified; that is, they may only proceed where it can be demonstrated that the benefits to individuals and society outweigh the potential health detriments arising from ionising radiation.[122] Given that such a balancing exercise involves socio-political, economic, and ethical considerations, it falls beyond the remit of the regulatory authority.[123] Regulatory bodies must maintain strict neutrality towards nuclear energy: they are neither to advocate for its deployment nor to oppose it.

In Hungary, the requirement for justification is codified under Section 7 of Act CXVI of 1996 on Atomic Energy ("the Atomic Energy Act"), which requires that the National Assembly provide preliminary consent before any further licensing may

120 | IAEA 2023, 27–28.
121 | Cook 2022, 193.
122 | Council Directive 2013/59 Euratom, Article 5.
123 | Engstedt 2020, 89.

be undertaken. While this preliminary consent from the perspective of State-led projects is largely procedural, it carries more significance for private projects, which are imaginable in the case of SMRs such as those proposed for industrial applications. In such cases, the evaluation of the potential benefits and harms can lead to conflicts between the private entities involved and the state.

In case of the Paks II project, the preliminary consent for the project was given with an overwhelming majority of the Parliament pursuant to Parliamentary Resolution 25/2009 (IV. 2.) OGY, a concise and unelaborate decision endorsing the initiative. The resolution was grounded in the findings of the 2007 Teller project,[124] which assessed the feasibility of establishing a new nuclear power plant in Hungary. Interestingly, the documentation underpinning this project was not readily available to the public, although it concerned the spending of thousands of billions of forints in public funds. This lack of transparency prompted litigation under the Act on the Right of Access to Data of Public Interest, ultimately compelling the release of the underlying documents.[125] The foundations of this policy decision[126] did not escape scrutiny. The Parliamentary Commissioner for Future Generations voiced criticism, asserting that the justification had not been supported by a sufficiently robust evaluation of the necessity of constructing an additional nuclear power plant in Hungary.[127]

Following the National Assembly's consent, preliminary work on the Paks II project was commenced. In 2012, MVM Magyar Villamos Művek Zrt. (MVM Hungarian Electricity Works Private Company Limited by Shares)—a state-owned company also owner of the Paks I plant—established the MVM Paks II. Atomerőmű Fejlesztő Zártkörűen Működő Részvénytársaság (MVM Paks II Nuclear Power Plant Development Private Company Limited by Shares). Later that same year, the project was deemed a priority investment for national economy and crucial to our energy security.[128]

5.1.1. Convention between the Government of Hungary and Government of the Russian Federation

A further pivotal step in the advancement of the Paks II project was the promulgation of the intergovernmental Convention between the governments of Hungary and the Russian Federation on the cooperation in the peaceful uses of nuclear energy, enacted into Hungarian law as Act II of 2014. This convention set forth that the parties would cooperate in deploying two new reactor units at the

124 | After the decision in principle in 2009 the Project was renamed Lévai-project.
125 | Tolna Megyei Bíróság 13.Gf.40.024/2011/4. számú ítélete
126 | See more: Kocsis 2016, 230–231.
127 | Parliamentary Commissioner for Future Generations JNO-128/2010. számú állásfoglalása.
128 | 1194/2012. (VI. 18.) Korm. határozat a Paksi Atomerőmű telephelyén létesülő új atomerőművi blokkal (blokkokkal) kapcsolatos további feladatok meghatározásáról

Paks site, each with minimum electrical output of 1,000 MW; however, the precise reactor type to be deployed was not defined within the instrument.[129] Additionally, the convention provided that the Russian Federation would supply nuclear fuel to the new units for a period of 20 years, with a provision allowing for an extension of this arrangement. This 20 year fuel supply was ultimately modified to ten years due to diversification reasons following the procedure of the Euratom Supply Agency. Furthermore, the Convention stipulated as an option that spent nuclear fuel could be transported back to the territory of the Russian Federation for reprocessing.

The Convention prompted significant public and legal controversy. In 2014, the political party 'Együtt' initiated a referendum initiative posing the question: 'Do you agree that no new nuclear power plant units should be built in Hungary with the help of a public deficit-increasing loan?'[130] This initiative was rejected by the National Election Office, which based its decision on the Fundamental Law of Hungary, which precludes national referenda on obligations arising from international treaties.[131] In the Office's view, Article 1 of the Convention established such an international obligation.[132] The proponents of the referendum challenged this decision by lodging an application for review to the Curia (Supreme Court of Hungary), arguing that Article 1 did not impose a specific obligation on a project. The Curia, however, dismissed this contention, affirming the National Election Office's interpretation.[133] Dissatisfied with the ruling the proponents of the initiative filed a constitutional complaint with the Constitutional Court, which complaint was ultimately dismissed on the grounds that it did not raise any constitutional law issue of fundamental importance.[134] The decision to bar the referendum provoked criticism. Detractors argued that the Curia interpreted the commitment to cooperate in Article 1—and the Convention in its entirety—with undue breadth. The Court, they contended, improperly inferred the existence of a public deficit-increasing loan arrangement from the Convention, despite the absence of any explicit reference thereto in the text. At the time the Curia rendered its decision, no loan agreement enshrining such a financial arrangement had yet been concluded. On this view, the Convention should have been construed more narrowly, with careful scrutiny of whether it actually contained a commitment directly corresponding to the subject of the proposed referendum.[135] Nevertheless, the Curia adopted a more substantive approach.[136] Although the Convention did not explicitly reference a public

129 | 2014. évi II. törvény a Magyarország Kormánya és az Oroszországi Föderáció Kormánya közötti nukleáris energia békés célú felhasználása terén folytatandó együttműködésről szóló Egyezmény kihirdetéséről art.Sections 5–6.
130 | See more: Csink 2014, 37–42.
131 | Fundamental Law of Hungary, Article 8(d).
132 | NVB 91/2014. indokolás II. pont
133 | Kúria Knk.IV.37.178/2014/3. határozata
134 | 3195/2014. (VII. 15.) AB végzés
135 | Csink 2014, 37–42.
136 | Ibid.

deficit-increasing loan, given the scale of the project, it is difficult to conceive of any other feasible arrangement. While the critique of the Curia's decision—namely, that it drew overly broad conclusions from the text of the Convention—is well reasoned, the countervailing view that, in a project of such profound and long-term significance to Hungary's energy portfolio and economic development, the final decision ought to lie with the electorate,[137] warrants closer scrutiny. The domain of nuclear energy is inherently technical, marked by a high degree of complexity and unpredictability, rendering it exceedingly difficult for the general public to form a fully informed judgment. Moreover, the ease with which emotionally charged, anti-nuclear arguments—often devoid of scientific rigour—may be disseminated and absorbed by public opinion results in an uneven playing field, where balanced discourse between opposing views is seldom achievable. Experiences from other countries, notably Germany, demonstrate that where nuclear-related decisions are driven purely by political rhetoric, untethered from scientific expertise, the outcomes may lead to grave disadvantages.

Subsequently, a loan agreement was concluded between the contracting parties and thereafter promulgated by the Hungarian Parliament in 2014.[138] The agreement set forth that the Russian Federation undertook to extend a loan facility of up to EUR 10 billion for the purpose of financing the design, construction and commissioning of the two nuclear units, covering 80% of the project total costs, with the remaining 20%, as well as any cost overruns, to be borne by Hungary.[139] The repayment of the loan is structured over a period of 21 years, to be discharged through biannual instalments. Repayment is scheduled to commence upon the commissioning of the units, but in any event no later than 15 March 2026.[140] The repayment terms are delineated into three successive periods: during the first 7 years, Hungary is to repay 25% of the used loan amount at an interest rate of 4.50%; in the second 7-year period, 35% of the used loan is to be repaid at an interest rate of 4.80%; and during the final 7 years, the remaining 40% of the used loan is to be repaid at an interest rate of 4.95%.[141] In the event of late payment, a default interest rate equal to 150% of the applicable contractual interest for the respective period shall be imposed. Furthermore, should any payment remain outstanding for a period exceeding 180 days, the Russian Federation has the right to demand immediate repayment of the entire principal loan amount with all accrued interest.

Concerning the loan agreement, it is worth apposite to briefly address the state aid considerations arising from the case. While a comprehensive legal analysis

137 | Ibid.
138 | 2014. évi XXIV. törvény az Oroszországi Föderáció Kormánya és Magyarország Kormánya között a Magyarország Kormányának a magyarországi atomerőmű építésének finanszírozásához nyújtandó állami hitel folyósításáról szóló megállapodás kihirdetéséről
139 | Ibid. Section 1.
140 | Ibid. Section 3.
141 | Ibid. Section 3–4.

of this subject would warrant its own article, the following outlines the essential points. In 2015, Hungary formally notified the European Commission of the Paks II project, expressing that in its view, the arrangement did not constitute a state aid measure. However, their reasoning was rejected by the Commission, which subsequently initiated a state aid investigation. In the final analysis, the Commission found that the aid was compatible with the internal market and approved the measure.[142] Interestingly, the Euratom Treaty contains no specific provisions on state aid, as such measures were originally deemed to align with the fundamental aims of the Treaty.[143] The question of how state aid rules under the Treaty on the Functioning of the European Union (TFEU) are to be applied within the nuclear sector was clarified Court of Justice of the European Union in Case C-594/18 P Austria v Commission, concerning the state aid measure provided to the Hinkley Point C nuclear power plant. The Court of Justice held in this case that the provisions of the TFEU apply in cases where the Euratom Treaty is silent. The Court further held that state aid rules are not inconsistent with the previously mentioned objectives of the Euratom Treaty and thus should be applied in the case of nuclear power plants.[144] Returning to the decision of the Commission, it was later challenged by Austria before the General Court, which dismissed the action.[145] However, Austria appealed this decision before the Court of Justice and as of 2025, the Advocate General, Laila Medina, has opined that the appeal ought to be upheld.

Owing to considerable delays in the implementation of the project—delays which now render the commencement of operations more probable to begin in the 2030s—the original loan repayment commencement date of 2026 proved untenable. Consequently, the parties proceeded to amend the loan agreement in 2021,[146] specifically revising the provisions governing the repayment schedule. Pursuant to this amendment, Hungary shall repay the loan over a period of sixteen years, commencing from the date of commissioning of the units, but no later than 2031. Essentially, this amendment postponed the first repayment date by five years, from 2026 to 2031, while simultaneously shortening the overall repayment period from 21 to 16 years. On the face of it, this adjustment does not seem to improve Hungary's position much. However, the underlying rationale is that it is more favourable to start the repayment when the plant is operational and generating revenue. That said, as of 2025, the presumption that the plant will indeed be operational by 2031 is itself increasingly uncertain. The instalments were also changed accordingly: under the amended terms, 10% of the utilised loan is to be repaid in the first two years at an interest rate of

142 | Commission Decision (EU) 2017/2112
143 | Södersten 2022, 811–812.
144 | Sikora 2020, 517–518.
145 | Case T-101/18 Austria v Commission
146 | 2021. évi LXXI. törvény a Magyarország Kormánya és az Oroszországi Föderáció Kormánya között a Magyarország Kormányának a magyarországi atomerőmű építésének finanszírozásához nyújtandó állami hitel folyósításáról szóló, 2014. március 28-án kelt megállapodás módosításáról szóló jegyzőkönyv kihirdetéséről

3.95%; 40% is to be repaid over the subsequent seven years at 4.50% interest; and the final 50% is to be repaid in the last seven years, at an interest rate of 4.80%.

Another additional pivotal development in the trajectory of the Paks II project was the 2015 resolution of the National Assembly, whereby legislation was enacted: an Act granting the Paks II project special status in view of its exceptional significance for the national economy.[147] Among its various provisions, the Act prescribed that documentation and contractual materials related to the project would be exempt from disclosure as data of public interest for a period of 30 years.[148] In effect, this legislative measure essentially rendered the whole documentation of the project inaccessible to the public. In 2016,[149] this stringent confidentiality regime was partially relaxed. The exemption was no longer applied wholesale to all documents, but rather limited to specific trade and technical information, the disclosure of which could either compromise national security interests or infringe intellectual property rights. Notwithstanding this legislative change, the contracts related to the project remained undisclosed. This impasse was ultimately broken in 2019, when the Budapest Regional Court of Appeal[150] rendered a landmark judgment obliging Paks to release the relevant information, including the Engineering, Procurement and Construction (EPC) contract—albeit with the caveat certain sections may lawfully remain redacted.

Regarding the contractual framework underpinning the project, a 'turnkey' Engineering, Procurement and Construction (EPC)[151] contract, drafted in English, was executed between the parties in 2014,[152] along with an equally important Operation and Maintenance Agreement and Fuel Supply Agreement. While a comprehensive analysis of these instruments lies beyond the scope of this discussion, certain pivotal elements warrant emphasis. Under the EPC contract, the Russian party, in its capacity as contractor, is obliged to deliver a turnkey nuclear power plant in compliance with the owner's requirements and applicable regulatory provisions. Conversely, Paks, as the owner, is responsible for making the site available to the contractor free of charge, ensuring its protection at its expense throughout the project, and supplying all pertinent information concerning the site. Of particular legal and practical import is the provision allocating responsibility for the licensing process: under the terms of the agreement, the contractor is designated as the party primarily responsible for securing the requisite licences, with the owner under a duty to render reasonable assistance. However, in practice, the

147 | 2015. évi VII. törvény a Paksi Atomerőmű kapacitásának fenntartásával kapcsolatos beruházásról, valamint az ezzel kapcsolatos egyes törvények módosításáról

148 | Ibid. Section 5.

149 | 2016. évi XIX. törvény a Paksi Atomerőmű kapacitásának fenntartásával kapcsolatos beruházásról, valamint az ezzel kapcsolatos egyes törvények módosításáról szóló 2015. évi VII. törvény módosításáról

150 | A Fővárosi Ítélőtábla Pf. 20775/2019/7. számú határozata

151 | See more: Frank & Fork 2022, 501.

152 | Paks II Engineering, Procurement and Construction (EPC) Contract

differences in the applied standards necessitated a more active role by the owner than mere assistance, who has effectively assumed a leading position in the licensing procedure. Since its original execution, the EPC contract has undergone six amendments, the majority of which pertain to adjustments in project deadlines.

5.2. Site licence

According to the guidance of the IAEA, the siting of a nuclear power plant is an activity for which generally no specific licence is required by national legislations, thus they do not refer to it as one particular licensing stage.[153] Instead, the IAEA foresees the licensing of the site as an integral component of the Preliminary Safety Analysis Report (PSAR),[154] which is to be prepared prior to the authorisation of the construction and is assessed by the regulatory authority in tandem with the evaluation of the plant's design during the construction licensing phase. This position should not, however, be understood as a negation of the importance of site selection. On the contrary, the IAEA has developed detailed practices for selecting an adequate site for a nuclear plant, although it refrains from subsuming these procedures under the rubric of a specific 'site licence'. Accordingly, the IAEA advocates a two-stage approach to site selection. The first stage entails a broad site evaluation process to identify possible locations for nuclear power plants, a task it recommends should be carried out by a ministry or national authority. The second stage involves the detailed evaluation and assessment of a specific proposed site, a responsibility placed upon the prospective licensee.[155]

In Hungary, a markedly different approach has been adopted in contrast to the methodology endorsed by the IAEA. A dedicated site licensing stage has been established as the first nuclear safety licence issued by the HAEA within the broader authorisation process for the construction of a new nuclear power plant. This site licensing process itself is further subdivided into two distinct stages. Proponents of the non-separate site licence approach claim that incorporating site evaluation into the construction licensing procedure—wherein it is considered alongside the key design parameters—yields a more informed and holistic regulatory decision. However, such an approach places greater pressure on the regulator. Conversely, the existence of a separate site licence approach distributes regulatory workload more evenly. While it is true that, at this preliminary juncture, the plant's design is not yet subject to a comprehensive evaluation, the licensee still has to assess the suitability of the proposed site in light of the envisaged design.

The first phase of site licensing in Hungary consists in the granting of the site inspection and assessment licence. As part of this licence, the license applicant

153 | IAEA 2015, 8.
154 | IAEA 2010, 52.
155 | Stoiber et al. 2010, 62–63.

presents the site inspection and assessment program, which sets forth the methods and theoretical consideration intended to be used in evaluating the site, together with a justification demonstrating the adequacy of such methods for the purposes of site assessment. The general rules of the site inspection and assessment licensing stage are contained in Annex I of the NSRs, while more detailed provisions specific to this process are contained in Annex VII, which is specifically dedicated to the site inspection and assessment procedure. Further guidance is provided by Regulatory Guideline 1.1, concerning the siting licence of nuclear installations. At this stage, the primary task of the regulatory authority is to determine whether these presented evaluation methods are adequate for evaluating a site or not. The licence application must include methodologies for evaluating a range of factors, including but not limited to: geotechnical hazards, meteorological conditions, seismic activity, external man-made hazards, floods, fire hazards and biological hazards, etc.[156] The objective of this preliminary stage is to enable the prospective licensee to obtain a decision early on whether the proposed methods are methodologically sound, sufficiently comprehensive, and appropriately tailored to cover all relevant aspects of site suitability.[157] Once these methods are endorsed and subsequently applied to a specific site, their suitability will not be subject to further challenge, thereby ensuring that the site assessment proceeds in a manner that is both effective and procedurally secure.[158]

Paks II, submitted its application for the site inspection and assessment licence in April 2014. Under the applicable regulatory framework, the HAEA was afforded a period of 120 days within which to evaluate the licence application, a period which also encompassed the conduct of a public hearing—an obligatory component of every installation level nuclear safety licence. During the evaluation, the HAEA sought the expert opinion of the 'Hungarian Office of Mining and Geology, Pécs Mining Department' which acted in the capacity of a specialised authority with regard to the geological dimensions of the proposed development. In November In November 2014, albeit beyond the statutory time limit, the HAEA issued the site inspection and assessment licence to Paks II, subject to the fulfilment of certain conditions.[159] From a procedural standpoint, it is noteworthy that at this junction in the licensing process, Paks II held the status not of a licensee, but merely that of an applicant. The legal transition from applicant to licensee occurs only upon obtaining this licence, thus during the procedure the applicant also has to prove that they are qualified to become a licensee.[160] The temporal validity of the site inspection and assessment licence extends until the authority issues the site licence, but may not in any event exceed a period of five years.

156 | NBSZ (NSR) 7.
157 | 1.1. számú útmutató, Nukleáris létesítmények telephely-engedélyezése, 9.
158 | OAH 2025, Telephely-értékelés
159 | OAH, HA5919 határozat, Telephely vizsgálati és értékelési engedély
160 | 1996. évi CXVI. törvény az atomenergiáról art. 17(7).

The second stage of the site licensing procedure involves obtaining the actual site licence. Unlike the site inspection and assessment licence, this phase does not have a dedicated NSR annex, as it is principally concerned with the practical application of the previously approved evaluation methodologies to a specific site. The same regulatory guidelines as those applicable to the inspection and assessment stage remain in force at this juncture. During this stage, the licensee is required to establish two principal assertions: firstly, that no disqualifying conditions exist which would render the proposed site unsuitable for the siting of a nuclear power plant; and secondly, that the site-specific data, obtained through the application of the previous methods, substantiate the future construction of the plant. The findings of the assessments and inspections are included in the final report document, which forms the core of the licence application.[161] This final report demonstrates that the evaluation follows the preapproved methods, and must clearly state whether the findings support a positive or negative determination as to the suitability of the site.[162] Should the licensee elect to employ alternative methods, the report must also provide a substantiated justification for their adequacy.

Paks II submitted its application for the site licence in October 2016, which was issued with some conditions in March 2017,[163] thus exceeding once more the prescribed 120-day evaluation period. The conditions attached to the licence were predominantly technical in nature rather than legal. However one noteworthy requirement imposed upon Paks II was the obligation to carry out an analysis examining the potential effects of site-related activities on the safety of the adjacent Paks I plant, and to submit this assessment prior to the commencement of any implementation works. This obligation aptly reflects a particularly distinctive and complicating feature of the project—namely, that it is situated in the immediate vicinity of an operational nuclear power station.

In 2021, the temporal scope of the site licence was extended, as the implementation licence had yet to be obtained, and the original five-year validity period was approaching its expiration. Under the Nuclear Safety Rules, an extension may be granted by the HAEA, provided the original licensing conditions remain satisfied. In accordance with this framework, the HAEA duly extended the site licence in 2022, prolonging its validity by a further five years.[164]

In the case of Paks II, this less conventional specific site licensing approach, presented notable challenges for the IAEA. The Agency had anticipated that the documentation of the site would be included in the Preliminary Safety Analysis Report (PSAR), customarily submitted during the implementation (construction) licensing stage. However, in the case of Paks II project, such extensive site documentation was absent from the PSAR, as it had already been submitted during

161 | 1.1. számú útmutató, Nukleáris létesítmények telephely-engedélyezése, 18.
162 | Ibid. 18.
163 | OAH, P2-HA0008 határozat, Telephelyengedély
164 | OAH, P2-HA0264 határozat, Telephelyengedély időbeli hatályának meghosszabbítása

the earlier phases of the site inspection and assessment, and the subsequent site licensing stages.[165]

5.3. Other licences affecting the course of implementation licensing procedure

As previously mentioned, obtaining the implementation licence is contingent upon the prior acquisition of additional authorisations issued by authorities other than the nuclear regulator. These ancillary licences occupy differing positions within the broader implementation licensing framework, yet they share the common feature of constituting prerequisites for the issuance of the implementation licence itself. This section shall address two such pivotal authorisations: firstly, the Authorisation in Principle for a Power Plant with Significant Impact on the Electricity System; and secondly, the Environmental Licence. Although both are expressly referenced in the Act on Atomic Energy, their substantive regulation is not contained therein but is instead governed by distinct pieces of legislation.

5.3.1. Preliminary licence issued by MEKH

The first of the requisite ancillary authorisations is the Authorisation in Principle for a Power Plant with a Significant Impact on the Electricity Grid, issued by the Hungarian Energy and Public Utility Regulatory Authority (MEKH). This licence, governed by the provisions of the Act on Electricity, is required in the case of plants exceeding 500 MW in capacity.[166] The purpose of this preliminary licence is to evaluate, at an early stage, the prospective integration of such a large-scale installation into the national electricity system, with particular regard to the availability of domestic reserves. This preliminary assessment is conducted prior to the commencement of other licensing procedures in which the authority would be limited to examining the formal adequacy of the application materials.[167] Additionally, this stage provides the possibility to the grid operator to identify what infrastructural upgrades might be needed to accommodate the projected output of the plant. By conducting this analysis at a preliminary stage, the legislation seeks to forestall a scenario in which grid infrastructure might prove inadequate at the time the plant enters into commercial operation. The Act on Electricity specifically mentions that for nuclear power plants, this licence may only be applied for after the decision-in-principle has been granted by the National Assembly. Furthermore, it stipulates that the implementation licensing procedure may not be initiated until the MEKH's authorisation-in-principle has been granted. In the case of the Paks II project, this authorisation was duly issued in 2017. This authorisation-in-principle is not the

165 | Katona 2024, 408–409.
166 | 2007. évi LXXXVI. törvény a villamos energiáról, Section 80/A
167 | 2007. évi LXXXVI. törvény indoklása a villamos energiáról

sole licence which has to be obtained under the Act on Electricity. The electrical implementation licensing procedure for power plants with a capacity exceeding 50 MW likewise applies to Paks II, and this licence was obtained in 2020.[168]

5.3.2. Environmental licence[169]

Although environmental licensing falls outside the ambit of the nuclear safety licensing regime, it nonetheless constitutes an indispensable element in the authorisation process of a new nuclear power plant, given the paramount importance of environmental protection in relation to such installations—a principle underscored by international instruments such as the Convention on Nuclear Safety (CNS).[170] In some countries, environmental licences are issued also by the nuclear regulatory authority itself, while in others this task is entrusted to a separate authority, which may not, in all cases, oversee the entire environmental licensing process.[171] The initial question in this context is whether the construction of a nuclear plant constitutes a 'use of the environment' within the meaning of Act LIII of 1995 on the General Rules of Environmental Protection. Unsurprisingly, the answer to this question is affirmative.[172] In Hungary, nuclear power plants—irrespective of their generating capacity—are required an integrated environmental licence, specifically an Environmental Impact Assessment (EIA) procedure.[173] This requirement is not only mandated under domestic law, but also constitutes an obligation under European Union law.[174] The Paks II project initiated preliminary consultations regarding the environmental licence in 2012, and by 2014, the Environmental Impact Assessment had been completed. This assessment addressed a wide range of potential environmental effects, including noise pollution, dust emissions, cooling water (thermal) discharges into the Danube, and the management of radioactive waste.[175] Public hearings were held in the course of the national EIA procedure, though no material objections were raised therein. In addition to the domestic EIA, a transboundary environmental impact assessment was also required under Hungary's obligations pursuant to the Espoo Convention. Accordingly, in 2015, a transboundary EIA procedure was launched, resulting in seven public hearings being conducted in participating states. This procedure was brought to a conclusion in 2016.[176] Subsequently, later that same year, the Baranya

168 | MEKH H 2413/2020 erőmű létesítésére vonatkozó engedély
169 | See more: Bujtás & Pécsi 2024, 511–555.
170 | Convention on Nuclear Safety 1994.
171 | Raetzke 2013, 69–70.
172 | Kocsis 2017, 79.
173 | 314/2005. (XII. 25.) Korm. rendelet a környezeti hatásvizsgálati és az egységes környezethasználati engedélyezési eljárásról
174 | Directive 2011/92/EU of the European Parliament and of the Council
175 | Kocsis 2017, 84.
176 | Baranya Megyei Kormányhivatal 78-140/2016 környezetvédelmi engedély 74

County Government Office issued the first-instance environmental licence to the plant.[177] However, this decision was swiftly challenged by environmental and anti-nuclear organisations. In 2017, the Pest County Government Office upheld the first instance decision.[178] Dissatisfied with the outcome, the same organisations sought judicial review of the licensing decision, but their challenge was ultimately dismissed by the courts.[179] The crucial nature of the environmental licensing process in relation to the nuclear safety licensing procedure lies in the fact that the implementation licence may not be issued in the absence of a valid the environmental licence. While the applicant is permitted to initiate the implementation licensing procedure prior to obtaining the environmental licence, the implementation licence itself cannot be granted until the latter has been secured.

Additionally, in the context of environmental licensing, a few remarks must be made concerning the licence extension of the Paks I nuclear power plant.[180] Although the necessity of conducting EIAs for the long-term operation of existing nuclear installations is a subject of ongoing debate—and regulatory practices across jurisdictions remain far from uniform[181]—Hungary, elected to conduct an EIA during the Paks I licence extension process. What is more, both the licensee and the Authority were of the opinion that a transboundary EIA is not needed for a licence extension.[182] However, due to significant international interest in the authorisation procedure, a transboundary environmental impact assessment was ultimately initiated, in accordance with the provisions of the Espoo Convention. Some commentators have characterised this particularly rigorous approach to environmental impact assessment as a form of retrospective rectification—a compensatory measure, as it were—for the absence of such procedures during the original licensing of the plant.[183] However, the rationale behind this approach is arguably more nuanced. On the one hand, at the level of the European Community, the first directive[184] mandating EIAs was only adopted in 1985, three years after the commissioning of the first unit of Paks I. Prior to that, environmental impact assessments were not yet a standard procedural requirement.[185] On the other hand, while a full-scale EIA procedure was not carried out initially, certain environmental aspects—such as the plant's impact on air and water quality—were nonetheless subject to scrutiny.[186]

As various legal scholars and practitioners have observed, environmental assessment procedures, though not themselves determinative of the fate of a

177 | Ibid.
178 | Pest Megyei Kormányhivatal PE-KTF/203-40/2017. határozat
179 | Kocsis 2019, 67.
180 | See more: Paulovics 2020, 360–375.
181 | Sexton Nick 2022, 22.
182 | Elter, Katona & Pécsi, 9.
183 | Emmerechts & Bourdon 2020, 11.
184 | Council Directive 85/337/EEC
185 | Bond & Wathern 1999, 234.
186 | 3296/19876. MT. határozat

nuclear project, are designed to ensure that authorisation decisions are made on the basis of the most complete and reliable information available.[187] This principle lies at the heart of all licensing regimes. Nevertheless, the influence of such procedures on public perception—and by extension, on the broader social acceptability of nuclear energy—ought not to be underestimated.

5.4. Implementation licence

In the licensing sequence, the stage following the granting of the implementation licence diverges from the approach applied to site licensing, in that subsequent licences have to be obtained separately for each reactor unit, rather than through a single licence for the whole plant as in the case of the site licensing procedure. The implementation licence thus serves as something of a transitional stage while the licensee may submit a unified application covering all proposed units, the regulatory authority is required to issue individual decisions for each reactor unit separately.

Hungarian legislation does not provide for a dedicated pre-licensing stage where a given reactor design may be granted generic approval in advance of plant-specific licensing. Nevertheless, given the relatively modest scale of Hungary's nuclear energy programme—and the correspondingly limited number of reactors that might realistically be deployed—this omission has not, to date, presented a major regulatory obstacle. That said, in the wake of a nuclear renaissance with SMRs, the introduction of such a design certification stage may warrant reconsideration in future regulatory reforms.

Nevertheless, while it does not constitute a formal pre-licensing phase, there exists an important preliminary stage which may materially influence the course of the implementation licensing procedure. This step is the submission of the Preliminary Safety Information (PSI), a document which serves a dual function: first, to demonstrate that the proposed plant complies with the safety requirements; and second, to provide the regulatory authority with adequate information at an early stage of the process. Within the PSI, the licensee is expected to evidence compliance with nuclear safety rules by presenting data from reactors similar to or identical to the one proposed. Although the submission of the PSI is not mandatory, it holds considerable practical relevance. In particular, its timely submission enables a reduction in the statutory timeframe for the implementation licensing procedure from eighteen months to twelve., However, the implementation licence application itself may only be lodged twelve months after the PSI has been submitted.

Turning to the implementation licence proper, it is by far the most comprehensive and extensive of all nuclear safety licences, as it includes the entire design of the plant. Notwithstanding its scope, the implementation licence does not in itself authorise the commencement of any physical construction works. Rather, it functions as

187 | Sexton Nick 2022, 23.

an 'umbrella licence' which permits obtaining individual licences for building,[188] manufacturing procurement, and installation works, collectively referred to as system and component nuclear safety licences. As such, the implementation licence, in its capacity as an 'umbrella licence' constitutes a detailed and authoritative confirmation that the overall design concept of the plant is sound and that the plant, as envisaged, may be operated safely on the chosen site. The regulatory framework governing the implementation licensing process is set out across three annexes to the Nuclear Safety Rules: NSR 1, governing the nuclear safety procedures of installations; NSR 3a, which sets out design requirements for new nuclear power plant units; and NSR. 9, which details the provisions governing the design and construction phase of new nuclear installations. These are complemented by their corresponding guidelines, which offer further elaboration and practical interpretation.

The central document in the implementation licensing process is the Preliminary Safety Analysis Report (PSAR), which substantiates the plant's compliance with all applicable regulatory requirements necessary for the plant's implementation. The content and structure of the PSAR is detailed in a separate guideline, which itself extends to over 200 pages.[189] Besides the core contents of the PSAR, a wide array of supplementary technical and supporting documentation must be submitted. For instance, while the PSAR contains the summaries of the deterministic and probabilistic safety analyses, their comprehensive versions are provided as separate attachments.[190] The PSAR can specify building works—though the scope of these is strictly limited—and long-lead manufacturing components in respect of which the building and manufacturing licences can be obtained before the implementation licence is issued, provided these are expressly approved in advance by the regulatory authority. This procedural flexibility was introduced by the legislature in recognition of the complexity and duration of the implementation licensing process, with the aim of enhancing project efficiency by allowing preparatory works on time-critical components to proceed. However, any risk arising from this approach—namely, that the implementation licence might ultimately not be issued—rests entirely with the licensee.[191]

Another key document in the licensing process is the Nuclear Accident Response Action Plan, which has to first be submitted at this stage, and then continuously revised, to ensure preparedness for radiological emergencies. Since the new Paks II plant is being built adjacent to the operational Paks I facility, these action plans have to be aligned with those already in place for the existing units.[192]

188 | See more: Kádár & Majoros 2024, 692. As of 2016 the HAEA also acts as a general building authority and building supervisory authority in the nuclear safety zone of the nuclear installations.
189 | N3a.34. sz. útmutató, Új atomerőművek biztonsági jelentései.
190 | N1.2. sz. útmutató, Új atomerőművi blokk létesítési engedélyezési dokumentációjának tartalmi és formai követelményei, 22.
191 | 1996. évi CXVI. törvény az atomenergiáról, Section 12(7).
192 | N1.2. sz. útmutató, 17.

In the case of the Paks II licensing process, the PSI was submitted in 2015, projecting the reduction of the implementation licensing process from 18 to 12 months. The formal implementation licence application, accompanied by very extensive documentation, was submitted in 2020. The PSAR alone comprised in excess of 37,000 pages, supplemented by a further 40,000 pages of technical documentation, with the authority subsequently requesting more than 200,000 pages of further documentation.[193] In parallel, the licensee used the opportunity to licence long-lead manufacturing components prior to the implementation licence being issued. Consequently, the manufacturing licenses of the core catchers were granted before[194] the issuance of the implementation licence, one of them has already arrived on.[195] The IAEA was also involved in evaluating the implementation license application. Their group of experts made some remarks; however, their overall opinion of the documentation was positive. The HAEA ultimately granted the implementation licences for both units in August 2022. However, the procedure, which ought to have been completed within twelve months by virtue of the PSI, extended to a full twenty-four months. Moreover, the licences were not granted unconditionally: the HAEA imposed a hold-point requiring the submission of a revised PSAR.[196] A revised version of the PSAR was submitted later that same year, followed by an extended period of iterative consultation between the licensee and the authority, This process culminated in the submission of the final version in 2024.[197] Although not formally mandated by law, the HAEA initiated a procedure to evaluate the removal of the hold-points, which subsequently led to the granting of an unconditional implementation licence.[198] Currently, this marks the latest stage in the Paks II licensing process in relation to installation-level authorisations. Meanwhile, system- and component-level licences are still being issued based on the implementation licence. As part of this ongoing process, the first concrete pouring—expected to occur in March 2025—is anticipated to formally designate the Paks II project as an active nuclear power plant construction under the criteria of the International Atomic Energy Agency.

5.5. Commissioning licence

The next installation-level nuclear safety licence to be obtained following the plant's construction is the commissioning licence. Unlike the previous licensing stages, no dedicated annex or standalone guideline has been issued specifically

193 | OAH 2025, Létesítési engedélyezés
194 | On 30 June 2022, which meant that in reality, the benefits of long-lead manufacturing licensing were not fully harnessed.
195 | Paks II. 2024
196 | OAH, P2-HA0375 határozat, Létesítési engedély
197 | OAH 2024
198 | OAH, P2-HA0696 határozat, Visszatartási pont feloldása

for this phase. However, it is addressed within the framework of NSR 1, beginning from Section 1.2.4.0100, as well as in the guideline concerning the Safety Analysis Report of New Nuclear Power Plants.

This licensing stage confirms that the plant was built according to the design intent, and that the as-built facility conforms with both the expectations of the regulatory authority and the applicable regulatory requirements.[199] The central document of the commissioning stage is the Preliminary Final Version of the Safety Analysis Report (SAR)—an updated and actualised version of the PSAR. This revised SAR must incorporate the details of the commissioning programme, including its various stages, the stakeholders involved, and updated technical data based on the completed construction of the facility.[200] The said commissioning program governs the initial start-up of the plant encompassing the systems checks, tests and the evaluation of these results.[201] The aim of this evaluation is to assess whether the plant is fit for commissioning in accordance with the relevant requirements. The subsequently performed commissioning is the confirmation of the correct functioning of the plant's systems. Once obtained, the commissioning licence allows the licensee to undertake the first fuel load into the reactor, execute the commissioning program in its entirety—including the active testing of systems—and, most significantly, proceed with the initial start-up and operation of the plant at nominal capacity.

Another critical document of the commissioning phase is the finalised version of the Nuclear Accident Response Action Plan, initially submitted during the implementation licensing stage. This plan has to be updated according to the commissioning process and submitted as part of the licence application prior to the arrival of the first nuclear fuel at the site.[202] The statutory duration of the commissioning licensing procedure is 11 months, and the licence is valid for 12 months. However, in view of the inherently time-consuming nature of the requisite testing and the staged nature of the initial operational activities, the authority is entrusted with discretion to extend the duration of the licence, provided that a well-founded justification is duly submitted.

5.6. Operation licence

While the commissioning licensing stage allows for test operation, it does not permit commercial operation; for that purpose, the operation licence must be obtained. This licence is sought on the basis of the operational insights gained during the commissioning phase, which serve to inform and substantiate the licence application. As with earlier stages, the central document of the operation licence application is the final iteration of the Safety Analysis Report (SAR). This

199 | 1/2022 (IV. 29.) OAH rendelet, Section 12(1).
200 | N3a.34. sz. útmutató, Új atomerőművek biztonsági jelentései, 150.
201 | Ibid. Section 145–149.
202 | N1.2. sz. útmutató, 19.

definitive version consolidates the findings and experiences accrued during the commissioning stage, elaborates on the changes that have occurred compared to the commissioning stage, and demonstrates that the safe operation of the plant is provided under it. The approach that the operation licence is based on the commissioning experiences aligns with the obligations under the Convention Nuclear Safety (CNS),[203] which prescribes that operation must be predicated on a prior commissioning program. In addition to the SAR, in order to obtain the licence, it is equally important to prove that the radioactive waste and spent fuel originating from the plant is going to be stored. This requirement entails providing evidence that such materials will be handled in accordance with the latest scientific knowledge and in compliance with internationally accepted standards—whether through final or interim storage solutions. Although the CNS does not explicitly prescribe such storage as a condition for licensing, it does require that due consideration be given to waste disposal as part of operational planning.[204] The statutory duration of the operation licensing procedure is eleven months, mirroring that of the commissioning licence., Upon completion of the review, should the authority determine that all criteria are met, the operation licence is granted. This licence entitles the licensee to operate the unit in accordance with the terms and conditions therein, for a defined operational period. This operational period is determined by the authority based on the specifications of the plant. Although it may vary from plant to plant, but it cannot exceed the reactor's operational lifespan. In essence, the operation licensing stage is the final step before commercial operation. It is during this phase that all documentation of the plant is brought to its final form, and the experiences of the commissioning stage are evaluated.

6. Deployment of Small Modular Reactors (SMRs) in Hungary

In this potential nuclear renaissance, many countries express a strong dedication towards SMRs, —a trend observable even within our region, as evidenced by initiatives in Romania or Poland. While Hungary's enduring interest in nuclear remains unequivocal, its approach to advanced nuclear technologies has, thus far, been comparatively measured.

Currently, Paks I operates under licences valid until the period 2032-2037, which coincides with the anticipated commissioning timeline of Paks II. However, the licences of Paks I, will most likely be renewed once more for another 10 or 20 years, resulting in a prolonged phase of simultaneous operation between the two plants. It is within this prospective overlap that Hungary must confront a pivotal strategic question—if nuclear power remains a cornerstone of national energy

203 | Convention on Nuclear Safety 1994, Section 19(I).
204 | Ibid. 19(VIII).

policy, should the country pursue the construction of a new large-scale nuclear facility, or instead transition to the deployment of SMRs as a means of replacing the ageing Paks I infrastructure? This question gains heightened significance in view of recent industrial developments across Hungary that will likely result in considerable increases in electricity demand. Notable examples include the BYD automotive factory in Szeged and the BMW production facility in Debrecen. In light of such decentralised industrial expansion, SMRs would seem like a reasonable option. This realisation has emerged across multiple levels. In 2023, the Minister of Energy, Csaba Lantos, expressed his belief that a third nuclear power plant is needed in Hungary, around 2029-2030, probably in the form of an SMR in proximity to regions exhibiting increased electricity consumption.[205] A similar position is reflected in the long-term planning of the Hungarian Electricity Works Company (MVM), whose Strategy 2035 envisions the possible deployment of a 300 MW SMR within Hungary as part of its broader energy diversification efforts.

SMRs pose a host of legal and regulatory challenges to the existing nuclear law frameworks.[206] Historically, the national nuclear licensing frameworks were developed with a view to accommodating conventional, large-scale nuclear power plants, and as such, they do not always accommodate the particularities of SMRs with ease or flexibility.[207] The case is similar in Hungary, where the nuclear licensing framework was tailored to accommodate conventional large nuclear power plants, more specifically pressurised water reactor (PWR) technologies.[208] The technological specificity embedded in the structure of the licensing system renders it fundamentally incompatible with alternative reactor types. Accordingly, SMRs employing boiling water reactor (BWR) or CANDU technologies cannot currently be licensed under the prevailing legal framework—still less those utilising advanced reactor technologies, such as high-temperature gas-cooled or molten salt reactors. Thus, under the current legal framework, only SMR designs based on PWR technology may be eligible for licensing, significantly constraining the diversity of viable options. In addition to technological limitations, the regulatory approach itself poses further obstacles. Broadly speaking, two principal models of regulatory oversight may be distinguished: the prescriptive-based and the performance-based approaches. The former provides the licensee with a detailed description on how to meet a given objective, while the latter sets a performance objective and then entrusts the licensee to meet this target in the way they deem it appropriate. Although prescriptive approaches have a lot of benefits from the perspective of SMRs, the detailed concrete characteristics contained in the legislation to which SMRs would have to adhere can be considered excessive in light

205 | Világgazdaság 2023
206 | See more on the challenges that SMRs pose to the international nuclear law framework: Van Kalleveen 2022, 4–13.
207 | Ramana, Berzak Hopkins & Glaser 2013, 556–557.
208 | Adroján & Rétfalvi 2022, 4.

of their smaller size and increased safety.[209] In contrast, a performance-based model—by setting safety goals without a mandated method to reach it—offers greater flexibility and is more conducive to the licensing of advanced and innovative reactor designs[210]. Hungarian nuclear regulation, as articulated in the Nuclear Safety Rules (NSRs), broadly aligns with a performance-based approach, albeit supplemented by some prescriptive elements.[211] These prescriptive provisions, typically contained in accompanying regulatory guidelines, do not per se preclude the licensing of SMRs; however, deviation from the prescribed methods invariably entails longer procedures and increased costs. Therefore, while the framework may not impose an outright barrier to SMR deployment, it does render the process more onerous for non-conventional designs. An additional barrier in the national legal frameworks in front of SMRs is the excessive emergency preparedness zones (EPZs) that reflect large-scale plants and have significant financial implications. The size of these and the associated cost with the maintenance of these zones combined with the fact that SMRs in given applications should be located nearby the end users, means that these traditional approaches are not adequate for SMRs.[212] Indeed, many SMR developers advocate for the reduction—or in certain cases, the complete removal—of EPZs, leveraging the reactors' enhanced safety profiles and passive safety features to justify a more flexible, goal-setting approach. In Hungary, we have a traditional large minimum 30 km EPZ, which could be burdensome for SMR designs planned to be deployed, it would be prudent to reassess the EPZ requirements, and consider adopting a more performance-based and proportionate framework, rather than maintaining fixed numerical thresholds.

Devising efficient and effective regulatory solutions for advanced technologies such as SMRs is an inherently complex undertaking. Regulatory authorities generally do not have experience with these plants from which they can draw conclusions, moreover even if they have the designs are so varied that a licensing solution appropriate for one reactor would not necessarily be readily applicable to another. Generally, these licensing solutions should take into consideration the specific features SMRs, the fact they seek to be standardised the increased safety features, their economics which is different from the economies underpinning large conventional nuclear power plants. In addressing these national regulatory constraints, international cooperation emerges as a crucial instrument. Such cooperations that may assume a wide array of forms—ranging from informal information-sharing networks among regulatory bodies, to more structured initiatives aimed at developing harmonised licensing frameworks.[213]

209 | Sam, Sainati, Hanson & Kay 2023, 4.
210 | Dandy 2020, 7–36.
211 | Móga 2019, 3.
212 | Sam, Sainati, Hanson & Kay 2023, 4.
213 | Olajos 2016, 367–396.

Hungary to this end, has actively pursued international cooperation across multiple levels. A notable example of this engagement is the strategic partnership established between Hungary and the United Kingdom, centred upon the industrial development of Small Modular Reactors. This partnership not only signals Hungary's general commitment to the advancement of SMR technologies, but also reflects a particular interest in the Rolls-Royce reactor design.[214] This dedication comes after the HAEA signed a Memorandum of Understanding with the United Kingdom's Office for Nuclear Regulation (ONR) in 2024, a key aspect of which focused on SMR[215] regulatory experience sharing, particularly in connection to the development of the Rolls-Royce technology. Although, at present, the most advanced regulatory discussions concern the Rolls-Royce design, this by no means implies a definitive commitment to its deployment in Hungary. In fact, the Hungarian Foreign Minister has recently expressed interest in alternative technologies, including that offered by Westinghouse.[216] In parallel, Hungary also participates in a number of multilateral initiatives concerning the deployment of SMRs under the auspices of IAEA, Euratom, and the EU. As of yet, however, no formal announcement has been made regarding potential legislative or regulatory amendments to accommodate SMR deployment, nor is it presently known what such amendments, if introduced, might entail.

7. Conclusions and *de lege ferenda* proposals in the context of a nuclear renaissance

Hungary's association with nuclear energy spans several decades and, for the foreseeable future, nuclear power will remain a cornerstone of our electricity generation portfolio. The domestic legal framework governing the peaceful use of nuclear energy has undergone a marked evolution—transforming from the early transpositions of Soviet-type regulations into a sophisticated modern regime aligned with binding international instruments and reflective of the soft law developments of international organisations. Since the inception of the Paks II project, significant progress has been achieved in refining this legislative framework, with various legal innovations introduced in response to the practical challenges encountered. One unequivocal conclusion emerges: the realisation of nuclear projects serves not only as a testbed for the operability of the regulatory framework but also as a catalyst for its evolution. This dynamic has been manifestly evident in the case of Hungary, where the implementation of the Paks II project has prompted numerous legislative amendments aimed at streamlining procedures without compromising

214 | Portfolio 2025
215 | Világgazdaság 2024
216 | Portfolio b 2025

nuclear safety. Such developments include, inter alia, the licensing of long lead manufacturing items the 'notification acknowledgment' and 'derogation notification acknowledgement' procedures or the elevated role of the authorised inspection organisations. Experts directly involved in the project have observed that, were the licensing procedure of the Paks II to begin under the current legal regime, the timeline for its execution would be appreciably shorter due to the more mature and responsive regulatory architecture now in place.

A crucial consideration that should go hand in hand with adopting more streamlined licensing procedures is the position of the regulator in the sector. To the uninitiated, increased procedural efficiency may give the superficial impression of a retreat from safety—an inference that is wholly unfounded, particularly when one considers the markedly improved safety characteristics of Generation III+ reactors. Nonetheless, when such streamlined procedures are adopted by truly independent—both from politics and the industry—expert bodies then the validity of these decisions is a lot less questionable. In this regard, the structural reorganisation of the HAEA in 2022 has yielded a favourable situation, as Hungary now benefits from an effectively independent regulator entrusted not only with supervisory but also with legislative competences in the nuclear domain. Currently, the Hungarian legislative and regulatory landscape provides a solid foundation for a nuclear renaissance. However, it remains more attuned to the continued deployment of conventional nuclear technologies—particularly in view of the ongoing construction of Paks II and the anticipated extension of the operating licences of Paks I—than to the prospective deployment of advanced technologies such as Small Modular Reactors. Should Hungary, as part of this emerging renaissance, choose to pursue SMR deployment, certain elements of the extant licensing regime would need to be reconsidered to accommodate the distinct characteristics of such technologies. Although the author does not endeavour to present a comprehensive analysis on how to advance the licensing of these technologies, several preliminary considerations may be identified for further scholarly exploration.

A key requirement for a licensing regime suitable to SMRs is that it be both efficient and economically proportionate. Traditional long-licensing systems are invariably costly, and these costs are largely fixed irrespective of plant capacity—meaning that smaller reactors bear a disproportionately high licensing cost per megawatt. Any legal or procedural innovation that reduces the financial and temporal burden of licensing would, therefore, materially support the viability of SMR deployment.

Given that SMRs are proposed to be built more in a factory environment and then transported to the site, the works at the actual site are supposed to take a lot shorter then for conventional plants. Moreover, SMRs vendors also generally claim that sites should be less of a limiting factor on their deployment. Considering these features, two proposals can be made. Firstly, for SMRs, it is worth looking into making the licensing process more front-loaded and introducing pre-licensing

or design certification procedures to provide more certainty to the applicant and familiarize the authority early on with the proposed design. These procedures, currently absent from the Hungarian framework, could provide prospective applicants with greater regulatory certainty at an early stage while simultaneously allowing the authority to familiarise itself with the proposed design. This would be particularly advantageous given the standardised nature of SMR technologies, which are not intended to be extensively adapted to individual national frameworks. Secondly, although the separate site licensing stage is believed to be a beneficial element of the traditional licensing process, it is worth considering how its possible effectiveness could be increased to respond to the less site-dependent features of SMRs. This can be done either by a more risk-informed approach to the siting licence, weighing in their increased safety, but then the design considerations should be more accentuated, or by moving towards a joint licence for the implementation and the siting. Regarding the implementation licensing stage, it is worth addressing the possibility of deploying multiple SMRs of the same design in the country at different locations. Such a question would not be raised for conventional plants in a country the size of Hungary, but for industrial SMRs it is imaginable that the same design could be deployed at multiple locations. In these cases, the implementation licensing procedures should consider the previous evaluation and seek to not replicate all the assessments that are not necessary. The form of how to prevent this multiplication of the same procedures can be done in different ways, possibly in the form of a general implementation licence for the given design. Another issue that is worth assessing is the modularization of SMRs. Compared to large-scale plants SMRs are proposed to be deployed with larger unit numbers, but the currently in Hungary in case of implementation, commissioning, and operation stages licences are issued by the units, and in case of the latter two even the application cannot be submitted jointly for multiple units that is not an issue for large scale plants since there are fewer units which are not going to reach the commissioning and operation stage simultaneously. In the case of the commissioning and operation stages, due to their respective aims, it can still be argued that the licences should be granted by units, but it might make the procedure more efficient if the applications could be launched together for multiple units, reflecting their more standardized nature. Such an approach if the units would reach commissioning and operations simultaneously, could reduce procedural burdens.

Beyond the legal and procedural issues outlined herein, it must be acknowledged that the deployment of advanced reactors will inevitably bring forth novel regulatory challenges that cannot yet be fully anticipated. The first licensing procedures will likely encounter unforeseen complexities. Nevertheless, until such time as deployment begins in earnest, the country should strive to prepare as much as possible by paying attention to international development the outcomes of which can be implemented through the periodic review of the legislative framework.

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Sirja-Leena PENTTINEN[1]

Nuclear Energy in Finland[2]

Abstract

Finland has an ambitious decarbonisation agenda aiming for climate neutrality by 2035. The country relies significantly on nuclear power to meet its energy needs. Finland operates five nuclear reactors across two power plants, with a combined capacity of over 4,000 MWe. Finland is also a global leader in nuclear waste management, hosting the world's first permanent underground repository for spent nuclear fuel at Onkalo. This article provides a comprehensive overview of nuclear energy in Finland, focusing on its current state, regulatory framework, and future prospects. The regulatory framework governing nuclear energy in Finland is robust, involving multiple authorities and a detailed licensing procedure. Recent trends indicate a growing interest in small modular reactors for district heating and power production, necessitating potential legislative reforms to accommodate these technologies.

Keywords: nuclear, small modular reactors, decision-in-principle, nuclear waste management

1. Introduction

Finland is an EU member state located in Northern Europe, with neighbouring countries Norway, Sweden, Estonia, and Russia. The country has a vast land area covered in forests and lakes. It is scarcely populated, with the majority of the population located in the south. Finland has relatively long winters, with several months of cold, sometimes even extreme cold, periods, with a milder climate in the south. In 2023, electricity consumption in Finland was about 14,000 kWh/yr per capita.[3]

1 | Dr Sirja-Leena Penttinen, Associate Professor (tenured) in Law and Sustainability Transitions (Faculty of Law, University of Lapland, Finland), sirja-leena.penttinen@ulapland.fi

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3 | IEA.

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Finland features a highly developed and predominantly free-market economy. This economic structure is marked by significant industrialisation and a high standard of living, combined with a Nordic welfare state model, as evidenced by the high gross domestic product per capita.

Finland also has a very ambitious decarbonisation agenda: climate neutrality by 2035.[4] This objective is part of a broader strategy to transition to a low-carbon economy. Naturally, this objective has wide implications for the energy sector as well. The climate neutrality target also foresees the complete phase-out of coal by 2029. As a result, some coal-fired power production facilities have already been shut down.[5]

Finland participates in the Nordic wholesale electricity market, Nord Pool, which encompasses the Nordic countries as well as the Baltic States. Following the enactment of the Electricity Market Act (588/2013) in 1995, Finland's electricity market underwent a gradual liberalisation process. By late 1998, this deregulation allowed all electricity consumers, including private households, to select their preferred electricity suppliers.

A unique national characteristic of the country is that energy-intensive industries have invested heavily in large-scale energy production. Energy-intensive companies have adopted a strategy of jointly investing in electricity production facilities, selling power to shareholders at a cost price. This financing method, known as the Mankala model, helps mitigate the impact of rising prices and market volatility in liberalised electricity markets, effectively distributing risk.[6] Approximately one-third of the electricity produced in Finland is produced under the Mankala model.[7] The Mankala model was also significant in the 1970s, enabling the financing of the first major nuclear power facility projects in Finland.

These characteristics of Finland have dictated the choices made in the country's energy sector. The national energy mix is very diversified, relying on multiple sources of energy. The current electricity generation in Finland relies on nuclear and hydropower, in particular. Figure 1 illustrates the electricity generation sources in Finland in 2023.[8]

4 | State Treasury 2021.
5 | See e.g. Helen 2021.
6 | On the Mankala principle and competition law, see Talus and Guimaraes-Purokoski 2011.
7 | TVO 2023.
8 | IEA.

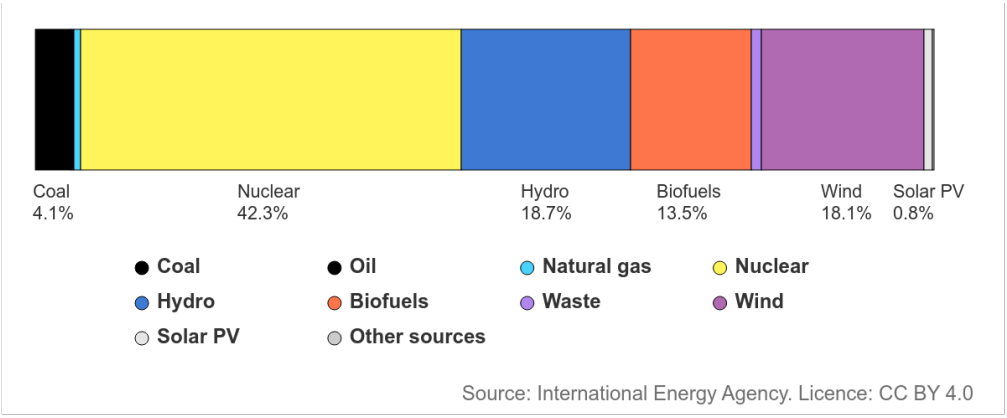

Figure 1. Electricity generation sources, Finland, 2023

This article discusses the current state of play regarding the regulation of nuclear energy in Finland.[9] The following section, Section 2, provides an overview of the nuclear reactors in Finland. Section 3 discusses the current institutional and legislative framework on nuclear energy, whereas Section 4 details the licensing framework for nuclear energy. Section 5 provides an overview of the nuclear waste management and the state-of-the-art final nuclear waste disposal facility in Finland. Section 6 discusses some recent trends that have led to the discussion on the need for legislative reforms before conclusions.

2. Nuclear reactors in Finland

Finland currently has five nuclear reactors in operation. Two reactors are in a nuclear power plant in Loviisa in southern Finland, and three in the Olkiluoto Nuclear Power Plant in the south-west of Finland. The total capacity of these reactors is 4,394 MWe.

Both of the Loviisa reactors and Olkiluoto 3 are pressurised water reactors, whereas Olkiluoto 1 and 2 are boiling water reactors. Loviisa 1 was the first nuclear reactor in Finland. It was brought online in 1977, with Loviisa 2 following in 1980. The peculiarity of Loviisa nuclear facility is that, while the reactors are Russian pressurised water reactors, they were modified at the request of the owner to comply with Western safety standards of the day.[10] Loviisa Nuclear Power Plant is owned and operated by Fortum, a large energy utility with main operations in the

9 | On the development of nuclear law in the EU, see Engstedt 2020; on the regulation of nuclear power at an international level, see Negri della Torre 2020, 565–568.
10 | Hyvärinen, Riikonen, Telkka, Hujala, Kouhia et al. 2024, 112935.

Nordics. Both Loviisa 1 and 2 reached their original design lifetime of 30 years in 2007 and 2010, respectively. Both reactors were granted a lifetime extension, i.e. new operating licenses in 2007, allowing the Loviisa nuclear facility to continue operation until the end of 2050.[11]

Loviisa nuclear facilities will undergo a modernisation process starting in 2026, which is planned to be carried out in conjunction with the normal annual outages. The project entails the replacement of eight low-pressure turbine housings and their internal components. This process is expected to substantially enhance the efficiency of the facility's electricity generation, while maintaining the reactor's thermal output at its current level.[12] In addition, steam turbines' protection systems and control systems are being upgraded as the current systems are reaching the end of their technical service life, and the availability of spare parts is limited.[13] These modernisation projects rely on a multi-package contract model, involving multiple contracts for different aspects of the project, allowing for greater flexibility and the involvement of various specialised contractors.

Olkiluoto 1 and 2 are identical nuclear reactors. Power production in Olkiluoto 1 started in 1978 and Olkiluoto 2 in 1980. Olkiluoto Nuclear Power Plant is owned and operated by an energy company, Teollisuuden Voima (TVO). The construction of the Olkiluoto 3 reactor began in 2005. The plant supplier consortium companies Areva NP, Areva GmbH, and Siemens AG, as well as the Areva Group parent company Areva SA, built the plant unit according to a fixed-price turnkey contract.[14] Olkiluoto 3 became a world-famous project for being delayed by over 10 years from its original schedule.[15] It was initially planned to be completed in 2009, and finally to go online in 2022. The reactor is currently the biggest nuclear reactor in Europe, with a net capacity of 1,600 MWe, making it a part of the top ten also on a global scale.[16] Figure 2 illustrates the evolution of electricity generation sources in Finland since 2000.[17] The sharp spike in nuclear energy production is due to Olkiluoto 3 finally coming online in 2022. Wind has also increased its share in the generation mix, while hydro has served and continues to serve as the backbone of the electricity generation portfolio.

11 | Valtioneuvoston päätös 2023.
12 | Fortum 2024a.
13 | Fortum 2024b.
14 | TVO 2021.
15 | Vanttinen 2020.
16 | Statista.
17 | IEA.

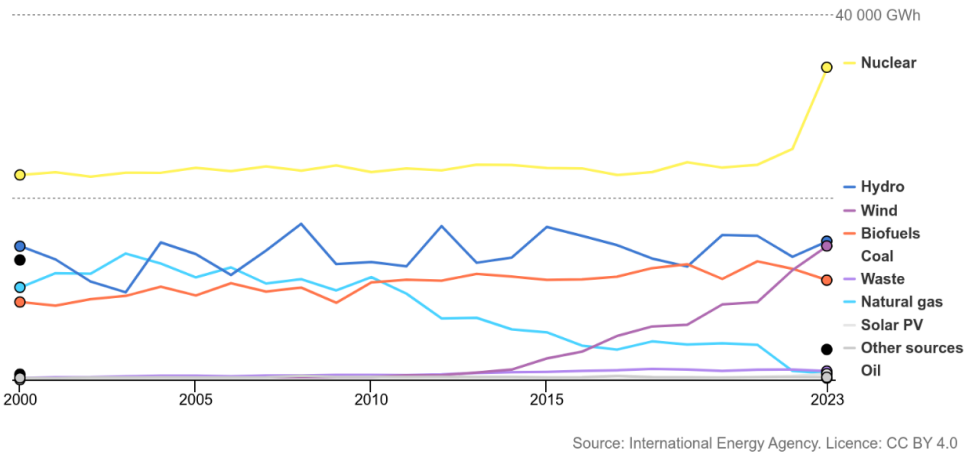

Figure 2. Evolution of electricity generation sources in Finland since 2000.

In addition to actively increasing the share of nuclear energy by building new reactors, Finland also hosts the world's first permanent underground repository for nuclear waste, discussed in more detail in Section 4.

In addition to these commercial-scale power production facilities, a 250-kW reactor was commissioned in 1962 from the USA for research and educational purposes. Furthermore, towards the end of its operational life, it was also used for healthcare. Located on the Aalto University campus in Otaniemi, the reactor was shut down in 2015 and provided much-needed know-how concerning the decommissioning of a nuclear facility.[18]

In March 2020, Fortum, the owner of the Loviisa facility, entered into an agreement with VTT[19], the owner of the research reactor. Following the agreement, the planning and approval processes for the demolition commenced. As the main contractor, Fortum was responsible for decommissioning planning, preparatory measures, reactor decommissioning, and waste management, including the final disposal of radioactive decommissioning waste. VTT managed the transportation of spent fuel to the US for further use – an exception allowed under the Nuclear Energy Act for research reactors.[20]

Nuclear power production facility construction can follow various approaches, the first most common one being a so-called turnkey project (Engineering, Procurement, and Construction) where the facility supplier or a consortium takes full responsibility for the project's implementation. The second most common

18 | Radiation and Nuclear Safety Authority.
19 | VTT.
20 | Fortum 2024c.

approach is decentralised procurement, where the owner manages the project and is responsible for ensuring the overall functionality of the facility. In the 1970s, both procurement procedures were relied on in Finland for nuclear new builds. The initial owner of the Loviisa nuclear facility, Imatran Voima Oy, constructed the Loviisa facility by using a decentralised procurement approach. The reason for this is that the then-Soviet main equipment supplier would not take overall responsibility for modifying the plant to meet Western safety standards. On the other hand, TVO built the Olkiluoto 1 and 2 units with the Swedish company Asea Atom, which delivered the plans on a turnkey basis. Olkiluoto 3 was also purchased as a turnkey facility, but as described above, it suffered from serious challenges in terms of implementation.[21]

As there are no active uranium mines, Finland relies on an external fuel supply. TVO sources uranium for its nuclear facilities from Canada, Australia, and Kazakhstan. Fuel fabrication takes place in Germany, Sweden, and Spain.[22] Fortum's Loviisa nuclear facilities were fueled by a Russian fuel supply, but in November 2022, Fortum partnered with American company Westinghouse to develop, license, and provide a new fuel type for the Loviisa Nuclear Power Plant.[23] One of the permit conditions for the extension of the operating licenses for Loviisa units was to ensure the diversification of fuel supplies.[24]

Under the Nuclear Energy Act, exporting spent fuel is prohibited, and Finland lacks a spent nuclear fuel reprocessing facility. Additionally, it has been held that reprocessing is not economically feasible for Finnish nuclear power plants at current prices and that the small amount of used fuel generated in Finland makes reprocessing not cost-effective.[25]

In the 2000s, there were two nuclear projects planned. The first one, a consortium of 67 companies, led by E.On and Voimaosakeyhtiö SF formed Fennovoima Ltd to build a new nuclear power plant in Finland. A decision-in-principle was granted to the consortium, and the project came to be Hanhikivi 1 project, located in Pyhäjoki, on the Gulf of Bothnia, in 2010.[26] E.On left the project in 2012, reducing its potential capacity.[27] In 2013, Fennovoima signed a contract with Rusatom Overseas for an AES-2006 reactor (different from the one originally approved for Fennovoima's nuclear plant), and Rusatom acquired a 34% share in Fennovoima.[28] Local stakeholders committed 50.2% of the plant. By mid-2015, Finnish ownership was confirmed at 65.1%. Major excavation began in 2016, with the Russian Titan-2

21 | Hujala, Hyvärinen, Rintamaa, Suikkanen et al. 2022, 64.
22 | TVO.
23 | Fortum 2024d.
24 | Valtioneuvoston päätös 2023.
25 | TVO.
26 | Valtioneuvoston periaatepäätös 2010.
27 | World Nuclear News 2012.
28 | Yle 2023.

as the general contractor.[29] The Russian invasion of Ukraine in 2022 posed significant risks, leading to the termination of the EPC contract with Rusatom. The project faced numerous challenges, including changes in ownership, design modifications, geopolitical issues, and delays, ultimately leading to its uncertain future.[30]

In 2008, TVO sought approval to construct a new nuclear unit, Olkiluoto 4, with a capacity ranging from 1000 to 1800 MWe. The decision-in-principle was granted in May 2010.[31] TVO evaluated several reactor designs, formal bids were requested in March 2012, and five proposals were received by January 2013.[32] Initially, TVO planned for the unit to be operational by 2020. However, delays with Olkiluoto 3 project led TVO to request a five-year extension of the government approval in 2014. This extension was not granted, leaving TVO with a deadline of June 2015 to apply for a construction license.[33] Due to the ongoing delays with Olkiluoto 3, TVO concluded that it was not feasible to make the necessary decisions for Olkiluoto 4 within the given timeframe. Consequently, TVO decided not to proceed with the project at that time, although it acknowledged the importance of Olkiluoto 4 and expressed an intention to seek a new decision-in-principle in the future.[34]

Currently, there are no ongoing nuclear power projects in Finland. Despite this, nuclear energy plays a crucial role in Finland's energy portfolio, from the security of supply and the decarbonisation perspectives. The public perception of nuclear power as an energy source was at an all-time high in a study made in 2023. This was most likely due to the energy crisis that led to high electricity prices, together with the Russian invasion of Ukraine. These events underlined the importance of domestic energy sources from the energy security perspective, and with the regular electricity production starting in Olkiluoto 3 with approximately 1,600 MW, it had an impact on the prices as well.

3. An overview of the competent authorities and the legislative framework on nuclear energy

3.1. The competent institutions

The Government is the ultimate decision-making body, responsible for all critical decisions regarding the utilisation of nuclear energy, whereas the Ministry of Economic Affairs and Employment (hereinafter referred to as the Ministry) holds the primary authority over nuclear energy matters in Finland at a more practical

29 | Yle 2015.
30 | Fennovoima 2022.
31 | Valtioneuvoston periaatepäätös 2010.
32 | TVO 2013.
33 | TVO 2014.
34 | Arola 2015.

level. Pursuant to the Nuclear Energy Act – the main legislative instrument regulating nuclear energy in Finland – the Ministry is responsible for formulating licensing decisions pertaining to the construction and operation of nuclear facilities in Finland, before submitting them to the Government for approval. Additionally, the Ministry ensures the Nuclear Energy Act is up to date and proposes legislative enhancements to the government for decision-making.

The Ministry acts as Finland's representative in international nuclear energy organisations and engages in negotiations concerning international agreements within this sector. Additionally, it oversees and monitors the implementation of these international agreements.

Nuclear waste management and the safe operation of nuclear energy are the most critical components of regulating nuclear energy use. The Ministry directs and oversees the planning and execution of nuclear waste management, ensuring compliance with national requirements and international regulations.

The Nuclear Energy Act also acknowledges the pivotal role of the Ministry of the Environment as the primary and coordinating authority for environmental issues.

Official duties are carried out both within the Ministries and their subordinate organisations with a commitment to official responsibility. Independence is ensured under the Act on Public Officials in Central Government (750/1994), which requires that public servants exercising public power must strictly comply with the law, act in a neutral, independent and impartial manner, and observe the secrecy obligation. Public servants are subject to liability for acts in the office. Therefore, operations are free from political influence and adhere to the principles of legality and good governance.

In addition to the Ministry, another important institution is the Radiation and Nuclear Safety Authority, the main competence of which relates to the other critical component of nuclear energy regulation, safety. The Radiation and Nuclear Safety Authority's aim is to mitigate and prevent the adverse effects of radiation. The primary objective of the Authority is to ensure that the radiation exposure of the Finnish population is minimised to the lowest feasible levels through the application of practical measures, adhering to the ALARA principle (As Low As Reasonably Achievable). Additionally, the Authority aims to prevent radiation and nuclear incidents with a very high degree of certainty, in accordance with the SAHARA principle (Safety As High As Reasonably Achievable).[35] The Radiation and Nuclear Safety Authority is an independent state administrative. The independence of the organ is ensured in Section 1(2) of the Radiation Act (1164/2022).

The Radiation and Nuclear Safety Authority monitors compliance with the Radiation Act (859/2018), the Nuclear Energy Act (990/1987), and the decrees issued

35 | Ojanen, Ollikkala, Reiman, Ruokola and Tiippana 2004.

pursuant to them. It also participates in the preparation of regulations and issues statements in the preparation of regulations concerning its industry. Based on Section 7q of the Nuclear Energy Act, the Radiation and Nuclear Safety Authority also has the authority to issue more detailed regulations on the technical details of the principles and requirements.[36]

Furthermore, according to Section 7r of the Nuclear Energy Act, the Radiation and Nuclear Safety Authority shall specify detailed safety requirements concerning the implementation of the safety level. The guiding principle in drafting new safety requirements is enshrined in Section 7a of the Nuclear Energy Act, according to which the safety of nuclear energy use shall be maintained at as high a level as practically possible. According to Section 7r(3) of the Nuclear Energy Act, the safety requirements of the Radiation and Safety Authority are binding on the licensee, while preserving the licensee's right to propose an alternative procedure or solution to that provided for in the regulations.

The Radiation and Nuclear Safety Authority is supported by four advisory committees, consisting of external members. Most important from the perspective of the use of nuclear energy is the Advisory Committee on Nuclear Safety, which is appointed by the Government. According to the Decree on the Advisory Committee on Nuclear Safety (164/1988), it is an advisory body involved in the preparation of issues pertaining to the safety of nuclear energy.

3.2. The legislative framework

The Nuclear Energy Act (990/1987) is the primary legislative instrument that governs nuclear energy production, first adopted in 1987. The Act repealed the Act on Atomic Energy (356/1957), adopted in 1957. According to Section 2 of the Act, it applies to the following nuclear-related activities:

(1) the construction, operation and decommissioning of a nuclear facility;
(2) mining and milling operations aimed at producing uranium or thorium;
(3) the possession, manufacture, production, transfer, handling, use, storage, transport and import of nuclear material;
(4) the possession, manufacture, production, transfer, handling, use, storage, transport and import of nuclear material;
(5) disposal of nuclear waste that is of a lesser extent than large-scale disposal of nuclear waste;
(6) in cases to be provided for by a government decree, the possession, manufacture, assembly, transfer and import of certain materials, devices, equipment, or information, should they prove pertinent to the proliferation of

36 | For example, based on the authorisation, the Radiation and Safety Authority has issued regulations on nuclear power plant safety (STUK Y/1/2018), contingency arrangements (STUK Y/2/2018), security arrangements for the use of nuclear energy (STUK Y/3/2020), nuclear waste disposal safety (STUK Y/4/2018), and the safety of mining and beneficiation of uranium or thorium (STUK Y/5/2016).

nuclear weapons or should the obligations under Finland's international treaties in the field of nuclear energy have a bearing on them; and

(7) export and import of uranium-containing or thorium-containing ores.

The Nuclear Energy Act aims to achieve two primary objectives: (1) to ensure that the use of nuclear energy aligns with the overall good of Finnish society, and (2) to ensure that the utilisation of nuclear energy is safe for the population and the environment. To reach this objective, the Act lays down provisions on the general principles for the use of nuclear energy, the implementation of nuclear waste management, the licensing and control of the use of nuclear energy, and the competent authorities.

The above-mentioned objectives constitute the general principles of the Nuclear Energy Act. According to these principles, the utilisation of nuclear energy must serve the overall benefit of Finnish society (Section 5 of the Nuclear Energy Act) and ensure safety, avoiding harm to individuals, the environment, and property (Section 6 of the Nuclear Energy Act). Furthermore, Section 4 prohibits the import of nuclear explosives, their manufacture, possession, and detonation in Finland. Given the numerous facets involved in large nuclear energy projects, it is deemed justified that the regulation of nuclear energy use prioritises the overall benefit of society. This concept of overall benefit was novel in legislative terms, introduced upon the adoption of the Nuclear Energy Act. Defining this concept necessitates careful consideration of its appropriateness.

The Nuclear Energy Act also lists the obligations of the operator of the facility. The most important of these are the responsibility for the safety of the use of nuclear energy, the obligation to take care of security and preparedness arrangements and other arrangements necessary to limit nuclear damage that do not fall within the scope of responsibility of the authorities, the obligation to take care of nuclear waste management, and the obligation to cover the costs of nuclear waste management.

In the context of nuclear waste management, the general principles enshrined in the Nuclear Energy Act also provide rules on the management of nuclear waste generated in Finland. According to Section 6a of the Nuclear Energy Act, as the main rule, nuclear waste generated in connection with or because of the use of nuclear energy in Finland must be handled, stored, and permanently disposed of in Finland. Because of this provision, Finland is globally the forerunner in nuclear waste management, discussed in more detail in Section 4.

The Nuclear Energy Act is complemented by the Nuclear Energy Decree (161/1988), providing more detailed rules on certain measures. In addition, to the extent necessary, the Government is required to issue general regulations concerning the safety of nuclear energy use, regulations on security, emergency arrangements, and rescue services. The supervisory authority, the Radiation and Nuclear Safety Authority, is authorised to provide detailed regulations on the use

of nuclear energy and establish specific requirements for operations as stipulated by in the permitting procedure. Additionally, the license holder is bound by the conditions introduced in the licences.

The new Radiation Act (859/2018) entered into force on 15 December 2018. Together with related decrees, it transposes the obligations arising from the EU's Basic Safety Standard Directive on radiation protection[37] into the national legislation. The main objective of the Act is therefore to protect health from any harm caused by radiation. In addition to health protection, the Act seeks to prevent and reduce environmental harm and any other harm caused by radiation. Section 2a of the Nuclear Energy Act further specifies the provisions of the Radiation Act that apply to the use of nuclear energy.

Finally, the Nuclear Liability Act (484/1972) mandates that the licensee must maintain nuclear liability insurance to compensate for injuries sustained by third parties as a result of a potential nuclear accident in accordance with the requirements set out in the law.

4. Nuclear licensing in Finland

4.1. Energy infrastructure licensing framework

The Finnish permitting framework is characterised by the involvement of multiple authorities, each operating under distinct legislative mandates. Various permits and authorisations are required for different infrastructure projects, with several sector-specific authorities responsible for processing these applications. The specific steps, assessments, and permits necessary for the approval of energy infrastructure projects are contingent upon the project's nature. While the procedural steps are largely consistent across infrastructure projects, variations arise due to factors such as project location and the specific works required.

Throughout the permitting process, particularly during the pre-permitting stage but also subsequently, there is active collaboration between the permitting authorities and project promoters. This collaboration includes informal meetings and guidance provided by the authorities, both at the pre-permitting stage and throughout the entire process.

The Finnish permitting framework for energy infrastructure projects can be divided into two main phases the pre-applications or preparatory phase and the statutory permit-granting phase.

The pre-application or preparatory phase relates to land use planning. Land use planning is conducted at regional and local levels, involving regional councils and municipalities. These plans, which consider the National Land Use Guidelines, as

37 | Council Directive 2013/59/Euratom.

stipulated by the Land Use and Building Act, project 10 to 20 years into the future. The environmental impact assessment (EIA) process, mandated by the Environmental Impact Assessment Act (468/1994), is required for large-scale projects. The EIA serves as a planning tool, independent of permit procedures, and is evaluated solely on its adequacy. During this phase, various project alternatives must be presented, and public participation is integral. Although the EIA is a separate process, its findings are later utilised in various permit applications.

The statutory permit-granting phase involves the construction permits, essential for all types of energy infrastructure projects. The applicable laws, competent authorities, and specific application details vary depending on the type of infrastructure. Typically, the construction permit is the final permit granted before construction begins, as it incorporates the outcomes of other permitting procedures. Land access for energy infrastructure projects is achieved through negotiations with landowners. If agreements cannot be reached, the project promoter must seek the right to expropriate the land via a 'redemption permit' as outlined in the Act on the Redemption of Immoveable Property and Special Rights. While the EIA, construction permit, and land access processes are universally applicable to all energy infrastructure projects, additional permits or licenses may be required on a case-by-case basis. The specific assessments, authorisations, or permits needed depend on the unique circumstances of each project.

The establishment of a new nuclear power facility in Finland is governed by a distinct regulatory framework established under the Nuclear Energy Act. In comparison to other energy technologies, activities related to nuclear energy necessitate a specific license. According to Section 8 of the Nuclear Energy Act, the utilisation of nuclear energy without a mandatory license is prohibited. Chapter 5 of the Nuclear Energy Act delineates the licensing framework for nuclear energy. The Act specifies the conditions for granting a permit, which have been compiled into a uniform set of regulations for each type of permit.

In accordance with Section 16 of the Act, licenses are mandatory for the (1) construction, (2) operation, and (3) decommissioning of a nuclear facility. The licenses are required by the government. Only minor research and development activities are exempted from the licensing requirements.[38] If requested, the competent Ministry must give a binding advance ruling on the necessity to apply for a license. The primary mechanism for ensuring compliance with the provisions of the Nuclear Energy Act is the licensing system.[39] This system encompasses the entire life cycle of nuclear facilities, from construction to decommissioning.

The Finnish licensing framework for nuclear energy generation is structured into three distinct stages. The initial stage is political, while the subsequent stages

38 | According to Section 8 of the Nuclear Energy Act, the operator of these small-scale activities must nevertheless annually submit a notification, the details of which are in the Government Decree, to the Radiation and Safety Authority.
39 | HE 16/1985 vp.

are technical and administrative. These stages are interconnected through the pivotal role of the Government in the decision-making process and their shared mandate to consider the general principles as provided in the Nuclear Energy Act, such as the overall benefit to Finnish society and safety.

The integration of political decision-making is crucial, given the profound, long-term impacts, political controversies, and far-reaching consequences of nuclear power. The unique nature of nuclear energy demands a level of democratic engagement far beyond what a mere administrative process can offer. Yet, this democratic process must be fortified with stringent administrative oversight of any nuclear project.[40]

The licensing framework for a new nuclear power plant unfolds in three pivotal stages: (1) decision-in-principle; (2) construction license; and (3) operating license. These decisions are made by the government, with parliament's involvement required for the decision-in-principle. The licensing framework follows a one-step-at-a-time (step-by-step) procedure, meaning that the license can only be applied after the previous stage of the licensing process has been cleared, as illustrated in Figure 1.

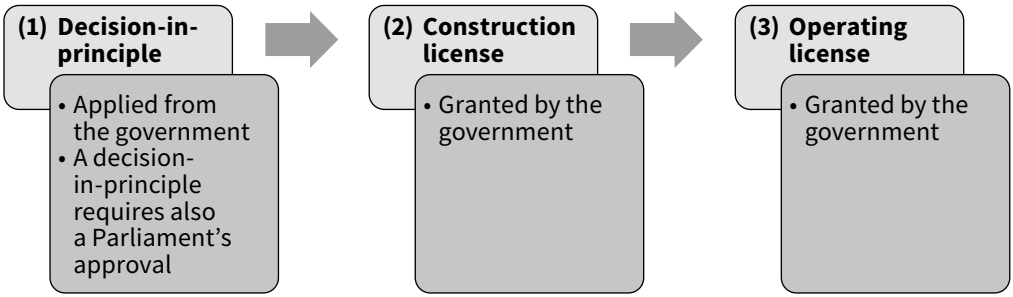

Figure 3. The three stages of the nuclear-specific licensing process in Finland

In addition to the nuclear-specific licensing regime, nuclear energy projects may also need other permits, depending on the project. It is up to the project promoters to identify the applicable permits and competent authorities and apply for these separately. The following list illustrates permits that might be required depending on the project in question.

- The EIA, pursuant to the Environmental Impact Assessment Act (252/2017);
- The Natura assessment, pursuant to the Nature Conservation Act (5.1.2023/9);
- Permits pursuant to the Environmental Protection Act (527/2014);
- Permits pursuant to the Water Act (587/2011);
- Construction permit for high voltage power line, pursuant to the Electricity Market Act (588/2013);

40 | Talus and Guimaraes-Purokoski 2011.

- Redemption permit, pursuant to the Act on the redemption of Immoveable Property and Special Rights (603/1977);
- Construction or operation permit, pursuant to the Land Use and Building Act (132/1999);
- Permits pursuant to the Antiquities Act (925/1963);
- Permits pursuant to the Act on the Safety of Handling Dangerous Chemicals and Explosives (390/2005).

However, as this contribution will focus on nuclear energy projects, the nuclear-specific licensing regime as established in the Nuclear Energy Act will be examined in more detail in the following sub-sections.

4.2. The decision-in-principle

At the first stage of the licensing framework, the construction of a new nuclear power plant of significant general importance requires a decision-in-principle from the government. The purpose of this decision-in-principle is to ensure that the construction aligns with the broader public interest of Finnish society, thus following the general principles outlined in the Nuclear Energy Act. According to Section 11 of the Nuclear Energy Act, nuclear facilities deemed to be "of considerable general significance" are: (1) all nuclear power plant projects intended to generate nuclear energy with a thermal capacity exceeding 50MW; (2) facilities used for the disposal of nuclear waste; and (3) facilities operated for purposes other than the generation of nuclear energy and the possession, at any given time, of an amount of nuclear material or waste or involving radiation risks comparable with nuclear facilities as defined in paragraph 1. All these facilities require a decision-in-principle from the government.

The application for a decision-in-principle is submitted by the applicant to the government. According to the Nuclear Energy Decree (161/1988), the application for a decision-in-principle must state at least (1) the name of the applicant or the business name and domicile used in business; and (2) for each nuclear facility its intended location, its intended use, and the scope of the activity carried out in it or, if it is a nuclear facility intended for the production of nuclear energy, its efficiency class and its planned operating time.

In addition, the application must include proof that the applicant is a Finnish or EU citizen or entity. According to Section 24 of the Nuclear Energy Decree, if the applicant is a company, it should provide copies of its articles of association, partnership agreement, and shareholder register, or, for other entities or foundations, copies of their rules. The application should also detail the applicant's expertise, explain the significance and necessity of the nuclear facility project for the country's energy supply and nuclear waste management, and provide information

on the applicant's financial conditions and the project's business profitability. Additionally, a general financing plan for the nuclear facility project is required.

According to Section 24 of the Nuclear Energy Decree, the application for each nuclear facility project must include a description of the technical operating principles, an explanation of the safety principles, and a statement of the ownership and management relationships of the planned location. It should also contain a report on the planned location, including details about the population, activities in the vicinity, and zoning arrangements. Furthermore, the application must provide an assessment of the suitability of the location considering local conditions' impact on safety, security and preparedness, as well as the facility's environmental effects. An environmental impact assessment report, an outline plan for nuclear fuel supply, and a statement on nuclear waste management plans are all required. If the applicant is from another EU member state, a statement of citizenship and corresponding documents must be included. The applicant must also provide the Radiation and Nuclear Safety Authority with information on the preliminary safety assessment as required by the Nuclear Energy Act.[41]

The documentation provided by the applicant must enable a preliminary safety assessment. However, at the application stage, organising a tender is not required, meaning there may not yet be a specific facility option, and the application could cover alternative locations. The Radiation and Nuclear Safety Authority's preliminary safety assessment will rely on generally available information about potential nuclear power plant alternatives, without detailed plant design specifics. If the government deems multiple alternatives to be in the overall interest of society and Parliament does not overturn this decision, the choice of which alternative project to proceed with for construction license processing is left to the applicant.[42]

The responsibility of the competent ministry is to process the application and prepare the decision-in-principle. First, the ministry must obtain a preliminary opinion on the security of the proposed nuclear facility from the Finnish Radiation and Nuclear Safety Authority. Moreover, according to Section 12 of the Nuclear Energy Act, it must seek the opinion from the Ministry of Environment, the municipal council of the municipality where the facility is to be located, and from neighbouring municipalities. In this regard, the Nuclear Energy Act provides for a very extensive consultation of citizens, municipalities, and authorities to ensure that in the consideration of the decision-in-principle, all possible perspectives regarding the overall interest of society would be taken into account.

The Ministry is also required to coordinate the environmental impact assessment (EIA) procedure for the construction of a new nuclear facility. The EIA procedure precedes the decision-in-principle, as the Nuclear Energy Decree requires

41 | Sections 12 and 14 of the Nuclear Energy Act, Section 25 of the Nuclear Energy Decree and YVL A 1 (Regulatory oversight of safety in the use of nuclear energy, 17.3.2020, <https://www.stuklex.fi/en/ohje/YVLA-1>

42 | HE 16/1985 vp.

the environmental impact assessment report as part of the application for the decision-in-principle. Essentially, this means that if an applicant has multiple potential sites at the application stage for a decision-in-principle, an EIA must be conducted for each of these sites.[43] The inclusion of environmental impact assessment at the first stage of the licensing framework has been criticised because, at this stage, the project planning is still in progress.[44] However, Section 15 of the Environmental Impact Assessment Act (252/2017) mandates that the planning of the EIA procedure should begin as early as possible, while project alternatives are still considered. This timing allows for influencing the selection of alternatives and the decisions regarding environmental impacts made by the project leader.[45]

According to Section 13 of the Nuclear Energy Act, before the government issues a decision-in-principle, the applicant must publicly disclose a general explanation of the planned nuclear facility, including its estimated environmental impact and safety aspects. The ministry must also organise a public hearing at the proposed site of the nuclear facility. All opinions expressed during these preparatory stages must be forwarded to the government as part of the procedure.

A prerequisite for the decision-in-principle is the approval of the municipality where the nuclear facility is to be located, along with sufficient conditions regarding the safety aspects of the proposed plant. This seeks to ensure the right of municipal self-determination, as the positive opinion of the municipality where the nuclear facility is located is an absolute prerequisite for the adoption of the decision-in-principle.

Finally, depending on the location of the planned facility, consultation with neighbouring countries is required. This obligation arises from the Agreement on communication related to the safety issues of nuclear facilities to be built near the borders between Finland, Norway, Sweden, and Denmark.[46]

If these conditions are met, the government will consider the decision-in-principle based on the general principles of the Nuclear Energy Act, weighing the benefits and disadvantages of the nuclear facility. Specifically, it will consider (1) the necessity of the nuclear facility project for the country's energy supply; (2) the suitability of the intended site and its environmental impact; and (3) arrangements for nuclear fuel and waste management.[47]

43 | In 2008, Fennovoima Ltd conducted environmental impact assessments for three potential sites for a nuclear facility before applying for a decision-in-principle. The decision-in-principle was granted in 2010. However, in 2011, the confirmed site for the nuclear facility was different from the initially considered alternatives. Consequently, the competent ministry mandated the company to update the project's environmental impact assessment through the EIA procedure for the new location. See <https://tem.fi/documents/1410877/2445107/Yhteenveto+2013>

44 | Pölönen 2024, 34–55.

45 | Hujala, Hyvärinen, Rintamaa, Suikkanen et al. 2022, 38.

46 | SoPS 19/1977.

47 | Section 14 of the Nuclear Energy Act.

The decision-in-principle must encompass the conditions essential for implementing the general principles outlined in the Nuclear Energy Act, as well as the safety requirements stipulated by the Nuclear Energy Act.[48] Furthermore, the government is required to consider the recommendations presented in the preliminary safety assessment conducted by the Radiation and Nuclear Safety Authority.[49] The Nuclear Energy Act is silent on the modification of these conditions.

The government's decision is based on policy discretion rather than legal consideration[50], although it is framed by legal requirements. This policy discretion allows for freedom in consideration behind the decision and excludes the right of appeal. Section 14 of the Nuclear Energy Act outlines the focus areas of the government's decision-making process, requiring it to consider the decision-in-principle based on the overall good of Finnish society.

The decision-in-principle must be scrutinised and approved by the parliament by a majority vote. Under the Nuclear Energy Act, the parliament can either approve or reject the decision-in-principle as it stands, without making amendments or setting further conditions. Section 75(3) of the Nuclear Energy Act specifies that the decision-in-principle is not subject to appeal, and this also applies to the subsequent decision by the parliament. The decision by which the parliament has left the decision-in-principle without revoking, factually only means permission to continue preparatory activities, and that the condition for granting a construction permit exists in this regard.[51]

It should be noted that the Finnish Parliament has only been involved in the decision-making process for the construction of nuclear facilities since 1992. Since then, one decision-in-principle for additional nuclear power construction has been rejected, while four have been approved. The four oldest nuclear power facilities were constructed before the legislation required parliamentary approval for the decision-in-principle.

Despite the criteria stipulated by the Nuclear Energy Act, some requirements allow for considerable discretion by the government, particularly regarding the project's alignment with the overall good of Finnish society and its contribution to the security of the country's energy supply.

The Nuclear Energy Act does not provide for the alteration of a decision-in-principle or a permit. In practice, it has been necessary to carry out a case-by-case assessment as to whether proposed changes necessitate a new decision and when it is feasible to supplement the existing decision.[52]

Finally, the applicant is prohibited from taking any measures that could, due to their economic significance, impede the government's or parliament's ability

48 | Section 14a(1) of the Nuclear Energy Act.
49 | Section 14a(2) of the Nuclear Energy Act.
50 | Koutaniemi, Reponen, Salminen, Sandberg and Varjoranta (2004).
51 | HE 16/1985 vp.
52 | Liukko, Slant and Välimäki 2020, 70.

to exercise their discretion in decision-making. Such measures include commitments entailing significant economic obligations related to plant construction, nuclear fuel, or nuclear waste. Under Section 30 of the Nuclear Energy Decree (161/1988), these include: (1) entering into financially binding agreements concerning the delivery or manufacture of the nuclear facility or essential parts, components, or structures thereof; (2) manufacturing said parts, components, or structures by the applicant; (3) excavating substantial underground facilities for the nuclear facility. However, measures resulting in only minor financial losses if the project is not carried out are excluded from this prohibition.

4.3. Construction license

Following the approval of the decision-in-principle by the parliament, the construction of a new nuclear facility necessitates a construction license issued by the government. This license can only be granted to a natural person, a legal entity, or an authority under the jurisdiction of an EU member state. In addition to the decision-in-principle, the conditions for the construction license encompass safety plans, site selection, environmental protection, nuclear waste management, and the final disposal of high-level radioactive waste. Furthermore, a designated area for the nuclear facility must be reserved in a local detailed plan based on the Building Act. This area must also be in the possession of the applicant. At this stage, it is essential that the applicant's plans are significantly more detailed than those in the decision-in-principle application, particularly concerning the location of the facility.

The application for the construction license is submitted to the government, with its contents regulated under Sections 31 and 32 of the Nuclear Energy Degree in a non-exhaustive manner. According to Sections 31 and 32 of the Nuclear Energy Decree, the applicant must include in their application, *inter alia*, details of the applicant, the specific site where the nuclear facility is situated, the intended use of the facility and the basic operational principles, a statement of the quality and quantity of nuclear materials or waste, an outline of technical operating principles and safety arrangements, plans for nuclear fuel maintenance, financial documentation, an explanation of the applicant's expertise, documentation of the type of nuclear facility to be built and the planned suppliers, as well as an explanation of the facility's environmental effects and design principles to avoid damage.

Additionally, the applicant must provide certain risk-related information to the Finnish Radiation and Nuclear Safety Authority. These include a preliminary safety report detailing the design and safety principles of the nuclear facility, a probability-based risk analysis, and a proposal for a classification document that categorises structures, systems, and equipment based on their safety significance. Furthermore, a report on quality management procedures, a plan for periodic inspections, and preliminary plans for security and preparedness arrangements

are required. The applicant must also provide a plan for preventing the spread of nuclear weapons, a statement of specific arrangements as per the Nuclear Energy Act, a program for determining the environmental baseline of the facility, and a decommissioning plan.[53]

The Ministry prepares the decision regarding the construction license for the government. Section 37 of the Nuclear Energy Decree mandates that the Ministry requests opinions on the construction license application from various government entities, including ministries, authorities, and municipalities. The content of these requests is not legally stipulated and is tailored to each entity's function and competencies. For instance, the local municipality is asked to provide information on the potential impact of the construction phase on the municipality and its residents, while the Ministry for the Environment assesses the project from the perspective of Section 19(2) of the Nuclear Energy Act, which pertains to safety and environmental protection. The content of the decision regarding a construction license was provided in a non-exhaustive manner in the Nuclear Energy Decree.

Once the construction license application is ready for a decision, the Ministry presents it to the government. Then, the government makes the final decision on the grant of the construction license.[54] As this matter falls within the general competence of the Ministry, the government's decision on the construction license is signed by the Minister. The Ministry notifies various ministers, authorities, and municipalities of the decision to grant the construction license.

According to Section 26 of the Nuclear Energy Act, the construction license, once granted, can be partially or wholly revoked if the implementation of the general principles for the use of nuclear energy is fundamentally endangered. This could occur if (1) the licensee violates the conditions of the construction license or regulations issued under the Nuclear Energy Act; (2) the licensee neglects the financial provision obligations referred to in Chapter 7 of the Nuclear Energy Act or violates the Nuclear Liability Act (484/1972); or (3) the licensee dies, loses legal capacity, or if the corporation or foundation holding the construction license is dissolved, discontinues operations, or goes bankrupt.

According to Section 8 of the Administrative Judicial Procedure Act (808/2019), the government's decision on the construction license can be appealed before the Supreme Administrative Court. Based on Section 13 of the same Act, the appeal must be based on the legality of the decision, specifically whether the law was followed in granting the license and whether the application met legal requirements. Appeals cannot be based on the exercise of political discretion, as this falls within the government's purview.

53 | Section 35 of the Nuclear Energy Act.

54 | The plenary sessions of the government make decisions on nuclear matters, with minor exceptions; see Section 6 of the Government Rules of Procedure (262/2003).

4.4. Operating license

The third and final stage of the licensing procedure for a new nuclear facility involves obtaining an operating license, which is issued by the government. As with the construction license, the Ministry is responsible for preparing the operating license. It may only be issued to a natural person, a legal entity, or an authority under the jurisdiction of an EU member state.

The license may be granted if the nuclear facility and its operation comply with the safety requirements provided in the Nuclear Energy Act, ensuring the safety of both employees and the public. The applicant must also demonstrate adequate provisions for nuclear waste management, the final disposal of nuclear waste, and the decommissioning of the nuclear power unit. Additionally, the applicant must possess sufficient expertise and the necessary resources to operate the nuclear facility in a safe manner and in accordance with the international treaty obligations.

When applying for the operating license, the applicant must submit several documents to the Radiation and Nuclear Safety Authority. These include: a final safety data sheet, a probability-based risk analysis, and a classification document that categorises structures, systems, and equipment based on their safety significance. Moreover, the quality management program for the facility's use, safety-technical conditions of use, and a summary program of periodic inspections are required. Plans for security and preparedness arrangements, a report on the control measures to prevent the spread of nuclear weapons, and the management rules of the facility must also be provided. Furthermore, a report on the basic state of environmental radiation, a program for radiation monitoring, a report on the fulfilment of safety requirements, an aging management program, and a decommissioning plan are necessary.

The government will reassess whether the nuclear facility aligns with the overall good of Finnish society and meets the other general principles as outlined in the Nuclear Energy Act. Thus, compliance with the general principles as enshrined in the Nuclear Energy Act is assessed in every licensing stage to ensure that the nuclear project serves the overall good of Finnish society. Similarly, as can be seen from the documents required to be submitted with the application, various aspects in relation to safety, preparedness, environmental impact, waste management, and decommissioning are re-assessed through every licensing stage both by the competent ministry in preparing the decisions, the government as well as the Radiation and Nuclear Safety Authority. Considering that nuclear facility projects are long-term projects, the potentially changing circumstances can be taken into account throughout the application procedure.

The nuclear facility cannot initiate its operations until the Finnish Radiation and Nuclear Safety Authority has approved its safety requirements and the Ministry has verified the applicant's preparedness for the costs of nuclear waste management.

The operating license is issued for a fixed period. Its validity may expire if the nuclear facility does not begin operations within a specified period from the date of issue. The conditions of the operating license may be modified to ensure compliance with the general principles of the Nuclear Energy Act and the requirements of the license. Like the construction license, the operating license can also be revoked. As with the construction license, appeals against the operating license can be based on the legality of the decision but not on the exercise of political discretion.

4.5. Decommissioning license

Section 7g of the Nuclear Act provides that the license applicant and license holder – thus depending on the timeline of the licensing/operation of the nuclear facility – must have a plan for the decommissioning of the nuclear facility. The license holder is also required to update the plan at least every six years, unless otherwise specified in the license terms. The updated plan must be approved by the Ministry. During the operations requiring a license for decommissioning, the plan must be kept up-to-date, and the updated plan must be approved by the Radiation and Safety Authority.

When operations at the nuclear facility come to an end, the licensee is obligated to ensure that the decommissioning process is conducted in strict accordance with the decommissioning license, the established safety requirements, and the plan approved by the Radiation and Nuclear Safety Authority. Furthermore, the operating license holder must apply for a license for the decommissioning of the nuclear facility. The objective of the decommissioning project is to decontaminate the nuclear facility's structures and systems of radioactive materials, thereby releasing the licensee from all associated obligations.

Section 20a of the Nuclear Act requires the licensee to apply for the decommissioning license well in advance so that the authorities have adequate time to assess the application before the termination of the operating license of the nuclear facility. Detailed provisions on various documents to be included in the application for the decommissioning license and on the submission of those documents are enshrined in the Nuclear Energy Decree. These required documents include a report on the quality and maximum quantity of nuclear materials and waste accumulated, processed, and stored during decommissioning. An outline of the technical principles and solutions for decommissioning, along with safety arrangements and an assessment of their implementation, is required. The EIA report, supplementary information to limit environmental impact, and an explanation of the applicant's expertise and organisation for the decommissioning phase must also be provided. Furthermore, the application should include plans and methods for nuclear waste management, including final disposal, along with a schedule and estimated costs. An explanation of the applicant's financial position, a management plan for financing the decommissioning, and financial statements

for the year of the application and the previous five years, or information on where these documents can be accessed electronically, are also necessary.[55]

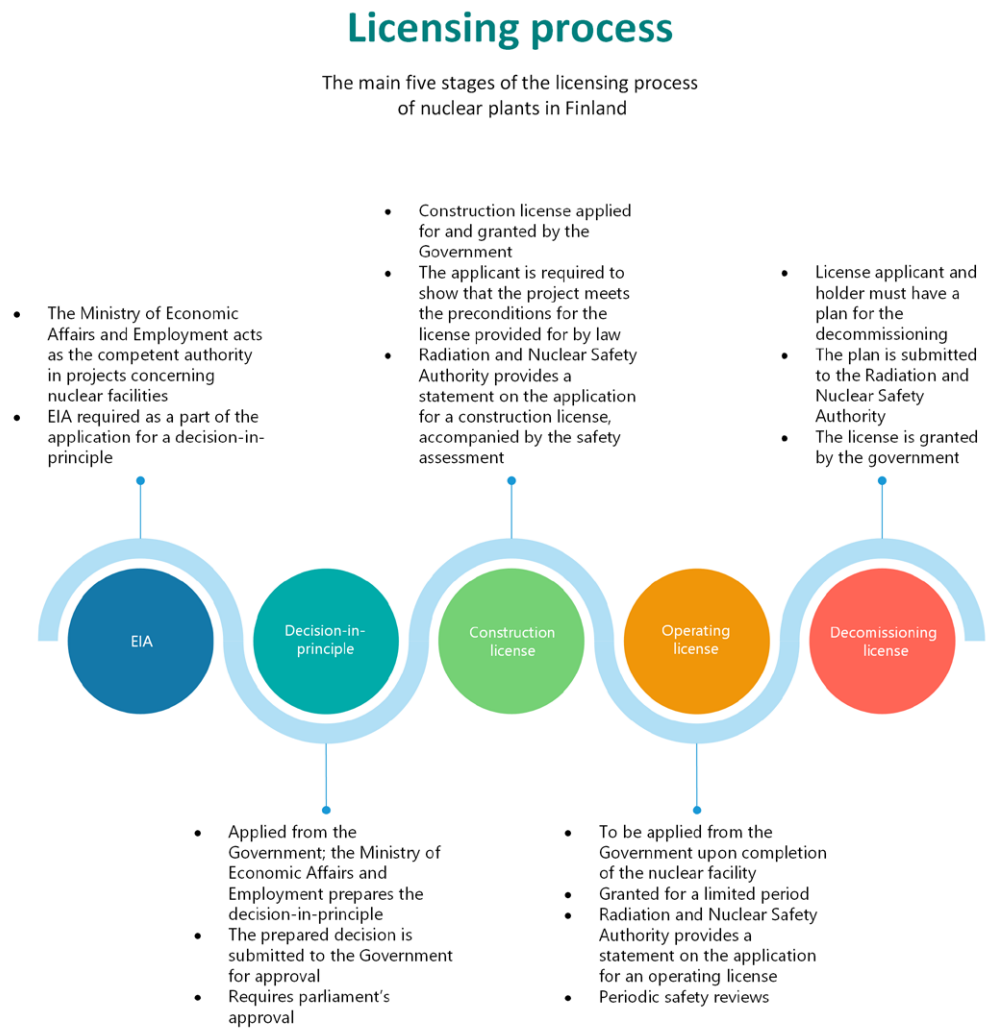

Figure 4: Licensing process of nuclear facilities in Finland

In addition to the decommissioning application submitted to the government, the applicant must provide the necessary documentation to the Radiation and Nuclear Safety Authority. These include the final decommissioning plan, a decommissioning risk review, and a safety statement. Additionally, a classification

55 | Section 34a of the Nuclear Energy Decree.

document that categorises structures, systems, and equipment based on their safety significance, and the nuclear facility's quality management program are required. The application must also include technical requirements of use relating to safety, a summary program of periodic inspections, and plans for security and preparedness arrangements. The Radiation and Nuclear Safety Authority provides a detailed explanation of these documents to the licensing authority in its statement regarding the decommissioning license. Figure 3 provides an illustration of the nuclear licensing procedure.

5. Nuclear waste management

5.1. Legislative framework

The Nuclear Energy Act provides for the primary principles guiding nuclear waste management in Finland. First, according to Section 6a of the Nuclear Energy Act, "nuclear waste generated in connection with or as a result of use of nuclear energy in Finland shall be handled, stored and permanently disposed of in Finland". Second, according to Section 27a of the Nuclear Energy Act, the amount of nuclear waste generated in the use of nuclear energy shall be kept as small as reasonably achievable.

A national nuclear waste management program outlines the policy and management of spent nuclear fuel, including general goals, principles, waste quantities, locations, cost, and schedule estimates. The program will be developed by the Ministry in collaboration with the Radiation and Nuclear Safety Authority. Public input will be solicited during the drafting process. The program is subject to updates based on the Nuclear Energy Act.

The responsibility for nuclear waste management lies with the waste producers, who must manage nuclear waste in accordance with the Nuclear Energy Act. According to Section 28 of the Nuclear Energy Act, the management of spent nuclear fuel is a duty of the nuclear facility license holder. To this end, the party responsible for waste management is required to submit a plan for nuclear waste management to the licensing authority for evaluation. The plan must be presented at regular three-year intervals throughout the duration of the licensed operations, unless otherwise specified in the license terms. Additionally, the plan must include a general outline for the next six years.

Furthermore, the entity responsible for nuclear waste management must meet its financial obligations by making annual payments into the National Nuclear Waste Management Fund. It is also required to provide the State with the specified collateral security to safeguard against potential insolvency, based on Section 36 of the Nuclear Energy Act.

The National Nuclear Waste Management Fund aims to ensure that society possesses adequate financial resources and expertise to manage nuclear waste under all circumstances. The Fund operates independently of the state budget and falls under the jurisdiction of the Ministry. It comprises two distinct funds: the Financial Provision Fund and the Research Fund for Nuclear Energy Expertise.

The Fund is responsible for collecting, storing, and reliably investing the necessary funds for future nuclear waste management. Additionally, it annually finances research related to nuclear safety and waste management, as well as the development of research infrastructure.

The capital of the National Nuclear Waste Management Fund is derived from annual payments made by operators with waste management obligations, as well as the returns generated by the fund. Each year, the Ministry sets the annual fee to be paid into the Fund, ensuring that it consistently has sufficient assets to cover the costs of all remaining nuclear waste management activities.

The disposal of nuclear waste is deemed complete once the Radiation and Nuclear Safety Authority has verified that the waste has been permanently disposed of in an approved manner. Similarly, a nuclear facility is considered decommissioned when the Radiation and Nuclear Safety Authority confirms that the levels of radioactive materials remaining in the buildings and soil at the facility site meet the requirements outlined in the Nuclear Energy Act. When the license holder's waste management obligation has ceased, the ownership of the nuclear waste is transferred to the State, which then assumes responsibility for the waste. If necessary, after disposal, the State retains the right to undertake all needed measures at the disposal site to monitor and control the nuclear waste and to ensure the safety of the repository as stated in Section 31 of the Nuclear Energy Act.

5.2. The final disposal of spent nuclear fuel in Onkalo

Finland employs a once-through nuclear fuel cycle[56], meaning that spent nuclear fuel is not reprocessed. Instead, after being removed from reactors, the spent fuel is stored in the interim pool-type storage facilities at the power plant sites in Loviisa and Olkiluoto. This storage period lasts for 30–50 years. However, a water pool storage does not fulfil the requirements for permanent disposal in Finnish soil or bedrock, as stipulated by Section 6 of the Nuclear Energy Act and Section 76 of the Nuclear Energy Decree. Given the long-term safety concerns associated with soil disposal under Finland's conditions, geological disposal in bedrock was considered a viable option. Following the interim 'cooling period', the spent fuel will be disposed of deep within the Finnish bedrock, in Onkalo.

56 | On the nuclear fuel cycle, see World Nuclear Association.

In 2020, the Government adopted a decision-in-principle according to which, among the various options for final disposal of high-level nuclear waste, geological disposal deep in bedrock is the most effective and realistic method to isolate the waste from the biosphere.[57] In Finland, this involves depositing the waste in crystalline bedrock, which makes up the majority of the country's bedrock and is among the oldest in the world.

Onkalo ('pothole' in English) is situated in Olkiluoto, Eurajoki, Finland, where three of the five nuclear facilities are located. Onkalo is operated by Posiva Ltd, a company owned by Teollisuuden Voima Ltd (60%) and Fortum Power and Heat Oy (40%). The company's primary responsibility is to manage the maintenance of spent nuclear fuel from its owners' nuclear power facilities (Olkiluoto 1, 2, and 3 as well as Loviisa 1 and 2) following interim storage at the power plant sites (the cooling period).

Onkalo consists of (1) an encapsulation plant above ground and (2) a final disposal repository underground. At the above-ground encapsulation plant, spent nuclear fuel is securely sealed in final disposal canisters, which are then transported to the underground final disposal repository. The underground section extends to a depth of approximately 450 meters, with the actual final disposal repository situated between 400 and 430 meters deep. In the final disposal tunnel, each canister is placed in a designated deposition hole, with each tunnel containing 30 to 40 such holes. Once all holes are filled and the canisters are isolated with bentonite clay buffers, the entire tunnel is backfilled with clay and sealed. Onkalo has the capacity to accommodate 6,500 tons of spent nuclear fuel. The safety of the final disposal relies on the multibarrier principle, ensuring long-term safety through multiple redundant release barriers. These engineering barriers include the condition of the fuel, the final disposal canister, the bentonite buffer, and the tunnel backfill, with the bedrock serving as a natural barrier. The final disposal of spent nuclear fuel is anticipated to start operations in the mid-2020s, although the exact start date has yet to be determined.[58]

The Finnish legislation currently allows the final disposal of nuclear waste generated in connection with or as a result of the use of nuclear energy in Finland. Despite the interest in Finnish spent nuclear fuel disposal technology, current national legislation prohibits the import and disposal of spent nuclear fuel. Although there is considerable potential to monetise this pioneering disposal method, the political sensitivity of the issue suggests that legislative amendments are unlikely to be proposed in the near future.

57 | The decision-in-principle is available at <https://www.eduskunta.fi/FI/vaski/Documents/m_7+2000.pdf> (in Finnish only).
58 | Posiva 2024.

6. Recent trends

6.1. Small modular reactors

Small modular reactors (SMRs) are considered to represent a promising advancement in nuclear power technology, offering significant benefits in terms of safety, economic efficiency, and diverse applications. The current Government Programme provides clear guidelines for the development of nuclear energy. The current Government is especially advocating for the use of SMRs for district heating purposes, and this area is currently being examined by energy companies. Furthermore, the current level of social acceptance for nuclear energy use in Finland is unprecedentedly high. This favourable public perception is regarded as a significant opportunity for the advancement and development of SMRs.

However, the legislative framework on nuclear power, currently in force in Finland, is built on the notion that nuclear power facilities are constructed infrequently and consist of large units with intricate safety mechanisms and numerous custom-manufactured components. While the licensing and constructing SMRs in Finland is considered to be, in principle, feasible under the existing legislation, practical implementation remains challenging.

As the current nuclear energy legislation and the regulations issued by the Radiation and Nuclear Safety Authority are primarily designed for large-scale power plant reactors and major operators, there are certain requirements within the Radiation and Nuclear Safety Authority's regulations that are not well-suited for SMRs, particularly those intended for district heat production.[59] These issues relate particularly to the streamlining of licensing because the current framework, as discussed above, is designed for the risk management and safety of large-scale nuclear facilities. As the risks and safety aspects associated with SMR are on a different scale compared to large-scale nuclear facilities, it has been held that both safety requirements and licensing and control measures must be calibrated to correspond to the level of risk associated with the activity.[60] More specifically, a discussion on the need to revise the Nuclear Energy Act currently in force to also better encompass SMR issues related to the location and type-approval of SMRs.

As held above, the deployment of SMRs in Finland is envisioned to relate to district heating, in addition to power production. Using SMRs for the combined production of electricity and district heat, or heat production alone, requires placing the facility closer to the population. Therefore, the SMRs most likely entail geographical decentralisation, resulting in multiple new plant locations. The current Nuclear Energy Act and other relevant regulations do not delineate a distinct process for determining the

59 | Ydinturvallisuusneuvottelukunta 2019.
60 | Negri della Torre 2020, 573.

suitability of a site for nuclear power plant use. Formally, the site-specific planning criteria are only validated when the Government issues a construction permit for the nuclear facility, which is suboptimal for timely facility procurement. Therefore, it is recommended that the Nuclear Energy Act be amended to include a separate approval process for the location of nuclear facilities.[61]

The decision-in-principle procedure is not intended for the technical evaluation of plant alternatives. The Advisory Committee of Nuclear Safety has recommended adding an alternative stage in the process that would entail the technical evaluation of plant alternatives. To facilitate this, the legislation should allow for the pre-approval of plant designs through a design certification process. According to this proposed mechanism, prospective plant suppliers seeking pre-approval should engage with the Radiation and Nuclear Safety Authority prior to the construction permit phase to ensure that the technical solution of their plant alternatives complies with Finnish safety requirements and the necessary approval documentation. The type-approval process should be contingent upon the plan supplier having a customer in Finland who is interested in the technology and is deemed to have realistic conditions for utilising the technology once type approval has been granted.

The government is currently considering the implementation of a type approval-based procedure, particularly for SMRs. In relation to SMR, the possibility of eliminating the onerous permit-in-principle procedure is being examined, while still ensuring the verification of project owner details prior to construction.

In 2020, a working group authorised by the Ministry recommended a comprehensive reform of the Nuclear Energy Act.[62] According to the working group, a central focus of this reform is the suitability of Finland's licensing system for future nuclear energy needs, including nuclear waste management, facility decommissioning, and the construction of new and innovative nuclear facilities such as SMRs. The working group recommended the necessity of introducing pre-approvals for both plant locations and reactor types. Specifically concerning SMRs, pre-approval might concern, for example, new types of locations and/or the construction and use of modular technology.[63]

6.2. NATO and the Finnish Nuclear Act

Amidst turbulent times due to the Russian invasion of Ukraine, Finland decided to join the North Atlantic Treaty Organisation (NATO), submitting the official application in May 2022, and became a full member of NATO in 2023. The NATO membership has provoked discussion as to the need to reform the Nuclear Energy Act currently in force.

61 | Ibid.
62 | Työ- ja elinkeinoministeriö (2023).
63 | Hujala, Hyvärinen, Rintamaa, Suikkanen et al (2022).

This discussion relates to Section 4 of the Nuclear Energy Act, according to which the import of nuclear explosives as well as their manufacture, possession, and detonation in Finland are prohibited.[64] Since Finland decided to join NATO without any conditions for Finland's membership in the military alliance, the Section is problematic from this perspective. At the moment, there are no amendments proposed that would address the problems in relation to Section 4 of the Nuclear Energy Act, but the ongoing comprehensive reform of the Nuclear Energy Act might also lead to amendments with regard to Section 4.

7. Conclusion

Finland currently operates five nuclear reactors across two power plants, Loviisa in Olkiluoto, with a combined capacity of over 4,000 MWe. Finland has a solid track record in terms of nuclear safety, and the modernisation and lifetime extensions of these reactors highlight Finland's commitment to maintaining and enhancing its nuclear capabilities.

The Finnish Nuclear Energy Act, complemented by the Nuclear Energy Decree and the Radiation Act, provides a comprehensive regulatory framework for the construction, operation, and decommissioning of nuclear facilities. The involvement of multiple authorities is critical in ensuring a robust oversight mechanism.

The licensing process for nuclear facilities in Finland involves multiple stages: a decision-in-principle, a construction license, and an operating license. This process ensures that all aspects of safety, environmental impact, and societal benefit are thoroughly evaluated. Furthermore, Finland is a global leader in nuclear waste management, with the world's first permanent underground repository for spent nuclear fuel.[65]

In conclusion, Finland's approach to nuclear energy is characterised by a strong regulatory framework, a commitment to safety and environmental protection, and a forward-looking strategy that includes the development of new technologies like SMRs.

64 | Penalties for infringement are also set in the Criminal Code 39/1889.
65 | On the global trends of spent nuclear fuel and waste management see IAEA 2022.

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Nataša SAMEC BERGHAUS[1] – Aleš FERČIČ[2] – Klemen DRNOVŠEK[3]

Slovenia's Nuclear Energy Pathway: Strategic Expansion, Regulatory Hurdles, and Future Prospects[4]

Abstract

Slovenia boasts a longstanding tradition in the field of nuclear energy generation, with the Krško Nuclear Power Plant (NEK) traditionally playing an important role in the national energy system. As the country plans its future energy mix, nuclear power continues to figure prominently, not least in light of the proposed JEK2 project. However, the development of new nuclear facilities faces significant challenges, including lengthy regulatory procedures, complex construction processes, financial uncertainties, long-term issues related to nuclear fuel supply and waste management, as well as broader concerns regarding public acceptance. This article focuses on the legal dimensions shaping Slovenia's nuclear energy pathway, with non-legal considerations introduced solely insofar as they serve to elucidate or reinforce the legal analysis. Within this framework, the licensing process in Slovenia is examined in detail, with particular regard to its multi-step structure and the administrative challenges it poses. In addition, issues related to public procurement procedures, transparency, and governance are well discussed, particularly considering past infrastructure project failures. While Small Modular Reactors (SMRs) are being explored as a potential long-term solution, their licensing and deployment remain uncertain due to regulatory and spatial constraints. The paper also emphasises the importance of strategic workforce planning. Ultimately, the attainment of a resilient and secure energy future in Slovenia demands not only continued investment in nuclear infrastructure, but also a broader consideration of energy efficiency, security risks, and long-term sustainability—considerations which are addressed herein.

1 | Izredna profesorica (Associate Professor), PhD. Faculty of Law, University of Maribor
2 | Redni profesor (Full Professor), PhD. Faculty of Law, University of Maribor
3 | Asistent (Assistant), LLM (univ. dipl. prav.). Faculty of Law, University of Maribor
4 | *The research and preparation of this study was supported by the Central European Academy.*

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A) Overview of National Nuclear Characteristics of Slovenia

Nuclear energy plays a significant role in Slovenia's energy landscape, contributing to the country's energy security and its commitments to reducing greenhouse gas emissions. The Krško Nuclear Power Plant (NEK), operational since 1983, is a pressurised water reactor (PWR) located in the municipality of Krško. It is the only commercial nuclear power plant in Slovenia, being jointly owned by the Republic of Slovenia and the Republic of Croatia, with both countries sharing ownership and the produced electricity equally (50:50),[5] Slovenia receiving approximately 20% of its electricity needs[6] and Croatia 16% of its electricity needs from the plant.[7] This unique ownership structure makes NEK the only nuclear power plant in the region jointly operated by two countries, representing a notable example of international cooperation.[8] In 2023, nuclear energy accounted for approximately 43% of Slovenia's domestic energy production, the total of which slightly exceeded 141,000 terajoules (TJ).[9] This substantial contribution underscores the centrality of nuclear energy within Slovenia's energy mix, ensuring a stable and reliable energy supply.

The operational lifespan of the NEK has been recently extended by 20 years, thereby permitting its continued operation until the year 2043. The decision to prolong its operation was preceded by significant legal and procedural challenges, with particular contention arising in relation to the granting of the environmental consent.[10] However, the consent was successfully issued in January 2023, ensuring the continued operation of the NEK.[11] In addition to the commercial NEK facility, the TRIGA Mark II research reactor is also in operation in Slovenia, located in Brinje near Ljubljana. This reactor is primarily used for research, education, and training purposes, rather than electricity generation. Thus, Slovenia has one commercial nuclear reactor (NEK) and one research reactor (TRIGA Mark II).[12]

5 | BHRNEK 2003, 369.
6 | In the past, the nuclear power plant contributed substantially more electricity to the Slovenia's energy mix.
7 | NEK 2023.
8 | World Nuclear Association 2024.
9 | SURS 2024. Renewable energy sources, including hydropower, contributed nearly 36%, while coal accounted for 21%. Domestic energy sources satisfied more than half (52%) of Slovenia's energy needs, with the remaining energy being imported. Compared to the previous year, Slovenia's energy dependency decreased by 5 percentage points.
10 | See more Ferčič & Samec Berghaus 2021, 25–26.
11 | See the Slovenian Ministry's decision, No. 35428-4/2021-2550-96, 13.1.2023.
12 | SNSA 2023, 51.

Public attitudes towards nuclear energy within Slovenia remain ambivalent. While there is general support for nuclear energy as a dependable and low-emission energy source, apprehensions persist regarding nuclear safety, radioactive waste management, and the potential environmental impact of new projects.[13] These concerns are further compounded by anxieties surrounding financing mechanisms, and long-term dependencies related to fuel supply and maintenance. The recently adopted Resolution on the Long-Term Peaceful Use of Nuclear Energy in Slovenia (ReDMRJE) by the Slovenian Parliament emphasises the importance of transparent and inclusive processes to address public concerns and build trust in nuclear energy.[14] Additionally, organisations such as GEN energija, d.o.o. (GEN energija)[15] and the Slovenian Nuclear Safety Administration have implemented public consultations and educational campaigns to improve understanding and acceptance of nuclear projects, with a particular focus on the proposed JEK2 project.[16]

A referendum concerning the proposed JEK2 project, originally scheduled for 24 November 2024, was cancelled due to concerns about insufficient information available to the public at this stage. This decision reflects the government's commitment to ensuring an informed and inclusive approach to the future of nuclear energy in Slovenia. Notwithstanding the postponement of the referendum, preparatory activities in relation to the JEK2 project continue apace, with the preparation of studies and other documentation to support the finalisation of the National Spatial Plan (NSP) and required changes to local infrastructure.[17]

According to the revised National Energy and Climate Plan (NEPN), Slovenia is considering several scenarios for its energy landscape, namely:

- Continuing the "Current State" Scenario (OU): Under this approach, no additional production capacities would be constructed, and the current energy system continues without significant expansion.[18]
- A "Nuclear Scenario" (DU-JE): This scenario includes the construction of new nuclear capacities (e.g., JEK2 by 2040) alongside renewable energy sources (RES) and a smaller modular nuclear reactor (approximately 250 MW) by 2050.[19] A sub-scenario under this model also explores excluding large new hydropower plants.[20]

13 | Valenčič 2024, 3.
14 | ReDMRJE 2024, 1.
15 | GEN energija, d.o.o., is a state-owned holding company established by the Republic of Slovenia and serves as the project promoter and investor in the JEK-2 nuclear project. See: GEN energija 2024.
16 | Ibid. 4.
17 | SNSA 2024, 3.
18 | NEPN 2024, 222.
19 | Technologies under consideration for JEK2 include pressurised water reactors (PWR) from providers such as US Westinghouse, France's EDF, and Korea Hydro & Nuclear Power. The decision to focus on PWR technology is based on the accumulated knowledge and experience from the existing Krško NPP over the past 40 years. For more details, see GEN energija 2025a.
20 | NEPN 2024, 276.

| A "100% RES Scenario": Under this vision, Slovenia would transition entirely to renewable energy sources by 2050, without building new nuclear energy capacities.[21]

The NEPN further specifies that a definitive decision on the construction of a new nuclear power plant is anticipated by 2028, depending on the outcomes of ongoing studies, consultations, and strategic environmental assessments.[22]

The Republic of Slovenia is actively engaged in the preparatory stages of developing a second nuclear power plant, designated as JEK2. The licensing process for JEK2 is divided into four main stages: siting, building permit, trial operation, and operational licensing.[23] The siting phase involves the formulation of a National Spatial Plan (NSP), which is managed by the Ministry of Natural Resources and Spatial Planning (MNRSP) and includes a Strategic Environmental Assessment (SEA) conducted by the Ministry of the Environment, Climate and Energy (MECE).[24] The Environmental Impact Assessment (EIA), which is more extensive than the SEA, is conducted during the building permit phase.[25]

The Slovenian Nuclear Safety Administration (SNSA) plays a crucial role throughout the licensing process. Its responsibilities include the provision of expert evaluations and the assurance of compliance with international safety standards, such as those established by the International Atomic Energy Agency (IAEA). SNSA also ensures that the JEK2 project aligns with EU legal acts and binding international agreements.[26]

In conclusion, nuclear energy remains one of the central pillars of Slovenia's energy strategy, reflecting the country's broader goals of energy security, sustainability, and climate responsibility. While several critical decisions—most notably, the final authorisation for the construction of JEK2—remain pending, Slovenia's careful planning and scenario analysis demonstrate its commitment to an informed, transparent, and balanced energy future.[27]

B) Nuclear regulatory organs and national nuclear laws

Slovenia's institutional framework for nuclear governance is founded upon three fundamental pillars: energy policy development, independent regulatory

21 | Ibid.
22 | Ibid. 76.
23 | Torkar et al. 2024, 1.
24 | Ibid.
25 | Ibid. 2.
26 | SNSA 2024, 3.
27 | It should be noted that nothing in this contribution is intended as an endorsement or rejection of any specific nuclear energy scenario. In view of the complexity involved, a robust evidentiary basis and objective analyses remain essential before any final decisions are made.

oversight, and radioactive waste management.[28] Administrative and regulatory responsibilities are distributed among several ministries and their internal bodies—most notably the Ministry of Natural Resources and Spatial Planning (MNRSP), the Ministry of the Environment, Climate and Energy (MECE), and the Ministry of Health (MZ)—as well as subordinate agencies and inspectorates such as the Slovenian Nuclear Safety Administration (SNSA), the Radiation Protection Administration (URSVS), and the Directorate for Energy. In parallel, a number of public legal entities bear significant responsibilities. Among these are the Agency for Radioactive Waste Management (ARAO), the public fund for decommissioning NEK, and the nuclear insurance pool. These bodies are further supported by expert commissions and certified technical advisors, who are mandated to issue independent opinions where legally required. Given the complexity of the institutional framework, an exhaustive analysis of all stakeholders exceeds the scope of this article. Therefore, the following section focuses on the Slovenian Nuclear Safety Administration (SNSA), which is considered to be the central state authority in the field of nuclear safety and licensing, particularly in relation to NEK. Although the analysis is focused on domestic institutions, it is important to underscore that Slovenia's EU and Euratom membership gives rise to an operational interplay between national and supranational regulatory systems. The primacy of EU law and the duty of sincere cooperation serve to ensure that internationally established norms and principles are effectively transposed and implemented within the Slovenian legal order.

The Slovenian Nuclear Safety Administration (SNSA) constitutes the principal body of state administration charged with the supervision of nuclear safety within the Republic of Slovenia. Operating under the auspices of the Ministry of Natural Resources and Spatial Planning, it is tasked with performing expert and developmental administrative functions, as well as conducting inspection supervision to ensure compliance with nuclear energy regulations.[29]

The statutory basis for the functions of the SNSA is articulated in Article 14(4) of the Regulation on Bodies within Ministries (*Uredba o organih v sestavi ministrstev*),[30] which delineates the tasks of the SNSA in the field of nuclear and radiation safety. In line with this, the SNSA is responsible for ensuring nuclear safety and radiation protection, including overseeing radiation practices and the use of radiation sources outside the healthcare and veterinary sectors. Its tasks include monitoring environmental radioactivity, protecting the population and environment from ionising radiation, ensuring the cyber security of nuclear facilities, and managing the physical protection of nuclear materials, facilities, and radioactive sources. Additionally, the SNSA plays a pivotal role in

28 | See further: ReJSV24–332023, Chapter 6.
29 | Ferčič & Samec Berghaus 2021, 54.
30 | Official Gazette of the Republic of Slovenia, Nos. 35/15, 62/15, 84/16, 41/17, 53/17, 52/18, 84/18, 10/19, 64/19, 64/21, 90/21, 101/21, 117/21, 78/22, 91/22, 25/23 and 127/23.

the enforcement of legal provisions concerning the non-proliferation of nuclear weapons, oversees the transport of nuclear and radioactive substances, and enforces nuclear liability regulations. The administration is also involved in the management of radioactive waste and spent fuel, as well as emergency preparedness for nuclear and radiological incidents, with a specific focus on the protection of critical infrastructure, such as nuclear power plants. In addition to its domestic regulatory mandate, the SNSA is entrusted with inspectional supervision across all the aforementioned fields and holds a central role in fulfilling international obligations under nuclear and radiation safety treaties, while also facilitating international data exchange.

Organisationally, the SNSA is structured into several specialised internal divisions, including the General Affairs Service, International Cooperation Service, Nuclear Safety Division, Radiation Safety and Materials Division, Emergency Preparedness Division, Radiation and Nuclear Safety Inspection, and Cybersecurity Division. Each of these units plays a vital role in SNSA's mission, ensuring Slovenia's mission to uphold and advance the highest standards of nuclear safety and regulatory integrity, in accordance with both national legislation and international legal obligations.[31]

The General Affairs Service bears responsibility for drafting regulations, providing legal assistance in administrative procedures, and participating in the implementation of international agreements. The International Cooperation Service manages SNSA's participation in international organisations and agreements, ensuring compliance with international nuclear safety standards and fostering global collaboration. The Nuclear Safety Division oversees the safety of nuclear facilities, including the Krško Nuclear Power Plant (NEK). Its remit includes the conduct of regulatory inspections and ensuring compliance with safety regulations. The Radiation Safety and Materials Division focuses on protecting workers and the public from radiation exposure and oversees the safe handling and transport of radioactive materials. The Emergency Preparedness Division is tasked with planning and coordinating responses to nuclear or radiological emergencies, ensuring that Slovenia is prepared to handle potential incidents effectively. The Radiation and Nuclear Safety Inspection conducts inspections to ensure compliance with radiation and nuclear safety regulations, providing oversight of facilities and activities involving ionising radiation. Finally, the Cybersecurity Division addresses cybersecurity risks related to nuclear facilities and ensures the protection of critical infrastructure from cyber threats.[32]

31 | SNSA 2023, 105.
32 | More available at: SNSA 2024.

1. Independence from Industry and Political Influence

Under the binding framework of the Euratom legal framework, Member States are required to establish and maintain a competent regulatory authority responsible for performing specific regulatory tasks and activities related to nuclear energy.[33] This authority must be sufficiently independent. Although the requisite standard of independence is not as stringent as that imposed upon regulators in fully liberalised sectors—such as electricity, telecommunications, postal services, or rail transport—it nonetheless entails a high degree of institutional and operational autonomy.[34] In principle, the regulatory authority must be able to make decisions without undue influence. Therefore, it must be functionally separated from any entity involved in the regulated activities. In addition, it must possess the appropriate legal powers, as well as human and financial resources necessary to discharge its mandate.

The SNSA operates under the Ionising Radiation Protection and Nuclear Safety Act (*Zakon o varstvu pred ionizirajočimi sevanji in jedrski varnosti*, ZVISJV-1).[35] However, ZVISJV-1 does not provide a systematic or coherent legal framework regulating the national regulatory authority in the field of nuclear energy. Its legal powers are stipulated in various provisions of ZVISJV-1. However, there is an even greater problem: ZVISJV-1 does not contain a dedicated chapter—or even a single provision—regarding the legal status of the regulatory authority, which is, in the authors' view, a notable deficiency in the Slovenian regulatory landscape. This structural shortcoming is not mitigated by the Resolution on Nuclear and Radiation Safety in the Republic of Slovenia for the Period 2024–2033 (ReJSV24–33), which—while emphasising in Section 8.5 ("Institutional Framework Objectives," Goal 8) the importance of maintaining regulatory independence to ensure effective oversight and compliance with international standards—does not carry binding legal force. The resolution rightly emphasises that regulatory authorities, including the SNSA, must have adequate technical and managerial competencies, as well as sufficient human and financial resources, to fulfil their responsibilities. It further requires that these authorities remain independent from license holders and other stakeholders, ensuring that their decisions are free from undue influence.[36]

Since ZVISJV-1 does not expressly regulate legal status of the SNSA, this aspect must necessarily be inferred from other legislative instruments or general legal acts. Chief among these is the State Administration Act (*Zakon o državni upravi*,

33 | See, for example, Arts. 5 of the Directive 2009/71/Euratom, 76 of Directive 2013/59/Euratom, and Art. 6 of Directive 2011/70/Euratom.
34 | For a detailed discussion of independence standards and requirements in the energy sector, see, for example, Ferčič 2022.
35 | Official Gazette of the Republic of Slovenia, Nos. 76/17, 26/19, 172/21 and 18/23 – ZDU-1O.
36 | ReJSV24–332023.

ZDU-1).[37] Based on this Act, the Government adopted the Regulation on Bodies within Ministries, defining the SNSA as a body within a ministry. This classification, while not dispositive, permits certain indirect inferences regarding the SNSA's legal status and, more crucially, its degree of institutional independence. In principle, such a body is established to carry out specialised expert tasks, especially when high workload is expected, and efficiency and quality are essential. It is also envisaged in cases where a relatively high degree of autonomy in decision-making is required Although this structure may at first glance seem conducive to regulatory independence, a closer examination of the relevant provisions reveals that a body within a ministry cannot operate independently of its parent institution. For instance, where the body exercises first-instance decision-making authority, the ministry typically acts as the appellate authority.[38] In addition, the head of such a body is appointed in accordance with the general procedure laid down in the legislation governing public servants.[39] It is also worth noting that a body within a ministry performs its tasks in accordance with applicable laws, secondary regulations, the work program adopted by the minister upon the proposal of the head of the body, and the financial plan approved under the legislation governing public finances — all of which allow little room for autonomous decision-making.[40] The minister provides strategic guidelines,[41] issues mandatory instructions, and may require the body to undertake specific actions within its jurisdiction and report accordingly.[42] The minister also represents the body before the National Assembly and the Government[43] and supervises its overall functioning. Moreover, the minister may at any time request performance reports, statistical data, or other relevant documentation.[44] The head of the body must report regularly and, when specially requested, provide detailed updates on all key matters falling within the body's responsibilities.[45] Finally, the internal organisation and systematisation of job positions within a body established within a ministry are determined by the minister, in agreement with the government and upon the proposal of the head of the body.[46] Taken together, these provisions demonstrate a significant degree of ministerial control over the SNSA. However, considering the relatively modest independence standards set by the Euratom legal acts, the Slovenian framework cannot be deemed incompatible *per se* with supranational requirements.

37 | Official Gazette of the Republic of Slovenia, Nos. 113/05, 89/07 – CC Dec. 126/07 – ZUP-E, 48/09, 8/10 – ZUP-G, 8/12 – ZVRS-F, 21/12, 47/13, 12/14, 90/14, 51/16, 36/21, 82/21, 189/21, 153/22 and 18/23.
38 | Art. 25 of the ZDU-1.
39 | Art. 22 of the ZDU-1.
40 | Art. 23(1) of the ZDU-1.
41 | Art. 23(2) of the ZDU-1.
42 | Art. 23(3) of the ZDU-1.
43 | Art. 23(4) of the ZDU-1.
44 | Ibid.
45 | Art. 24(2) of the ZDU-1.
46 | Art. 26(1) of the ZDU-1.

Supranational rules mandate only functional separation from other bodies or organisations, not necessarily legal separation in the strict sense. Therefore, the fact that the SNSA is not constitutes as a distinct legal entity under public law—separate from the ministry, the government, or the state more broadly—does not automatically disqualify it from meeting the Euratom standard. Moreover, the SNSA appears to possess the legal powers by supranational standards. Regarding the additional requirement—namely, the availability of sufficient human and financial resources to fulfil its tasks—it is evident that the SNSA does not enjoy full autonomy in this respect. Nevertheless, this lack of financial and staffing autonomy does not, in and of itself, automatically imply that the SNSA lacks the functional capacity to carry out its responsibilities. A more detailed analysis is required before reaching a definitive conclusion. That said, it is noteworthy that the SNSA has, in successive annual reports, repeatedly drawn attention to the insufficiency of qualified personnel and the need for increased financial allocations.

More precisely, the SNSA regularly publishes reports on its activities and decisions, thereby promoting a high degree of transparency and accountability to the public and international community. These reports provide insight into the agency's regulatory actions and demonstrate its commitment to maintaining high standards of nuclear safety. The institutional framework objectives outlined in the 2023 Annual Report on Radiation and Nuclear Safety in the Republic of Slovenia further emphasise the importance of maintaining the separation and independence of regulatory authorities from entities promoting the use of nuclear energy or ionising radiation sources. The report also underscores the imperative of ensuring that such bodies are equipped with adequate financial resources and qualified personnel, without which effective regulatory oversight cannot be guaranteed.[47] It also notes that administrative adjustments have been made to enhance the efficiency and independence of regulatory bodies, including measures to ensure financial stability, eliminate administrative obstacles, and safeguard decision-making processes from external influence.[48] Nonetheless, the report implicitly recognises that no *pro forma* reform can substitute for the provision of sufficient human and financial resources, which remain essential to both the independence and operational effectiveness of the SNSA. In the authors' view, this matter is of such fundamental importance that it ought to be reconsidered by the legislator.

Furthermore, it is worth noting that the Rules on the Expert Council for Radiation and Nuclear Safety establish stringent procedures to prevent conflicts of interest. Members of the council are appointed based on professional qualifications, and whose service is expressly designated as honorary.[49] Article 3 of the Rules specifies that members cannot hold leadership positions in nuclear or radiation facilities,

47 | SNSA 2023, 84.
48 | Ibid.
49 | Rules on the Expert Council for Radiation and Nuclear Safety, Official Gazette of the Republic of Slovenia, No. 114/24.

and Article 5 outlines the grounds for dismissal, including failure to maintain confidentiality and the existence of any conflicts of interest.[50] These provisions ensure that decisions are made impartially and free from improper influence.

In summary, while supranational rules require the establishment of a national regulatory authority, while the applicable independence standards and requirements appear relatively modest—particularly when compared to those governing regulators in liberalised sectors such as energy. Nevertheless, even these moderate standards are not fully satisfied under the current Slovenian legal framework. This shortfall becomes increasingly salient considering the growing responsibilities entrusted to the regulatory authority, particularly when such expansions are not accompanied by corresponding adjustments in human and financial resources. It must be emphasised that the independence of regulatory authorities is not static but a dynamic concept, requiring continuous effort to safeguard them from undue political or corporate influence.[51] Therefore, the Slovenian legislator should give serious consideration to amending the legal framework to enhance the institutional position of the SNSA. In this regard, it would be prudent to weigh the potential benefits and drawbacks of transforming the SNSA from a body within a ministry into an independent public legal entity.

2. National nuclear legislation

The legal foundation for administrative, professional, and inspection-related tasks in the field of nuclear safety and radiation protection, is primarily laid down in the Ionising Radiation Protection and Nuclear Safety Act (*Zakon o varstvu pred ionizirajočimi sevanji in jedrski varnosti,* ZVISJV-1), together with an array of secondary legislation adopted pursuant to this statute. Complementary legal instruments include the Act on Liability for Nuclear Damage (*Zakon o odgovornosti za jedrsko škodo*, ZOJed-1),[52] the Act on the Transport of Dangerous Goods (*Zakon o prevozu nevarnega blaga*, ZPNB),[53] along with regulations in the broader field of nuclear and radiation safety, as well as ratified and published international treaties in the field of nuclear energy and nuclear and radiation safety, also serve as the legal framework.

Within this legal framework, the licensing procedure for the construction of a new nuclear power plant is governed by a number of interrelated statutory and regulatory instruments, including but not limited to the following:

- The Spatial Management Act (*Zakon o urejanju prostora*, ZUreP-3), which governs the process of spatial planning and, in particular, the preparation and

50 | Ibid.
51 | Ferčič 2022,1183–1218.
52 | Official Gazette of the Republic of Slovenia, No. 77/10.
53 | Official Gazette of the Republic of Slovenia, Nos. 33/06 – Official Consolidated Text, 41/09, 97/10 and 56/15.

adoption of the National Spatial Plan (NSP) an essential prerequisite for siting nuclear facilities;[54]

- The Building Act (*Gradbeni zakon*, GZ-1), which regulates construction permits and technical standards;[55]
- The Environmental Protection Act (*Zakon o varstvu okolja*, ZVO-2), which provides the framework for environmental assessments and protection measures;[56]
- The Ionising Radiation Protection and Nuclear Safety Act (*Zakon o varstvu pred ionizirajočimi sevanji in jedrski varnosti*, ZVISJV-1), which serves as the cornerstone of the nuclear safety regime, laying down safety requirements for nuclear installations, radiation protection measures, and regulatory oversight;
- The Rules on Radiation and Nuclear Safety Factors (*Pravilnik o dejavnikih sevalne in jedrske varnosti*), which detail safety factors for nuclear installations;[57]
- The Rules on ensuring safety after the start of operation of radiation or nuclear facilities (*Pravilnik o zagotavljanju varnosti po začetku obratovanja sevalnih ali jedrskih objektov*), which prescribe the ongoing safety assurance measures;[58]
- The Regulation on the Areas of Limited Use of Space due to a Nuclear Facility and the Conditions of Facility Construction in these Areas (*Uredba o območjih omejene rabe prostora zaradi jedrskega objekta in pogojih gradnje objektov na teh območjih*), which delineates exclusion and buffer zones around nuclear facilities and imposes construction limitations within these zones to safeguard public health and environmental integrity.[59]

In addition to the legislative framework, any construction project, including nuclear facilities, must also consider the Spatial Development Strategy of Slovenia 2050 (*Strategija prostorskega razvoja Slovenije 2050* – ReSPRS2050), a high-level planning document adopted by the National Assembly of the Republic of Slovenia on 28 June 2023 through a resolution.[60]

In support of the legal framework, the Cybersecurity and Management Sector of the SNSA prepares a series of non-binding "*Practical Guidelines*", intended to assist stakeholders in interpreting and applying statutory and regulatory requirements. These guidelines provide suggestions for good practices in meeting legal

54 | Official Gazette of the Republic of Slovenia, Nos. 199/21, 18/23 – ZDU-1O, 78/23 – ZUNPEOVE, 95/23 – ZIUOPZP, 23/24, and 109/24.
55 | Official Gazette of the Republic of Slovenia, Nos. 199/21, 105/22 – ZZNŠPP, 133/23 and 85/24 – ZAID-A.
56 | Official Gazette of the Republic of Slovenia, Nos. 44/22, 18/23 – ZDU-1O, 78/23 – ZUNPEOVE, and 23/24.
57 | Official Gazette of the Republic of Slovenia, No. 56/24.
58 | Official Gazette of the Republic of Slovenia, No. 27/24.
59 | Official Gazette of the Republic of Slovenia, No. 78/19.
60 | Resolution on the Spatial Development Strategy of Slovenia 2050 (ReSPRS2050), Official Gazette of the Republic of Slovenia, No. 72/23.

requirements to assist stakeholders. While stakeholders remain free to adopt alternative ways to fulfil their obligations or exercise their rights, they should be aware that such alternatives may require the SNSA to spend more time assessing their adequacy and may necessitate additional explanations. The guidelines describe what the SNSA recognises as good compliance with legal requirements.[61]

C. Licensing stages of a nuclear power plant

a) Decision-in-Principle

In Slovenia, the initiation of a nuclear project constitutes a sovereign decision taken at the highest level of national governance, following a transparent and inclusive process in which all relevant stakeholders are invited to participate. Such a decision is predicated upon a thorough assessment of the project's justification, based on the country's energy needs, economic factors, environmental impacts, and compliance with international obligations. The process aligns with the requirements of the European Union's Council Directive 2013/59/Euratom of 5 December 2013 laying down basic safety standards for protection against the dangers arising from exposure to ionising radiation.[62] Article 19 of the Directive mandates that Member States shall ensure the justification of any new practice involving exposure to ionising radiation prior to its introduction. This principle of justification requires that the benefits of such a practice demonstrably outweigh the potential radiological risks.

Although Slovenia does not possess a formally codified licensing phase explicitly designated as a "decision-in-principle" stage, such a phase exists in practice and is articulated through national resolutions and long-term energy policy instruments, which are adopted by the National Assembly (*Državni zbor*) and the Government (*Vlada*). These high-level policy determinations are informed and supported by preliminary safety assessments, environmental impact analyses, and extensive stakeholder participation. The ZVISJV-1 provides the principal statutory basis for implementing the justification principle required by Article 19 of the Council Directive 2013/59/Euratom, ensuring that benefits of nuclear projects outweigh associated radiation risks.

Strategic policy orientations confirming Slovenia's long-term commitment to nuclear energy are outlined in the ReDMRJE 2024 and the Resolution on Slovenia's Long-Term Climate Strategy until 2050 (*Resolucija o dolgoročni podnebni*

61 | SNSA 2025.

62 | Council Directive 2013/59/Euratom of 5 December 2013 laying down basic safety standards for protection against the dangers arising from exposure to ionising radiation, and repealing Directives 89/618/Euratom, 90/641/Euratom, 96/29/Euratom, 97/43/Euratom and 2003/122/Euratom, OJ L 13, 17.1.2014, 1–73.

strategiji Slovenije do leta 2050, ReDPS50).[63] The former emphasises the importance of nuclear energy as a strategic energy source for ensuring a reliable, sustainable, and low-carbon energy supply. It also highlights the role of nuclear energy in mitigating climate change and reducing Slovenia's energy import dependency. The latter resolution reaffirms Slovenia's plans to use nuclear energy in the long term and outlines the necessary administrative and preparatory steps for future investments.

b) Environmental license

In the Republic of Slovenia, the nuclear licensing process comprises two distinct yet interrelated environmental assessments:

- First, a Strategic Environmental Assessment (SEA) is undertaken during the first phase of the process, specifically within the context of preparing the National Spatial Plan (NSP). Regulated under the Spatial Management Act (*Zakon o urejanju prostora*, ZUreP-3), the SEA evaluates the strategic environmental impacts of potential locations and spatial planning decisions. It focuses on regional and national-level environmental considerations (including transboundary context) and ensures public participation through public disclosure and consultations.[64]
- Secondly, during the subsequent phase, a project-specific Environmental Impact Assessment (EIA) is carried out as part of the integrated construction permitting process, which falls under the remit of the Environmental Protection Act (*Zakon o varstvu okolja*, ZVO-2). This assessment is more detailed than the SEA and involves a comprehensive evaluation of the specific environmental impacts of the chosen nuclear project, including emissions, water use, radiological safety, and local ecosystem effects.[65]

While the SEA primarily addresses strategic planning and spatial considerations, the EIA includes a more comprehensive analysis of project-specific environmental impacts. The EIA incorporates transboundary environmental impact assessments, as required by Article 98 of the ZVO-2, thereby ensuring that potential environmental repercussions on neighbouring countries are properly accounted for.[66] This process involves notifying the relevant authorities in affected countries, providing translated documentation, and conducting consultations to mitigate or eliminate potential cross-border environmental risks.[67]

63 | Official Gazette of the Republic of Slovenia, Nos. 119/21 and 44/22 – ZVO-2.
64 | Arts. 69 and 105 of the ZUreP-3.
65 | Arts. 94–97, 101, and 104 of the ZVO-2.
66 | Art. 98 of the ZVO-2.
67 | Art. 98(1)– (6) of the ZVO-2.

The SEA is administered during the siting stage, managed by the MNRSP, with the MECE responsible for its execution. The SNSA participates in this process as an expert body, providing authoritative opinions on matters of nuclear and radiation safety.[68] The EIA, on the other hand, is integrated into the construction permitting process (*integralno gradbeno dovoljenje*), where the Environmental Consent (*okoljevarstveno soglasje*) is formally issued before construction begins.[69]

To ensure the future adequacy of the Environmental Consent (EC), Slovenian legislation includes mechanisms to adapt to changes in environmental conditions or project parameters. Article 101 of the ZVO-2 governs modifications to the EC if significant changes occur in the project or its environmental context post-consent but pre-construction. Furthermore, the MECE can order a new EIA if significant technological changes or environmental risks arise, ensuring that safety and environmental standards remain robust and effective.

Additional oversight is afforded by Periodic Safety Reviews (PSR), as outlined in Article 112 of the ZVISJV-1. These reviews require the licensee to systematically evaluate and verify nuclear and radiation safety, including assessments of environmental impacts. PSR findings must be submitted at least 40 months before the expiration of the operating licence.

These mechanisms ensure that environmental concerns are addressed comprehensively and remain relevant throughout the lifecycle of the nuclear project, which can span several decades.

c) Nuclear-Specific Licensing Framework

Slovenia operates under a hybrid nuclear licensing regime that combines both prescriptive (standards-based) and goal-setting regulatory approaches.

At its core, the Slovenian legal framework is grounded in the ZVISJV-1 and its associated secondary regulations define strict prescriptive requirements based on international standards such as the IAEA Safety Standards and WENRA reference levels. The SNSA enforces these regulations, ensuring that nuclear facilities comply with clearly defined technical and operational safety requirements. This includes regular oversight, as well as the issuance of licenses, inspections, and compliance monitoring.[70]

In parallel with these prescriptive norms, the Slovenian regime incorporates goal-setting regulatory elements, particularly in domains where risk-informed decision-making and performance-based safety assessments are deemed appropriate. Licensees are thereby required to undertake both probabilistic and deterministic safety analyses, justify their safety cases, and demonstrate how they

68 | Torkar et al. 2024, 1.
69 | Art. 63 of GZ-1.
70 | SNSA (2023).

meet overarching safety objectives rather than just following prescriptive rules.[71] This balance encourages operators to adopt innovative safety technologies while maintaining compliance with regulatory expectations.

The salient features of Slovenia's hybrid regulatory approach may be summarised as follows:

- Prescriptive elements: Mandatory compliance with domestic and international safety codes and standards, including those established by the IAEA, WENRA, ASME, and EUR.
- Goal-setting elements: An obligation on the part of licensees to demonstrate safety performance and justify compliance with regulatory expectations laid down by the SNSA.
- Regulatory oversight: Licenses for nuclear facilities are issued for a maximum period of 10 years, as mandated under Article 138 of the ZVISJV-1. During this time, the SNSA conducts regular inspections and Periodic Safety Reviews (PSR) to verify continuous compliance with safety standards.

Although the Slovenian model retains a primarily prescriptive character, its integration of risk-informed safety principles and regulatory flexibility places it in alignment with modern European nuclear regulatory practices, ensuring both strict compliance and adaptability to technological advancements.

d) Installation level licenses

1. Siting Process for a NPP in Slovenia

The siting of a nuclear power plant (NPP) in Slovenia is governed by the ZUreP-3, the ZVISJV-1, The Rules on Radiation and Nuclear Safety Factors, and the ZVO-2. In view of the national significance of such an infrastructure project, the siting process is undertaken through the preparation of an NSP, which must align with the ReSPRS2050. The MNRSP manages the NSP process, while the MECE is responsible for conducting the SEA, as required for large-scale infrastructure projects.[72]

The procedure is initiated by the MECE, which submits a formal initiative to the MNRSP, which verifies whether the initiative is complete and properly substantiated.[73] This initiative must contain all relevant information necessary to launch the NSP process, including a draft plan for public participation and a preliminary timetable for NSP preparation. Upon verifying its completeness, the MNRSP publishes the initiative in the Spatial Information System, ensuring transparency and accessibility for stakeholders.[74] Given the potential environmental impact of an

71 | See for example Arts. 112, 116, 119, 137, and 138(1) of the ZVISJV-1.
72 | See Arts. 69 and 84 of the ZUreP-3.
73 | Torkar et al. 2024, 2.
74 | Art. 91 (3) of the ZUreP-3.

NPP, the NSP must undergo an SEA, which assesses the project's strategic environmental implications and ensures public involvement.[75]

Following publication, the MNRSP circulates the initiative to the competent spatial planning authorities, including the SNSA, requesting their input for the NSP. The SNSA provides specific nuclear and radiation safety requirements that must be incorporated into the NSP. Additionally, it outlines the scope, content, and level of detail required for the environmental report related to nuclear and radiological safety considerations. A further integral element of the NSP is the inclusion of a variant study, which evaluates various technical and locational alternatives, considering environmental and safety aspects.[76]

Pursuant to Article 4 of the Rules on Radiation and Nuclear Safety Factors, the siting process also requires the implementation of pre-operational environmental monitoring, including the measurement of baseline environmental conditions.

Public participation constitutes a cornerstone of the NSP procedure. A public hearing is convened, affording local communities to articulate their views and concerns regarding the variant study, environmental report, and the NSP proposal as a whole. Simultaneously, and in light of the inherently transboundary environmental implications of a nuclear installation such as an NPP in Slovenia, neighbouring EU Member States are notified and invited to provide comments. This cross-border consultation ensures that potential adverse effects on the environment beyond Slovenia's borders are properly addressed.[77]

Upon the conclusion of the public consultation and transboundary environmental assessment, the competent spatial planning authorities, including the SNSA, issue their final opinions. The SNSA evaluates the site based on a second expert review conducted by an authorised radiation and nuclear safety specialist, assessing the feasibility of constructing the nuclear facility at the designated location.[78] The SNSA issues an official decision on the status of the site as a nuclear facility, defining the limited-use area surrounding the site (Article 95 of the ZVISJV-1). This decision establishes legal and safety constraints for future developments within the designated perimeter, ensuring compliance with nuclear and radiation safety regulations. The decision by the SNSA outlines site-specific conditions, such as permissible environmental radiation burdens and design parameters necessitated by nuclear and radiation safety considerations. This decision forms an integral part of the NSP documentation.

Following the issuance of the SNSA's decision and the approval of all relevant authorities, the Government formally adopts the NSP and issues a decree

75 | Art. 19 of the ZUreP-3 and Art. 98 of the ZVO-2.
76 | See Arts. 94 in connection with Art. 100 of the ZUreP-3, and Art. 86(1) of the ZVISJV-1, which governs the status decision for a nuclear facility.
77 | See Art. 98 of the ZVO-2.
78 | Torkar et al. 2024, 2.

under Article 97 of the ZUreP-3, which finalises the zoning restrictions for the nuclear site.

It is manifest that Slovenian legislation integrates the preliminary design review of the reactor into the overall licensing process rather than treating it as a standalone pre-licensing stage. The process begins already during the strategic spatial planning phase, where the investor submits the conceptual design and initial safety analysis. The SNSA, in conjunction with independent expert reviewers, then assesses whether the reactor design meets national and international safety standards. This approach ensures that nuclear facilities are planned and sited with full consideration of all safety and radiation protection aspects. Accordingly, well before the issuance of a construction permit, the regulatory framework already provides for a thorough review confirming the technical and safety adequacy of the proposed design.

Whilst Slovenia has established a legally robust and scientifically supported framework for the siting of a nuclear power plant, certain procedural challenges remain—particularly in relation to transparency and legal clarity. Despite the detailed requirements set forth in the ZVISJV-1, ZUreP-3, and ZVO-2, the lack of clear procedural guidance and cross-referencing between these regulations can make the process difficult to navigate in practice, particularly for investors and regulatory bodies responsible for implementation. In the context of an infrastructure project of such profound national and cross-border significance, there exists a pressing need to enhance procedural clarity, harmonise the relevant legal provisions, and foster greater openness in public consultations. Such reforms would not only bolster public trust and institutional confidence. Aligning these efforts with IAEA recommendations and EU legal requirements further underscores the importance of transparent governance in such critical infrastructure projects.

2. Construction – the building permit procedure

The construction of a NPP in Slovenia follows a highly regulated licensing framework that integrates nuclear safety, environmental protection, and spatial planning requirements. The process is governed by the GZ-1, the ZVO-2, the ZVISJV-1, and the Rules on Radiation and Nuclear Safety Factors. In recognition of the profound environmental implications inherent in such an undertaking, the construction permitting process is conducted as an integral procedure, which combines the EIA and the building permit approval process, ensuring that both environmental and safety concerns are thoroughly assessed before construction begins.[79] This is achieved through an integral procedure that combines the Environmental Impact Assessment (EIA) and the building permit approval process. Under Article 88(2) of the ZVO-2, any project with a potentially significant

79 | Art. 63 of the GZ-1.

environmental impact must undergo an EIA and obtain an Environmental Consent (*okoljevarstveno soglasje*) before proceeding. For NPPs, this requirement is further reinforced by Article 63 of the GZ-1, which mandates the issuance of an integral building permit (*integralno gradbeno dovoljenje*).

The MNRSP is responsible for issuing the building permit, while the MECE oversees the environmental assessment process. In parallel, the SNSA plays a key role in evaluating nuclear and radiation safety aspects of the project.

The process is initiated by the investor, who submits a formal application to commence the integral permitting procedure.[80] This request must include the necessary project documentation, proof of ownership or other property rights, an Environmental Impact Report (EIR), and a Preliminary Safety Analysis Report (SAR), as required under Article 86(1) of the ZVISJV-1. Prior to the formal initiation of the EIA, the investor may solicit guidance from the MECE regarding the required scope and content of the EIR.[81] At this stage, the SNSA provides input on nuclear and radiation safety, ensuring that the EIR includes all relevant safety aspects and complies with national and international safety standards.[82]

Upon receipt of a complete application, the MNRSP disseminates the relevant documentation, including the EIR, to the competent regulatory bodies for review and comment. The SNSA, in discharging its statutory functions, must procure an expert opinion from an authorised radiation and nuclear safety specialist, who evaluates the acceptability of the proposed construction.[83] In this evaluation, the SNSA also considers the adequacy of the EIR's findings on environmental and societal impacts during the operational lifetime of the NPP.[84] In addition, the SNSA reviews the Preliminary Safety Analysis Report (SAR), the Preliminary Decommissioning Plan, and the Cyber Security Programme to determine whether the proposed design meets nuclear safety requirements.[85] Where warranted, and pursuant to Article 95(5) of the ZVISJV-1, the SNSA may also propose modifications to the designated area of limited use of space around the NPP site.

Public participation constitutes an essential pillar of the licensing process, ensuring both transparency and democratic engagement in the decision-making process. As required under ZVO-2, the MNRSP facilitates public hearings and provides an opportunity for stakeholders to submit comments on the project documentation. Given the inherently transboundary environmental impacts of a nuclear power plant, neighbouring EU Member States are also consulted under Article 98 of the ZVO-2, ensuring that Slovenia fulfils its international obligations to assess and mitigate cross-border environmental risks.

80 | See Art. 46 in connection with Art. 64 of the GZ-1.
81 | See Arts. 94 and 95 of the ZVO-2.
82 | See Art. 97 and 98 of the ZVISJV-1.
83 | Arts. 94(3) and 101 of the ZVISJV-1.
84 | Art. 101(2) of the ZVISJV-1.
85 | Torkar et al. 2024, 4.

Following a comprehensive review of all submitted documentation, expert evaluations, and public feedback, the SNSA issues its final opinion on the project's acceptability. This opinion includes an assessment of nuclear and radiation safety, the final approval of the EIR, and specific conditions for the construction and operation of the facility. Simultaneously, the SNSA issues an official decision on the status of the nuclear facility, as required by Article 86(1) of the ZVISJV-1. Once all regulatory conditions have been met, the MNRSP grants the final building permit, allowing construction to commence.

During the construction stage, all critical systems, structures, and components must undergo pre-operational testing to verify their structural integrity, operational functionality, and compliance with nuclear safety regulations. The scope of these tests is determined by the *Rules on Radiation and Nuclear Safety Factors*, which also require the investor to submit a Pre-operational Testing Programme to the SNSA for approval, as specified in Article 26 of the Rules. In circumstances where fresh nuclear fuel is to be delivered or stored on site during construction, a special permit must be obtained from the SNSA. This measure ensures the enforcement of stringent radiation protection safeguards even prior to operational commissioning.

Whilst the construction stage of a nuclear power plant is highly regulated, integrating safety, environmental, and planning requirements, certain systemic challenges persist. As in the siting stage, these challenges arise from the complexity and fragmentation of legal provisions. The interplay between ZVISJV-1, GZ-1, and ZVO-2 lacks clear procedural cross-referencing, making navigation through the licensing process difficult. To this end, the adoption of a more streamlined approach, with explicit procedural linkages and clearer institutional responsibilities, could enhance regulatory efficiency and transparency. These challenges are particularly relevant for large-scale infrastructure projects like NPP, where legal certainty and predictability are crucial for both investors and the public.

3. Commissioning Process

The commissioning of a nuclear power plant in Slovenia follows an interwoven two-step licensing process: first, the issuance of a permit for trial operation, and subsequently, the permit of use for the facility. Both permits are regulated under the GZ-1, ZVISJV-1, and the Rules on Radiation and Nuclear Safety Factors.[86] These procedures ensure that the plant meets all technical, nuclear safety, and environmental protection standards before entering full operation.

Once the construction of the NPP is completed, the investor must obtain a permit for trial operation before moving on to the final operational phase. The application for trial operation is submitted to the SNSA in accordance with Article

86 | See Arts. 80, 84 of the GZ-1; Arts. 108, 109 of the ZVISJV-1; and Arts. 26, 27 of the Rules on Radiation and Nuclear Safety Factors.

108(2, 3) of the ZVISJV-1 and must include the final Safety Analysis Report (SAR), results of pre-operational testing, and an expert opinion from an authorised nuclear and radiation safety expert.

The specific content and scope of the application are exhaustively set forth under Article 26(1) of the Rules on Radiation and Nuclear Safety Factors, which prescribes the suite of documentation and substantive conditions to be satisfied prior to the commencement of trial operation. Among the key requirements are the final Safety Analysis Report (SAR), a trial operation programme, a radioactive waste and spent fuel management plan, Cyber Security Programme, a fire hazard analysis, and documentation verifying the quality of installed equipment and materials.[87] Upon reviewing the documentation, the SNSA evaluates whether the facility meets all nuclear safety and radiation protection standards and issues a consent for trial operation.[88] Based on this consent, the MNRSP grants the permit for trial operation for a limited period, not exceeding two years, with a possibility of a six-month extension if necessary.[89]

Upon the successful completion of the trial operation phase, the investor must seek the issuance of the permit of use. The permit of use is issued after a technical inspection, which is conducted by a designated technical inspection committee under Article 82 of the GZ-1, which includes representatives of the SNSA.[90] During this inspection, the committee verifies that all design and safety requirements outlined in the approved SAR and project documentation have been met.[91] A critical precondition for obtaining the permit of use is the completion of trial operation and a positive assessment of its results.[92] The SNSA must confirm that all nonconformities identified during technical inspection have been addressed before the MNRSP formally issues the permit of use.[93]

4. Operating licence

The operation of a nuclear power plant in Slovenia requires a license issued by the SNSA, in accordance with Article 109 of the ZVISJV-1 and Article 27 of the Rules on Radiation and Nuclear Safety Factors. The operating licence is valid for a maximum of 10 years and can be extended following a successful Periodic Safety Review (PSR).[94]

87 | However, in accordance with Article 26(2) of the Rules, the applicant is not required to resubmit any documents or data that have already been provided in previous procedures, if they remain unchanged.
88 | Art. 108(4) of the ZVISJV-1.
89 | Art. 108(6,7) of the ZVISJV-.
90 | See Art. 82(2), 83(7) of the GZ-1 and Torkar et al. 2024, 7.
91 | Torkar et al. 2024, 7.
92 | Ibid.
93 | Art. 85(1) of the GZ-1.
94 | See Arts. 138(1), 138(4) of the ZVISJV-1.

In order to obtain an operating licence, the applicant must submit a formal application to the SNSA, which must include the following key documents[95]:

- a valid permit of use, certifying that the installation has satisfactorily passed all requisite technical inspections and is fit for operational service;[96]
- the updated SAR, reflecting the most current safety evaluations, design changes, and procedural refinements;[97]
- an expert opinion from an authorised nuclear and radiation safety specialist, evaluating the plant's compliance with nuclear safety standards;[98]
- the final report on trial operation, providing a comprehensive account of the plant's performance during the limited operational phase.[99]

The SNSA reviews the application within 90 days, assessing whether the facility meets all operational safety requirements. This includes evaluating the updated SAR, trial operation report, and cyber security measures. If all conditions are satisfied, the SNSA issues the operating licence.[100] In accordance with Article 138(1) of the ZVISJV-1, the operating licence is issued for a period of up to 10 years. Before the expiration of the license, the operator must conduct a Periodic Safety Review (PSR), which involves a comprehensive reassessment of nuclear and radiation safety. The findings of this review form the basis upon which a determination is made as to whether the licence may be renewed for an additional term.[101]

Through the imposition of strict licensing conditions and the institutionalisation of regular safety reviews, Slovenia's regulatory architecture ensures that nuclear power plants operate in alignment with contemporary safety standards, reflecting both technological advancements and evolving best practices in the field of nuclear regulation.

e) Energy Permit for Electricity Generation in Slovenia

In addition to securing an Integral Building Permit, an Operational License, and an Environmental Consent, the construction and operation of an electricity generation facility, including a nuclear power plant, also require an Energy Permit and grid connection approvals under the Electricity Supply Act (*Zakon o oskrbi z*

95 | See Arts. 109, 110 of the ZVISJV-1. The exact documentation required for the application is detailed in Article 27(1) of the Rules on Radiation and Nuclear Safety Factors. However, Article 27(2) specifies that documents already submitted with the application for trial operation consent do not need to be resubmitted if they remain unchanged.
96 | Art. 109(2) of the ZVISJV-1.
97 | Art. 110(1) of the ZVISJV-1.
98 | Ibid.
99 | Art. 110(4) of the ZVISJV-1.
100 | Art. 110(4) of the ZVISJV-1.
101 | See Arts. 112(5), 138(4) of the ZVISJV-1.

električno energijo, ZOEE).[102] While this section focuses on the energy permit, other approvals related to grid connection and system integration are also necessary but will not be addressed in detail here.

Under the ZOEE, an energy permit is mandatory for the construction of electricity generation facilities with a rated power above 10 MW that are connected to the public grid. The permit is issued by the Ministry responsible for energy and must be obtained after the adoption of the National Spatial Plan or the regulation on the most suitable variant.[103] The energy permit specifies the location, type of facility, fuel source, conditions for grid connection, and environmental and safety obligations.[104] The permit is valid for five years and may be extended if the investor can demonstrate justified reasons for the delay.[105] Nevertheless, where the investor fails to submit a complete application for a building permit or other necessary approvals within said timeframe, the permit lapses by operation of law.[106] Before the adoption of ZOEE, the Energy Act (*Energetski zakon*, EZ-1)[107] required an energy permit to be obtained before initiating the spatial planning procedure for projects of national importance, including nuclear power plants.[108] For the JEK2 project, an energy permit was issued in 2021 under the EZ-1, when obtaining this permit before the completion of the NSP was legally permissible. Nevertheless, the issuance of this permit has since been the subject of legal contestation, with questions raised as to its conformity with the procedural stipulations applicable at the time.[109]

f) Procedural Aspects of Nuclear Licensing in Slovenia

The procedural architecture governing nuclear licensing in Slovenia is generally founded upon the General Administrative Procedure Act (*Zakon o splošnem upravnem postopku*, ZUP).[110] Nonetheless, a number of notable exceptions and sector-specific rules are established under the ZVISJV-1, particularly in respect of nuclear safety oversight. One of the key procedural distinctions is the lack of an appeal process for certain critical decisions, such as the refusal or approval

102 | Official Gazette of the Republic of Slovenia, No. 172/21.
103 | Art. 35(2) of the ZOEE.
104 | Art. 35(3) of the ZOEE.
105 | Art. 35(8) of the ZOEE.
106 | Art. 35(9) of the ZOEE.
107 | Official Gazette of the Republic of Slovenia, Nos. 60/19 – official consolidated text, 65/20, 158/20 – ZURE, 121/21 – ZSROVE, 172/21 – ZOEE, 204/21 – ZOP, 44/22 – ZOTDS and 38/24 – EZ-2.
108 | Art. 52 of the EZ-1.
109 | Claim against the decision on planning the long-term use of nuclear energy in the Resolution on the Long-term Climate Strategy of Slovenia until 2050 (ReDPS50 2021).
110 | Official Gazette of the Republic of Slovenia, nos. 24/06 – UPB2, 126/07, 65/08, 8/10, 82/13, 175/20 – ZIUOPDVE, 3/22 – ZDeb, 28/23 – ZSDH-1D.

of trial operation,[111] emergency safety inspections,[112] and modifications affecting nuclear safety.[113] That said, the right of access to judicial review remains intact, as judicial review of administrative acts must, in principle, be effectively guaranteed in Slovenia. The Administrative Court and the Supreme Court are competent to decide on administrative disputes. In cases where human rights and fundamental freedoms are affected, the administrative decision may even be subject to review by the Constitutional Court.

While legislative initiatives such as the introduction of the integral building permit under Article 63 of the GZ-1 were conceived as measures to streamline and rationalise nuclear licensing, systemic inefficiencies persist. These streamlined procedures were introduced to enhance regulatory efficiency but, in practice, impose additional administrative burdens on a small country like Slovenia.

The question of whether these procedural reforms will accelerate nuclear projects remains open, especially given Slovenia's broader administrative challenges. Data from inspection reports in 2023 indicate that general construction procedures have not significantly improved, with regulatory delays persisting.[114]

1. Case Studies of Procedural Weaknesses: TEŠ 6 and HE Mokrice

The Šoštanj Thermal Power Plant Unit 6 (TEŠ 6) serves as a prime example of administrative inefficiency and regulatory failure. The project, initially estimated at €655 million, ultimately ballooned to €1.4 billion, rendering it one of Slovenia's largest corruption scandals. According to *Petrovčič*, the delays were largely due to inadequate coordination between regulatory bodies and insufficient oversight, exacerbating the financial and legal complexities.[115]

A similarly instructive case is presented by the Mokrice Hydropower Plant (HE Mokrice) highlights the prolonged nature of Slovenia's licensing processes. Although the siting process began in 2007, the licensing procedure remains incomplete after more than 13 years. The key procedural bottleneck arose during the EIA phase. In 2019, the Administrative Court annulled the environmental consent issued by ARSO, citing procedural deficiencies such as restricted access to crucial studies and inadequate impact assessments for Natura 2000 areas. In response, the Government sought to assert the primacy of energy-related public interest over biodiversity conservation, a move that triggered further litigation in 2021.[116]

111 | Art. 108(8) of the ZVISJV-1.
112 | Art. 113(3) of the ZVISJV-1.
113 | Art. 117(5) of the ZVISJV-1.
114 | Ministry of the Environment, Climate and Energy 2023. Inspection report on administrative procedures in construction licensing. https://tinyurl.com/66kw3hsx [24.02.2025].
115 | Petrovčič 2024.
116 | See more Drnovšek & Samec Berghaus 2021, 491–502.

2. Consequences of Authorities Failing to Meet Deadlines

Although Slovenian law prescribes statutory deadlines for decision-making, the consequences of non-compliance vary. Under ZUP, if an authority fails to issue a decision within the prescribed timeframe, the applicant may file an appeal due to administrative silence (*molk organa*).[117] In circumstances where such an appeal is unavailable, the aggrieved party may initiate judicial proceedings before the Administrative Court. However, nuclear projects often involve extensive safety reviews, making strict enforcement of deadlines difficult. Importantly, Slovenian law does not provide for automatic approval in instances of undue delay. Instead, applicants must seek redress through litigation in administrative courts. The deterrent effect of such deadlines is therefore limited, as nuclear safety considerations generally take precedence over procedural timeliness.

Appeals in nuclear licensing matters generally adhere to the rules set out in the ZUP, but additional scrutiny applies to nuclear-related cases. Depending on the nature of the decision, appeals can be lodged before the MECE or the MNRSP. Judicial review is available before the Administrative Court of the Republic of Slovenia, in accordance with Article 157 of the Slovenian Constitution. Public participation in nuclear licensing is safeguarded by the Aarhus Convention and ZVO-2, which allow affected individuals and NGOs to challenge environmental permits. While no appeal (*pritožba*) is permitted against the decision to issue an environmental permit, judicial review through an administrative dispute (*upravni spor*) remains available.[118] Moreover, such disputes must be treated as priority matters, thereby ensuring expedited judicial oversight in environmental proceedings. It must be noted, however, that although IAEA standards stipulate that persons substantially affected by nuclear activities ought to be granted participatory rights, Slovenian law does not provide automatic legal standing to all interested parties. This omission imposes procedural barriers on the ability of NGOs and civil society actors to partake fully in the licensing process.

3. Efficiency of the Licensing Procedure and Planned Reforms

Nuclear licensing in Slovenia continues to be characterised by its procedural intricacy and protracted timelines, necessitating the navigation of numerous regulatory checkpoints and expert evaluations. According to *Torkar et al.*, the licensing procedure for JEK2 is expected to span several decades, with the siting phase alone projected to take 4–5 years, followed by a 4-year building permit process, a 7-year construction period, and an additional year for trial operation and final licensing.[119]

117 | Art. 222(4) of the ZUP.
118 | Art. 134(10) of the ZVO-2.
119 | Torkar et al. 2024, 8.

The SNSA has been actively working on regulatory improvements, with recent updates to the Rules on Radiation and Nuclear Safety Factors and the Decree on Areas of Limited Use of Space expected to provide clearer regulatory guidance.

Notwithstanding these efforts, broader reform discussions remain ongoing. Two principal avenues for procedural streamlining are currently under consideration:

1. Further integration of licensing steps, inspired by the integral building permit model, aimed at reducing procedural fragmentation; and
2. The digitalisation of administrative procedures, with a view to enhancing document management and inter-institutional coordination.[120]

Yet, due to the fundamental nature of nuclear safety regulation, significant reductions in licensing time are unlikely. The complexity of nuclear governance necessitates rigorous oversight, ensuring that regulatory frameworks prioritize safety, environmental protection, and public transparency over administrative efficiency. Moreover, a persistent shortage of qualified personnel within regulatory authorities further exacerbates delays, as the workload for overseeing such large-scale projects often outstrips available human resources. Frequent legislative changes and low incentives for professionals to pursue careers in nuclear regulatory bodies further contribute to systemic inefficiencies, making long-term strategic workforce planning essential for improving regulatory capacity.[121]

D) Nuclear project characteristics

The existing Krško Nuclear Power Plant (NEK), jointly owned by Slovenia and Croatia, was developed under a turnkey contract—a procurement model prevalent in major infrastructure projects of the late twentieth century. This contract type placed full responsibility for design, procurement, and construction on the contractor, ensuring that the facility was delivered as a fully operational unit. The turnkey approach minimised investor risk and was particularly suited for complex nuclear projects where cost predictability and technical integration were critical.[122]

In contrast, the contractual structure for the second unit, JEK2, has not yet been determined. Preliminary cost estimates from three nuclear technology vendors (EDF, KHNP, and Westinghouse) have been presented as "an initial estimate of the total cost of an Engineering, Procurement, and Construction (EPC) contract."[123] While this suggests that Slovenia may opt for an EPC contract, which would

120 | European Commission 2025.
121 | Government of the Republic of Slovenia (2023); Government of the Republic of Slovenia (2024).
122 | Nuklearna elektrarna Krško 2024.
123 | Ernst & Young 2024, 16.

consolidate project responsibility under a single contractor, alternative approaches should also be considered. Alternative models such as multi-package contracting, where different aspects (e.g., reactor, turbine island, civil works) are awarded separately, are common alternatives to the EPC model that allow more flexibility and cost control.[124] The implementation models used for nuclear power plant projects include turnkey, split package and multiple package contracts, with each offering different balances of risk allocation and project governance.[125]

In considering its options, Slovenia would do well to heed the cautionary tales offered by other European nuclear projects, particularly the challenges that EPC projects in Europe have faced (for instance at Olkiluoto 3 in Finland and Flamanville 3 in France), where significant cost overruns and delays occurred due to supply chain and regulatory obstacles.[126] Consequently, the government ought to carefully assess whether a split-package model—providing more direct oversight of subcontractors—would be more appropriate for JEK2, thus avoiding highly detrimental contractual arrangements similar to those entered into with Alstom for the TEŠ-6 project.[127]

1. Procurement Procedure for Nuclear Power Plants in Slovenia

The procurement procedure for nuclear power plants in Slovenia is primarily governed by the Public Procurement Act (*Zakon o javnem naročanju*, ZJN-3).[128] This law establishes the general framework for competitive tendering in large infrastructure projects, including energy facilities.

For nuclear power plants, the technology selection process typically involves strategic national planning, technical and economic feasibility studies, and environmental impact assessments. In theory, the procurement should follow a competitive tender process to ensure transparency and cost-effectiveness. However, experts and industry representatives have raised concerns about whether standard procurement procedures are suitable for such complex, long-term projects. In particular, it has been suggested that direct negotiations with selected vendors or sector-specific procurement models may be more appropriate, as seen in other countries. Additionally, some highlight that the procurement process for JEK2 could justify special treatment, as the project could be classified as a "particularly sensitive non-military security-related acquisition," which might allow for a more flexible approach.[129]

124 | IAEA 2024, 16–23.
125 | World Nuclear Association 2015, 19.
126 | OECD-NEA 2020, 59–60.
127 | National Assembly of the Republic of Slovenia 2015.
128 | Official Gazette of the Republic of Slovenia, Nos. 91/15, 14/18, 121/21, 10/22, 74/22 – odl. US, 100/22 – ZNUZSZS, 28/23 in 88/23 – ZOPNN-F.
129 | Leskovec & Škof 2024.

While Slovenia has not yet confirmed the procurement model for JEK2, discussions are ongoing about the most suitable approach. The government must balance transparency and competition with the need for an efficient selection process that ensures the long-term safety, security, and reliability of the project.

2. Nuclear Fuel Supply

The Krško NPP (NEK) utilizes uranium dioxide (UO_2) as its reactor fuel. The uranium, once enriched, is procured from URENCO, while the fuel assemblies are manufactured by Westinghouse. During each 18-month fuel cycle, NEK consumes approximately 20 tons of nuclear fuel.[130]

Throughout its operational life in the reactor, ownership of the nuclear fuel remains with NEK. Upon depletion, the spent fuel is initially transferred to a spent fuel pool located within the reactor building, where it undergoes a mandatory cooling period of at least five years. Following this phase, the fuel is moved to a dry storage facility, designed to safely house spent nuclear fuel for at least 100 years.[131]

Even after removal from the spent fuel pool, title to the spent fuel does not transfer during storage or disposal; it remains the property of NEK, which is responsible for its safe storage and potential final disposal. The dry storage facility has a capacity for 70 containers, sufficient to accommodate all spent fuel generated during the plant's planned 60-year operational lifespan.[132]

Additionally, while Slovenia does not have a domestic nuclear fuel reprocessing facility, the energy permit for the new nuclear reactor (JEK2) includes a requirement that the plant must be compatible with reprocessed fuel. This means that Slovenia could send its spent fuel abroad for reprocessing, where it would be purified and transformed into fresh nuclear fuel. Such an approach would enable the reuse of fuel from the first nuclear power plant, reducing long-term storage needs and enhancing sustainability.[133]

E) Small Modular Reactors (SMRs)

As previously noted, Slovenia's updated National Energy and Climate Plan (NEPN) from December 2024 delineates a nuclear development scenario (DU-JE), which includes the construction of a new nuclear power plant by 2040 and a smaller modular nuclear reactor (approximately 250 MW) by the year 2050.[134] While the JEK2 project remains the central pillar of Slovenia's near-term nuclear strategy,

130 | Alternator 2022; NEK 2025.
131 | N12023; NEK 2025.
132 | JEK22025.
133 | Alternator 2022.
134 | NEPN 2024, 222.

interest in SMRs is gathering momentum due to their scalability, advanced safety features, and feasibility for deployment in areas with limited grid infrastructure. On the other hand, at this early stage of development, they also present certain real risks which warrant careful and measured scrutiny.

While JEK2 is a key priority in Slovenia's nuclear strategy, GEN energija is also exploring the development of SMRs. In 2025, key activities for the JEK2 project include spatial planning procedures and ongoing technical feasibility studies, with participation from providers such as EDF and Westinghouse. Additionally, GEN energija plans to conduct a pre-feasibility study within a year to assess the potential for deploying SMR plants in Slovenia. These developments underscore Slovenia's commitment to integrating SMRs into its future energy mix, reflecting a proactive approach to adopting advanced nuclear technologies.[135]

The primary challenges for SMR deployment in Slovenia relate to licensing, regulatory adaptation, and supply chain development. The existing legal framework, primarily governed by the ZVISJV-1, was designed for traditional large-scale nuclear facilities and does not include specific provisions for SMRs. Regulatory adjustments would be needed to reflect their modular construction, passive safety features, and factory-based manufacturing approaches.

Slovenia follows a multi-step licensing approach, requiring separate approvals for siting, construction, trial operation, and full operation. While this structure ensures rigorous safety oversight, applying it to SMRs without modification may lead to unnecessary delays.[136]

International cooperation offers opportunities for knowledge-sharing, regulatory harmonisation, and joint licensing efforts, potentially reducing duplication in regulatory reviews. The European SMR Partnership and IAEA's SMR Regulatory Forum facilitate cross-border dialogue on SMR deployment. However, the SNSA maintains that final licensing decisions must remain under national jurisdiction to ensure compliance with site-specific safety requirements.[137]

While Slovenia is not prioritizing SMRs over large-scale nuclear projects, nevertheless their potential role in future energy diversification is gaining attention. The government's strategy acknowledges the long-term benefits of SMRs but underscores the need for regulatory adaptation and international alignment. Addressing licensing barriers and ensuring efficient oversight will be critical in determining whether SMRs become a viable part of Slovenia's nuclear energy mix. However, Slovenia's modest territorial size and limited availability of suitable sites pose additional constraints, potentially limiting the geographical spread of SMR deployment. In addition, other reals risks of the SMR technology must be carefully

135 | GEN energija 2025b.
136 | IAEA 2023.
137 | Ibid.

evaluated. In this regard, experts should conduct an objective and credible analysis, after which a final decision can be made.

Conclusion: Slovenia's Energy Future – Between Expansion and Systemic Challenges

For several decades, Slovenia maintained a relatively balanced energy mix in terms of risk diversification, relying on hydropower (renewable energy), thermal energy, and nuclear energy. However, as thermal power generation is now poised for progressive phase-out, and the continued operation of the nuclear plant beyond its original design life, the Slovenian energy system now faces significant challenges.

In essence, Slovenia faces complex and interconnected challenges in securing its long-term energy future. The country's energy mix has become increasingly dependent on external resources, while domestic production capacities—most notably the existing nuclear power plant (NEK)—already operate under an extended license. Although the life extension granted to NEK provides temporary relief, it cannot substitute for the formulation of a comprehensive and sustainable energy strategy.[138] Beyond the immediate costs and benefits of generating nuclear power domestically, one must also consider the geopolitical context, as the relationship between the client (Slovenia) and the vendor is inherently long-term. In fact, the two parties must frequently cooperate well beyond the operational phase of the plant.

The JEK2 project was initially positioned as a crucial step in ensuring energy security, yet negative experiences from past infrastructure projects, particularly TEŠ-6, have led to public and political hesitation. The postponement of the JEK2 referendum highlights the lack of consensus on Slovenia's nuclear future. In this context, it is worth mentioning that many people believe energy can be generated in a way that is entirely harmless to nature and the environment. Such an ideal, regrettably, does not exist. In selecting energy production capacities, one does not choose between beneficial and harmful, but rather between degrees of harm, weighing lesser evils in the pursuit of national interest. Consequently, it is essential to consider measures that reduce energy demand. All this means that, focusing solely on boosting energy production without addressing consumption trends is not a sustainable approach. Slovenia must also look to reduce overall energy demand, improving energy efficiency, and promote sustainable transport solutions. Without simultaneous efforts to curb excessive consumption, the benefits

138 | On the similar Hungarian problem of extending the operating time, see: Flekácsné Kocsis 2020, 202–229.

of new energy projects—including JEK2 and potential SMRs—will be undermined by rising demand.

In addition to fiscal and governance considerations, Slovenia's regulatory framework presents a formidable array of institutional impediments. Slovenia's lengthy and fragmented licensing procedures, combined with the limited capacity of regulatory bodies, contribute to prolonged decision-making processes. The country's small size further constrains possible expansion scenarios—large-scale nuclear projects require extensive safety and environmental assessments, while SMRs – even if we overlook the real risks associated with new technology – cannot simply be placed anywhere due to spatial and infrastructural limitations.

Simultaneously, the geopolitical and security landscape has shifted dramatically. The war in Ukraine has highlighted the vulnerability of energy infrastructure, with nuclear facilities increasingly targeted in modern conflicts. The risk of drone strikes, cyberattacks, and sabotage is no longer theoretical, raising urgent questions about how Slovenia would ensure the resilience of its nuclear assets in an evolving security landscape.[139] While proponents argue that nuclear power remains among the safest and most stable energy sources, the reality is that absolute safety is an unattainable ideal—risk mitigation must be balanced with pragmatic decision-making.

Finally, the country must confront its own systemic weaknesses—corruption risks, lack of financial discipline in major infrastructure projects, and the long shadow of TEŠ-6. Without a renewed commitment to transparency, strategic foresight, and political resolve, the nation risks repeating past errors, culminating in cost overruns, delays, and a further erosion of public trust. While nuclear energy could play a critical role in Slovenia's future, its success depends not only on technical feasibility but on the presence of sound governance, responsible stewardship, and a well-informed public discourse.

139 | For more on operational safety issues, see the International Atomic Energy Agency's job descriptions; Kocsis 2016, 41–62.

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Dhiego TELES DA SILVA[1]

Nuclear Renaissance in France: Legal and Regulatory Challenges[2]

Abstract

"The revival of nuclear energy in France is driven by the need to meet climate objectives under the Paris Agreement and ensure energy security amidst global crises. Nuclear power offers a reliable, carbon-free baseload energy source, complementing renewables. This study examines the legal and regulatory challenges of this resurgence, focusing on authorization procedures for new nuclear facilities, nuclear fuel supply chains, and spent fuel management. Special attention is given to Small Modular Reactors (SMRs), evaluating whether current frameworks are adequate or require tailored approaches, and exploring opportunities for international regulatory harmonization".
Keywords: Nuclear energy, Energy security, Climate objectives, Small Modular Reactors Authorization procedures, Nuclear fuel supply, Comparative analysis, Carbon-free energy, Energy transition

The nuclear energy sector is experiencing a significant resurgence in France, propelled by two principal considerations. Foremost among these is the imperative to meet climate targets established under the Paris Agreement, which necessitates the expansion of carbon-neutral energy sources. While renewable energies present undeniable advantages, their intrinsic intermittency and lack of production stability currently compromise their ability to ensure a reliable baseload supply unaided. In parallel, the ongoing global energy crisis has highlighted the strategic importance of energy security as an essential facet of state sovereignty. Within this dual context, nuclear power reemerges as a viable solution for carbon-free baseload electricity production.

1 | Doctor in Public Law, Teacher/researcher at Nîmes University, Visiting researcher at Kokugakuin University in Japan
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This inquiry seeks to explore the legal ramifications of this nuclear revival, focusing particularly on the authorisation procedures for new nuclear facilities. Through a comparative analysis of national regulatory frameworks, this study investigates the sequential stages of authorisation—from the initial governmental determination through to final commissioning—together with the contractual aspects and ownership structures of nuclear projects, legal issues related to nuclear fuel supply, and the distinct regulatory challenges associated with Small Modular Reactors (SMRs).

Adopting a comparative methodology, this study traces the trajectory of nuclear development in France, identifying areas of convergence and divergences in national legal systems, critical points in authorisation procedures, and the emergence of novel regulatory innovations. This approach enables a systematic examination of various jurisdictions while maintaining analytical rigour. Particular attention is paid to documenting legal sources, including legislative and regulatory texts, relevant case law, public policy documents, and relevant international agreements.

One specific interest is the legal frameworks governing nuclear fuel supply chains and spent fuel management—matters which acquire heightened importance in the context of expanded nuclear deployment. The study also addresses the emerging regulatory challenges posed by SMRs, examining whether existing frameworks are adequate or whether tailored approaches are warranted. In this regard, the potential for international regulatory harmonisation in SMR licensing is explored, along with associated jurisdictional and sovereignty considerations.

By contributing to a deeper understanding of contemporary legal challenges in nuclear development while facilitating experience sharing between legal systems. The analysis of regulatory approaches to SMRs is particularly significant, especially in light of potential international harmonisation of authorisation procedures. Through this comprehensive analysis, the study aspires to furnish policymakers, legal practitioners, and industry stakeholders with critical insights as they navigate the complex landscape of nuclear energy regulation.

The findings of this analysis are especially pertinent at a time when nations increasingly turn to nuclear power as a solution to both climate change and the exigences of energy security. Understanding the legal and regulatory frameworks that govern nuclear deployment is crucial for ensuring safe, efficient, and effective implementation of nuclear energy programmes while maintaining public confidence and international cooperation in this critical sector.

This academic treatment emphasises methodological rigour and clearly structured research objectives while maintaining the substance of the original text and providing a comprehensive analysis of the contemporary legal challenges in nuclear energy development. As a point of departure, it is necessary to consider the historical evolution of nuclear energy in France (A). This trajectory is of particular significance, as it illuminates the foundations upon which the nation's regulatory

bodies and legal frameworks in the nuclear domain have been constructed (B). An analysis of the various stages involved in the licensing of nuclear power plants further provides valuable insight into the distinctive characteristics of the French approach to the nuclear sector (C), while simultaneously offering a perspective on the future of the country's nuclear strategy (D)—a matter of increasing relevance in light of the development of small modular reactors (E).

A – The evolution of nuclear energy in France

1- The beginning of nuclear industry in France

The post-war period marks a decisive juncture in French industrial history with the emergence of the nuclear programme. The creation of the Atomic Energy Commission (CEA) in 1945 laid the cornerstone of what would evolve into one of the world's most ambitious nuclear programmes. Under the impetus of General de Gaulle, who saw nuclear energy as a means of ensuring France's energy independence, the programme initially developed in a difficult post-war context, marked by fiscal austerity and considerable technological challenges[3].

The early years of the programme were characterised by an intense experimentation phase. The commissioning of ZOE in 1948, France's first experimental reactor, represents a crucial step demonstrating French scientists' ability to master fundamental nuclear technologies. This reactor, albeit modest in its performance, served as an essential learning platform for an entire generation of French scientists and engineers the subsequent period, spanning from 1953 to 1965, witnessed the programme's true transition to an industrial scale. The Marcoule site emerged as the symbol of this industrialisation with the successive construction of reactors G1, G2, and G3[4]. These facilities, designed for both civilian and military purposes, allowed France to acquire a singular proficiency in the nuclear fuel cycle. The creation of COGEMA[5], a CEA subsidiary, structured fuel cycle management, thus establishing the foundations of an integrated nuclear industry.

The broader geopolitical landscape, particularly the Suez Crisis in 1956, strengthened France's determination to pursue nuclear self-sufficiency. The signing of the EURATOM treaty in 1957 opened new perspectives for European cooperation while allowing France to maintain its technological autonomy. This period also saw the emergence of structuring industrial partnerships, notably between Électricité de France (EDF) and CEA, which would durably shape the French nuclear landscape[6]. The question of technological orientation assumed a

3 | Bouttes 2023, 67.
4 | See Goldschmidt 1969, 83–96.
5 | *Compagnie générale des matières nucléaires*
6 | Rémy 1998, 17.

position of central importance in the 1960s. France experimented with several technologies, notably the French-designed UNGG reactors and American-origin pressurised water reactors (PWR). This technical debate, often called the "war of technologies," concluded in 1975 with the choice of PWRs, a decision that definitively oriented the future of the French nuclear programme.

The industrial architecture established in support of France's nuclear endeavour is remarkable for its coherence. EDF assumed the role of architect-integrator and operator, while Framatome emerged as the principal reactor constructor. This structuring was accompanied by the development of a complete industrial fabric, involving companies such as Pechiney for materials, Saint-Gobain for chemical processing, and Creusot-Loire for heavy components[7]. Crucially, regulatory and safety considerations were not overlooked. France progressively developed a strict regulatory framework and independent control bodies. This attention to safety was accompanied by exacting training policies, designed to ensure a high level of competence among personnel employed within the nuclear sector. The economic and social impact of the nuclear programme proved substantial. It created highly skilled employment opportunities, catalysed regional development around nuclear sites, and contributed to the emergence of internationally recognised French expertise. Territories hosting nuclear installations undergo profound transformations, both economically and socially.

Another cornerstone of the programme lay in the comprehensive management of the nuclear fuel cycle. France developed capabilities in all segments: uranium extraction, enrichment, fuel fabrication, and waste treatment. This complete mastery of the cycle came to be viewed as a major strategic asset[8]. Environmental and societal considerations gradually acquired increasing prominence. Issues relating to site selection, public acceptance, and environmental impact assessment become major issues in programme development. This formative period of French nuclear power laid the foundations for an industry that would become a pillar of national energy policy, exemplifying France's capacity to successfully carry out a major industrial programme, combining technological innovation, efficient industrial organisation, and long-term strategic vision[9].

2- The Decline of Nuclear Power in France

The trajectory of French nuclear power entered a new phase in the 1990s, signalling the end of two decades of sustained expansion. This turning point was driven by both domestic and European factors that reshaped the entire electricity sector. At the supranational level, the European Union instigated a liberalisation

7 | Finon 2009, 189.
8 | Bouttes 2023
9 | Jean-Marie 1990, 126.

process that sought to dismantle national monopolies in favour of competitive electricity markets. This transition, which began in the UK under the Thatcher government, progressively extended to the Continent. Over time, the EU's support for nuclear power diminished, particularly after Germany's decision to phase out nuclear energy following the 2011 Fukushima disaster. Although France initially resisted these changes but eventually had to adapt. One of the most consequential measures was the introduction of the *Accès Régulé à l'Électricité Nucléaire Historique* (ARENH) mechanism, which required EDF to sell up to 100 TWh of its nuclear-generated electricity annually to competing suppliers at a fixed tariff of €42 per MWh. This policy significantly impacted the economics of nuclear power in France[10].

Multiple factors contributed to nuclear power's declining position. Electricity demand grew more slowly than anticipated, partly due to the closure of energy-intensive sectors. Environmental concerns about nuclear waste gained more prominence, and political support for nuclear energy began to erode. As a result, France built fewer new reactors, and existing nuclear fleet began to show signs of ageing. The statistics clearly show this downturn: nuclear power's share in French electricity generation dropped from 76.2% in 1990 to 70% in 2015, and further fell to 62.6% in 2022. Notwithstanding President Sarkozy's efforts to revive the nuclear sector, exemplified by the initiation of the Flamanville EPR project, these initiatives faced numerous challenges. Under the presidency of François Hollande, the focus shifted away from nuclear power. Several older nuclear plants were closed, along with coal-fired power stations. The country began placing more emphasis on renewable energy sources, marking a significant shift in France's energy policy.

This transformation reflects broader changes in society, economics, and politics. France's once-dominant nuclear power programme was compelled to adapt to new market conditions, changing public opinion, and evolving energy policies. While nuclear power remains important in France's energy mix, its role has significantly diminished compared to its peak in the 1990s. The story of French nuclear power demonstrates how even well-established energy systems can change dramatically due to a combination of market forces, political decisions, and social preferences. It also highlights the challenges of maintaining a large nuclear fleet in an increasingly competitive and environmentally conscious energy market[11]. A particularly symbolic moment in this decline occurred in 1998, when Prime Minister Lionel Jospin made the significant decision to shut down the Superphénix reactor, an advanced fast-breeder facility developed in partnership with Germany and Italy. Although technical issues with sodium oxidation were

10 | Taccoen 2023, 12.
11 | Débrégeas & Gassin 2023, 54.

cited as the official reason, strong pressure from environmental groups heavily influenced this decision.

The closure of Superphénix marked the beginning of a series of setbacks. When the government tried to revive advanced nuclear technology with the ASTRID project in 2006, it also failed and was eventually cancelled in 2019. Environmental groups, particularly Greenpeace, vigorously opposed these projects due to safety concerns. Technical problems also plagued the industry. The construction of the new Flamanville reactor faced continuous delays and cost overruns. AREVA, whose reorganisation gave birth to Orano and allowed Framatome to regain its name, after becoming a subsidiary of EDF, struggled to manage these projects effectively and had difficult relationships with EDF, France's main electricity provider.

Government policy decisions have introduced further constraints. In 2011, authorities limited nuclear power to 50% of France's electricity production. This regulatory ceiling was reinforced by the Programmation Pluriannuelle de l'Énergie (PPE) of 2019, requiring the closure of 14 nuclear reactors and setting ambitious targets for reducing energy consumption[12]. Experts identified several critical mistakes in France's approach. Chief among these were inadequate forecasting of future energy needs, an unnecessarily adversarial dynamic between nuclear and renewable energy supporters, and inadequate preparation for maintaining ageing reactors. The country also accepted unfavourable European energy market conditions and abandoned promising nuclear technologies too quickly. The situation now requires significant changes. France needs to reorganise its entire energy system while considering both traditional nuclear power and renewable energy sources. Most experts agree that the European electricity market needs reform and that better long-term energy planning is essential.

These changes show how quickly a country can lose its leadership in an important technology. Political decisions, technical challenges, and changing public opinion all played a role in transforming France's once-dominant nuclear programme. The country now faces the dual challenge of finding the right balance between different energy sources while ensuring a reliable and sustainable power supply for the future. The French case offers a cautionary tale about how energy policy decisions can have long-lasting effects on a country's future. It also shows the importance of maintaining technical expertise and planning carefully for future energy needs.

3- The challenges of Nuclear Power in France and Europe

The European continent remains sharply divided over nuclear energy's future. France has positioned itself at the forefront of a coalition of thirteen EU nations

12 | *Ibid.*

who affirmed their commitment to nuclear power, including several Eastern European countries, Finland, the Netherlands, and Belgium. Beyond the EU, the United Kingdom maintains its firm support for nuclear energy. Germany leads the opposition to nuclear power, joined by Italy, Spain, Austria, and Luxembourg. These nations firmly believe Europe can achieve its carbon-neutral goals through renewable energy alone, without recourse to nuclear power. This schism is mirrored in the European Union's prevailing energy policy. While setting ambitious targets for renewable energy at 45% by 2030, EU policies have largely marginalised nuclear power, despite its significant contribution of 25% to Europe's current electricity supply.

France, under the leadership of President Emmanuel Macron, has chosen a markedly divergent path. In 2022, he launched what he called a "nuclear renaissance," announcing plans to build six new EPR2 reactors immediately, with a further eight envisaged thereafter. The government has removed the previous 50% cap on nuclear power's share in the energy mix and streamlined construction regulations[13]. Notwithstanding this renewed political commitment, the practical implementation of the plan is fraught with formidable challenges. France's extant fleet of reactors is ageing and requires extensive maintenance or phased replacement. There is also a pressing need to train a new generation of nuclear engineers. France must also reduce its dependence on Russian nuclear fuel supplies. Looking ahead toward 2050, France has developed comprehensive energy plans. The country expects electricity demand to reach between 555 and 900 terawatt hours (TWh), requiring a balanced approach of nuclear and renewable energy sources. This includes ambitious targets for solar and wind power alongside nuclear capacity[14].

France has undertaken decisive steps to fortify international cooperation within the nuclear energy domain. The country has formed a Nuclear Alliance with fourteen other nations, aiming to diminish Russian influence in the nuclear fuel supply chain and share technical expertise. The economic and environmental implications of this strategy are far-reaching. France aims to ensure energy independence while meeting climate change commitments and maintaining competitive energy prices. The plan also focuses on creating high-skilled jobs and supporting industrial development. This bold approach demonstrates France's commitment to maintaining its nuclear proficiency, even as it recalibrates to meet the exigencies of a rapidly evolving energy landscape. While some European counterparts have chosen to renounce nuclear energy, France continues to regard it as essential to achieving a sustainable, carbon-free energy future.

13 | Vaglietti & Creti 2023, 14.
14 | Report of french Court of Accounts 2023, 116.

The success or failure of France's nuclear renaissance could significantly influence energy policies across Europe and shape the continent's energy landscape for generations to come. Time will tell whether this ambitious plan can overcome the technical, financial, and political challenges it faces. France finds itself confronting considerable operational challenges in its nuclear power sector but has developed a clear plan for recovery. After discovering damaged welds in multiple reactors, power production dropped notably in early 2023. Despite this setback, EDF remains confident about reaching normal production levels of 300-330 TWh by 2025. Safety inspectors have taken a proactive approach to the maintenance issues. They have approved a comprehensive plan to check and repair damaged welds, prioritising the most critical repairs first. This methodical approach aims to restore full operational capacity while maintaining strict safety standards.

Engineers are actively working to improve the efficiency of existing nuclear plants. Current reactors operate at about 35% efficiency, but technical teams believe they can increase this to 38-40%. These improvements would focus on upgrading secondary systems and optimising maintenance schedules. The Flamanville reactor project represents a crucial milestone in France's nuclear programme. After lengthy delays since construction began in 2007, this new reactor is anticipated to enter into service in 2025. The successful commissioning of this facility will demonstrate France's ability to build and operate new-generation nuclear facilities[15]. France has developed ambitious plans for future reactor construction. Six new reactors will be built in pairs at three different locations, with construction starting between 2027 and 2030. This coordinated approach allows for efficient resource use and standardised construction methods.

The country is also investing in emergent smaller nuclear reactor technology. A consortium led by EDF plans to build two 170-megawatt Small Modular Reactors (SMRs) by 2035. These compact reactors could provide more flexibility and potentially lower construction costs compared to traditional large-scale reactors. Research continues into advanced nuclear technologies at various facilities across France. The Cadarache Research Centre leads work on fusion power, while several companies develop innovative reactor designs. These research efforts ensure France maintains its position at the forefront of nuclear technology. This comprehensive strategy demonstrates France's commitment to nuclear power as a key element of its energy future. By confronting present operational difficulties while planning for future developments, France seeks to secure a reliable, clean energy supply capable of meeting the demands of the coming decades.

15 | Bouttes 2023

B – Nuclear regulatory bodies and national nuclear laws

1- The role of the Nuclear Safety Authority in France

The Nuclear Safety Authority (Autorité de sûreté nucléaire, ASN) was established in 2006 through the Nuclear Transparency and Safety Law (Loi relative à la transparence et à la sécurité en matière nucléaire, TSN). This creation addressed the crucial need for independent oversight of France's nuclear sector — one of the largest and most complex in the world. The recent decision to merge ASN with Institute for Radiological Protection and Nuclear Safety (IRSN) in 2025 marks a significant evolution in the institution's history, aiming to streamline nuclear fleet supervision amid France's nuclear programme revival[16]. The control and enforcement of nuclear safety standards forms the bedrock of of ASN's missions. Its inspectors are tasked with regular visits paid to France's 56 nuclear reactors to ensure compliance with safety standards. They closely monitor nuclear research facilities, verifying that security protocols are strictly followed.

In the medical field, ASN plays a crucial role by controlling equipment using ionising radiation in hospitals and care centres. This surveillance covers everything from radiology equipment to radiotherapy devices and nuclear medicine facilities. The supervision of radioactive material transport represents another important aspect of its activities. ASN ensures that each movement of radioactive material follows strict security protocols, from dispatch to arrival at its final destination. Organisationally, ASN is characterised by a clearly delineated hierarchical structure. At the top, a board of five commissioners, led by a president, makes strategic decisions. These commissioners are appointed for non-renewable six-year terms, ensuring their independence[17].

The day-to-day administration of the Authority is entrusted to its General Management, supported by eight specialised directorates covering different aspects of nuclear safety. Eleven territorial divisions ensure an active presence throughout France, providing local control of nuclear installations. ASN works closely with numerous nuclear sector stakeholders. It maintains regular relations with EDF—the predominant operator of the nation's civil nuclear reactors—alongside Orano, which is tasked with operations pertaining to the nuclear fuel cycle and the Commissariat à l'énergie atomique et aux énergies alternatives (CEA) for nuclear research. Partnerships extend to government institutions, local authorities, and research organisations. ASN also actively participates in international exchanges, sharing expertise with other safety authorities worldwide.

16 | See Delzangles 2013, 7–30.
17 | See Frison-Roche 2006, 17.

The progressive ageing of France's nuclear fleet poses major challenges for ASN. The authority is charged with the critical task of ensuring that ageing power plants maintain optimal safety levels while evaluating life extension projects. In parallel, cybersecurity of nuclear infrastructure has emerged as an area of mounting concern. ASN continuously develops its capabilities in this area to address emerging threats. ASN's actions directly contribute to public health protection. It ensures that exposure to ionising radiation is kept as low as reasonably achievable, both for sector workers and the public. Environmental preservation is also a priority. ASN exercises stringent control over nuclear site emissions, maintaining close surveillance of their potential impact upon surrounding ecosystems[18].

On the international stage, ASN also plays a leading role. It actively participates in developing international nuclear safety standards and offers its widely acknowledged expertise to foreign counterparts. The authority also contributes to international emergency management, as demonstrated during major transnational incidents such as the Fukushima accident. Facing energy transition challenges, ASN constantly adapts its methods and continues to refine its regulatory approaches. The development of new reactors, particularly Small Modular Reactors (SMRs), requires evolving control practices. The authority invests significantly in continuous staff training and new surveillance technologies to maintain its excellence level. This complex and evolving organisation enables ASN to fulfil its fundamental mission: ensuring nuclear safety in France while maintaining the transparency necessary for public trust. Its role is increasingly crucial in the current context of energy transition and nuclear revival in France[19].

2- The fusion between ASN and IRSN

The institutional landscape of nuclear safety in France is poised for profound transformation as the government has decided to implement a reform of nuclear safety in France by effecting the merger of the Nuclear Safety Authority (ASN) with the Institute for Radiological Protection and Nuclear Safety (IRSN). These two entities, historically distinct yet complementary—one serving as the regulatory authority, the other as technical and scientific expert—are to be consolidated into a single body: the Nuclear Safety and Radiation Protection Authority (ASNR), to be formally established in January 2025. The rationale for such a reorganisation, initiated behind closed doors at the Élysée Palace in February 2023, came as a surprise to many within the sector.

18 | See Tuot 2006, 229.
19 | About the role of ASN in France see: Delzangles 2008, 545.

In the context of France's nuclear energy revival, including a programme of six to fourteen reactors, the government sought to create a more coherent, authoritative, and agile supervisory entity. As articulated by the Minister for Industry, Mr Roland Lescure, the objective was to render the new authority "more powerful, more independent, and more attractive," whilst aiming to "gain efficiency in state resources" and "accelerate and simplify procedures." According to Yves Marignac, head of the Nuclear and Fossil Energy Division at *négaWatt* Institute, the nuclear industry contends that "part of its difficulties stems from unreasonably high safety requirements, while its difficulties are organisational and deeper". Unsurprisingly, the proposed merger has provoked widespread concern. The government, however, remains resolute in its assurances: "we will not compromise on nuclear safety." The reform "does not modify any aspect of the safety framework applicable to nuclear operators," assures the Ministry of Energy Transition[20].

Yet this decision remains profoundly contentious. Currently, IRSN's scientists operate like independent detectives, investigating safety issues without pressure from decision-makers, whilst ASN fulfils the role of adjudicator, making final calls based on this unbiased expertise. This careful separation has been a cornerstone of French nuclear safety, however, it stands on the verge of dissolution. The human consequences of this institutional upheaval are already manifest. A quiet exodus is underway, as seasoned scientists at IRSN are quietly leaving for private companies like EDF and Orano, taking with them decades of irreplaceable expertise. Even with a recently implemented 15% increase in public sector salaries, these nuclear safety experts still earn significantly less than their private sector counterparts, rendering their retention increasingly tenuous. With just days until the January 2025 merger, 12 working groups are racing against time to piece together this complex organisational puzzle. It is a delicate operation where failure isn't an option, especially with France's ambitious nuclear power expansion plans on the horizon[21].

Critics have voiced grave concerns that the proposed merger could weaken France's nuclear safety architecture. They argue that combining nuclear expertise and decision-making in one organisation risks compromising the independence that is crucial for effective safety oversight. The funding of research presents another complex challenge. Indeed, how can a regulatory body maintain independence while accepting research funding from the operators? Beneath the surface of this administrative restructuring lies a distinctly human dimension: dedicated scientists and inspectors face uncertainty while trying to maintain rigorous safety standards. Some fear that years of organisational turbulence could impact safety at a critical time for France's nuclear industry.

20 | About this debate, see Lorino 2024, 21.
21 | Report of French Senate 2023

The proposed merger further gives rise to serious questions concerning research continuity. IRSN's laboratories have been crucial in advancing nuclear safety knowledge, yet, the future role and financing of these facilities within the emergent institutional framework remain imprecisely defined, leaving many specialists apprehensive about the potential erosion of this critical research capacity.

As the calendar inexorably advances towards the statutory establishment of the new authority in January 2025, France appears to be placing a strategic wager: that unified oversight will strengthen nuclear safety. However, in an industry where mistakes can have catastrophic consequences, this reorganisation represents either a visionary step forward or a perilous gamble with nuclear safety. The success of this merger will depend not just on organisational charts and procedures, but on preserving the expertise, independence, and rigorous safety culture that have, for decades, defined the French model of nuclear oversight. As France pushes forward with new nuclear reactors, the imperative to navigate this transition with precision and foresight has never been more urgent[22].

For several decades, France's nuclear safety relied on a unique dual system born from the lessons of Chernobyl. The ASN acted as the industry's regulatory enforcer, or "police force," while IRSN assumed the role of its analytical conscience and served as its "scientific brain". Together, they formed a sophisticated safety net protecting France's extensive nuclear programme. This institutional division of labour was neither incidental nor expedient. Born in 2001 under an environmentalist minister, IRSN earned a reputation for its rigorous standards. Sometimes they were seen as too demanding, but as former deputy director Thierry Charles noted, their role was to furnish the ASN with unvarnished scientific evidence upon which to base its regulatory determinations.

Looking beyond France's borders, different countries have taken various approaches. The United States operates under the Nuclear Regulatory Commission (NRC)—a structure frequently held up as a notional blueprint for France's forthcoming institutional configuration. However, the NRC still maintains constitutional safeguards as "checks and balances", including public commissioner meetings and independent advisory committees—elements which, notably, do not appear within the contours of France's envisaged reform. In the aftermath of the Fukushima catastrophe, Japan undertook a wholesale reconfiguration of its regulatory framework, creating the Nuclear Regulation Authority (NRA). Their experience showed how crucial independent oversight is for public safety and trust. Belgium provides yet another instructive contrast. They considered merging their equivalent organisations but ultimately chose to forgo it. Their former safety expert, Benoît De Boeck, warned that such transitions risk losing crucial expertise

22 | Roger 2024

– expertise that takes years to rebuild but only moments to lose[23]. This international perspective raises important questions about France's current reorganisation. The success of this French experiment could influence how other countries approach nuclear safety oversight in the future.

3- The nuclear legal framework in France

In the French legal order, nuclear activities are governed by Article L. 1333-1 of the Public Health Code. These activities are subject to specific rules aimed at protecting people and the environment. These regulatory measures apply uniformly across the spectrum of nuclear operations. France also applies the International legal Framework for Radiation Protection. For example, public authorities need to implement the recommendations published by the International Commission on Radiological Protection (ICRP) on how to protect workers, the public, and patients from ionising radiation. These recommendations are based on scientific research, including work done by the United Nations Scientific Committee on the Effects of Atomic Radiation (UNSCEAR). In parallel, the International Atomic Energy Agency (IAEA) regularly publishes and updates safety standards for nuclear safety and radiation protection. At the European level, the Euratom Treaty, particularly Articles 30 to 33, sets out how the European Union develops rules for protection against ionising radiation and defines the responsibilities of the European Commission in applying these rules. The Euratom Directives must be followed by all EU member countries after they are integrated into national law. Council Directive 2013/59/Euratom, adopted on 5 December 2013, establishes basic safety standards for protection against ionising radiation. It was published in the Official Journal of the European Union on 17 January 2014, and constitutes the cornerstone of French radiation protection regulations, covering the protection of the public, workers, and those exposed in medical settings[24].

The legal framework governing nuclear activities in France underwent substantial reform with the transposition of Directive 2013/59/Euratom of 5 December 2013. In France, this directive was mainly implemented through Ordinance No. 2016-128 of 10 February 2016, as part of the Energy Transition Law (TECV). Two decrees, No. 2018-434 and No. 2018-437, issued on 4 June 2018, introduced additional rules concerning nuclear activities and worker protection against radiation. The ordinance of 10 February 2016, revised a section of the Public Health Code related to ionising radiation while maintaining the core principles. The aforementioned June 2018 decrees proceeded to amend a range of legislative instruments, including the Labor Code, the Public Health Code, and the Environmental Code.

23 | De Boeck 2010, 62.
24 | Neri 2021, 56.

At the heart of this regulatory framework lies Article L. 1333-2 of the Public Health Code, outlining three cardinal principles of radiation protection: justification (the benefits must outweigh the risks), optimisation (minimising radiation exposure), and limitation (there are exposure limits that must not be exceeded). These principles serve as the guiding compass for the Nuclear Safety Authority (ASN) in its regulatory actions. To improve risk management, a new registration system was introduced, which is a simplified procedure between declaration and authorisation. ASN, in its Decision No. 2018-DC-0649, updated the list of nuclear activities requiring a declaration. Decisions No. 2021-DC-0703 and No. 2021-DC-0704 outline which activities must be registered, including industrial, veterinary, research, and medical uses of ionising radiation. These rules have been in effect since 1 July 2021. Additionally, a new article—Article L. 1333-7—was inserted into the Public Health Code to protect public health, safety, and the environment from the risks associated with ionising radiation, including malicious acts[25].

In addition to the foundational principles set forth in the Public Health Code, the Environmental Code, at Article L. 591-1, defines key concepts related to nuclear security. Nuclear security includes nuclear safety, radiation protection, the prevention and combatting of malicious acts, and civil security actions in case of an accident. However, in some texts, "nuclear security" is still limited to the prevention and response to malicious acts. Within this framework, nuclear safety is defined as "all technical measures and organisational procedures related to the design, construction, operation, shutdown, and decommissioning of basic nuclear installations (BNIs), as well as the transport of radioactive materials, aimed at preventing accidents or limiting their effects", and Radiation protection refers to "the protection against ionising radiation, meaning the set of rules, procedures, and preventive and monitoring measures to prevent or reduce the harmful effects of ionising radiation on people, either directly or indirectly, including through environmental damage."

Further elaboration is provided by Article L. 593-42 of the Environmental Code, which specifies that "the general rules, regulations, and measures enacted under this chapter, as well as chapters V and VI, for public health protection, when concerning worker radiation protection, focus on collective protection measures that are the responsibility of the operator and ensure compliance with radiation protection principles as defined in Article L. 1333-2 of the Public Health Code. These apply to the design, operation, and decommissioning phases of the installation and do not affect the employer's obligations under Articles L. 4121-1 and following of the Labor Code." In this regard, the principle of nuclear transparency is defined as "all measures taken to guarantee the public's right to reliable and accessible information on nuclear security as defined in Article L. 591-1."

25 | Lamoureux 2022, 167.

Article L. 591-2 of the Environmental Code outlines the role of the State in nuclear security. It states that the State establishes regulations for nuclear security and implements the necessary controls to enforce them. Moreover, it is incumbent upon the State to "ensure that nuclear safety and radiation protection regulations, and their oversight, are evaluated and improved as necessary, taking into account operational experience, lessons from nuclear safety analyses conducted for operating nuclear facilities, technological advancements, and relevant research findings in nuclear safety." In keeping with Article L. 125-13 of the Environmental Code, "the State ensures that the public is informed about the risks related to nuclear activities defined in the first paragraph of Article L. 1333-1 of the Public Health Code and their impact on public health, safety, and the environment." The general principles applicable to nuclear activities are outlined in Articles L. 591-3 and L. 591-4 of the Environmental Code. Lastly, the Defence Code includes various provisions related to the protection against malicious acts in the nuclear field, as well as the oversight of nuclear activities and installations of interest to national defence[26].

In the context of ecological transition, the French Energy Transition for Green Growth Act (Loi relative à la transition énergétique pour la croissance verte – TECV), adopted in 2015, significantly impacts the nuclear energy sector. Title VI for example, "Strengthening Nuclear Safety and Public Information," focuses on transparency and public engagement. The roles of Local Information Commissions (Commissions Locales d'Information – CLIs) are expanded, requiring them to hold annual public meetings and granting them the power to address any relevant safety or environmental concern. CLIs can now request and must be granted site visits, even after incidents. They are also accorded a mandatory consultative role in the amendment to Special Intervention Plans (Plans Particuliers d'Intervention – PPIs) and public information efforts. For nuclear sites near international borders, CLIs must include members from neighbouring countries. The law also reinforces information procedures, mandating regular updates to residents within PPI perimeters and requiring public inquiries for reactor life extensions beyond 35 years[27].

Title VIII of the Energy Transition for Green Growth Act addresses the oversight of nuclear safety and radiation protection. The law strengthens the Basic Nuclear Installations (BNI) regime, particularly regarding subcontracting. Henceforth, operators are expressly prohibited from delegating the oversight of essential external contractors, a safeguard that had hitherto existed only at the level of subordinate legislation. Further regulatory measures concerning subcontracting are expected in due course. The BNI authorisation process is also streamlined, adopting terminology consistent with environmental regulations. "Substantial" modifications now trigger a full authorisation procedure with a public inquiry,

26 | Rambour & Carvalho 2021, 97.
27 | See Denolle 2016, 99.

while "significant" modifications require authorisation or declaration to the ASN, potentially accompanied by public consultation.

Finally, the law brings clarity to the process for definitive shutdown and decommissioning of BNIs. Immediate dismantling is now the legal standard. Operators are required to declare the planned shutdown date at least two years in advance. From that date, the installation is considered definitively shut down and must be dismantled according to procedures outlined in a decree. Any installation ceasing operation for two consecutive years is automatically deemed definitively shut down[28].

C – Licensing stages of a nuclear power plant in France

1- The authorisation process for creating a Basic nuclear installation

To grasp the future trajectory of nuclear energy in France, one must first understand the legal architecture underpinning the licensing of a nuclear power plant. French law governing Basic Nuclear Installations (BNIs), like nuclear power plants and fuel processing facilities, was substantially overhauled with the vote of the Act on Transparency and Security in the Nuclear Field (commonly referred to as the TSN Law) in 2006. This law, along with its implementing decrees, is codified within the French Environmental Code. The regulations take a comprehensive, or "integrated," approach to managing BNIs. This means they consider all potential hazards, not just radiological ones, throughout a facility's entire lifecycle. This includes for example the Initial Authorisation and Construction with strict guidelines dictating the safety requirements and approval processes for building new BNIs, Ongoing Operations and Inspections with very regular inspections and monitoring ensure compliance with safety standards during the operational phase and a special legal framework for the waste Management. Indeed, the law establishes a framework for the safe handling and disposal of all radioactive waste generated by BNIs. Finally, specific provisions govern the Decommissioning and Dismantling, with detailed procedures governing the eventual shutdown, dismantling, and cleanup of BNIs at the end of their operational life.

Transparency and public information constitute fundamental pillars of the French legislative framework governing nuclear activities. The law establishes Local Information Commissions (*Commissions Locales d'Information*, or CLIs) to provide local communities with information and opportunities for input regarding nearby BNIs. At the national level, the High Committee for Transparency and Information on Nuclear Safety (*Haut Comité pour la Transparence et l'Information sur la Sécurité Nucléaire*, or HCTISN) fulfils a parallel function. Both institutions

28 | See Russo 2024, 76.

serve to guarantee the public's right of access to information and foster dialogue on nuclear safety issues. The law also guarantees the public's right to information about BNIs and their potential impacts.

The authorisation procedure for the creation of a BNI is comprehensively set out in Chapter III of Title IX of Book V of the Environmental Code. This legal chapter delineates a multi-stage process encompassing the full operational lifespan of an installation—from initial design considerations to final decommissioning. It also provides a legal framework for modifications during the installation's operational life. Even before formally applying for creation authorisation, a prospective BNI operator can consult with the ASN about their chosen safety options. The ASN provides feedback and may request additional studies or justifications. These safety options are then formally presented as part of the preliminary safety report submitted with the creation authorisation application. This preliminary consultation streamlines the later regulatory review process.

For new nuclear production sites or other BNIs exceeding certain cost thresholds (€460 million or €230 million, depending on the type of installation), the involvement of the National Commission for Public Debate (*Commission nationale du débat public*, or CNDP) is mandatory[29]. The CNDP is tasked with determining whether a full public debate is necessary or if a less formal public consultation process suffices. Should a public debate be deemed appropriate, the CNDP assumes responsibility for its organisation and appoints a dedicated special commission to oversee its conduct. For consultations, the project leader organises the process, and the CNDP appoints a guarantor to ensure its fairness[30].

The entity seeking to establish the installation, upon submitting its application, acquires the legal status of "*exploitant*" (operator). The application for creation authorisation must be lodged with the Minister responsible for nuclear safety and must be accompanied by a comprehensive dossier. This includes detailed plans, an environmental impact assessment, a preliminary safety report, a risk assessment study, and a decommissioning plan. Upon receipt of the application, the ASN, at the request of the Ministry, reviews the application. Simultaneously, public and expert consultations are conducted.

The BNI creation project undergoes an environmental assessment procedure, which includes an impact study by the project leader, consultations with the environmental authority, local authorities, and other relevant groups, and a review of all gathered information by the authorising authority. The complete project dossier—including the environmental impact study and the formal application—is submitted for expert opinion to the environmental authority within the General Council for the Environment and Sustainable Development for their opinion[31].

29 | Article L 121-8 of Environmental Code
30 | About the question of democracy and nuclear energy: Pontier & Roux 2013
31 | Article 122-1 of Environmental Code

Prior to the granting of any authorisation, a public inquiry is mandatory[32]. This inquiry aims to inform the public and gather their opinions, suggestions, and counter-proposals. This information is crucial for the authorising authority's decision-making process. The inquiry follows specific legal procedures and is held in any municipality located within five kilometres of the proposed BNI. The inquiry lasts at least one month and no more than one and a half months, barring suspensions or additional inquiries. The application dossier, inclusive of the preliminary safety report—which outlines the potential risks associated with the installation, as well as the preventive and mitigating measures proposed—is made publicly available. A non-technical summary of the risk assessment is also provided for easier understanding. The entire inquiry file is published online and is also accessible physically at designated locations. Computer access is also provided at public venues. Finally, the operator must obtain a construction permit from the *préfet* (the State's local representative) according to building code regulations[33]. Importantly, construction activities may not commence until the public inquiry concerning the creation authorisation has been formally concluded[34].

Following the conclusion of the public inquiry, the Minister responsible for nuclear safety sends the operator a draft decree granting or refusing creation authorisation (décret d'autorisation de création, DAC). The operator has two months to submit their observations. The Minister then obtains the opinion of the ASN. ASN Decision No. 2010-DC-0179 of 13 April 2010, allows operators and CLIs to be heard by the ASN board before it issues its opinion. The creation authorisation for a BNI is issued by decree of the Prime Minister, countersigned by the Minister responsible for nuclear safety. The DAC determines the perimeter and characteristics of the installation. It also sets the duration of the authorisation, if any, and the commissioning deadline. Furthermore, it imposes the essential elements required for the protection of public security, health, and safety, as well as the protection of nature and the environment.

For the implementation of the DAC, the ASN defines the requirements relating to the design, construction, and operation of the BNI that it deems necessary for nuclear safety. The ASN also determines the regulatory conditions pertaining to water abstraction and effluent discharges arising from the BNI. The requirements setting the limits for discharges from the BNI under construction or in operation into the environment are subject to approval by the Minister responsible for nuclear safety. Prior to the commissioning of the installation, the operator must submit a comprehensive file to the ASN. This submission must include an updated version of the preliminary safety report for the "as-built" installation, the general

32 | About the role of transparency in nuclear acceptance: Cohen & Raineau 2020, 147.
33 | Article R 421-1 of Urbanism Code
34 | About the debate concerning the development of nuclear energy in France: Stenberg & Topçu 2019, 225.

operating rules, the internal emergency plan, and an update, if necessary, of the decommissioning plan and, if applicable, an update of the impact study.

Upon verifying that the installation conforms to the objectives and rules set forth in Chapter III of Title IX of Book V of the Environmental Code and the texts adopted for its application, the ASN authorises the commissioning of the installation. This authorisation is duly notified to the operator, and a formal communication is made to the Minister responsible for nuclear safety, the *préfet*, and the CLI. The authorisation decision is published in the Official Bulletin of the Nuclear Safety Authority.

Also, there are specific rules that govern the modifications of a BNI. Pursuant to Article L. 593-14 of the Environmental Code, minor modifications are exempt from the authorisation process. However, "substantial" modifications are subject to a more stringent regulatory regime. These modifications are subject to a procedure similar to that of an application for creation authorisation, conducted according to the procedure provided for in Articles L. 593-7 to L. 593-12 of the same Code. A modification is deemed "substantial" where it meets the criteria listed in Article R. 593-47 of the Environmental Code. This includes, inter alia: Any change in the nature of the installation or an increase in its maximum capacity; Any modification of the essential elements for the protection of the interests mentioned in the first paragraph of Article L. 593-1 of the Environmental Code, which appear in the authorisation decree; The addition, within the perimeter of the installation, of a new BNI whose operation is linked to that of the installation in question. Other modifications, depending on their significance, may either be subject to declaration to the ASN or to authorisation by this authority pursuant to Article L. 593-15 of the Environmental Code. This same article provides that these modifications may be subject to public consultation.

The BNI are also subject to two important international conventions for Environmental Protection. First, the OSPAR Convention, signed in 1992, is a comprehensive agreement for protecting the marine environment of the Northeast Atlantic. It involves the European Commission and 15 countries, including France. Of particular relevance is its objective to curb the discharge of radioactive substances into the sea. This is achieved through a strategic approach of progressively decreasing the release of radioactive substances. The ultimate aim is to reach near-zero levels for artificial radioactive substances and natural background levels for naturally occurring radioactive materials. The convention takes into account radiological impacts on both humans and marine life, legitimate uses of the sea, and technical feasibility in its decision-making process. The second instrument is the Espoo Convention, adopted in 1991 and entering into force in 1997. This Convention imposes binding obligations upon Parties to undertake environmental impact assessments (EIAs) for activities with potential transboundary effects. This is particularly relevant for nuclear facilities, including power plants, fuel production and enrichment facilities, and radioactive waste management sites. The convention

requires countries to notify and consult with potentially affected neighbouring states before authorising such activities. This mechanism promotes international cooperation in mitigating environmental risks associated with large-scale projects, especially in the nuclear sector[35].

2- The management of radioactive waste

France has also established a distinct regulatory framework for the control of discharges from BNIs. As with other industries, nuclear activities (including nuclear industry, nuclear medicine, and research facilities) give rise to both radioactive and non-radioactive by-products. A source reduction approach aims to minimise their quantity. The radioactivity released in effluents represents only a marginal fraction of that confined in waste. The choice between liquid or gaseous discharge routes is part of an approach to minimise the overall impact of the installation. The French Nuclear Safety Authority (ASN) ensures that the BNI creation authorisation request explicitly details, in the impact study, the operator's choices. This includes source reduction measures and trade-offs between substance containment, treatment, or dispersion based on safety and radiation protection criteria. Optimisation efforts, prompted by authorities and implemented by operators, have led to continuous emission reductions for "equivalent operation". The ASN imposes discharge limit values to encourage operators to maintain their optimisation and discharge control efforts. It ensures that discharges are as limited as the best available techniques allow and has been revising discharge limits for several years[36].

Substances discharged from BNIs can impact the environment and population due to their chemical characteristics. The ASN considers that such discharges should be regulated in a manner identical to that applied to other industrial installations. French law and general technical regulations on discharges and the environment incorporate this objective. This integrated approach is uncommon abroad, where chemical discharges are often controlled by a different authority than the one overseeing radioactive discharge. Within France, however, the ASN bears responsibility for ensuring that chemical discharges, no less than radioactive ones, pose the lowest possible risk to human health and the environment.

A number of BNIs, particularly nuclear power plants, release cooling water into rivers or the sea, either directly or after cooling in cooling towers. These thermal discharges result in a localised increase in ambient water temperature, which generally remains moderate but can reach several degrees in certain circumstances, especially during low water periods. The limits imposed on BNI discharges aim

35 | About environmental issues and the development of nuclear energy: Kerboul 2023, 54.
36 | About the evolution in management of radioactive waste and discharges from BNIs in France: Le Dars 2004, 116.

to prevent modification of the receiving environment, particularly fish fauna, and to ensure acceptable sanitary conditions if there are downstream water intakes for human consumption. These limits may therefore differ depending on the environments and technical characteristics of each installation. The law of 7 February 2012, and the ASN decision of 16 July 2013 (as subsequently amended) on controlling nuisances and the impact on health and environment of BNIs impose requirements aimed at preventing or limiting, in case of an accident, the direct or indirect spillage of toxic, radioactive, flammable, corrosive, or explosive liquids into sewers or the natural environment. This regulatory framework demonstrates France's comprehensive approach to managing nuclear installations, prioritising environmental protection, public safety, and continuous efforts improvement in operational practices.

The management of waste, whether radioactive or otherwise, in BNIs is regulated by the ASN to prevent and reduce – particularly at the source – the production and harmfulness of waste, especially by acting on the design and operation of the installation, sorting, treatment, and packageing of waste. To exercise effective control in this domain, the ASN relies upon several documents established by BNI operators. Among these, the impact study, submitted as part of the creation authorisation dossier pursuant to Article R. 593-16 of the Environmental Code, occupies a central role. It presents the waste that will be produced by all installations and equipment located within the perimeter of the installation, whether radioactive or not, as well as their volume, nature, harmfulness, and planned disposal methods. It describes the provisions adopted by the operator to ensure that the management of this waste meets the objectives mentioned in Article L. 541-1 and II of Article L. 542-1-2 of the Environmental Code.

In addition, pursuant to Articles 6.4 and 6.6 of the law of 7 February 2012, the operator is mandated to undertake a rigorous analysis and assessment of waste produced, or projected to be produced, within the installation. This includes a detailed review of the arrangements in place for its management, together with the formulation and periodic update of a waste zoning plan. The operator must also produce an annual report assessing waste management performance[37]. This assessment aims to verify the adequacy of waste management with the provisions planned for waste management and to identify areas for improvement. By Decision No. 2015-DC-0508 of 21 April 2015, the ASN set requirements relating to the study on waste management and the assessment of waste produced in nuclear facilities and specified the operational procedures for waste management. Complementing these measures, ASN Guide No. 23, published on 30 August 2016, offers detailed recommendations regarding establishing and modifying the waste zoning plan for nuclear facilities.

37 | About the evolution of Safety measures in BNIs in France: Pontier & Roux 2012

3- The decommissioning of a Basic nuclear installation

With regard to the decommissioning of nuclear installations, Article L. 593-28 of the Environmental Code prescribes that the decommissioning of a nuclear installation is prescribed by a decree, taken after consultation with the ASN. The decommissioning file presented by the operator is subject to the same consultations and inquiries as those applicable to BNI creation authorisation requests according to the same procedures. This same article specifies that the decommissioning decree sets, in particular, the characteristics of the decommissioning, its completion deadline, and, if applicable, the operations to be carried out by the operator following the decommissioning process.

The responsibility for the final shutdown of a BNI rests squarely with the operator, who is required to notify both the Minister responsible for nuclear safety and the ASN at least two years prior to the anticipated date of definitive cessation—save where a shorter period is duly justified. From this date, the operator is no longer authorised to operate its installation, which is considered to be definitively shut down and must be decommissioned. Article L. 593-26 of the Environmental Code provides that, until the entry into force of the decommissioning decree, the installation remains subject to the provisions of its creation authorisation decree and to ASN prescriptions, which may be supplemented or modified if necessary. The ASN has elaborated, in a revised version of Guide No. 6, upon the regulatory framework for BNI decommissioning operations, following work aimed at clarifying the implementation of administrative procedures.

Upon the completion of decommissioning, a nuclear installation may be subject to declassification. Once declassified, the installation is removed from the list of BNIs and is no longer subject to their regime. The operator must provide, in support of its declassification request, a file demonstrating that the envisaged final state has indeed been achieved and including a detailed description of the site's condition after decommissioning (analysis of the condition of soils, remaining buildings or equipment, etc.). Depending on the final state achieved, public utility easements may be imposed, taking into account projected future uses of the site and any extant buildings. These may contain a number of use restriction measures (limitation to industrial use, for example) or precautionary measures (radiological measurements in case of excavation, etc.). The ASN retains the authority to render the declassification of a BNI conditional upon the establishment of such easements. ASN Guide No. 14 and ASN Guide No. 24, published on 30 August 2016, set out recommendations relating to the methods for decontaminating structures and managing soil polluted by BNI activities, respectively.

Sections 1 and 2 of Chapter IV of Title IX of Book V (legislative part) and Section 1 of Chapter IV of Title IX of Book V (regulatory part) of the Environmental Code establish a system relating to the securitisation of charges linked to the

decommissioning of nuclear installations and the management of radioactive waste. These provisions are specified by the Order of 21 March 2007, relating to the securitisation of financing for nuclear charges. This legislative and regulatory framework is designed to ensure the long-term financial security of these obligations, in alignment with the "polluter pays" principle. It is therefore up to nuclear operators to ensure this financing, via the constitution of a portfolio of assets dedicated to the level of anticipated charges. This is done under the direct control of the State, which analyses the situation of operators and can prescribe necessary measures in case of insufficiency or inadequacy. In all cases, nuclear operators remain responsible for the proper financing of their long-term charges[38].

To that end, operators are required to prudently estimate the costs of decommissioning their nuclear installations, or, in the case of radioactive waste storage installations, the costs of final shutdown, maintenance, and post-operational monitoring. They also evaluate the charges for managing their spent fuel and radioactive waste in application of Article L. 594-1 of the Environmental Code. In application of Article D. 594-13 of the Environmental Code, the ASN is tasked with issuing an opinion as to the consistency of the operator's proposed decommissioning strategy and radioactive waste and spent fuel management plans, specifically with regard to nuclear safety and radiation protection.

Among the classes of assets that may be recognised as cover for provisions for the charges mentioned in Article L. 594-1 of the Environmental Code—namely, the decommissioning of installations, charges for final shutdown, maintenance and monitoring, charges for managing spent fuel and radioactive waste—a distinction is drawn between those mentioned by the provisions of the Insurance Code and those specific to nuclear installation operators. It makes certain debt securities admissible, notably certain negotiable medium-term notes and securitisation mutual funds and, under certain conditions, unlisted securities; it specifies, in particular, as a consequence of this extension, the exclusion criteria for unlisted intra-group securities. Furthermore, it prescribes the maximum allowable value of assets belonging to the same category or emanating from the same issuer and determines new quantitative ceilings applicable to categories of assets that have been rendered admissible under these provisions.

4- The challenges behind the legal regime applicable to BNIs

The legal regime applicable to BNIs in France presents several notable difficulties. Chief among these is the regulatory complexity inherent in a framework comprised of numerous overlapping and intersecting legislative and regulatory instruments. This fragmentation frequently renders the law difficult to interpret and apply, even for seasoned actors within the sector. A further complicating factor

38 | Bréchet & Dautray 2015, 27.

is the constant evolution of regulations. Nuclear law evolves rapidly, particularly in response to feedback and technological developments, which requires constant updating of knowledge for operators and authorities. Another complex aspect is the interface between different areas of law. The BNI regime also lies at the confluence of multiple legal domains—notably environmental law, energy law, public health law, and security law, which can create conflicts or inconsistencies in the application of texts.

Authorisation procedures for the creation, modification, or decommissioning of a BNI are themselves markedly complex. They involve numerous steps and consultations, which can slow down projects and create legal uncertainties. Continuous control and surveillance exercised by the ASN represent a significant operational constraint for operators. Although necessary for safety, these controls add a layer of complexity to the daily management of installations. Lastly, the long-term management of radioactive waste presents its own category of legal difficulty—particularly regarding the allocation of legal responsibility over geological time scales. This raises complex questions about the durability of current legal provisions.

Provisions relating to decommissioning financing equally present a number of interpretative and practical challenges. They can pose problems of interpretation and application, particularly regarding the evaluation of future costs and the securing of funds. While transparency obligations and public participation requirements constitute essential democratic safeguards, they also impose additional procedural burdens. They can sometimes conflict with the security and confidentiality imperatives specific to the nuclear sector. Moreover, the interaction between national law, international law, and European law can create difficulties in interpretation and application. The need to harmonise these different sources of law further complicates the legal framework applicable to BNIs. Finally, adapting the legal framework to new nuclear technologies represents a constant challenge. Periods of regulatory misalignment may arise during which the law is not fully adapted to technological realities, thus creating temporary legal uncertainties.

5- The use of AI in the nuclear industry[39]

Within this regulatory and operational landscape, the integration of Artificial Intelligence (AI) presents significant potential benefits for Basic Nuclear Installations (BNIs) in France. In the realm of safety and risk management, AI has the potential to markedly enhance predictive maintenance systems, enabling the early identification of anomalies and potential equipment failures. This proactive

39 | At this moment, Nîmes University (France) and Kokugakuin University (Japan) work on some AI tools that could be used in nuclear industry. The first results of this research will be published in 2026. Researchers on the project: Dhiego Teles da Silva, Charles Condevaux, Nobuyuki Takahashi.

approach could significantly improve safety measures and reduce unplanned operational downtime. Regulatory compliance, a complex aspect of BNI operations, could be streamlined with AI-powered systems. These systems could assist in monitoring and ensuring compliance with the intricate regulatory framework, tracking changes in regulations, and automatically updating compliance protocols. AI also offers considerable advantages in the field of data analysis, particularly in the processing and interpretation of large volumes of real-time data generated by sensors and monitoring systems. In terms of radiation monitoring, AI-driven algorithms could bolster detection and monitoring systems. This could lead to more accurate and real-time data on radiation levels, further improving safety measures[40].

In the sphere of radioactive waste management, a critical aspect of nuclear operations, could be optimised through AI. The technology could potentially find more efficient ways to treat, store, and dispose of radioactive waste. Furthermore, for installations approaching final shutdown, AI may support the strategic planning and execution of decommissioning operations. This could lead to more efficient and cost-effective decommissioning procedures. In emergency situations, AI systems could provide rapid analysis and decision support. This could potentially improve response times and effectiveness in critical situations. Lastly, operator training programmes stand to benefit from AI-integrated virtual and augmented reality simulation tools, enabling immersive, realistic, and adaptive training environments designed to reinforce operational competence and resilience.

Environmental impact assessments stand to benefit from the application of AI. The technology could aid in predicting and assessing the environmental impact of BNIs, helping to ensure compliance with environmental regulations. Public communication, an important aspect of BNI operations, could be improved through AI-enabled virtual assistants and automated information systems. These could provide accurate and timely information about plant operations and safety measures to the public. AI could also contribute to energy output optimisation by analysing various factors like demand, weather conditions, and plant performance. This could lead to more efficient energy production. In the increasingly critical domain of cybersecurity, AI systems could enhance the resilience of nuclear facilities by detecting, analysing, and responding to cyber threats with greater speed and precision. Notwithstanding these advantages, it is essential to underscore that the deployment of AI in such a critical and highly regulated industry would require careful consideration, extensive testing, and regulatory approval. The use of AI in nuclear installations would necessitate rigorous oversight, extensive validation protocols, and, where applicable, regulatory authorisation.

40 | Hewes 2023, 14.

D – The future of nuclear energy in France

1- The French energy strategy for 2030 and 2050

France's energy strategy for the coming decades relies on replacing fossil fuels with massive production of decarbonised, renewable, and nuclear electricity. As part of the France 2030 investment plan, the nuclear sector has been allocated €1.2 billion in public funding to develop a sovereign and sustainable nuclear industry. The nuclear revival is built around four pillars: diversification of uses, reduction of volume and radioactivity of nuclear facility waste, increased strategic autonomy through nuclear materials multi-recycling and improvement of nuclear safety and security. The State can rely on the French Alternative Energies and Atomic Energy Commission (Commissariat à l'énergie atomique et aux énergies alternatives – CEA) and 2,600 companies in the sector. The industrial sector, present across all value chain links, is responsible for innovating and developing new technologies in a context of increased international competition with accelerated research programmes on Small Modular Reactors (SMRs) in certain countries[41]. In parallel with these R&D efforts, the sector continues operating the existing nuclear fleet as long as it meets safety requirements and maintains the construction of new EPR2 reactors.

Innovation lies at the heart of France's nuclear resurgence. In this context, the French sector is tasked with leading the European SMR project, particularly by supporting the French SMR NUWARD project. This low-power reactor integrates notable safety innovations and may constitute a cost-competitive alternative for both industrial and decentralised energy users. The NUWARD concept aims to replace thermal power plants (coal and gas) of comparable power at a reasonable cost through "mass production." The sector's revival also aims to support emerging players by developing a new ecosystem of "nuclear startups" in nuclear fission and fusion[42]. France has launched a call for projects (Appel à projets – AAP) supported by approximately €500 million in public funding. This programme is intended to support new innovative reactor concepts and the nuclear sector in general by promoting innovative young companies.

Research and development into disruptive technologies for modular reactors opens new horizons for the long-term management of radioactive materials. Reducing waste volume and radioactivity must reduce the sector's environmental impacts[43]. Energy sovereignty is intrinsically linked to the strategy for nuclear fuel processing and recycling. France can rely on its pressurised water reactor

41 | Piketty 2024, 9.
42 | Collet 2024, 91.
43 | Lewandowski 2024, 78.

technology and new modular reactor technologies being deployed to achieve this energy independence goal. Indeed, developing techniques around Multi-Recycling in Pressurised Water Reactors (MRREP) and research on Fast Neutron Reactor (FNR) technologies could enable significant advances in strategic autonomy.

France is consolidating its leadership in the nuclear energy sector through an unprecedented investment plan. Beyond the initial €1.2 billion allocation, the government has committed an additional €5 billion in 2023 to accelerate energy transition. This additional funding underscores France's unwavering commitment to retaining its global leadership in nuclear technology. International cooperation now constitutes a key axis of France's nuclear policy, with the country establishing strategic collaborations worldwide, including collaboration with Japan on decommissioning technologies, a major agreement with India for the construction of six EPR reactors, and a strategic alliance with Canada for SMR development. These partnerships enhance France's global influence in the nuclear sector. The French nuclear industry is undergoing a technological revolution. Advanced artificial intelligence systems are being deployed for predictive maintenance, while digital twin technology is revolutionising plant operations. Virtual reality training programmes are preparing the next generation of nuclear operators more effectively than ever before.

Public participation and transparency have been substantially reinforced through citizen monitoring committees and enhanced scientific mediation programmes. Innovative public consultation tools are ensuring greater transparency and community involvement in nuclear projects. In line with its 2050 strategic objectives, France plans to construct 14 new EPR2 reactors and deploy 10 SMRs across its territory. The country aims to reduce nuclear waste volume by 75% and achieve complete fuel cycle autonomy. These goals support France's ambition to become the world's leading nuclear technology exporter. The establishment of an international training centre and active participation in global fusion projects demonstrate France's commitment to international leadership. The development of common EU standards and researcher exchange programmes are strengthening international cooperation in the nuclear field.

2- The revival of nuclear energy in France and abroad

Japan has undergone a notable shift in its nuclear energy policy, marking a significant departure from its earlier post-Fukushima phase-out trajectory. The government has officially recognised nuclear power as essential for achieving its energy security and climate goals. This policy reversal includes plans to extend the operational life of existing reactors and potentially construct new ones. It is interesting to note that the debate surrounding the operational life of nuclear reactors is not limited to France and Japan. In fact, a majority of nuclear reactors in the United States already possess extended operating licenses. The US nuclear fleet contains

a substantial number of reactors that were commissioned in the 1970s for example. Among 94 reactors currently operating approximately twenty have either reached or surpassed the fifty-year mark. All of these units hold operating licenses that permit them to run for up to 60 years. In the United States, the Nuclear Regulatory Commission (NRC) initially grants operating licenses for a 40-year term. These licenses are subsequently eligible for renewal in 20-year increments. This regulatory framework differs from that of France, where operating authorisations are reviewed every ten years, subject to a comprehensive safety reassessment[44].

Another notable point of regulatory divergence lies in the regulatory framework. As observed by Sunil Félix, in the US, "the regulatory standards applied when granting a license extension correspond to the regulations that were in effect at the time of the plant's construction." He further clarifies that, despite this historical baseline "the operator need to demonstrate, at the time of the license renewal application, that the primary structures and critical components of the facility are in good condition. Furthermore, the operator must provide evidence of effective management of ageing processes throughout the extended operational period for non-replaceable components, such as the reactor pressure vessel"[45]. In regulatory practice, the licence renewal process in the United States is divided into two distinct phases, initiated between five and ten years prior to the expiration of the existing license. Notably, some US nuclear reactors already possess authorisations to operate for up to 80 years. In late August 2024, the Nuclear Regulatory Commission approved Virginia Electric and Power Company's (Dominion Energy) application to extend the operating licenses for the two pressurised water reactor units (944 MWe each) at the North Anna Nuclear Power Station. Across the United States, out of 94 operating units, 76 reactors currently have licenses permitting operation up to 60 years, and 8 have licenses extending to 80 years.

Across the globe, a significant proportion of operating nuclear reactors were constructed during the 1980s and are now approaching the end of their fourth decade of service. Consequently, several other nations, including Hungary, the Netherlands, and Switzerland, have similarly authorised the operation of nuclear reactors for up to 60 years, mirroring the US approach. In the Hungarian context, the expansion of the Paks Nuclear Power Plant—commonly referred to as Paks II—forms an integral element of a broader national strategy aimed at energy transition. This strategy envisages a substantial augmentation of the country's nuclear generating capacity to accommodate rising electricity consumption, while facilitating the gradual retirement of ageing coal-fired power stations. The Paks II development project entails the construction of two new VVER-1200 pressurised water reactors (PWRs), jointly offering an installed capacity of 2,400 megawatts electric (Mwe). These new reactors are conceived to surpass the existing the

44 | See Paulovics 2020, 344–359.
45 | Félix 2022

existing VVER-440/213 units in terms of operational safety and efficiency, whilst also yielding reduced volumes of radioactive waste.

In parallel with the Paks II initiative, Hungary is also investigating the potential deployment of Advanced Modular Reactors (AMRs) as a complementary means of bolstering its nuclear infrastructure. AMRs are smaller nuclear reactors that offer advantages in terms of faster construction timelines and reduced costs compared to large-scale, traditional nuclear power plants. They also provide greater flexibility in adapting to fluctuating electricity demand and replacing ageing generating facilities. Moreover, the Hungarian authorities are contemplating a further extension of the operational lifetime of the existing reactors by an additional twenty years, which, if authorised, would bring their total lifespan to seventy years, potentially allowing them to operate well into the 2050s. Feasibility studies and thorough safety evaluations are currently in progress. If this extension is approved, these reactors could remain operational into the 2050s. All operational extensions are subject to rigorous safety assessments conducted by the Hungarian Atomic Energy Authority. These assessments focus on key areas, including overall plant safety, ageing management programmes, and comprehensive safety analyses. Nuclear power plays a critical role in Hungary's energy mix, supplying approximately 48% of national electricity production. The Hungarian government views nuclear energy as a fundamental pillar of its energy strategy, ensuring security of supply, reducing reliance on imported fossil fuels, and contributing to the achievement of climate objectives.

The incorporation of nuclear power into Japan's green energy transition strategy marks a pronounced evolution in its national energy policy. Following the Fukushima accident, Japan has implemented the world's most stringent nuclear safety standards. Existing nuclear facilities are undergoing comprehensive modernisation, notably through the enhancement of seismic resilience and the reinforcement of flood mitigation systems. Advanced emergency response systems have been developed, incorporating lessons learned from past experiences. These improvements have set new global benchmarks for nuclear safety. A gradual transformation is also discernible in Japanese public sentiment towards nuclear power. The government and industry have implemented unprecedented transparency measures to rebuild public trust. Community engagement programmes have been expanded, giving local stakeholders more voice in nuclear-related decisions. Public information centres and educational initiatives are helping to address concerns and provide accurate information about nuclear technology.

France and Japan alike are confronted with comparable challenges in ensuring energy security while meeting climate commitments. Their approaches to technological innovation share common elements, particularly in areas such as digital transformation and safety enhancement. Both countries recognise the critical importance of developing a skilled nuclear workforce and are investing heavily in training programmes. But the historical context and public perception

of nuclear power differ significantly between the two countries. Japan's regulatory framework underwent a radical and comprehensive restructuring in the wake of Fukushima, whereas France has pursued a more incremental, albeit no less rigorous, path of regulatory evolution. Geographic and seismic considerations create distinct technical challenges for each country. The scale and scope of their nuclear programmes reflect these different national contexts.

France and Japan have forged a strong bilateral cooperation within the nuclear sector, characterized by regular exchanges of technical expertise between their respective nuclear operators and regulatory authorities. Joint research programmes are addressing common challenges in areas such as waste management and advanced reactor design. Industry partnerships are facilitating knowledge transfer and technology development. The concurrent revitalisation of the nuclear sectors in these two leading economies is exerting a discernible influence upon the evolution of international nuclear policy. Their enduring commitment to nuclear power provides important reference points for other countries considering nuclear energy. Their combined efforts in climate change mitigation through nuclear power demonstrate the technology's potential role in addressing global environmental challenges[46].

E – The emergence of small modular reactors

1- The development of Small modular reactors in France

At present, France is firmly committed to developing small nuclear reactors (SMR/AMR) intended to be installed, in some cases, outside current nuclear sites, often near industrial hubs. In 2022, France launched an ambitious programme to develop innovative small nuclear reactors, Small/Advanced Modular Reactors (SMR/AMR), as part of the "France 2030" programme. Specifically, the government is supporting the development of the new Nuward nuclear reactor developed by EDF and launched a competitive call for projects (CFP) that selected about twelve companies working on the subject. These next-generation reactors embody novel fission and fusion technologies, new construction methods (modular factory manufacturing), new safety approaches (small size, intrinsic safety), and even, for some, new materials and waste management methods (multi-recycling). Beyond the generation of electricity, SMRs and AMRs are designed to fulfil emerging "deep decarbonisation" imperatives. These include low-carbon heat production for urban heating and industry needs, powering high-temperature electrolysers to produce

46 | On January 27, 2025, Nîmes University (France) and Kokugakuin University (Japan) organize a large Conference about *"Energy Sovereignty"*. My presentation in this conference was about the *"Revival of nuclear energy in France and Japan"*

clean hydrogen, or seawater desalination. Their size is suitable for serving industrial zones, communities (via heat networks), and non-interconnected areas[47].

Unlike electricity, heat cannot be conveyed efficiently over long distances. Therefore, serving these areas would, in many cases, require opening new nuclear sites closer to consumption zones than the current sites where large power reactors are operated. Most of the winning companies initially envision a first prototype on an existing nuclear site and have made requests to this effect to the government. The projects, at different stages of maturity, have already begun contacting potentially interested industrialists to better understand their needs. Jimmy company notably announced on April 30, 2024, the submission of a creation authorisation request (Demande d'Autorisation de Création, DAC)) for a project to install a 10 MWth reactor at the Cristanol site in Marne.

At the national level, the value proposition of SMRs/AMRs is primarily aimed at industrialists, with the promise of providing a reliable and competitive decarbonization solution, and also to the Nation, with a promise of energy sovereignty, qualified jobs, and reduction of greenhouse gas emissions. Until now, the French nuclear industry has remained mono-technological (with custom-made pressurised water reactors), cantered on a single operator (EDF) and dedicated solely to supplying electricity to the grid. However, the SMR model takes a completely different form. First, their "ready-to-deploy" manufacturing requires, as ASN points out, exportation outside France to be profitable. In fact, the infrastructure study cannot be ensured by the French authority alone. In this regard, the Nuward project, led by an EDF-led consortium, is already subject to a joint evaluation by ASN on the French side and five other similar agencies in the Netherlands, Sweden, Finland, Poland, and the Czech Republic. The Institute for Radiological Protection and Nuclear Safety (IRSN) has already spoken out against the temptation of harmonisation, possibly lighter, of safety rules accepted between all these organisations. Despite the advantages of SMRs, "there is no reason to lower safety requirements for SMRs," IRSN maintained in an October 2021 note. "While electrons have the advantage of not being contaminated, this is not the case for heat exchange systems between the reactor and the 'client' industrial process," underscoring the necessity of maintaining rigorous safety oversight

2- The new risks of small modular reactors

The operation of SMRs entails a series of notable challenges. Intended to be deployed at industrial sites to contribute to their decarbonisation, these installations must be "autonomous," implying operation without the need for specialised personnel on-site, and in certain cases, to be remotely controllable. Moreover, given the differences in fuels required for their operation, some of the targeted

47 | About the development of Small modular reactors: Chesne 2024, 75.

technologies will require the development of entirely new production capabilities, still non-existent in France, for example, to produce chloride salts (essential for molten salt fast reactors, MSR) or Triso-type fuel (tristructural-isotropic, based on two layers of pyrolytic carbon and one of silicon carbide around a uranium particle)[48].

In addition, bespoke solutions for transport packaging and interim storage, tailored to each specific fuel type, must be devised and subjected to rigorous regulation. Currently, as ASN reminds us, none "is approved for these new fuels." Last January, Bernard Doroszczuk, ASN president, specifically called for vigilance regarding "suppliers' lack of knowledge of important safety-specified requirements, lack of control over certain special processes, and lack of rigour and performance in supply chain monitoring. "Finally, these SMRs are not being designed to supply the electrical grid. Unlike conventional reactors, their primary function is to deliver heat to industrial installations or urban centres, or to generate electricity off-grid, thereby supporting industrial entities in their efforts to decarbonise energy consumption. "Site choice is no longer an option," ASN concludes. The degree of nuclear safety will be all the more demanding as SMRs will need to be installed at sites close to more or less populated areas. Moreover, the heat produced by SMRs to decarbonize industrial thermal processes is not without consequences. "While electrons have the advantage of not being contaminated, this is not the case for heat exchange systems between the reactor and the 'client' industrial process (food industry, manufactured products, medicines, district heating network, etc.)," explains ASN.

ASN is presently overseeing the progression of approximately ten distinct projects, over half of which have already secured public funding. However, not all are at the same level of technological maturity and, consequently, evaluation by ASN and IRSN. They are preparing, for example, to review the creation authorisation file (including a "detailed design," the final design stage before prototype construction) submitted by the startup Jimmy. This company is working on a helium-cooled high-temperature reactor (HTR) with a power of 10 MWth, associated with a Triso fuel assembly plant. Next will come, by the end of 2026, the review (and inspection) of the Nuward and Calogena projects (another light water reactor, fueled with standard uranium, with a capacity of 30 MWth). In parallel, ASN and IRSN are working to finalize the "preparatory review" (preliminary step before instruction) of two other projects: Naarea (an 80 MWth MSR), by September 2024, and Newcleo (a lead-cooled fast reactor, LFR, with two possible dimensions – 80 or 450 MWth – and fuelled with MOX), by the end of the year. The five other monitored projects (Hexana, Otrera, Blue Capsule, Thorizon, and Stellaria) remain too early in development.

48 | Greneche 2023, 35.

Conclusion

The future trajectory of nuclear energy in France presents a complex and challenging subject for analysis. Indeed, even though climate and energy challenges are significant, the investments required to develop the nuclear branch are substantial. France is already equipped with a comprehensive legal framework designed to safeguard the continuity of nuclear energy within its territory, but each technical or technological evolution creates new challenges in terms of safety and security Activities such as medical uses of radiation, the operation of nuclear facilities, the production, transport, and use of any radioactive materials, and the management of radioactive waste must be subject to safety standards. Regulating safety is a national responsibility. Nonetheless, the risks associated with ionising radiation possess the potential to transcend national boundaries, thereby rendering international cooperation indispensable. Such cooperation is paramount to fostering and enhancing safety globally by sharing experience and improving skills to control risks, accident prevention, emergency response, and the mitigation of adverse consequences. In this context, the International Atomic Energy Agency (IAEA), under the provisions of its Statute, is mandated to promote international collaboration and is empowered to develop and promulgate safety standards aimed at protecting health and minimising hazards to life and property. IAEA develops these standards through an open and transparent process that allows for the collection, integration, and sharing of knowledge and experience gained from the use of technologies and the implementation of safety standards. The safety standards include 3 series of publications: Safety Fundamentals, Safety Requirements, and Safety Guides. The first defines the fundamental safety objective and the principles of protection and safety, while the second sets out the requirements that must be met to ensure the protection of people and the environment, both now and in the future. The Safety Guides provide recommendations and guidance on how to apply the Safety Requirements[49]. However, even if many challenges remain, the opportunities offered by nuclear power are also interesting. It is undeniable that France's energy sovereignty is closely linked to the development of nuclear energy. This study offers a preliminary overview of the multifaceted issues and potentialities inherent in nuclear energy; however, it is manifestly clear that political decision-making, legislative reform, and technological innovation within this sector will demand vigilant observation and thoughtful scrutiny in the times to come.

49 | Kocsis 2016, pp. 41–62.

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WATER UTILITY SERVICES

Victoria CHIU[1]

The Public Water Services in France: Between Public and Private Management[2]

Abstract

Since the early 2000s, France has witnessed a marked shift towards the remunicipalisation of public water services. The model of private management is currently undergoing a period of crisis, as public sentiment strongly favours the reappropriation of these essential services by local authorities. This study sets out to identify the historical context of public water services management in France. It offers a number of explanations for the observed reversion to public management, chief among them being the growing demand for transparency within public services and the desire to take account a social dimension in the management of public services, particularly in light of the formal acknowledgement of access to water as a fundamental human right. The movement towards the remunicipalisation of public water services is propelled by a vigorous social demand, reflecting the citizenry's aspiration to participate more effectively in the governance of water. It signals, moreover, the emergence of a civic counterbalance to both State authority and private sector interests.

Keywords: local authorities, management, public participation, remunicipalisation, right to water, public water service, water price

As water constitutes a vital resource, it ought not to be subordinated to the imperatives of the market. In France, this principle was given renewed prominence in the findings of a parliamentary committee of enquiry, which, on 15 July 2021, issued its report on the private control of water resources and the attendant consequences[3]. Set against the backdrop of climate change and increasing water scarcity, the report examines the predominant role of private operators in the management

1 | Associate Professor in public law, Faculty of Law, University Jean Moulin Lyon 3, member of the Institute of Environmental Law, UMR CNRS 5600 EVS-IDE.

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of water supply and sewerage services. It records that 61% of the population is presently served by private operators. Of the 12,096 public water supply services existing in France, 30.6% are managed by a private operator, accounting for the provision of water to approximately 57.3% of the French population[4].

In addition, of the 14,355 collective wastewater services, 22.9% are under private management, serving an estimated 61.4% of the population[5]. The report underscores that water services administered by local authorities—who bear statutory responsibility for such services—are generally more effective, both in terms of quality and cost. Nevertheless, private management remains predominant[6]. The report further warns that some companies could "abuse their dominant position to favour companies in their group"[7]. Furthermore, according to the report, "private interests may clash with the objectives of collective management of water resources and distribution if the State does not guarantee clear, transparent and fair rules of the game"[8]. In a broader reflection, the parliamentary committee of enquiry advocates a re-examination of the role of the public authorities in the regulation of private activities, , urging the redefinition of water as a common good[9], thereby positing a conceptual alternative to the traditional dichotomy of public and private ownership.

The governance of public water supply and sewerage services are managed now lies at the nexus of a multitude of political, financial, environmental and legal concerns. In an era marked by increasing decentralisation and successive environmental and financial crises, locally elected representatives are impelled to determine a mode of management that ensures an efficient and high-quality service, for which they bear both oversight and accountability.

The management of water services sits at the confluence of a number of fundamental issues concerning the pricing of services, access thereto, the quality of provision, and the transparency of water management. The European Union has, over time, developed an extensive body of rules on water supply and sewerage management. In particular, it has recognised that water supply constitutes a service of general economic interest within the meaning of Articles 14 and 106(2) of the Treaty on the Functioning of the European Union (TFEU), thereby acknowledging that, at the discretion of the Member States, such activity may be subject, in

4 | Ibid. 22.
5 | Ibid.
6 | Regarding the overseas territories, in 2023, in terms of drinking water, more than 70% of the population was supplied by a service managed by a private operator. See Cour des comptes 2025, 55.
7 | Assemblée Nationale 2021, 222.
8 | Ibid. 25.
9 | In order to take into account the results of the parliamentary investigation, two legislative proposals were registered in the National Assembly on October 19, 2021: one creating a legal status for common goods (n° 4590) and the other relating to the protection of common goods (n° 4576), both having nevertheless been rejected by the Committee on Constitutional Laws, Legislation and General Administration of the Republic. More broadly see, for example, Bories & Boussard (eds.) 2023, 353., See also Perroud (ed.) 2023, 220.

whole or in part, to market forces, or alternatively, may be classified as a matter of general interest and subject to public service obligations. Protocol No. 26 annexed to the TFEU by the Treaty of Lisbon in 2007 underlines the broad discretionary powers vested in national, regional and local authorities to provide, commission and organise these services[10].

In France, water is deemed a local public service insofar as it constitutes an activity either undertaken or assumed by a public entity with a view to satisfying the general interest[11]. The public service is managed either directly by the public authority or by a private party. However, water is "a resource that should not be managed solely according to the imperatives of profitability, because it is in the general interest that this should be the case"[12].

The identification of the contours of the public water service[13] is, in legal terms, relatively intricate. While the public water supply service[14] and the public wastewater treatment service[15] are clearly established, there also exists a public service dedicated to the management of urban rainwater, specifically addressing the handling of rainwater in urbanised zones or planned development areas[16]. Lastly, competence in relation to runoff water represents yet another aspect of this diversified regime[17]. The diversification and fragmentation of water services can sometimes engender challenges of internal coordination, which in turn may give rise to asymmetries of information within the public authority charged with their organisation.

This study is principally concerned with the public water supply service, which gives practical expression to the right of access to clean water intended for human consumption.

Under French law, the public service of water supply[18] is recognised as a local public service and includes "any service providing all or part of the production, transport, storage and distribution of water intended for human consumption is a drinking water service. The production of water intended for human

10 | Art. 1, Protocol n°26 on services of general interest, C 326/1, Official Journal of European Union, 26/10/2012, "the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users (...)".
11 | Chapus (ed.) 2001, 579.
12 | Romi (ed.) 2004, 470.
13 | In English and in the British context, these services are usually referred to as Public Utilities; in France, they are *services publics industriels et commerciaux*.
14 | Art. L. 2224-7 and Art. L. 2224-7-1 the General Code on Local Authorities (in French : Code général des collectivités territoriales).
15 | Art. L. 2224-8, the General Code on Local Authorities.
16 | Art. L. 2226-1, the General Code on Local Authorities.
17 | Art. L. 211-7, the Environmental Code.
18 | The public nature of the drinking water service was enshrined in French domestic law by administrative jurisprudence from the end of the 19th century, Conseil d'État, 27/04/1877, Ville de Poitiers, Rec. p. 385.

consumption includes all or part of the abstraction, protection of the point of abstraction as well as the treatment of the raw water"[19]. This entire chain of activity is presently subject to a series of technical and legal constraints imposed under European Union law, wherein the European legislator has enacted robust standards in terms of water quality protection. The obligation to supply drinking water as set out in Article L. 1321-1 of the French Public Health Code[20] is to be interpreted as a strict obligation of result. This is the interpretation given by the Court of Cassation in its decision of 28 November 2012,[21] which aligns with the jurisprudence of the Court of Justice of the European Union, likewise construing the duty to supply quality drinking water as one requiring the attainment of a defined result[22].

While compliance with European water quality requirements is mandatory, European Union law affords Member States the discretion to determine whether the provision of water services should be effected through public or private means. In France, the public water supply and sewerage services are the responsibility of the local authority, in accordance with the constitutional right to self-government administration of territorial communitie[23]. In accordance with this principle, municipalities[24] and inter-municipal grouping[25] are empowered to select the mode of management they consider most appropriate for the operation of the public water service.[26] They may either assume direct responsibility for the service or delegate its management to a publicly owned local company or a private enterprise[27]. French law allows for the functional separation and differ-

19 | Art. L. 2224-7, the General Code on Local Authorities.

20 | According to this Article, "any person who makes water intended for human consumption available to the public, whether in return for payment or free of charge and in any form whatsoever, including in the form of ice cream, is required to ensure that this water is clean and wholesome".

21 | Cour de cassation, chambre civile, 28/11/2012, Mme Mataillet c/Commune de Saint-Hilaire-de-Lavit, n°11-26.814.

22 | CJEC, 8/03/2001, Commission c/France, aff. C-266/99 ; CJEC, 14/11/2002, Commission c/Irlande, aff. C-316/00 ; CJEC, 31/01/2008, Commission c/France, aff. C-147/07.

23 | Art. 72 of French Constitution.

24 | In the context of our study, the terms "communes" and "municipalities" are used as synonyms. In France, there are now 34955 communes. Many are very small and there have been attempts to encourage mergers in recent years.

25 | Many services are provided by joint organisations between communes (*établissements publics de coopération intercommunale)* which have legal personality.

26 | Since the adoption of the 2014 law, municipal competence for water supply and sewerage has been transferred to the organization between communes called *établissement publics de cooperation intercommunale*, including the metropolitan areas; loi n° n° 2015-991 du 7 août 2015 portant nouvelle organisation territoriale de la République.

27 | The delegating authority concludes a contract with a delegate, which may take the form of a franchise (*affermage)* contract, a concession contract or a *régie.* Under a franchise contract, the contractor has to operate the service with means put at its disposal by the public authority. Under a concession, the contractor has to finance and provide the infrastructure and other equipment. In both cases the contractor is paid out of operational revenue. The *régie* is a contract of transfer of operational management of public service, in which a public person responsible for the service entrusts the management of the service to a third party (public establishment), called a manager,

ential management of the constituent activities of drinking water supply. Thus, it is entirely lawful, for instance, for a municipality to delegate the production of drinking water to a private operator, whilst retaining distribution under public control—typically in the form of a *régie,* a publicly operated entity affiliated with the local public authority[28].

In principle, the French model has historically favoured the delegation[29] of public water services to private operators. The development of private management of water services is mainly driven by economic and technical considerations, particularly the need to mobilise private investment to build water supply networks and to produce and distribute drinking water.

Delegating public water services to a private company also reflected a policy choice to outsource complex technical management, investment financing and operational risk.

However, this model has come under increasing scrutiny in France, with a growing trend to "remunicipalise"[30] the public service. "Remunicipalisation" refers to the reversion to public management of water services previously delegated to a private company. This process entails the re-internalisation of activities once outsourced and has served both to expose the limitations of private water management and to rekindle broader debate concerning the optimal form of governance for public services.

It must be noted that the recent rise of remunicipalisation stands in contrast to a longstanding tradition in France, wherein local authorities consistently preferred private management for water services.

who acts on behalf of the public entity and receives from it a remuneration indexed to the financial results of the service. These public services are managed by local authorities. In this case, the management of the service is fully under the control of the organizing authority, including cases where the authority decides to set up a company with legal personality. The local authority manages the service with its own human, material, and financial resources. The *régies* having the status of a public law corporation under local government control have their own balance sheet, board and executive manager. There are several types of *régie* : simple, financially autonomous, and financially autonomous with legal personality. See more Guglielmi, Koubi & Long (eds.), 2016, 896.

28 | Conseil d'État, 28/06/2006, Syndicat intercommunal alimentation en eau vallée du Gier, n° 288459 ; Cour administrative d'appel de Marseille, 4/06/2018, Association syndicale Libre des propriétaires de la baie du Gaout Benat, n° 17MA00709.

29 | The term "public service delegation" in the general code of local authorities (Art. L.1411-1) has the same meaning and legal scope as that of "concession in the form of a public service delegation", retained by the public procurement code (Art. L. 1121-3) following the transposition of the 2014 European directives. In the context of our study, we will use the term "*public service delegation*", which is still in use in the water sector. A public service delegation is a contract by which a legal entity under public law entrusts the management of a public service for which it is responsible to a public or private delegatee, whose compensation is substantially linked to the results of the operation of the service. The delegatee may be responsible for constructing works or acquiring assets necessary for the service.

30 | Hall, Lobina & Terhorst 2013, 193–214 ; Chiu 2014, 247–262.

1. Private management of public water services, historically favoured by local authorities

France has a long history of devolving public water services to the private sector. From the 19th century onwards, private management of water distribution was favoured and was entrusted to two large private companies, the *Compagnie Générale des Eaux* (founded in 1853) and the *Société Lyonnaise des Eaux et de l'Eclairage* (founded in 1880).

The *Compagnie Générale des Eaux* was formally authorised by imperial decree on 14 December 1853 to manage the public service of drinking water. The company's objectives were as follows: "considering the important services that could be rendered to the embellishment and healthiness of towns, as well as to agriculture and the sanitation of the countryside, by the establishment of a company whose purpose would be to provide for the distribution of water in towns and the irrigation of land, they [the respondents] resolved to carry out this work of public utility"[31]. As Stéphane Duroy aptly observes, "the use of private companies was essential at the time because the immensity of the task required private capital"[32]. In the inter-war period, a notable resurgence of public management took place. This was largely attributable to the financial difficulties encountered by concessionaires and, more fundamentally, to the political and ideological movement known as "municipal socialism"[33]. However, by the end of the 20th century, the majority of French towns had opted for private management[34]. The principal rationale invoked in support of private management lay in the perceived expertise of private undertakings, in particular, their superior technical, technological and financial resources available to them. Private operators, unlike their public counterparts, were credited with greater operational agility and a heightened capacity to respond to unforeseen contingencies.

Whilst improved water governance may be among the stated aims of private operators, their principal motive remains the pursuit of profit. Among the leading multinationals specialising in the water sector are Veolia (formerly *Compagnie Générale des Eaux* and Vivendi) and Suez (formerly GDF-Suez and *Lyonnaise des Eaux*). These French conglomerates, heirs to a legacy of technical expertise

31 | Goubert (ed.) 1986, 117.
32 | Duroy (ed.) 1996, 213.
33 | This was a movement towards the creation of public services by local public bodies, made possible in particular by the adoption of the law of 10 August 1871 on the organisation of the *département* and the municipal law of 5 April 1884. As Professor Jacques Chevallier points out, "the development of municipal socialism led to local authorities taking over the management of a series of local services, as well as more directly economic activities", Chevallier 1997, 9.
34 | Fraysse 2011, 32.

spanning over a century, are responsible for water distribution in a number of cities worldwide, including Shanghai, Hong Kong, Budapest and Dubai[35].

However, the model of private water management in France has come under increasing scrutiny, particularly in the wake of a highly publicised corruption scandal involving the award of a contract to Suez to manage the service in the city of Grenoble.[36] The affair culminated in the criminal liability of the mayor[37], and the contract between Suez and the city of Grenoble was cancelled in 1998[38]. The water service was taken over by the municipality *régie* in a resolution passed on 20 March 2000.

For a long time, the private management of public services represented a fertile ground for corruption. This was due, in part, to the liberal nature of the legal regime then governing such delegations, which, prior to the enactment of legislation in 1993,[39] imposed no formal requirement for competitive tendering. Although the 1993 law introduced mandatory public notice, competitive bidding procedures, and evaluation of tenders for public service delegations. Yet in practice, contracts for the delegation of public water services are awarded to three major private sector companies, Veolia, Suez and SAUR (*Société d'aménagement urbain et rural*), with the former two controlling approximately three-quarters of the sector[40].

The model of private management, long emblematic of the French approach to public water services, is currently in crisis, with a 20% drop in market share in the space of 20 years[41].

The reversion to public management in the water sector began in the 2000s and gathered notable momentum from 2010 onwards, coinciding with the expiry of numerous delegation contracts and triggering a widespread phase of renegotiation. This return to public management has taken place in both small

35 | The professor Nicolas Haupais refers to the turnover of the Suez company for 2008, which is approximately 12,000 million euros, half of which is linked to the water sector, Haupais 2011, 61.

36 | In this case, the mayor of Grenoble, Alain Carignon received 21 million francs for awarding the contract to Suez.

37 | Cour de cassation, chambre criminelle, 27/10/1997, pourvoi n° 96–83.698, Alain Carignon et autres : the mayor of Grenoble was sentenced for complicity in the misuse of corporate assets, concealment of misuse of corporate assets, passive corruption and witness tampering, to 5 years' imprisonment (1 year suspended), with a warrant for his arrest, a fine of 400,000 francs and a 5-year ban on the right to vote and ineligibility.

38 | Tribunal administratif de Grenoble, 7/08/1998, req. n° 962133, 964778, 964779, 964780, 98481, 98482.

39 | Law n° 93-122 of 29 January 1993 on the prevention of corruption and the transparency of economic life and public procedures (known as the Sapin I Act) (Loi n° 93-122 du 29 janvier 1993 relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques, dite loi Sapin I). Since this Act, the granting of an unjustified advantage in public contracts and delegations of public services has been punishable by the offence of favouritism. This offence is now set out in Article 432-14 of the Criminal Code.

40 | Cour des comptes 2024, 133.

41 | Assemblée nationale 2021, 169.

towns and large cities such as Amiens, Bordeaux, Strasbourg, Nancy, Nantes, Paris, Grenoble, Tours, Reims, Rennes, and Lyon. This trend is not confined to France, but has likewise manifested in other countries, such as Italy[42], Spain and Germany[43].

The example of the city of Paris remains emblematic of the broader movement from private to public control of water services. During the 2008 municipal elections, the incumbent Socialist mayor, Bertrand Delanoë, pledged to restore public management of the city's water service in the event of his re-election[44]. This electoral promise was duly honoured: with effect from 1 January 2010, the water supply service was placed under public management. It is now managed by the public *régie Eau de Paris* ("Water of Paris"), thereby establishing the first local public water company in France. Water management in Paris was thus remunicipalised after twenty-five years of private management by Suez and Veolia. This transition lends weight to the growing perception that the model of private management is in a state of decline or dysfunction[45].

To comprehend more fully the dynamics underpinning the remunicipalisation movement, one must consider the autonomous discretion exercised by local authorities in selecting among the various available modes of water service management. In this context, the relationship between the right to water and the reassertion of public control becomes a critical axis of analysis.

2. Freedom of choice in the management of public water services

The reversion to public management of water services is facilitated by the principle of freedom of choice accorded to local authorities, which serve as the organising authorities for these services.

Under French law, local authorities and their groupings are not obliged to carry out an in-depth analysis of the advantages and disadvantages of the various methods of managing public services when they create a new service, extend an existing service or contemplate a change in its method of management.

42 | Lucarelli 2015, 198.
43 | Bauer 2015, 723–746; Bauer & Markmann 2016, 281–296.
44 | Le Strat 2011, 119.
45 | Law n° 2010-559 of 28 May 2010 on the development of local public companies, particularly in the field of environmental public services, reinforces this trend (La loi n° 2010-559 du 28 mai 2010 pour le développement des sociétés publiques locales, en particulier dans le domaine des services publics environnementaux, renforce cette tendance, JORF du 29/05/2010).

The scope of the principle of freedom of choice

Administrative jurisprudence has clarified the scope of this principle for local authorities when choosing the method of managing public services, affirming that the discretionary powers conferred upon local authorities preclude the administrative judge from reviewing the expediency of the management option selected by the public authority[46].

Furthermore, the question of whether a public authority may vary the amount of its financial aid it provides based on the management model employed has long been a matter of contention in domestic law. Initially endorsed by the *Conseil d'État*[47] (the Council of State), the highest administrative court in France, such a practice was later explicitly prohibited by legislative intervention. The Law of 30 December 2006[48], introduced a statutory bar—enshrined in Article L. 2224-11-5 of the General Code of Local Authorities—stating that "public aid to municipalities and groups of local authorities responsible for water supply or sewerage cannot be modulated according to the method of management of the service".

This legislative provision was subsequently subjected to a *question prioritaire de constitutionnalité* (priority question of constitutionality)[49], leading the *Conseil constitutionnel* (the Constitutional Council) to declare it unconstitutional. The Court held that "that this prohibition on modulating subsidies according to the method of management of water supply and sewerage services restricts the constitutional right to self-government of the *départements* to such an extent as to infringe Articles 72 and 72-2 of the Constitution"[50]. The principle thus established recognises that adjusting subsidy levels in favour of public *régies* does not prohibit the choice of delegated management, nor does it unduly restrict the freedom of local authorities to determine the governance model for public services. This doctrinal position has since been reaffirmed in consistent case law[51].

The choice of private management governed by law

Under Article L. 1411-1 of the French General Code for Local Authorities, "local authorities, their groupings or their public establishments may entrust the

46 | Conseil d'État, 4/05/1906, Babin : Rec. CE, p. 363 ; Conseil d'État, 28/06/1989, Syndicat du personnel des industries électriques et gazières du centre de Grenoble ; Conseil d'État, 10/01/1992, Association des usagers de l'eau de Peyreleau ; Conseil d'État, 24/11/2010, n° 318342, Association fédérale d'action régionale pour l'environnement.

47 | Conseil d'État, arrêt d'assemblée, 12/12/2003, département des Landes, n° 236442.

48 | Law on water and aquatic environments (Loi n° 2006-1772 du 30 décembre 2006 sur l'eau et les milieux aquatiques, JORF du 31/12/2006).

49 | Conseil d'État, 29/04/2011, département des Landes, n° 347071 (decision to refer the priority constitutionality question to the Constitutional Council).

50 | Conseil constitutionnel, 8/07/2011, n° 2011-146 QPC, département des Landes.

51 | Cour administrative d'appel de Bordeaux (Administrative Court of Appeal of Bordeaux), 3/03/2014, Fédération professionnelle des entreprises de l'eau, n° 12BX02263.

management of a public service for which they are responsible to one or more economic operators under a public service delegation agreement", such agreements being governed by the provisions of the French Public Procurement Code.

As a general principle, the duration of contracts for the delegation of public water services is limited.

Article L. 3114-8 of the French Public Procurement Code specifies that these contracts may not exceed a term of 20 years[52], with the prevailing practice being to conclude them for an average duration of 12 years[53].

The Public Procurement Code[54] and the General Local Authorities Code[55] jointly regulate both the award procedures applicable to public service delegations and, to a lesser degree, the oversight exercised by local authorities in monitoring contractual performance.

The legislative milestone of 1993[56] introduced, for the first time, mandatory requirements for public service delegations to be publicly advertised and subject to competitive tendering. However, the oligopolistic position held by Veolia, particularly since the takeover of Suez in 2021, continues to impede effective competition from new entrants within the French water market.

Private management is frequently driven by the objective of optimising or streamlining management. With the involvement of a private operator, local authorities are relieved of the operational burdens and complexities inherent in managing public sector personnel, including recruitment, replacement of retiring staff, absenteeism. Furthermore, they are exempted from the stringent public procurement rules that govern the acquisition of goods and services. Larger private companies benefit from economies of scale in procurement, enabling them to secure lower prices than might be achieved by a solitary public

52 | Unless the departmental director of public finance, at the initiative of the granting authority, examines the justification for exceeding this period.

53 | Cour des comptes 2024, 60.

54 | Since Order n° 2016-65 of 29 January 2016 and its implementing decree no. 2016-86 of 1 February 2016 transposing Directive 2014/23/EU of 26 February 2014, the rules relating to concession contracts within the meaning of European Union law have been brought together in Part III of the Public Procurement Code. Following the example of European Union law, the latter distinguishes between two main categories of concessions: works concessions and service concessions. Without this difference having any legal impact, the General Code of Local Authorities has retained the term "public service delegation".

55 | Article R. 1411-1 of the of the French General Code for Local Authorities: "the public service delegations of local authorities, their groupings and their public establishments are awarded and executed in accordance with the provisions of the Public Procurement Code". The French General Code for Local Authorities lays down procedural rules for the adoption of public service delegation agreements: opinion of the local public services consultative commission and the public service delegation commission, deliberation by the decision-making body before the contract is signed. In accordance with Article L. 1411-5 of the French General Code for Local Authorities, the public service delegation committee analyses the applications and draws up a list of candidates admitted to submit a bid.

56 | Loi n° 93-122 du 29 janvier 1993 relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques, dite loi Sapin 1.

purchaser. The scale of the network to be operated may explain the use of a private management.

In the field of drinking water distribution, for example, "the size of the service and its management method are highly correlated: the larger the size of the service (in terms of number of inhabitants), the higher the proportion of delegated services. The proportion of delegated services is seven times lower than that of public *régies* in the category of services with fewer than 1,000 inhabitants, while it is 1.5 times higher on average in the categories with more than 3,500 inhabitants"[57]. Smaller municipalities often use public contracts to manage their services themselves. What is more, upon the imminent expiration of a public service delegation contract, the elected representatives of a local authority may opt to renew the delegation with a company that has the technical expertise and knowledge of the service to safeguard its uninterrupted operation. This This choice is often driven by considerations of continuity, security, and administrative simplicity. Particularly where a service has long been delegated, internal operational within the local authority tends to be limited, and a pronounced information asymmetry exists between the contracting private entity and the public authority.

For local authorities, exercising full control over the management of their public services entails the ability to alter the contracted operator or delegatee or, indeed, to modify the management method itself. This This requires anticipation and foresight, particularly through contractual provisions incorporated at the outset of the delegation agreement —at which point the local authority typically enjoys a more favourable balance of power in negotiations with the delegatee undertaking. In this respect, it is prudent to provide explicitly for the financial and material consequences of early termination on grounds of public interest within the initial contract.

The delegating authority is vested with the power to unilaterally terminate a delegation agreement in the event of sufficiently serious misconduct on the part of the delegatee or on grounds of public interest[58]. Should the public authority decide to bring the contract to an end prior to its scheduled expiry, the delegatee is entitled to compensation for losses incurred as a result of the premature, cost-free reversion of assets to the public authority, where such assets have not been fully depreciated[59]. In the event of termination on grounds of public interest, the delegatee company is entitled to full compensation for the loss it suffers as a result of the early termination of the contract[60]. This compensation takes into account the

57 | Observatoire des services publics d'eau et d'assainissement (*Observatory of public water and sanitation services*), Panorama des services et de leur performance en 2021, rapport national, publié en 2023, 29.
58 | Art. L. 3136-3 of Public Procurement Code.
59 | Art. L. 3136-10 of Public Procurement Code.
60 | Conseil d'État, 23 mai 1962, Société financière d'exploitation industrielle, n° 41178.

expenses incurred, as well as the loss of earnings for the contractor[61]. Nonetheless, it is open to local authorities to include provisions within the delegation contract that limit liability, for instance, by stipulating partial rather than full compensation for loss of earnings in the event of early termination.

In the water and sanitation sector, Article L. 2224-11-4 of the General Code of Local Authorities,[62] introduced in 2007, requires the delegatee company to transmit to the delegating authority—no later than six months prior to the expiry of the contract—a file comprising subscriber data, meter specifications, and plans of the water supply and wastewater networks. In principle, while the aim of this provision is to facilitate either competitive re-tendering or the assumption of the service by a new operator, the prescribed six-month notice period is widely considered insufficient. With the exception of small local authorities, the choice of new operator must be made at least six months before the expiry of the delegation contract, so that operations and staff can be taken over, necessitating the commencement of competitive procedures no less than a full year in advance. Potential bidders must be granted access to anonymised user data, as well as information on the characteristics of the meters and updated network plans, as soon as the call for tenders is issued. Where a public operator (in régie) is to take over the service, preparatory work may span as long as three years.

For example, the Métropole de Lyon required a full two-year period to prepare for the municipalisation of the water production and distribution service, which came into effect on 1 January 2023.[63] This transition was governed by a detailed contract with Veolia regarding the transmission of data. Although the precision of the contract facilitated the transfer to public ownership, it had to be supplemented by an end-of-contract protocol specifying, in particular, the obligations of the parties with regard to the General Data Protection Regulation (GDPR), Regulation (EU) 2016/679 of 24 May 2016, which came into force during the lifetime of the delegation, along with provisions concerning human resources and user relations[64]. More generally, the French Court of Auditors (*Cour des comptes*) considers that "in order to protect their interests, it is in the interest of local authorities to conclude with the delegatee company, one or two years in advance, a memorandum of understanding aimed at securing the proper operation of the public service until the end of the delegation and the transmission of the information necessary

61 | Conseil d'État, 18/11/1988, Ville d'Amiens et Société d'exploitation du parc de stationnement de la gare routière d'Amiens, n° 61871.

62 | Art. L. 2224-11-4 of the General Code of Local Authorities states that "the subscriber file, comprising personal data for billing water and wastewater services, together with the characteristics of the meters and updated network plans, shall be submitted by the operator to the delegating authority at least six months before the end of the contract".

63 | After almost 40 years of delegated private management, the Lyon Metropolitan Area has opted for public management of its water supply service from 1 January 2023. See more on the following website https://www.eaudugrandlyon.com/.

64 | Cour des comptes 2024, 123.

for the continuity of the service"[65]. In addition, to incentivise proper contractual performance throughout the term of the agreement, delegation contracts ought to incorporate penalty clauses and provisions for formal notice, thereby reinforcing the legal position of both the authority and the users of the public service.

3. The links between the human right to water and the return to public management of water services.

It is in response to the increasing scarcity and progressive privatisation of water resources that the law has, at times, acknowledged the status of water as a *res communis,* a common good[66], and at others, enshrined a fundamental right of access thereto. The resurgence of public management of water services thus contributes to the realisation of this paradigmatic shift.

Since 1992, the French legislator has formally recognised that "water is part of the nation's common heritage". At the European Union level, the Water Framework Directive of 23 October 2000[67] specifies in its opening recital that "water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such".

The European Parliament, in its resolution of 15 March 2012, advances this position further by stating that "water is a shared resource of humankind and, therefore, should not be a source of illegitimate profit and that access to water should constitute a fundamental and universal right"[68]. This resolution takes note in particular of the resolution of the United Nations General Assembly of 28 July 2010 which recognises the fundamental right to safe and clean drinking water[69].

Domestically, since 2006, the French legislature has recognised that "the use of water belongs to all and every natural person, for their food and hygiene, has the right to access drinking water under conditions economically acceptable to all".

65 | Ibid.

66 | Mention can be made of the publication on 29 May 2018 of an opinion piece in the newspaper *Le Monde* by fifty lawyers, economists and researchers calling for a constitutional revision aimed at introducing "the common good" as a limit on the right to property and entrepreneurial freedom. The Article, entitled in French "Bien commun : Une réforme sage et mesurée de notre Constitution est devenue une urgence" (and English : Common good: A wise and measured reform of our Constitution has become a matter of urgency), was signed by Mireille Delmas-Marty and Thomas Piketty, among others.

67 | Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, Official Journal L 327, 22/12/2000, 1–73.

68 | European Parliament resolution of 15 March 2012 on the 6th World Water Forum taking place in Marseille on 12–17 March 2012 (2012/2552(RSP)), P7_TA(2012)0091, Official Journal of the European Union, CE 251/102, 31/08/2013.

69 | UN General Assembly resolution 64/292 of 28 July 2010 on the human right to water and sanitation.

The legal scope of the right to water as affirmed by this provision has been criticised by legal doctrine. In this respect, Professor Bernard Drobenko specifies that "the recurrent assertion of access to drinking water and sanitation services reinforces an approach that is essentially economic and consumerist. This is the path chosen by the legislature with the law on water and aquatic environments... At no point are the conditions of this right of access specified, which, in substance, responds to the technical modality of need, but not to the fundamental right"[70]. Indeed, the recognition of the right to water remains constrained by financial considerations and suffers from the absence of enforceability[71]. As Professor Laurent Richer points out, the economic limits placed on this right "include the cost to the municipality"[72].

It is, moreover, necessary to distinguish the right *to* water from the right *of access* to water. While the former is part of the category of fundamental human rights, the latter is a matter of water law—that is, to the concrete modalities by which water resources are administered and distributed. Under positive law, it is not a right to water itself which is formally recognised, but rather a right of access to water[73], coupled with the competence of municipalities to guarantee such access. The Conseil d'État, in its decision of 26 January 2021, held that this right of access is not equivalent to a right to connection to the public drinking water network[74].

Guaranteeing everyone a minimum level of access to safe drinking water is an essential part of realising the right to water. In pursuit of this objective, some municipalities have enacted *arrêtés anti-coupures* (anti-disconnection orders) aimed at safeguarding the minimum level of service for persons in conditions of poverty. These municipal measures, however, have encountered a number of legal difficulties. While some administrative judges have validated these orders[75], others have refused to adopt a position in favour of a minimum right of access to water[76]. This divergence in administrative jurisprudence has catalysed a robust doctrinal debate[77]. As Professor Virginie Donier highlights, "in the case of public water or

70 | Drobenko 2007, 202.
71 | Ahoulouma 2011, 1887.
72 | Richer 2007, 1170.
73 | Drobenko 2012, 491.
74 | Conseil d'État, 26/01/2021, commune de Portes-en-Valdaine, n° 431494. More specifically, outside the service areas defined by the municipal or inter-municipal drinking water distribution scheme, or in the absence of such areas being defined by the scheme, the Council of State allows the competent authority more leeway in deciding what action to take on requests to carry out work to connect to the public drinking water distribution network, in accordance with the principle of equality before the public service, in particular on the basis of their cost, the public interest and the conditions of access to other sources of drinking water supply.
75 | Conseil d'État, 2010, footnote 287.
76 | Cour administrative d'appel de Paris 11/07/2007, Commune de Mitry Mory, n° 05PA01942 ; Cour administrative d'appel de Versailles 25/10/2007, Commune de Bobigny, n° 06VE00008 ; Cour administrative d'appel de Paris 12/02/2008, Société EDF, n° 07PA02710 ; Cour administrative d'appel de Nancy 11/06/2009, Préfet du Doubs, n° 08NC00599.
77 | Braconnier 2005, 644.

energy distribution services, the courts have consistently refused to recognise a right to continuity that could provide a legal basis for municipal anti-cuts orders. Once again, these solutions tend to restrict the scope of the right of access by jeopardising its effectiveness"[78]. The administrative judiciary has declined to recognise a right to water on the basis of human dignity, reasoning that "the infringement that this right would cause to the freedom of trade and industry seems excessive, even if most of the municipal orders limited their scope of application to only 'people in social difficulty in good faith'"[79]. This judicial stance is regrettable when viewed from the perspective of protecting the inviolable core of the right to human dignity.

It was not until the legislature intervened in 2013[80], and in particular the amendment of Article L. 115-3 of the Social Action and Families Code, that a degree of progress was made towards the effective implementation of the right to drinking water. Thus, paragraph 3 of this Article now states that "from 1 November of each year to 31 March of the following year, electricity, heat and gas suppliers may not interrupt the supply of electricity, heat or gas to individuals or families in their primary residence, including by terminating contracts for non-payment of bills". The last sentence of this paragraph specifies that this prohibition applies "to the distribution of water throughout the year", thereby establishing a general prohibition against water shut-offs due to non-payment. Furthermore, the Constitutional Council declared the constitutionality of this paragraph in a decision of 29 May 2015[81] by validating the ban on interrupting the distribution of drinking water in primary residences. The Constitutional Council affirmed that access to water "meets an essential need of the person", and it is intrinsically linked to "the objective of constitutional value that constitutes the possibility for any person to have decent housing". This decision validated the intention of the legislator, whose primary aim was to provide a secure legal basis for the mechanisms allowing households in a difficult economic situation to have access to the water.

Notwithstanding these developments, the scope of the right to drinking water remains circumscribed by the political will of the municipalities "competent in

78 | Donier 2010, 800.

79 | Ibid.

80 | Law n° 2013-312 of 15 April 2013 aimed at preparing the transition to a low-carbon energy system and containing various provisions on water pricing and wind turbines (Loi n° 2013-312 du 15 avril 2013 visant à préparer la transition vers un système énergétique sobre et portant diverses dispositions sur la tarification de l'eau et sur les éoliennes, JORF du 16 avril 2013, loi dite Brottes). This law authorised, for a period of 5 years in the form of an experiment, local authorities to implement social pricing as part of the public water service. This possibility was then perpetuated by the law of 27 December 2019 known as "Engagement and proximity", law no. 2019-1461 of 27 December 2019 relating to engagement in local life and the proximitý of public action (loi dite « Engagement et proximité », n° 2019-1461 du 27 décembre 2019 relative à l'engagement dans la vie locale et à la proximité de l'action publique, JORF, 28/12/2019).

81 | Conseil Constitutionnel, 29/05/2015, n° 2015-470 QPC, Société SAUR SAS. See for a commentary on this decision Nivard 2015, 1704.

matters of drinking water distribution", as well as that of their intercommunal groupings. Article L. 2224-7-1 of the General Code of Local Authorities specifies that "in this context, they establish a water supply network scheme determining the areas served by the distribution network". When interpreted in the light of the right of access to drinking water, this provision implies that, within designated service areas, there exists an obligation to accede to requests for connection works. Outside such areas, however, no such obligation arises.[82] In the latter case, local authorities decide what action to take in response to requests for connection to the public service, taking into account the cost of the work, the public interest and the conditions of access to other sources of drinking water supply, such as the existence of private wells. The administrative courts exercise only limited control over refusal decisions by local authorities[83].

Nonetheless, the scope for discretion afforded to local authorities was curtailed by the Order of 22 December 2022[84], which transposed into French law the provisions of European Directive 2020/2184 of 16 December 2020 on the quality of water intended for human consumption.[85] Article L. 1321-1 B of the Public Health Code now provides that "municipalities or their public cooperation establishments, taking into account the particularities of the local situation, take the necessary measures to improve or preserve access for all persons to water intended for human consumption". To this end, they drew up a "territorial diagnosis" in which they "identify the persons in their territory who have no access, or insufficient access, to drinking water and the reasons explaining this situation"[86]. In the light of this diagnosis, they "proceed to [...] the installation and maintenance of drinking water fountains and other equipment [...] allowing access in public places to water intended for human consumption"[87]. A further limitation on the right of access to drinking water is its justiciability. Indeed, the Council of State declined to recognise any enforceability of this right, in a case involving a challenge to the legality of a deliberation setting the price of water and the amount of sanitation charges levied as part of the public water service[88].

Despite recognition of the human right of water and the right of access to safe drinking water, it remains the case that public water services in France are not provided free of charge.

82 | Peyen 2021, 981.
83 | Conseil d'État, 26/01/2021, n° 431494. The administrative judge's review is limited to manifest errors of assessment (erreur manifeste d'appréciation); this is the weakest form of review.
84 | Ordonnance n° 2022-1611 du 22 décembre 2022 relative à l'accès et à la qualité des eaux destinées à la consommation humaine, JORF, n° 297, 23/12/2022.
85 | Directive (EU) 2020/2184 of the European Parliament and of the Council of 16 December 2020 on the quality of water intended for human consumption, Official Journal L 435, 23/12/2020, 1–62.
86 | Art. L. 2224-7-2 of the General Code of Local Authorities.
87 | Art. L. 2224-7-3 of the General Code of Local Authorities.
88 | Conseil d'État, 22/10/2021, Comité syndical du syndicat mixte des eaux de la région de Buthiers, n° 436256.

The price of public water services and the right of access to drinking water

The issue of pricing in the provision of public water services largely determines users' access to drinking water. In the words of Professor Laurent Richer, "water supply and sewerage services occupy a special place in the debates on public services, which in France never cease. The "water bill" is the cause"[89]. These words capture with precision the enduringly contentious nature of the debate—one that extends well beyond the confines of the French Republic.

The Law on Water and Aquatic Environments of 30 December 2006 established the principle of compulsory pricing for the supply of drinking water, mandating that such pricing must be set "at the rate applicable to the corresponding category of user." This legislative provision laid the foundations for an obligation on the part of the authority managing this public service to treat water users in different situations differently.

A central argument advanced in favour of a return to public management is the price of water paid by users, which is much higher when the public service is managed is a private company[90]. In its 2010 *Rapport public*, the Council of State underscored this disparity, noting that the price of water was between 5.5% to 9.5% higher when the service was managed by a private company[91]. In this context, economic considerations loom large: local authorities seek to maintain control over the price of water whilst simultaneously respecting transparency in the breakdown of service-related costs and expenditures. However, beginning in the 2010s, an upward trend in water pricing has been observed, regardless of the management method chosen. This phenomenon may be attributed, inter alia, to the marked increase in the cost of wastewater treatment (including the modernisation of treatment plants), as well as the rise in value-added tax to 10% in 2014. In addition, the price of water provision is not uniform across the territory; it varies in accordance with local specificities, including the scale of the service, geographic distance, quality and availability of water resources, topographical conditions, the configuration and density of the network, customer base, the level of treatment required, and the extent of capital investment.

The principle of dual billing for public water service

Article 9, paragraph 1 of Directive 2000/60/EC, known as the Water Framework Directive, sets out the principle of recovery of the costs of water services. It provides that "water-pricing policies (of the Member States) provide adequate

89 | Richer 2007, 1168–1169.
90 | It is interesting to note that contracts have been renegotiated by local authorities with private companies, leading to a reduction in water bills of up to 25%. Fraysse 2011, 33.
91 | Conseil d'État, 2010, 407, footnote 250.

incentives for users to use water resources efficiently, and thereby contribute to the environmental objectives of this Directive".

The methodology for calculating the price of water[92] is based on two pillars that contribute to represent the public service as a "productive function": namely, the principle of remuneration—corresponding to cost recovery—and the requirement of budgetary equilibrium [93]. In other words, whether the service is publicly or privately administered, the public drinking water service is bound by the obligation to maintain a balanced budget, ensuring parity between income and expenditure.

The general principle is that "water pays for water", denoting that the full operational, capital investment, and environmental preservation costs associated with both water supply and sanitation services must ultimately be borne by the users. In France, as in other European countries, the pricing system for public water services is based on the principle of *dual billing*. This entails that the price of water includes both an amount proportional to the volume of water actually consumed by the customer (variable part) and an amount independent of this volume, which generally corresponds to the costs of water distribution services (fixed part)[94].

The principle of dual billing was held by the Court of Justice of the European Union to comply with the Water Framework Directive in a judgment of 7 December 2016[95]. The matter arose from a request for a preliminary ruling by the Croatian court in the context of a dispute brought by a subscriber who contested that portion of his bill corresponding to the fixed charge element. Following a didactic recapitulation of the key tenets of the 2000 Water Framework Directive, and particularly with regard to the economic dimension of water protection, the Court affirmed, without notable departure from expectation, that in order to comply with the obligation to recover the costs of the services connected with water use, laid down in EU law, the Member States may lawfully implement other water-pricing methods which enable recovery of, inter alia, the costs borne by water distribution services in making it available to users in sufficient quantity and of sufficient quality, irrespective of their actual consumption of that water. Although this billing principle—prevalent across many Member States—may lead to substantial

92 | According to data from the National Observatory of Watersupply and sewerage Services (Observatoire national des services d'eau et assainissement), in 2023, the average price of drinking water services was €2.31 (including tax) per m3 and the average price of wastewater services was €2.37 (including tax) per m3, see the data online at https://www.services.eaufrance.fr/. However, the price of water services (distribution and sanitation) is on average 5.4% more expensive under private management than under public *régies*. The lowest price is particularly prevalent in local authorities with fewer than 10,000 inhabitants, see the National Assembly report, prec., 226.

93 | Camus 2023, 143–156.

94 | The constraints inherent in balancing the budget of public water services tend to encourage local authorities to introduce relatively high fixed charges. See Causse & Wulfranc 2022, 15.

95 | CJEU, 7/12/2016, Vodoopskrba i odvodnja, aff. C-686/15.

differences in taxation from one State to another, the Court nonetheless regarded it as a legitimate instrument for incentivising efficient use of water resources. As such, it contributes to the realisation of the environmental objectives set out in the 2000 Water Framework Directive.

Social pricing for public water services

Article 16 of the European Directive of 16 December 2020 on the quality of water intended for human consumption makes only cursory reference to social pricing. It obliges Member States merely to adopt the necessary measures to enhance or preserve universal access for all to water intended for human consumption. However, Recital 33 of the directive states that the Commission has invited Member States to guarantee access to a minimum water supply for all citizens, in accordance with the WHO recommendations, an approach deemed to be in line with Sustainable Development Goal No. 6 and its associated target of "ensuring universal and equitable access to safe drinking water at an affordable cost".

In this domain, "France is more committed than the Commission is inviting it to be"[96]. The social pricing of water[97], authorised in France by the legislator since 2013[98], aims to make effective the right of access to drinking water under economically acceptable conditions for all, as set out in Art. L. 210-1 of the French Environmental Code. Social pricing in this context refers to a spectrum of pricing policy measures applicable to public water supply and sewerage services. In a strict sense, it can consist of a modulation of the price of the public water services, based on the composition or income of the household, but it can also more broadly take the form of "assistance with the payment of water bills, assistance with access to water or support and measures to encourage water saving"[99]. The General Code of Local Authorities also provides that the price of the service may be modulated on the basis of incentive criteria "defined according to the quantity of water consumed"[100]. At the same time, it should be remembered that Article L.115-3 of the French Social Action and Families Code guarantees year-round access to water for individuals or families experiencing particular hardship, by expressly prohibiting water distributors from interrupting the service or reducing the flow rate in the event of non-payment of bills.

96 | Rabiller & Zavoli 2021, 537.
97 | Moysan 2024, 100–110.
98 | Article 28 of the aforementioned Act of 15 April 2013 (loi Brottes). Since the aforementioned law of 27 December 2019, Article L. 2224-12-1-1 of the General Code of Local Authorities authorises public water (and sanitation) services to implement social measures aimed at making the right of access to drinking water effective by taking into account, in particular, the composition or income of the household.
99 | Art. L. 2224-12-1-1 of the General Code of Local Authorities.
100 | Ibid.

4. Public participation in the governance of public water service

Beyond the traditional satisfaction surveys annually conducted by service providers, French law provides legal mechanisms and procedures to facilitate civic engagement in the operation of these services, thereby enhancing transparency in their management.

One such mechanism is the consultative commission for local public services[101], which enables users to be represented through local delegates appointed by the deliberative authority[102]. User representation means that representatives of local associations can be appointed to these commissions and, since 2022[103], representatives of users and residents with an interest in local public services. These representatives continue to be appointed by the deliberative body[104], although the composition of the commission is fairly free and the term of office of the user representatives coincides with that of the local elected representatives. For example, the Grenoble Alpes Métropole has set up a consultative commission for local public services with 40 members, including 10 elected officials, 10 representatives of associations and 20 residents from the 49 constituent municipalities in the metropolitan area[105].

While these commissions are compulsory in all municipalities exceeding 10,000 inhabitants, or public establishments for inter-communal cooperation serving over 50,000 residents.[106] Nevertheless, their remit remains purely consultative. By setting up such a commission, citizens are indirectly involved in the operation of local public services, whether these are operated *en régie* with a financial autonomy or delegated to private entities.

The law of 27 February 2002 on Local Democracy requires that various documents relating to the development of services be transmitted to the consultative commission for local public services or submitted to them for their opinion: the delegation project, the annual report on the quality and price of the service, the delegate's annual report, the activity report for the services operated in *régie*[107].

101 | For example, the Consultative Commission for Local Public Services of Lyon Métropole is consulted in the following areas: water and wastewater treatment; prevention and disposal of household and similar waste; district heating and cooling; gas and electricity; car parks; very high speed broadband, etc.
102 | Art. L. 1413-1 of the General Code of Local Authorities.
103 | Loi n° 2022-217 du 21 février 2022 relative à la différenciation, la décentralisation, la déconcentration et portant diverses mesures de simplification de l'action publique locale, dite « 3DS », JORF n° 44, 22/02/2022.
104 | Either the municipal assembly or the deliberative assembly of the public establishments for inter-communal cooperation.
105 | Cour des comptes 2024, 116.
106 | Art. L. 1413-1 of the General Code of Local Authorities.
107 | Ibid.

However, the advisory opinion rendered by the commission is issued only at the final stage of the decision-making process—immediately preceding the deliberative assembly's vote. What is more, as the report of the 2021 parliamentary commission of enquiry points out, in the absence of any regulatory provision setting out the composition or operation of local public service advisory committees, the latter are perceived more as chambers for recording the decisions of local authorities[108]. In order to strengthen citizen control over public water services, whatever the management method chosen, the composition of local commissions should be broadened and at least half of their members should be user representatives[109]. Such a change in positive law would constitute a significant step towards the consolidation of citizen oversight over local public services, including those concerned with water.

In certain instances, users may be granted even closer involvement in the governance structures of the entities—public or private—tasked with managing the public water service. This participatory approach is more feasible under *régie* arrangements. This is the case, for example, for the *Métropole de Lyon*, which, as of 1 January 2023, entrusted its drinking water service to the public *régie* known as *Eau du Grand Lyon* (Water of Greater Lyon). Of the 20 seats on the board of directors, four are reserved for user representatives, appointed by the Water Users' Assembly, a participatory forum inaugurated on 18 January 2023. The Water Users' Assembly is a forum for dialogue between users, the metropolitan authority and the public *régie*. It comprises 120 members, including 101 citizens and 19 representatives from various organisations. Any resident of the Lyon metropolitan area may join, provided they undertake to participate actively. Associative actors, collective interest groups, and non-domestic users are also eligible for representation.

This Assembly serves as a space for public deliberation and debate concerning strategic issues related to water within the local territory, including metropolitan public policies relating to access to water and the preservation of water resources. The Lyon Metropolitan Authority and the public *régie* may call on this assembly to consult or co-construct decisions[110].

108 | National Assembly 2021, 181.

109 | This proposal was included in the report of the parliamentary committee of enquiry in 2021, p. 181. It is inspired by the solution adopted by the French legislator for public water supply and sewerage services in Guadeloupe, see Law n° 2021-513 of 29 April 2021 renewing the governance of public water supply and sewerage services in Guadeloupe, (loi n° 2021-513 du 29 avril 2021 rénovant la gouvernance des services publics d'eau potable et d'assainissement en Guadeloupe, JORF, n°102, 30/04/2021).

110 | In 2023, the meeting's annual work topic was the solidarity-based and environmental water pricing system adopted by the metropolitan authority, which comes into force on 1 January 2025. This new pricing system applies only to the variable portion of drinking water. For private customers, three bands have been introduced: band 1, "vital water", which is free for the first 12 cubic metres of drinking water for each household and corresponds to 30 litres of water per day; band 2, "domestic water", for up to 180 cubic metres of water, which corresponds to the standard rate; and band 3, "recreational water", for more than 180 cubic metres, for which the rate is doubled.

The decision to remunicipalise the public water service in Lyon through a *régie* structure is the result of a conscious political choice. This course of action was motivated, first, by the desire, to retain control over an essential and crucial public service for the years to come, without depending on the private sector and second, by the objective of consolidating all public policies relating to drinking water under public management, so as to ensure greater coherence and to secure the participation of users in the decision-making processes of the public *régie*.

In conclusion

When faced with the choice between public and private management of the public water services, "the local authority must pay attention to a number of factors : the need to make investments that are more or less costly, the distribution of the risks inherent in managing the service, the degree of involvement that the local authority wishes to have in managing the service, the control of know-how, the control of service costs and the tariffs'"[111]. More generally, the rationale for remunicipalisation rests upon two principal foundations: the demand for transparency and the desire to take account of a social dimension in the management of the public service.[112]

On two notable occasions, in 1997[113] and again in 2003[114], the Court of Auditors drew attention to deficiencies in the transparency of water service management under private operators. This jurisdiction lamented the opacity surrounding the pricing structure of water and underscored the pressing need for clarity in how such charges are determined. That said, the return to direct public management is not without its challenges. Local authorities may confront significant difficulties, including the lack of technical skills, the problem of the fate of staff as well as financial, tax and accounting difficulties can all be obstacles in the reappropriation of water services[115].

While the public management system has many advantages—particularly in terms of democratic oversight by elected officials and citizens, as well as institutional knowledge of the water network—the influence of the management method on the price of the public service remains ambiguous, albeit with public management in the form of a *régie* appearing to confer a modest comparative advantage[116].

111 | Lachaume, et al. 2012, 231.
112 | On the social dimension of water law and its literature in Central Europe, see Jakab & Mélypataki 2019, 7–63 Szilágyi 2019, 255–298.
113 | Cour des comptes, 1997.
114 | Cour des comptes, 2003.
115 | Bordonneau et al. 2010, 137.
116 | Cour des comptes 2024, 156.

The movement towards the remunicipalisation of the public water service is propelled less by purely institutional considerations than by a robust social demand, reflecting a growing aspiration among citizens to participate more effectively in the governance of water—thereby constituting a counterbalance to both the State and the private sector.

The participation of water users, especially domestic users, is increasingly recognised as an essential element of good water governance. Such engagement not only contributes to improved decision-making, but also strengthens trust and legitimacy, while promoting more sustainable and equitable water management.

Regardless of the method of management adopted for the public service, it falls to the operator to ensure compliance with the constitutional principle of continuity of service. In other words, any interruption of the public drinking water distribution service violates this constitutional principle and, consequently, the right of access to drinking water cannot be fulfilled. Within the broader context of climate change, the obligation to maintain continuity in the public water supply service necessitates a long-term, sustainable, and ecologically responsible stewardship of water resources. The promotion of environmentally conscious behaviour—particularly through pricing mechanisms aimed at reducing consumption—stands in direct alignment with the overarching objective of preserving the sustainability of the public drinking water distribution service.

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Radomír JAKAB[1] – Eva BERNÍKOVÁ[2]

Understanding the dynamics of water services in the context of the Slovak Republic[3]

Abstract

Despite the fact that the legal regulation of water services is relatively young, it represents the result of significant and numerous changes, the common denominator of which is the effort to ensure a high level of availability, protection, and quality of water. Given the seriousness and global dimension of environmental protection, in addition to the attribute of dynamism, water management services also have the attributes of discussion and topicality. With regard to the above, the authors of the presented article employ basic scientific and theoretical methods to present a thorough analysis of the administration and management of water services in the Slovak Republic, with special emphasis on the institute of privatisation, which represented the initial step towards the transformation of water management enterprises after November 1989. The basic idea was to transfer decision-making authority over these enterprises from the state to municipalities and cities, with the aim of increasing the efficiency, quality, and long-term sustainability of the provision of water management services. In the authors' view, a deeper understanding of water services administration and management in the Slovak Republic appears highly valuable. It would not only serve as a suitable source for making comparisons with the situation in this area in other countries, but also as a means of stimulating informed dialogue in society, with the aim of increasing environmental awareness and thus preserving the most favourable environment for future generations.

Keywords: water management services, privatisation, financing, state administration, legal regulation

1 | PhD., Associate Professor, Pavol Jozef Šafárik University in Košice, Faculty of Law, radomir.jakab@upjs.sk.
2 | PhD., Lawyer, Pavol Jozef Šafárik University in Košice, eva.bernikova@upjs.sk.
3 | *The research and preparation of this study was supported by the Central European Academy.*

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1. Introduction

It is undeniable that water is the most abundant, basic, and essential raw material for the life of all organisms on Earth. The above statement gives a clear answer to the question of why water has long been the subject of various social, economic and, more recently, environmental challenges in all countries of the international community. These challenges are then reflected in legal regulation at the international,[4] regional, and national levels, including the Slovak Republic. Individual states are adopting various measures, some of which have their origins in legislation, to protect water. For example, the Slovak Republic responded to the need for water protection through a constitutional amendment that banned cross-border water transport.[5] Water protection is also ensured through the regulation of the provision of water management services, which primarily concern the areas of public water supply and public sewerage systems.

In the context of the Slovak Republic, the current legal regulation of the provision of water management services represents a synergy of numerous changes that have been influenced not only by historical, but also by political, financial, and ecological factors. One of the most significant changes in this area can be considered the introduction of the institution of privatisation, the basic principle of which is de-nationalisation, with the aim of increasing the efficiency, quality, and long-term sustainability of the provision of water management services. In addition to the undeniable advantages, however, the introduction and implementation of the privatisation institute also brought with it a number of concerns regarding compliance with aspects of fairness, affordability, and accountability. These controversies and discussions prompted us to thoroughly investigate this area of water service provision, while simultaneously examining various approaches to the issue of property rights, as well as to legal regulation and the institution of accountability, which undoubtedly affect the current situation and state of financing, establishment, operation, and development of water service provision in the Slovak Republic.

A thorough examination of the above aspects represents a suitable basis for fulfilling the main objective of this study, which is a deeper examination and understanding of the administration and management of water services in the context of the Slovak Republic, in order to support informed dialogue in society, as well as to enable comparison with the situation in this area in other countries. Fundamental research methods, a standard for the legal sciences, have been applied. More specifically, analytical and synthetic methods were used to examine the legislation, the related literature, and the results of the decision-making activity of

4 | For details, see: Jankuv 2022, 12–30.
5 | For details, see: Jakab 2023, 49–63.

public authorities. Explanations, interpretations, and analogies concerning institutes were also used.

2. Privatisation of water companies

The pre-privatisation period in the territory of today's Slovak Republic was characterised by the promotion of an interventionist policy based on the assumption that the private sector was not internally stable, that it tended to create an imbalance, which resulted in market failure, which then led to the need to supplement the functioning market system with the public sector, in which state or, more broadly understood today, interventionism of public authorities took place.[6] However, it is necessary to note that in all socialist countries (and therefore also in the territory of the then Czechoslovakia), the promotion of this policy took on extreme dimensions, as it was connected with the organisation and management of the national economy through directive planning and central price determination based on the implementation of the institution of nationalisation.[7] The mentioned high level of nationalisation of the economy (which naturally caused a great deal of dissatisfaction among the inhabitants of the then Czechoslovakia with the state and manner of managing the state's internal affairs), as well as foreign events (which include, for example, the adoption of the Final Act of the Conference on Security and Cooperation in Europe[8] in Helsinki in 1975 or the nuclear disaster in Chernobyl in 1986), caused the 'fall' of socialist ideologies on its territory at the end of 1989. Closely related to this was the need for a theoretical elaboration of the transition from an administrative-command economic system to a market economy system, i.e. the need to develop an economic policy for the transformation of the economic system, where the institute of privatisation came to the fore as a very original and so far unverified economic and political concept in social practice.[9] However, it was precisely the social unconventionality of the privatisation institute that gave rise to several dilemmas on the part of political leaders, which ultimately resulted in a relatively long and turbulent political development in Czechoslovakia at the time.[10] Namely, despite the stabilisation of the (initial) concept of privatisation, there was still disagreement in the political environment, especially regarding the issue of the time dimension of the implementation of privatisation methods. These political debates finally culminated in 1992, when, after the elections, the then-current privatisation concept was 'revised'. The new concept assumed placing

6 | Husár 2013, 67.
7 | Vincúr 2001, 17.
8 | Hereinafter referred to as the CSCE.
9 | Husár 2013, 67.
10 | These dilemmas mainly consisted of choosing the speed of the privatisation process, choosing the privatisation method, or choosing the privatisation sequence.

even greater emphasis on standard privatisation methods (thus giving coupon privatisation a backseat), as well as expanding the powers of central government bodies (especially ministries) in the area of privatisation.[11] However, the high level of time required, which is closely related to standard privatisation methods, and the lack of political will in the line ministries ultimately caused a slowdown in the privatisation process, which ultimately culminated in a vote of no confidence in the then government, despite the fact that towards the end of its term in office, it began to promote the concept of accelerated approval of direct sales in 1994.

Even though the interim government made several efforts to accelerate the privatisation process (especially through simplifying the approval process for direct sales, preparation, and implementation of the so-called second phase of coupon privatisation), the initial implementation of the transformation of state-owned water infrastructure enterprises did not occur until 1995, when the new government submitted the government's program statement to the National Council of the Slovak Republic.[12] In this program statement, the government pledged to specify the state's interest in the privatisation of strategic enterprises, especially in the energy, gas, telecommunications, water management, arms production, and banking sectors, and to limit the scope of the public sector for the purpose of balanced and stable development of society.[13] This document also outlined the course of this transformation, which consisted of transferring water supply, sewerage, and wastewater treatment plants to the property of municipalities, in order to create stable conditions for the development of this sector.[14]

Based on this program statement, the proposal for the transformation of water management enterprises was approved within the framework of the Report on Water Management of the Slovak Republic for 1995 by Resolution of the

11 | However, the new concept was based on the legal regulations adopted so far, in particular Act No. 92/1991 Coll. on the conditions for the transfer of state property to other persons, as amended by later legal regulations. This legal regulation is also often referred to in professional literature as the 'privatisation act', with regard to the provision No. 1 para. 1, according to which this Act regulates the conditions for the transfer of state property to which state enterprises, state financial institutions, state insurance companies, and other state organisations (hereinafter referred to as the 'enterprise') have the right to manage, including their equity interests in the business of other legal entities, as well as the conditions for the transfer of state equity interests in this business to Czecho-Slovak or foreign legal entities or individuals (hereinafter referred to as 'privatisation'). The central state administration body in the field of privatisation was based on the Act of the Slovak National Council No. 347/1990 Coll. on the organisation of ministries and other central state administration bodies of the Slovak Republic, as amended by later legal regulations, the Ministry of National Property Administration and Privatisation of the Slovak Republic, whose predecessor was the Office for National Property Administration and Privatisation.

12 | For the sake of completeness, it is necessary to note that the Interim government prepared a concept for the transformation of state-owned water infrastructure enterprises, which was contained in Resolution of the Government of the Slovak Republic No. 1003/1994. However, this concept was abolished by the new government based on Resolution No. 7 of January 3, 1995.

13 | Program Statement of the Government of the Slovak Republic No. 87/1995 of 17 January 1995.

14 | Ibid.

Government of the Slovak Republic No. 621 of August 22, 1995 and Resolution of the National Council of the Slovak Republic No. 192 of September 13, 1995.[15] On this basis, three privatisation projects were implemented simultaneously (initial, pilot, or experimental), based on the free transfer of selected infrastructures to the property of municipalities. This involved the water and sewage infrastructure of West Slovak Waterworks and Sewers, SOE, Bratislava, branch plant Trenčín, the infrastructure of West Slovak Waterworks and Sewers, SOE, Bratislava, branch plant Komárno, and the infrastructure of West Slovak Waterworks and Sewers, SOE, Bratislava, branch plant Hlohovec. In the case of the Trenčín branch plant, the municipalities contributed their water and sewage infrastructure as a non-cash contribution to the newly established company Trenčín Waterworks and Sewers, SOE, Trenčín, and the operating assets of this branch plant were sold to the private Water Management Company, SOE, Trenčín. In 1999, Komárno entrusted the operation of its infrastructure to its own company, CIVITAS, while the operating assets of the West Slovak Waterworks and Sewerage Company remained with the Komárno branch.[16] The 'Komárno model' was also applied in the case of the Hlohovec branch plant, on the basis of which the Water and Sewage Company, Inc., Dubovany was established.[17]

However, these pilot projects did not prove to be effective, as they faced several shortcomings, including:

- exclusion of municipalities without water supply and sewage systems from the transformation process;
- in the case of group water supply and sewerage systems, only the infrastructure assets were often transferred, because not all municipalities in the group were always interested in taking over the assets (as a result, the 'extra-municipal part' remained in the ownership of the state);
- refusal of municipalities to take ownership of investment projects under construction due to a lack of funds to complete them, and further procedures in these cases were not resolved at all;
- despite negative experiences from neighbouring countries, the process of atomising the established organisational structures for water supply, and wastewater collection and treatment has begun;
- a gradual removal of 'profitable plants' (Trenčín, Komárno, and Hlohovec) from the state enterprise, leaving 'loss-making plants' in it, which was one of

15 | The concept of transformation of state-owned water and sewerage enterprises approved by Government Resolution No. 35 of January 17, 2001.

16 | Antimonopoly Office of the Slovak Republic, 2008, 1–2.

17 | In addition to West Slovak Waterworks and Sewerage Company s. e. Bratislava, at the time of the implementation of these three pilot projects, another four water management entities participated in the supply of drinking water to the population, as well as the drainage and treatment of wastewater in the territory of the Slovak Republic, namely Waterworks and Sewers, SOE, Bratislava, Central Slovak Waterworks and Sewers, SOE, Banská Bystrica, North Slovak Waterworks and Sewers, SOE, Žilina and Eastern Slovak Waterworks and Sewers SOE, Košice.

the consequences of applying the 'principle of voluntariness' of municipalities, etc.[18]

The shortcomings mentioned ultimately led to the formulation of a new concept of transformation, which was formulated in Government Resolution No. 217 of March 7, 2001. The prism of this concept was the favouring of the establishment of joint-stock companies by the National Property Fund of the Slovak Republic[19], which was established by the Act of the Slovak National Council No. 253/1991 Coll. on the competence of the authorities of the Slovak Republic in matters of transfers of state property to other persons and on the National Property Fund of the Slovak Republic, as amended by later legal regulations.[20] The National Fund for National Resources, as the exclusive owner of the shares of the newly established water companies, subsequently transferred the shares free of charge to cities and municipalities within the territorial jurisdiction of the given water company, regardless of whether or not a public water supply or public sewage system had been built in the municipality, with the main criterion for redistributing the shares being the number of inhabitants of the municipalities.[21][22]

2.1. The influence of international institutions on the privatisation of water utilities

It is necessary to emphasise that the transformation of the centrally planned system into a market economy cannot be perceived only through a change in ownership structures, but in a broader context, taking into account the irreplaceable influence of international conventions and international institutions, which include, in particular, the World Bank, the International Monetary Fund, and the European Union.[23] As for the World Bank and the International Monetary Fund,

18 | See also: Concept for the transformation of state-owned water and sewerage enterprises, approved by Government Resolution No. 35 of January 17, 2001.
19 | Hereinafter referred to as the FNM.
20 | The Fund was an independent legal entity, which was organisationally subordinate to the Ministry for the Administration and Privatisation of National Property of the Slovak Republic. The Fund operated until 2015, when it was abolished by Act No. 375/2015 Coll. on the abolition of the National Property Fund of the Slovak Republic and on amendments and supplements to certain Acts.
21 | Antimonopoly Office of the Slovak Republic 2008, 2.
22 | Based on this transformation, seven water companies were created, namely: a) Bratislava Water Company, Inc., Bratislava, b) Trnava Water Company, Inc., Piešťany, c) West Slovakia Water Company, Inc., Nitra, d) North Slovakia Water Company, Inc., Žilina, e) Central Slovakia Water Company, Inc., Banská Bystrica, f) East Slovakia Water Company, Inc., Košice, g) Subtatra Water Company, Inc., Poprad. In 2006, North Slovak water company, Inc., Žilina was divided into six (successor) water companies, namely Považská Bystrica, Turčianske Teplice, Ružomberok, Orava, Liptov and Žilina water companies, Inc. (Ibid).
23 | From the perspective of international treaties and conventions, the Protocol on Water and Health, proclaimed by the United Nations in London in 1999, which the Slovak Republic ratified in 2001, cannot be overlooked. The objective of this Protocol is to promote, within the framework of sustainable development at all relevant levels in the national and international context, the protection of human

they influenced the transformation process mainly from an economic perspective, as they recommended and promoted the strategy of the so-called Washington Consensus for the transformation process, the basic ideas of which are, mainly deregulation, market institutions and mechanisms, privatisation, reducing the tax burden and minimal state interference in the economy.[24] The Washington Consensus, in the field of political economy, therefore, relies on the use of the so-called window of opportunity or periods of 'exceptional politics'.[25] For the sake of completeness, it should be noted that this policy of extraordinary times (i.e. a policy promoting the fastest possible privatisation) in the territory of the Czechoslovak Socialist Federal Republic was complemented by another economic concept originating from experts from the International Monetary Fund and the World Bank, specifically the concept of so-called 'shock therapy'. It is based on the assumption that in the target state, the market will be the coordinator of economic activities.[26] Although experts' opinions on the appropriateness of choosing the fastest possible privatisation differ, it is evident that these concepts brought about price liberalisation in 1991, which is one of the necessary conditions for the effective functioning of a market economy (of which water management is also a part).

In addition to the World Bank and the International Monetary Fund, the transformation process was also significantly influenced by the European Union, or so-called EU-isation.[27] The ideas of peace, security, freedom, justice without internal borders, economic growth, price stability, protection and improvement of the environment, as well as support for scientific and technological progress, which the European Union embodied, gave a clear answer to the question of which direction Slovakia (as well as other post-socialist countries) would take after the long-lasting socialist era full of fear, worries, serious distortion of the three-part separation of state power (through the hypertrophy of the executive power), unsatisfactory living standards of the population, and state budget deficits (including later ongoing inflation). By submitting an official application for membership in

health and well-being at the individual and collective levels, carried out through better use of water, which includes the protection of aquatic ecosystems, as well as through the prevention, control, and reduction of water-related diseases (Ministry of Environment of the Slovak Republic 2021, 1).

24 | Myant & Drahokoupil 2013, 144.

25 | Morvay et al. 2005, 12.

26 | Morvay et al. 2005, 9.

27 | EU-isation should be seen as a system encompassing the synergy of changes in candidate and member states of the European Union, which are a consequence of the obligation to introduce ideas, standards, and legislation of the European Union in these states (Wallace, 2000). This concept should not be confused with the concept of Europeanisation, which has a much broader dimension based on multiple approaches to the European Union, or rather to Europe. *In concreto,* Europeanisation does not only represent consideration of the phenomenon of European Union enlargement (i.e. territorial approach), but also includes the organisational aspect consisting in building European institutions (e.g. EU, NATO, or Council of Europe), the aspect of 'exporting' European institutions (rules and structures) to other (non-European) countries, the political aspect linked to a political project (the vision of which is the effort to deepen European integration), as well as the conditioning aspect consisting in the influence of European Union institutions on the political situation in the member states (Olsen 2001, 333).

the European Union in 1995, the Slovak Republic was obliged to meet the so-called accession (Copenhagen) criteria, which undoubtedly influenced the privatisation process. The criteria were as follows:

- stable institutions that guarantee democracy, the rule of law, human rights and respect for and protection of minorities,
- a functioning market economy and the ability to cope with competitive pressure and market forces within the EU,
- the ability to take on the obligations of membership, including the ability to effectively implement the rules, standards and policies that make up the body of EU law (the '*acquis*'), and to comply with the objectives of political, economic and monetary union.[28]

Since the fulfilment of these criteria was examined individually and in mutual contexts, not only the legal system and economy of the Slovak Republic as a whole were subject to examination, but also their individual components, including the water management sector. *In concreto*, the stability criterion contained in the first Copenhagen criterion must also be seen in terms of the need to create national regulators, especially in relation to markets where competition is not sufficiently developed.[29] One of these areas is undoubtedly the area of network industries, which provide a final product through a technological network in the form of the delivery of a certain good (in our case, water) or the form of the provision of a service, e.g. wastewater disposal.[30] This criterion, stemming from the perception of the absence of real competition (due to the disproportionately high costs required to build parallel network systems alongside the existing ones), as well as from the perception of the irreplaceability of the commodities provided by this sector for other sectors of the national economy, ultimately led to the adoption of Act No. 276/2001 Coll. on regulation in network sectors and on amendments and supplements to certain acts.[31][32] Based on this Act, the Regulatory Office for Network Industries was established as a body independent of state power and regulated entities, to whose substantive competence at the beginning of 2003 the area of price regulation of network industries (including the water sector) was transferred from the Ministry of Finance of the Slovak Republic.

The second Copenhagen criterion is closely related to the concept of the aforementioned shock therapy (i.e. the perception of the state as a 'partner' of business entities). An efficient market economy assumes that emerging market solutions are then formulated and integrated by economic policy, in cooperation with its

28 | European Union, 2024.
29 | Seman, Jakab & Tekeli 2020, 24.
30 | Bilišňanský 2017, 60.
31 | Bilišňanský 2017, 60.
32 | This act was later replaced by Act No. 250/2012 Coll. on Regulation in Network Industries, as amended by later legal regulations.

partners, into a programmatic form striving for a synthesis between the trends of the real economy and the anticipated structural changes that eliminate threats to future development and create a corridor for long-term economic growth.[33] *A maiori ad minus* part of this concept is also the orientation of economic policy to support the development of water management, as an inherent part of other sectors of the national economy. In the Slovak Republic, at the beginning of the privatisation period, the issue of water management development and planning was addressed mainly through the Water Management Plan, which was contained in Act No. 138/1973 Coll. on water (Water Act) as amended by later legal regulations.[34] However, the concept of the guideline water management plan was considered outdated at the beginning of 1991 due to its inefficiency and poor usability.[35] Therefore, the development of planning documents with a new content structure was initiated, namely Hydroecological River Basin Plans[36], the purpose of which was to protect the quality and quantity of water and their rational use, and Water Management River Basin Plans[37], as the basis for solving economic activities with water as a raw material.[3839] However, the effectiveness and efficiency of these concepts also required a high level of funding, where the European Union played an irreplaceable role among foreign investors, through the ISPA grant.[40] Based on this grant,

33 | Okáli 2004, 252.

34 | According to the provision No. 3 of Act No. 138/1973 Coll. on water (Water Act) as amended by later legal regulations, the Directive Water Management Plan of the Republic represented the basis for water management measures in all sectors of the national economy, for water management measures in spatial planning, the basis for water management decision-making, and was one of the bases for water management and for the development of long-term perspectives of sectors that had requirements for water resources or otherwise influenced water management or its quality. The state water management balance of surface and groundwater reserves and their quality was also part of the guideline water management plan.

35 | Its inefficiency was evidenced primarily by the Report on the State of the Environment of the Slovak Republic from 1992–1993, according to which the presented concept did not provide suitable measures to solve the 'most pressing' problems of the water management policy at that time, which included in particular the deficit of drinking water caused by insufficient wastewater cleaning, insufficient connection of the population to public water supplies and public sewerage systems, as well as numerous water losses (Ministry of the Environment 1994, 63–64).

36 | Hereinafter referred to as the HEP.

37 | Hereinafter referred to as the VHP.

38 | Ministry of the Environment of the Slovak Republic 2009, 1.

39 | These plans (which were replaced in 2000 by a comprehensive document entitled *General Protection and Rational Use of Water*) included several measures, involving not only the construction of water management infrastructure (e.g. the gradual construction of wastewater treatment plants for selected housing estates), but also the reconstruction of existing facilities (in 40 cities with over 10,000 inhabitants, more than 20% of the water supply network required reconstruction, and in 15 cities more than 10% of the water supply network was in a state of emergency). See also: Ministry of the Environment 1994, 65–67.

40 | This is the so-called pre-accession fund of the European Union, which is aimed at financing the development of transport and the environment. The basic assumption for this funding was the adoption of the European Agreement on Association with the European Union (Association Agreement), which was concluded for the purpose of economic, political, and cultural cooperation between the Slovak Republic and the European Union in 1993.

the Subtatra and Central Slovak water management companies received funds to finance a total of four projects related to the construction of public sewerage and streamlining wastewater treatment processes. The culmination of this case influenced the process of transformation of water management companies in the sense that it pointed out the impossibility of implementing the institute of privatisation, or rather the impossibility of omitting the obligation to notify the European Commission about the privatisation of financed companies, not only under the threat of stopping all ongoing payments, but also under the threat of excluding these companies from financing from European Union funds in the future.[41] As a result of this fact, there have been no further attempts to privatise water management companies in the Slovak Republic.

The third accession criterion was based on the need to harmonise the legislation of the Slovak Republic with European Union law. Similar to the first two criteria, this criterion has significantly influenced direction and concepts of water law in Slovakia. This fact was most clearly manifested at the beginning of the new millennium, when Directive No. 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water management was adopted, by which the European Union abandoned the perception of problems individually and opted for a comprehensive approach to the issue of water protection and use[42]. The introduction of this new approach undoubtedly had to be adopted by all member and 'candidate' states of the European Union (including the Slovak Republic). In a relatively short time, Slovak Republic adopted Act No. 442/2002 Coll. on public water supply and public sewerage systems and amending Act No. 276/2001 Coll. on regulation in network sectors, as amended by later legal regulations, as well as Act No. 364/2004 Coll. on waters and amending Act of the Slovak National Council No. 372/1990 Coll. on offences,

41 | This case consisted of the fact that at the time of financing, Subtatra Water Company, Inc. established Subtatra Water Utility Operating Company, Inc., and Central Slovak Water Company, Inc. established Central Slovak Water Utility Operating Company, Inc., with which lease and operation contracts were subsequently concluded. However, from the content of these contracts, it was clear from the beginning that this was the initial stage of privatisation. This was finally completed in May 2006, when the aforementioned companies announced the company called Veolia as the winner of the tender. In this regard, the European Commission took a position on a clear violation of the rules for providing funding from the ISPA grant, specifically the European Commission's exclusive right to reassess the amount of assistance provided from ISPA in the event that a 'significant change' occurs:
a) affecting the nature of the operation or its conditions of implementation, or providing undue advantages to a private or public entity, and
b) resulting either from a change in the nature of ownership of any part of the financed infrastructure, or from the termination or significant change of the operating framework (Havlíček 2007, 1–2). As a result of these facts, the Ministry of Finance of the Slovak Republic finally suspended financing of these companies.

42 | Hereinafter also referred to as the EU Water Framework Directive.

as amended by later legal regulations[43].[44] The determining factors of water quality, in the sense of this new concept (in the interest of protecting and improving the quality of European waters), are the assessment of the ecological and holistic status of waters, the setting of environmental objectives,[45] and the proposal for the implementation of measures to achieve them (their financial provision, planning in river basins, a strategy for the elimination of pollution by hazardous chemical substances, informing the public, and introducing financial instruments related to water management services and water use.[46]) In view of the above, it can be briefly summarised that the implementation of this directive was manifested mainly through a change in the method of processing conceptual policies, implemented through the development of river basin management plans, which, after certain changes, are still applied today.[47]

3. The organisational aspect of providing water management services nowadays

3.1. Administrative and control authorities

The current legal regulation in the field of providing water management services is subject to regulation by several legal regulations, of which the aforementioned Water Act and Act No. 442/2002 Coll. on public water supply and public sewerage systems and amending and supplementing Act No. 276/2001 Coll. on regulation in network sectors, as amended by later legal regulations[48]. While the Water Act represents the basic legal framework for comprehensive water protection, the ZoVaK is the key legal regulation in the field of public water supply and public sewerage, the aim of which is to comprehensively define the relationships related to the establishment, development, and operation of public water supply and public sewerage systems in order to ensure the supply of drinking water to the population and other consumers, the discharge and treatment of municipal wastewater and the simultaneous satisfaction of the justified needs of society for water use, as well as the development and implementation of financing plans for

43 | Hereinafter referred to as the Water Act or ZoV.
44 | This Act replaced the previous legal regulation contained in Act No. 184/2002 Coll. on water and on amendments to certain acts (Water Act), as amended by later legal regulations.
45 | See also: Lazorčáková 2024, 115–131.
46 | General part of the explanatory report to Act No. 364/2004 Coll. on water and on the amendment to Act of the Slovak National Council No. 372/1990 Coll. on offences, as amended (Water Act), as amended by later legal regulations.
47 | River basin management plans are developed both for sub-basins and for the Vistula and Danube River basins (the so-called Water Plan of the Slovak Republic).
48 | Hereinafter referred to as the ZoVaK.

the renovation of public water supply and public sewerage systems.[49] This is related to the definition of the organisational basis for the provision of water management services, which is regulated by five parts of ZoVaK.

According to this legislation, the central state administration body in the field of water infrastructure is the Ministry of the Environment of the Slovak Republic. Its competences include, in particular, managing the performance of state administration carried out by district offices in the regional seat and district offices in the area of public water supply and public sewerage; developing, approving, evaluating, and updating the development plan for public water supply and public sewerage for the territory of the Slovak Republic (including the timetable for its implementation); publishing the approved development plan on its website; ensuring technical standardisation tasks; directing and ensuring the financing of research in the area of public water supply and public sewerage; determining professional requirements for persons who may operate a public water supply or public sewerage; and ensuring the implementation of professional competence tests for operators of public water supply and public sewerage, etc.[50] In the water infrastructure sector, local government bodies, specifically district offices in the regional seat and departments of environmental care of these offices, also significantly participate in the implementation of these tasks. The scope of competence of district offices in the regional seat in this area includes establishing a plan for the development of public water supply and public sewerage systems for the territory of the region; decision-making on the declaration and cancellation of compulsory administration, as part of supervision; checking the technical and technological condition of public water supply and public sewerage systems; and issuing decisions on protection zones. As for district offices, they, for example, decide whether a water supply or sewerage system is considered a public water supply or public sewerage system; monitor the fulfi[51]; issue opinions on risk management of the drinking water supply system for the Public Health Authority or the Regional Public Health Authority or opinions on changes in

49 | General part of the explanatory report to Act No. 394/2009 Coll. amending and supplementing Act No. 442/2002 Coll. on public water supply and public sewerage systems and amending and supplementing Act No. 276/2001 Coll. on regulation in network industries, as amended.

50 | For more information, see the provision no. 36 para 3 of Act No. 442/2002 Coll. on public water supply and public sewerage systems and on amendments and supplements to Act No. 276/2001 Coll. on regulation in network industries, as amended by later legal regulations.

51 | For the sake of completeness, it should be noted that in the case of imposing sanctions for committing an offence or administrative delict, the ZoVaK favours imposing fines, which is a manifestation of the application of the polluter pays principle. This principle, the legal basis of which is Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, is based on the assumption that the person who causes environmental damage is obliged to bear the costs necessary to eliminate such damage and to restore the state of the environment or to prevent future environmental damage (Košičiarová et al. 2009, 23).

the monitoring program for the Public Health Authority or the Regional Public Health Authority.[52]

Territorial self-government units, specifically higher territorial units and municipalities, also have jurisdiction over the provision of water management services. While higher territorial units in this area 'only' comment on the regional development plan, the scope of municipalities is much more diverse.[53] Specifically, municipalities in the water management infrastructure sector:

- ensure conditions for supplying residents with drinking water from the public water supply, for draining and disposing of wastewater through public sewerage from its residents and other persons in the municipality, for emptying the contents of domestic cesspools in the municipality, for emergency drinking water supply, for alternative drinking water supply and wastewater disposal;
- ensure the development of public water supply and public sewerage systems corresponding to the needs of the municipality;
- decide on imposing an obligation on the owner of a building or land to connect to the public sewer system;
- by a generally binding regulation, temporarily restrict or prohibit the use of drinking water for other purposes, if this is necessary to ensure the supply of drinking water in the municipality during times of shortage;
- issue generally binding regulations on the method of alternative water supply and alternative wastewater disposal, and on the disposal of cesspool contents according to local conditions;
- issue an opinion for the district office in proceedings for a permit for special water use, change or cancellation, for a permit to construct, change or cancel a water structure and to put it into operation or decommission it;
- impose fines;
- ensure the supply of drinking water to residents;
- identify the population without access to drinking water or with limited access to drinking water, including vulnerable and marginalised groups, and determine the reasons for their insufficient supply of drinking water;
- assess the possibilities for improving the drinking water supply and inform the persons mentioned in the previous point about them; and

52 | For more information, see the provision no. 36 para 5 of Act No. 442/2002 Coll. on public water supply and public sewerage systems and on amendments and supplements to Act No. 276/2001 Coll. on regulation in network industries, as amended by later legal regulations.

53 | The competence of municipalities in the area of public water supply and public sewerage is a delegated competence, carried out on the basis of the delegation principle. As a result, the state continues to be responsible for the activities carried out by the municipality in this area, which is reflected not only in the area of control but also in methodological guidance and financing. For more information, see the provision No. 71 of the Constitution of the Slovak Republic No. 460/1992 Coll. as amended by later legal regulations.

| implement measures to ensure the supply of drinking water to vulnerable and marginalised groups.[54]

In connection with the issue of managing entities in the water infrastructure sector, the Regulatory Office for Network Industries[55] cannot be omitted, the activities of which are regulated by Act No. 250/2012 Coll. on regulation in network industries, as amended by later legal regulations. As already indicated, the area of price regulation carried out by the ÚRSO also includes the area of water management. Specifically, these involve the production and supply of drinking water through public water supply systems, the drainage and treatment of wastewater through public sewerage systems, the abstraction of surface water from watercourses, the exploitation of the hydropower potential of watercourses, the abstraction of energy water from watercourses, and the regulation of connection to public sewerage systems.[56] Price regulation of the listed activities is carried out by determining the method of calculating the maximum price, based on the Decree of the Regulatory Office for Network Industries No. 323/2022 Coll. which establishes price regulation of the production, distribution, and supply of drinking water through public water supply systems and the discharge and treatment of wastewater through public sewerage systems and certain conditions for carrying out regulated activities in the water management sector. The ÚRSO not only carries out price regulation of the so-called water and sewage services, but also, according to the provision No. 9 letter (b) point 5 of Act No. 250/2012 Coll. on regulation in network industries, as amended by later legal regulations, also carries out supervision and control in this area.

In addition to the ÚRSO, another supervisory and control body is the Supreme Audit Office of the Slovak Republic[57], which is not a public administration body, but a constitutional body, as it is separately regulated within the third title of the second section of the Constitution of the Slovak Republic No. 460/1992 Coll., as amended by later legal regulations.[58] The NKÚ is an independent body that carries out control over the management of budgetary funds, state property, property rights, and state receivables.[59] Since the majority of water and sewerage systems

54 | The provision No. 36 para 7 of Act No. 442/2002 Coll. on public water supply and public sewerage systems and on amendments and supplements to Act No. 276/2001 Coll. on regulation in network industries, as amended by later legal regulations.
55 | Hereinafter referred to as ÚRSO.
56 | The provision No. 11 para 4 of Act 250/2012 Coll. on regulation in network industries, as amended by later legal regulations.
57 | Hereinafter referred to as the NKÚ.
58 | Issues related to the scope, status, and internal organisation of the Supreme Audit Office of the Slovak Republic (including the basic principles and conditions for the performance of audit activities) are regulated in more detail in Act No. 39/1993 Coll. on the Supreme Audit Office of the Slovak Republic, as amended by later legal regulations.
59 | Art. No. 60 of the Constitution of the Slovak Republic No. 460/1992 Coll. as amended by later legal regulations.

are currently owned by municipalities and cities, the NKÚ carries out relatively numerous audits and inspections of water companies in order to ensure their efficiency, economy, and effectiveness. However, its control activities are not limited only to the area of determining the actual state of financial management, but also to the area of corrective measures (in the event of irregularities being detected). In the authors' opinion, this body is an irreplaceable part of the system of external control of water companies, as it significantly contributes to the development of water infrastructure, as well as to the deepening of the principle of transparency.

3.2. Water companies

In addition to the managing and supervisory entities, the organisational base of the water management infrastructure is also made up of managed entities, which are undoubtedly water companies, which are predominantly owned by municipalities and cities (as can be seen from the previous chapter). There are several water companies operating in the Slovak Republic, with the largest including:

- Bratislava Water Company, Inc. (BVS);
- Trnava Water Company, Inc. (TAVOS);
- North Slovak waterworks and sewers, Inc. (SEVAK);
- Central Slovak Water Supply Company, Inc. (StVPS);
- Eastern Slovak Water Company, Inc. (VVS); and
- West Slovak Water Company, Inc. (ZsVS).

The largest among the listed companies is Eastern Slovak Water Company, Inc. (VVS), whose territorial jurisdiction includes the entire Košice and Prešov regions, as well as part of the Banská Bystrica region (Revúca district). This company is not only often called 'the largest' but also 'the most modern'. This is evidenced by the fact that it was the first in the Slovak Republic to introduce the method of water disinfection using UV radiation. However, its pioneer status remains today, as on 30 October 2024, it launched a unique project in the village of Sveržov. This is a container wastewater treatment plant without sewerage using the unique WTR technology for septic tank water treatment.[60] This technology can be applied in any municipality with a population of up to 2,000, as it is a synergy of the aspects of financial simplicity and time efficiency.[61]

In connection with water companies, it is important to note the civic association called the Association of Water Companies[62], which was established at the beginning of 2004 as a response to the need for a comprehensive approach to solving the 'most pressing' problems related to the issue of providing water

60 | Eastern Slovak Water Company, Inc., 2024.
61 | Ibid.
62 | Hereinafter referred to as AVS.

management services by water companies in the Slovak Republic. Within the scope of the AVS (which currently has 14 full and 2 extraordinary members)[63], includes in particular:

- association of business entities actively operating in the field of providing water management activities related to the operation of public water supplies and public sewerage systems with the aim of actively contributing to the protection of public health (production and supply of drinking water) and environmental protection (collection, discharge, and treatment of wastewater and sludge processing) and other entities (authors' note – extraordinary members);
- performance of advisory activities for members of the association;
- cooperation with relevant state authorities, public administration bodies, and other relevant entities in the legislative process concerning the legitimate interests of the association, submitting its own legislative proposals aimed at adopting justified changes in the framework of building a suitable legal environment for the activities of the association's members, as well as creating conditions conducive to understanding or agreement between entities and institutions in such cooperation; and
- cooperation with similar professional associations operating in the Slovak Republic and the member states of the European Union, and developing activities that implement actions aimed at exchanging information and experience on the results of fulfiling the program objectives of cooperating entities, etc.[64][65]

4. Material and technical aspects of providing water management services

4.1. Ownership and operation of public water supply and public sewerage systems

With regard to the (already mentioned) complexity of the approach to the issue of public water supply and public sewerage systems, the ZoVaK not only establishes the organisational structure, rights, and obligations of drinking water consumers and wastewater producers, but also the rights and obligations of owners and operators of public water supply and public sewerage systems (including regulation of

63 | An extraordinary member is a person who owns public waterworks or public sewers but does not operate them.
64 | Article 3, point 3.1 of the statutes of the Association of Water Companies.
65 | Similar professional associations with which the Association of Water Companies cooperates include, in particular, the European Union of National Associations of Water and Wastewater Service Providers (EurEau), the Association of the Water and Sewerage Sector of the Czech Republic – SOVAK ČR, the Hungarian Water Association (Mavíz), etc.

their mutual relations). In particular, according to the provision No. 3 para 3 of the first sentence of the ZoVaK, the owner of public water supply and public sewerage systems may only be a public law entity for reasons of public interest.[66] If the construction of public water supply systems and public sewerage systems is provided by legal entities that are not public law entities, the condition for issuing a zoning decision is on the transfer of ownership of the structure in question between its owner and a public law entity, and the condition for issuing a building inspection decision is a contract on the transfer of ownership of the public water supply system or public sewerage system between the owner of the structure and a public law entity.[67] For the sake of completeness, it should be added that no incumbrance, lien, or rights with similar content and effects may arise on a public water supply or public sewerage system in favour of a person other than a public law entity – except for the lien to secure bank loans when financing investment projects through European Union funds, the state budget, and other public funds, the lien to secure the receivables of the provider of a non-refundable financial contribution, and the lien to secure bank loans to finance the establishment and renovation of public water supply and public sewerage systems.[68]

However, the favouring of a public law entity does not apply to the operator of public water supply and public sewerage systems. For these persons, ZoVaK places emphasis on fulfilling the trade requirements that operators must have at the time of operating public water supply and public sewerage systems, which is closely related to the requirement of integrity and professional competence.[69] However, in certain cases, ZoVaK allows the operation of water management infrastructure to be carried out by an operator whose trade license for the performance of these activities has expired. In these cases, the operator is obliged (for reasons of public interest) to carry out this activity through a so-called professional representative until a new operator is secured, which may not exceed a period of 90 days.

The above provisions (along with the 'pitfalls' of the ongoing privatisation process) have been translated into current application practice in various ways, or rather models of operational-ownership relationships, specifically:

66 | According to the provision No. 3 para 3 of Act No. 442/2002 Coll. on public water supply and public sewerage systems and on amendments and supplements to Act No. 276/2001 Coll. on regulation in network sectors, as amended by later legal regulations, a subject of public law is a municipality, a legal entity established under a special regulation, in whose business only municipalities or associations of municipalities, or an association of these legal entities and municipalities, participate in the property participation.

67 | The provision No. 3 para 2 of the first sentence of Act No. 442/2002 Coll. on public water supply and public sewerage systems and on amendments and supplements to Act No. 276/2001 Coll. on regulation in network industries, as amended by later legal regulations.

68 | The provision No. 3 para 2, last sentence of Act No. 442/2002 Coll. on public water supply and public sewerage systems and on amendments and supplements to Act No. 276/2001 Coll. on regulation in network industries, as amended by later legal regulations.

69 | Professional competence is verified by an examination by the Ministry of the Environment of the Slovak Republic, or a legal entity authorised by it. If the applicant successfully passes this exam, he/she will be issued a certificate of professional competence.

- the municipality as the owner and the water company as the operator (a typical example is the city of Komárno, whose infrastructure is operated by the company KOMVaK);
- municipality and water company as the owners, the owning water company also as the operator (e.g. Orava water company, Inc. Dolný Kubín);
- municipalities, water companies, and some business entities as the owners, the owning water company also as the operator (e.g. North Slovak waterworks and sewers, Inc., Žilina); and
- water company as the owner, another water company as the operator (this model is present, for example, in the case of Trenčín waterworks and sewers, Inc., Trenčín and Trenčín water management company, Inc., Trenčín).

From the above, it follows that the owner of water management infrastructure can also be in the position of the operator. In such a case, however, the owner is obliged to meet all the requirements that the ZoVaK imposes on the operator, i.e. the requirement of a trade and the associated professional competence and integrity. Conversely, if the owner does not meet the requirements related to the operator, the owner is obliged to provide an operator for their infrastructure, based on a lease agreement (specifically a lease and operation agreement).[70]

4.2. Water management infrastructure in numbers and its evaluation

According to the most recently published report on the state of the environment of the Slovak Republic in 2022, the number of residents supplied with water from public water supplies in 2022 reached 4,902,720, which represented 90.27% of the total population of the Slovak Republic. In 2022, there were 2,449 independent municipalities that were supplied with water from public water supplies, and their share of the total number of municipalities was 84.74%. Regarding public sewerage, the number of residents living in houses connected to public sewerage in 2022 reached 3,856,104, representing 71% of the total population. 1,190 municipalities had a built public sewerage system (41.18% of the total number of municipalities in the Slovak Republic).[71] This situation, in the authors' opinion, is a consequence of several factors that were (and still are) present in the territory of the Slovak Republic, specifically historical-political and economic-ecological factors.

Historical-political factors need to be perceived not only through the already mentioned transformation of the centrally planned economy into a market economy, but also in broader contexts, i.e. in the context of the division

70 | In the case of the construction of a new public water supply or sewerage system, this contract is also the basis for issuing a building inspection decision by the building authority.
71 | See also: Ministry of the Environment of the Slovak Republic 2023, 24, 31.

of Czechoslovakia (including its consequences, e.g. in the form of instability of payment ties between the Czech and Slovak Republics), and the related inherited structure and orientation of the Slovak economy from the period when Slovakia was an integral part of Czechoslovakia (Slovakia's orientation towards primary production).

Economic-ecological factors represent a synergy of requirements for good water status and increasing the standard of living of the population, while simultaneously maximising the use of water potential. As for the requirement to increase the standard of living of the population, in the field of water management infrastructure, this needs to be perceived through unlimited access to high-quality drinking water, which is also ensured by Drinking Water Monitoring Programs. The Plan for the Development of Public Water Supply and Public Sewerage Systems, which is being developed in six-year cycles starting in 2015, has an irreplaceable place in this area.[72]

Despite numerous reconstructions, constructions, and increasing percentages of connections to public water supply and public sewerage systems, the authors are of the opinion that the state of the current infrastructure cannot be described as satisfactory. This is especially true with regard to the European Union Biodiversity Strategy to 2030, which aims to bring nature back into our lives and is an integral part of the European Green Deal. While in the case of public water supplies, it is realistic to consider ensuring sufficient clean water for everyone (taking into account the long-term good quality of drinking water and the growing percentage of connections to public water supplies), the share of discharged and treated wastewater from agglomerations with over 2,000 inhabitants still does not reach the required level (although the percentage is gradually increasing). Furthermore, in the case of agglomerations with under 2,000 inhabitants, this percentage is very low. Despite several strategic documents, the intended measures are financially demanding, which is related to the requirement for the availability of financial resources, which has long been considered a risk factor for the development of water management infrastructure.[73]

4.3. Financing water infrastructure

Financing of water management infrastructure, especially the development and modernisation of public water supply and public sewerage systems, is multi-source in the context of the Slovak Republic. The first basic source is the provision of financial resources by the State, with these resources often allocated based on the needs of individual regions. State support is implemented mainly through the

72 | In 2015, Commission Directive (EU) No. 2015/1787 of 6 October 2015 was adopted, amending Annexes II and III to Council Directive 98/83/EC on the quality of water intended for human consumption.
73 | Ministry of the Environment 2023, 6.

Environmental Fund.[74] This fund is one of the most important tools for supporting environmental projects, including the construction, reconstruction, and modernisation of public water and sewerage systems. It provides subsidies and preferential loans for municipalities, cities, and other entities that implement projects to improve water management. The State provides financial resources for specific projects in the field of water management also through ministries (e.g. the Ministry of the Environment of the Slovak Republic, the Ministry of Agriculture and Rural Development of the Slovak Republic, and the Ministry of Investments, Regional Development and Informatization of the Slovak Republic) in accordance with the Development Plan for Public Water Supply and Public Sewerage Systems for the territory of the Slovak Republic.[75] These subsidies are aimed mainly at smaller municipalities that do not have sufficient resources. Likewise, the State can also announce one-off or thematic calls to support projects in the field of water management, for example, to address emergency situations or adapt to climate change. In addition, the State also co-finances projects supported for this purpose, primarily from European Union sources, in order to reduce the financial burden on municipalities and cities.

A significant source of financing for the modernisation and renovation of water management infrastructure is funds from the European Union. Slovakia, as a member state of the European Union, has access to various European structural and investment funds, which are intended to improve infrastructure, including water management. According to published information from the new programs, four calls with a total allocation of almost 210 million euros have been directed towards these purposes so far. At the same time, calls for phased projects were announced, continuing from the 2014–2020 programming period, for a total amount of 90 million euros. Two integrated calls have also been announced specifically for residents of municipalities from the Atlas of Roma Communities, within which it is also possible to support activities in the area of water and sewerage in the amount of 51 million euros.[76]

The Cohesion Fund and the European Regional Development Fund are intended primarily for these purposes. The Cohesion Fund is aimed at supporting environmental and infrastructure projects in EU member states that have lower GDP per capita.[77] In Slovakia, the Cohesion Fund finances projects for the construction and

74 | Support is implemented within the scope of the Water Protection and Use specification, with the following activities possible for 2024: Activity BV1 – Construction of a public water supply system, Activity BK1 – Wastewater treatment plant – construction, expansion, reconstruction or intensification, Activity BK2 – Sewerage network – construction, expansion or reconstruction, Activity BK3 – Construction of public sewerage, Activity BKV – Implementation of a water supply and sewerage system in one line, Activity BVO – Implementation of water retention measures in the country (see Environmental Fund 2024).

75 | For more information on the Development Plans for Public Water Supply and Public Sewerage, see: Ministry of the Environment of the Slovak Republic 2024.

76 | See also: Ministry of Investments, Regional Development and Informatisation of the Slovak Republic, 2024.

77 | Oleš & Hudcovský 2024.

modernisation of sewage systems, wastewater treatment plants, and the expansion of water supply networks. The aim is to achieve compliance with EU environmental directives. The European Regional Development Fund[78] supports regional development and investments in infrastructure, including water management projects. It focuses on improving the availability of drinking water, reducing water losses in distribution systems, and increasing the capacity of wastewater treatment plants.

The main instrument for implementing environmental programs supported by these funds is the Operational Program Environmental Quality.[79] European funds enable the implementation of large-scale projects that would otherwise not be possible due to limited national resources. Projects financed by European funds must meet strict sustainability and efficiency criteria, while their aim is also to protect the environment and improve the quality of life of residents.

Given that in the Slovak Republic, ownership of public water supply and public sewerage systems is limited to municipalities, legal entities with their exclusive ownership interest, or their associations, they must also participate in modernisation and construction. For these purposes, they use their own budgetary resources or use resources from loans and borrowings. In addition, they also use the profit from operating public water supply and public sewerage systems, accumulated from payments for water supply and wastewater disposal, for these purposes.

The construction, modernisation, and renovation of public water supply and public sewerage systems can also be implemented through so-called public-private partnerships[80],[81] with the contractual basis being a concession agreement. Based on it, a private law entity undertakes to carry out the construction, modernisation, or maintenance of a public water supply or public sewerage system, which will be owned by a municipality or a legal entity with exclusive ownership of the municipality, while the private law entity will have the right to operate the given water supply or sewerage system during the concession period and receive profits for it.[82]

Finally, financing of water management infrastructure can be achieved through the regulation of environmental taxes and the regulation of other payment obligations. Funds could be provided by the introduction of a water tax. Income tax would be the revenue of a local government that could only be used for protecting the water base and improving the service.[83]

The financing of public water and sewerage systems in Slovakia faces several challenges that affect the efficiency and sustainability of these services. First of all, it is a lack of financial resources on the part of the owners of public water supply

78 | For more information on the European Regional Development Fund, see: Fact sheets on the European Union, 2024.
79 | For more information on the Operational Program Environmental Quality, see: Ministry of the Environment of the Slovak Republic, 2015.
80 | Hereinafter referred to as PPP.
81 | See also: Liu, Clegg & Pollack 2024, 467–506.
82 | Pokorný & Černá 2024, 665–671.
83 | Nagy Z 2019, 174.

and public sewerage systems – municipalities or legal entities with exclusive ownership of municipalities, or their associations. Many municipalities and cities struggle with limited budgets, which complicates investments in the modernisation and maintenance of existing infrastructure. Insufficient funding can lead to a deterioration in the quality of services and an increased risk of accidents. In addition, another problem is Slovakia's heavy dependence on European funds. Slovakia relies heavily on financing from European funds, which can be problematic given the complex project approval processes and the need to meet strict criteria. A reduction in the availability of these funds could significantly affect the country's ability to invest in water infrastructure.

Another challenge is the condition of the public water supply and public sewerage infrastructure. Many parts of the water and sewage systems are outdated and require extensive renovations or replacement. This represents a significant financial cost that may be unaffordable for some municipalities. Likewise, state regulation of prices for water supply and wastewater disposal (including related services) has an impact on the possibilities of financing their renovation. Water and sewerage fees are regulated, which limits the ability of providers to generate sufficient revenue to cover investment needs and operating costs. Finally, increasing environmental requirements and standards for the protection of water resources require further investments in ecological solutions, which may increase financial pressure on operators and owners of water and sewer systems.

What are the prospects for further development of financing for the construction, modernisation, and renovation of public water supply and public sewerage systems? There is undoubtedly a need to continue the effective use of European funds. These funds will be a key to meeting environmental goals and improving the quality of services. However, it is necessary to increase the efficiency of drawing down these funds, as this is not sufficient. In addition, it is essential to increase investments in ecological solutions. With the growing emphasis on sustainability and environmental protection, it is expected that the funding will be directed towards projects that promote resource efficiency, emission reduction, and water resource protection. This may include investments in water recycling technologies and reducing losses in distribution systems. Another challenge is the need to intensify cooperation with the private sector. Public-private partnerships can provide additional sources of financing and expertise needed to implement large infrastructure projects. Such partnerships can help bridge the gap between needs and available public resources.

Moreover, regulators will need to relax the intensity of price regulation for water supply and wastewater disposal and related services. It is expected that regulators will need to adapt pricing policies to enable sustainable financing of water services without negatively affecting accessibility for the population. This may include revising tariff structures and introducing incentives for efficient water management. Finally, it will also be essential to invest in new technologies, such

as smart grids and advanced monitoring systems, which can increase operational efficiency and reduce costs. These innovations can also help identify leaks and optimise water consumption. These factors indicate that financing of public water and sewerage systems in Slovakia will need to be flexible and innovative in order to respond to changing needs and challenges in the field of water management.

Based on the above, it can be concluded that public resources are the main tool for financing the construction, modernisation, and renovation of public water supply and public sewerage systems in Slovakia. Related to this is the issue of state aid and its admissibility. Fundamentally, state aid must comply with competition rules and European Union regulations.[84] Specific rules apply in this area, ensuring a balance between supporting public services and protecting competition.

According to Article 107 of the Treaty on the Functioning of the European Union[85], State aid that distorts or threatens to distort competition is generally prohibited. However, there are exceptions for services of general economic interest, which include water services, such as drinking water supply and wastewater collection. Member states may provide state aid to finance these services if this is necessary to ensure their availability, quality, and affordability for the population. However, this aid must be proportionate and must not exceed the costs necessary to provide the service. If state aid is provided to finance services of general economic interest, it must meet the so-called Altmark criteria.[86] These include a clearly defined public service obligation, transparent calculation of compensation, and selection of the service provider based on efficiency.[87]

In the conditions of the Slovak Republic, assessing compliance with the conditions for the admissibility of state aid in connection with the provision of public resources for the purposes of construction, modernisation, and renovation of public water supply and public sewerage systems is a little easier. First, the law directly defines that it is a service in the public interest. In addition, by law, public water supply and public sewerage systems must be owned by municipalities or legal entities with the exclusive participation of municipalities or their associations, i.e. they will still be public entities. If these infrastructures were also implemented by a private entity, the transfer to municipalities or legal entities, with the exclusive participation of the municipality or their associations, must take place before their final approval. Taking these aspects into account, the above-mentioned Altmark criteria for the admissibility of state aid will generally be met.

In conclusion, it is necessary to mention the application of the polluter pays principle and the principle of full cost recovery in connection with the operation of public water supply and public sewerage systems. The principles of 'polluter pays' and 'full cost recovery' play a key role in the management of water services,

84 | García Coso 2024, 226.
85 | Hereinafter referred to as TFEU.
86 | Klasse 2013, 35–51.
87 | Sokol & Staničić 2019, 803–833.

and their implementation is enshrined in the EU Water Framework Directive[88], specifically in Article 9. These principles are designed to promote the sustainable use of water resources and ensure a fair distribution of the costs of water services. The 'polluter pays' principle requires that those who cause pollution or damage to water resources bear the costs of removing or restoring them. The principle of full cost recovery represents the requirement to cover all costs associated with the provision of water services. This principle ensures that the prices for water services reflect the true costs of providing them, thereby promoting efficient water management and system sustainability.[89]

In the context of the Slovak Republic, these principles are enshrined in national legislation, and their implementation affects the pricing of water management services and the protection of water resources. The 'polluter pays' principle is regulated in the Water Act. The law establishes obligations for entities that pollute water to bear the costs of removing it or mitigating its impacts. Entities that discharge wastewater or pollute water sources are required to pay pollution charges.[90] These fees are intended to finance measures to protect water and improve the quality of water resources. The amount of fees depends on the quantity and type of pollutants. Polluters may be required to implement technical measures to minimise their impact on water resources, such as installing wastewater treatment plants.

The principle of 'full cost recovery' is reflected in the conditions of the Slovak Republic, particularly in the area of price regulation. Prices for water management services (water supply and wastewater disposal) are regulated by the ÚRSO. This regulation is intended to ensure that prices cover all costs associated with providing services. Prices include operating and maintenance costs, infrastructure investment costs, and environmental costs such as water resource protection. Social affordability is also taken into account when setting prices to ensure that services remain affordable for all residents. This may lead to some compromises in fully applying the cost recovery principle. However, state subsidies and European funds also serve these purposes, and these funds help to alleviate the financial pressure on consumers and balance the compromises in applying this principle.

5. Future perspectives

The insufficient funding of water management services has long been a perceived shortcoming of the industry itself and local governments. This deficiency was also pointed out in the recent NKÚ report on the results of the inspection of selected water companies from 2024, according to which only two companies used adequate

88 | Hereinafter referred to as WFD.
89 | See: Unnerstall 2006, 29–42; Mylopoulos & Fafoutis 2012, 161–176.
90 | See: Maslen 2017, 54.

profit to implement the restoration plan. There are also problems with the creation and use of a special-purpose reserve, which has become a legal obligation of companies based on the legislative initiative of the NKÚ SR.[91] The achieved level of necessary restoration is not the result of management and regulator activity only in the controlled period but in many cases is the result of long-term non-systematic work in the field of restoration and the use of resources intended for both restoration and development activities.[92] In addition to insufficient funding, the inspection pointed out many other problems, including, for example, a high proportion of water losses (from 25% to almost 33%), different application practices (which result in different interpretations of the provisions of the ZoVaK), insufficient state supervision and oversight carried out by the Ministry of the Environment of the Slovak Republic and district authorities (for the period from 2021 to 2023, not a single inspection of theirs was directed towards the area of checking the status of the renovation of water infrastructure or the creation and use of a special-purpose financial reserve), etc.[93]

In response to the identified shortcomings (as well as to the so-called 'Bond Program of Guaranteed Yields' of the Eastern Slovak Water Company), the Ministry of the Environment of the Slovak Republic began preparing an extensive amendment to the ZoVaK in September of this year, which was submitted to the Government of the Slovak Republic for discussion on 30 October 2024.[94] This amendment contains a total of 13 amendment points, one of the most significant being the establishment or introduction of the state's pre-emptive right in water companies. The question of the appropriateness of the proposed legislation is, from the authors' point of view, quite controversial. While on the one hand the proposed concept undoubtedly speaks of an effort to 'follow the trend' of more advanced countries of the European Union, as well as the United States of America, and Canada (in which the area of water management infrastructure is entrusted to the public sector), on the other hand these countries are much more economically stable and independent than the Slovak Republic, which naturally creates controversy about the ability of the Slovak Republic to effectively financially support the water management sector. Even if we take into account that this deficiency can be bridged through foreign investments (especially from the European Union), in

91 | Supreme Audit Office of the Slovak Republic 2024, 3.
92 | Ibid.
93 | Ibid.
94 | The essence of this program (which, according to the Ministry of the Environment of the Slovak Republic, points to a preference for profit over long-term development of water infrastructure) is the 'exchange' of shares of villages and cities for securities in the form of bonds. In this context, the Eastern Slovak Water Company guarantees villages and cities a return with a fixed interest paid once a year at the level of 6% p.a, as well as the right of repurchase (return exchange for shares). Even though this program seems 'risky' (given the danger of weakening or losing shareholder influence), the opposite is true. When participating in this project, villages and cities must retain at least one share. See also: East Slovak Water Company 2024.

the authors' opinion, there is still a high risk of the abuse of power, which, given the past and current political dimension prevailing in the territory of the Slovak Republic, cannot be ignored.[95] Despite the aforementioned impossibility of stating the suitability or unsuitability of the proposed initiative, the authors agree that this concept demonstrates the 'lessons learned' from the adverse consequences of the privatisation of water companies, which resulted in neglect of water infrastructure and a significant increase in prices.

Another, no less important, challenge for the future in this area is the adoption of Directive (EU) No. 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law, which replaces Directives 2008/99/EC and 2009/123/EC, which the Member States of the European Union are obliged to transpose into their national laws by 21 May 2026. The implementation of this Directive will change the application practice in the sense that the criminal dimension of illegal water abstraction in the context of the Slovak Republic will not be assessed through the factual basis of theft, but through the new factual basis of illegal abstraction of surface and groundwater, which in the case of natural persons is also associated with a higher prison sentence (three years compared to the current two).[9697] Despite the prevailing tendencies of 'softening criminal law', in the opinion of the authors, this Directive is a clear benefit, with regard to strengthening the element of (not only individual, but also general) prevention, which is an immanent part of the complex measures aimed at preserving the most favourable possible living environment for future generations.

6. Conclusion

The fall of socialist ideologies in 1989 not only initiated social changes, but also political and economic changes. An important tool in promoting these changes was the institution of privatisation, which assumed a rapid change of the previously existing state ownership structures to private ownership relations. In addition to the attribute of speed, the institute of privatisation in the conditions of today's

95 | The authors' distrust in the stability of political power in this area is deepened by the fact that the announced amendment was submitted for discussion by the Government of the Slovak Republic without prior commenting (i.e. without public participation), which, given the principle of transparency, cannot be assessed otherwise than negatively.

96 | For more information, see Art. No. 3 para. 2 letter (m) in conjunction with Art. No. 5 para. 2 letter (e) of Directive (EU) No 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law, replacing Directives 2008/99/EC and 2009/123/EC.

97 | For the sake of completeness, it should be noted that Act No. 300/2005 Coll. The Criminal Code, as amended by later legal regulations, also regulates in provision No. 219a the specific factual nature of the unauthorised production, use or storage of a meter verification mark or a meter security mark, through which criminal liability is inferred for actions consisting (also) in unauthorised interventions in water meters.

Slovak Republic was also characterised by the attribute of extensiveness, as almost all production enterprises and shops owned by the state since 1948 (including water management enterprises) were subject to it.

Despite the fact that the process of transformation of water management companies began relatively late, shortly after the start of the new millennium, there was a change in ownership structures and the transfer of decision-making power over water management companies from the State to municipalities and cities, which can be described as a 'return' to the natural state, which assumes more efficient provision of drinking water, wastewater treatment and sewerage by the municipality as an entity that should be (in accordance with the principle of transparency) as close as possible to the citizens. However, this transformation has pointed to several shortcomings, especially the issue of political inconsistency, price instability, the unpreparedness of municipalities for the increase in the agenda, and inefficient financing. Even though these shortcomings have been largely overcome through the Slovak Republic's membership in the European Union, the water sector reform (initiated by its privatisation) cannot be described as effective. The reason is primarily the issue of financing, which significantly intersects with the state of today's water management infrastructure. In particular, even though the quality of drinking water in the Slovak Republic has been at a high level for a long time, the same statement cannot be made in relation to the percentage of residents connected to public water supplies and public sewers. Moreover, even the technical condition of the water management infrastructure cannot be described as satisfactory. Taking into account the above facts, as well as the rate of transformation of the attribute of modernisation and renewal of water management infrastructure, it is therefore reasonable to express concerns about the ability of the Slovak Republic to fulfill the strategic documents of the European Union in the field of the environment, which assume more effective protection and use of water in order to achieve climate neutrality by 2050.

The aim of this paper was to conduct a deeper investigation and understanding of the administration and management of water services in the Slovak Republic by using basic scientific and theoretical methods. The authors are of the opinion that this paper represents a suitable source of knowledge about the development and status of the provision of water management services in the Slovak Republic, which is capable of initiating or deepening informed dialogue in society and represents a suitable basis for comparison with the status of water management infrastructure in other countries.

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Miha JUHART[1]

Water Management in the Republic of Slovenia (Historical Overview and Current Regulations)[2]

Abstract

This paper undertakes a detailed examination of the historical development and present-day regulatory framework governing water management within the Republic of Slovenia. It traces the evolution of water governance from the socialist system to the emergence of a legal and institutional framework oriented towards sustainability and environmental protection. Particular attention is afforded to pivotal legislative developments, notably the post-1991 shift to a market economy following Slovenia's attainment of independence, the subsequent privatisation of public enterprises, and the adoption of the 2002 Water Act (ZV-1). A milestone of considerable legal and constitutional significance was the 2016 amendment to the Slovenian Constitution, whereby the right to access to drinking water was elevated to the status of a fundamental human right—thereby reinforcing the principle that water are to remain subject to public authority and may not be surrendered to private dominion.

The analysis further elucidates the respective competences of the state and local communities in the governance of water resources, public utilities, and concession-based service delivery. It explicates the legal mechanisms governing the supply of potable water, the maintenance of water infrastructure, and the authorisation of special water use through permits and concessions. Furthermore, the study addresses the societal and legal ramifications of public opposition to privatisation initiatives, as demonstrated by the 2021 referendum in which Slovenian citizens overwhelmingly rejected legislative amendments that could have paved the way for commercial exploitation of water resources. In conclusion, the Slovenian legal order is shown to embody a robust commitment to the preservation of water as a public good, safeguarding its availability and equitable distribution for both current and future generations.

Keywords: Water Management, Sustainability, Environmental Protection, Drinking Water, Water Rights, Concessions, Public Good, Referendum, Natural Resources

1 | Full Professor, University of Ljubljana, Department of Civil Law

2 | *The research and preparation of this study was supported by the Central European Academy.*

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Introduction

The legal regulation of water management occupies a position of paramount importance in modern society, as it ensures the sustainable use, protection, and conservation of water resources. As the very wellspring of life, water must remain accessible to all, and the obligation to guarantee its availability is a duty we owe to future generations. Therefore, one of the principal tasks of modern water management legislation lies in securing the rational and prudent use of water in such a manner as to preclude the diminution of this vital resource for those yet to come. Yet, the sustainable management of water forms but one facet of a broader approach to environmental protection. Consequently, the legal regulation of water management is inextricably bound to the fundamental principles of environmental protection.

This responsibility does not rest with the state alone; it is likewise incumbent upon each individual to contribute—through conscientious conduct and deliberate choices—to the achievement of shared goals. This applies in particular to the actions of individuals that directly concern all forms of water use. Consequently, modern water management regulations must not only set forth the parameters within which water may be used but must also impose users the corresponding obligations to maintain both the quality and quantity of water resources. Moreover, such legislation must provide for protective measures to shield water bodies from contamination and degradation.

Modern water management legislation should further promote an integrated approach to the management of aquatic ecosystems—one that duly considers the interdependencies between water, land, and biodiversity. Central to this is the concept of ecosystem services, which recognises that ecosystems confer valuable certain goods or benefits upon humanity, and they do so in interaction with human capital, social communities (social capital), and the environment (built capital). Crucially, this concept highlights nature itself—natural capital—as a generative force, akin to other forms of capital, with an intrinsic capacity to furnish services to society.[3] Collectively, these elements of the legal framework ensure that water management is firmly aligned with the aims of sustainable development, environmental protection, and socio-economic justice.

3 | Gantar 2021, 10.

1. Historical Context

1.1 Regulation of Water Management Before the Independence of the Republic of Slovenia

Within the former Socialist Federal Republic of Yugoslavia (SFRY), a particular concept of socialist regulation emerged, grounded in the notions of social ownership, united labour, and socialist self-management. In the field of municipal activities, special decision-making bodies called self-governing interest communities (*samoupravne interesne skupnosti* – SIS) were established. These bodies were instituted across various areas of general interest, and each SIS included representatives of providers of specific services of general interest—such as companies or organisations of associated labour in the field of water management[4]—alongside delegates representing service users, and members of the broader socio-political community.

In the socialist context, public utility enterprises were precluded from functioning according to entrepreneurial logic. Rather, their activities were subject to the determinations and directives of the competent SIS, whose resolutions governed essential aspects of utility operations. These included the formulation of developmental guidelines, the establishment of general service provision conditions, the standards for assessing service quality, and other matters deemed to fall within the general interest. The remit of the SIS was both extensive and multifaceted, encompassing culture, science, healthcare, agriculture, railway transport, electricity supply, water management and municipal services, as well as postal and telephone services.[5] The SIS system reached its final form after the adoption of the 1974 Constitution of the SFRY and the subsequent enactment of the 1976 Act on Associated Labour.[6] Owing to excessive institutionalisation, this system failed to remedy the manifest deficiencies and inefficiencies in the operation and provision of services of general interest. On the contrary, it rendered their governance increasingly convoluted, opaque, and, in the ensuing years, verging on the ungovernable.[7]

Following Slovenia's transition to independent statehood, the Republic of Slovenia was governed in matters of water management and water infrastructure

4 | Economic activity was carried out by legal entities in a proprietary partnership, which for a certain period of time were called companies, and later organisations of associated labour.
5 | Prinčič 2014, 68.
6 | Compare this with other ex-Yugoslav ways of dismantling the SIS system and the various methods of compensation: Ernst & Josipović 2024, 103–133; Karakamisheva-Jovanovska 2024 227–250.
7 | Prinčič 2014, 69.

primarily by the Fundamental Water Act (*Temeljni zakon o vodah* – TZV)[8], which served as the principal legislative instrument in this domain. The cornerstone of the TZV was the recognition of water as a good of general importance, classified as social property and capable of being utilised to meet both general and individual needs (Art. 1 TZV). The concept of social property was a hallmark of the socialist legal order inherited from the former Yugoslavia. Social property, under that regime, essentially meant the denial of private ownership by individuals of certain assets. However, social property could not be wholly equated with state property. Theoretically, social property belonged to all working people and citizens, who managed social property through self-governing organisations. In practice, these self-governing organisations could acquire the right to use individual items within social property. Such a right of use was defined as exclusive and conferred upon its holder de facto powers of possession comparable to those enjoyed under private ownership. In exceptional instances, this right could also be granted to private individuals or legal persons governed by private law, thus extending the functional domain of social property beyond collective structures.[9]

Although the TZV operated as a federal law applicable across the entire territory of the Yugoslav federation, the Republic of Slovenia, within its delegated legislative competence, adopted its own Water Act (*Zakon o vodah* – ZV),[10] which supplemented the TZV. This Act provided more detailed regulations regarding water and water infrastructure management and is therefore of greater significance. The ZV remained operative following Slovenia's declaration of independence and the transition to a market-based economy, until the adoption of the current Water Act (ZV-1)[11] in 2002.

Pursuant to the provisions of the ZV, natural watercourses, natural lakes, natural springs, coastal seas, public wells, and water lands were deemed social property. Additional categories, including certain water resources and coastal lands, were also subject to legal regulation. While coastal land could be either socially or privately owned, the rights of private proprietors were not absolute. Indeed, even privately owned coastal land was encumbered by public obligations: owners were obliged to permit the implementation of all water management

8 | Official Gazette of the SFRY, Nos. 13/65, 50/68, 60/70 and 29/71, Official Gazette of the Socialist Republic of Yugoslavia, Nos. 51/71 and 16/74, Official Gazette of the SFRY, No. 22/74, Official Gazette of the RS/I, No. 1/91 – UZITUL.

9 | It should be noted that the establishment of private law legal entities was limited.

10 | Official Gazette of the SFRY, Nos. 38/81, 29/86 and 32/89, Official Gazette of the SFRY, No. 83/89, Official Gazette of the Republic of Slovenia, Nos. 42/89 and 5/90, Official Gazette of the Republic of Slovenia – old, Nos. 8/91 and 10/91, Official Gazette of the Republic of Slovenia, Nos. 15/91 and 17/91 – ZUDE, Official Gazette of the Republic of Slovenia, Nos. 4/92, 55/92 – ZVDK, 13/93, 32/93 – ZGJS, 29/95 – ZPDF, 52/00, 2/01 – CC dec. and 67/02 – ZV-1.

11 | Official Gazette of the Republic of Slovenia, Nos. 67/02, 110/02 – ZGO-1, 2/04 – ZZdrI-A, 10/04 – CC dec., 41/04 – ZVO-1, 57/08, 57/12, 100/13, 40/14, 56/15, 49/20 – ZIUZEOP, 65/20, 65/20 – ZPKEPS-1D, 80/20 – ZIUOOPE, 152/20 – ZZUOOP, 112/21 – ZIUPGT, 187/21 – ZIPRS2223, 35/23 – CC. dec., 78/23 – ZUNPEOVE, 95/23 – ZIUOPZP, 131/23 – ZORZFS and 52/24 – CC dec.

measures on their land (Art. 69 (1) ZV) and, above all, to ensure that everyone could access water (Art. 2 (1) ZV). Of particular note is the 1982 ZV's express recognition of the primacy of drinking water, which was accorded precedence over all other uses and forms of exploitation of water resources (Art. 2 (3) ZV), thereby foreshadowing later constitutional and statutory developments affirming water as a basic human entitlement.

Within the field of water management, a series of priority tasks were articulated, chief among them being the regulation of the water regime to provide protection against flooding and erosion; the safeguarding of water reserves and quantities; the preservation of water quality; the monitoring of the status of water systems; the oversight of the construction of water management structures and installations; the direction of interventions and other arrangements in watercourses and natural water reservoirs; the maintenance of natural watercourses and other natural water reservoirs as well as water management facilities and installations in general use; and the collection and processing of data relevant to water management. Under the socialist regime, these tasks were centrally coordinated through the SIS. However, after the transition to a market economy, responsibility for these tasks was devolved to local communities and the state. The execution of services in the water management sector was entrusted to labour organisations established at the level of local communities. In the socialist system of united labour, labour organisations operated as enterprises in accordance with the then-applicable legislation. The linchpin of the Yugoslav socialist system was workers' self-management: labour organisations (companies) were governed by workers' councils, whose members were elected by the company's employees. These councils exercised all essential managerial functions, including the appointment of the management bodies, and were expected, in the exercise of their competences, to give due regard to broader social interests. This expectation was especially acute in the area of municipal services, where adherence to the decisions and other legal instruments adopted by the SIS was mandatory.

Beyond setting out provisions on water management organisation, the ZV also prescribed conditions governing the use of water resources. Pursuant to Article 45(1) ZV, any alteration of the water regime resulting from water use, water exploitation, or the discharge of polluted water or substances that contaminate water, as well as the construction and reconstruction of water management and other facilities and installations, and other interventions in natural or artificial watercourses and water lands that may alter water quantity, quality, spatial or temporal distribution, or change conditions on water and coastal lands, required the prior acquisition of a water management consent or permit. This requirement applied to both labour organisations and private individuals.

A *water management consent* was specifically required for the construction or reconstruction of water management facilities or installations, as well as for other facilities or installations that could influence the natural or artificially established

water regime. The competent authority for issuing such consents was the relevant local community body, or, in the case of larger and more significant installations, the responsible state ministry (Art. 48 ZV). A *water management permit* was likewise mandatory for water use and for discharging wastewater, refuse, or any other substances capable of polluting water or altering the water regime. The issuance of such permits was similarly entrusted to either local authorities or the competent state ministry, depending on the magnitude and significance of the intervention concerned.

1.2 Independence of the Republic of Slovenia and Privatisation of the Economy

Water management was among those spheres in which the advent of a new state and the establishment of a new legal system necessitated a different approach from that developed under socialist self-management. While it must be recognised that certain fundamental objectives—such as the protection and sustainable use of water resources—remained substantially unaltered, the legal framework required a thorough overhaul. This entailed the introduction of new legal concepts as well as the revival of institutions that had been abolished under the previous regime.[12]

With the proclamation of independence in 1991, Slovenia not only asserted its political sovereignty but also marked the definitive cessation of the socialist economic system, reintroducing a market economy. One of the most significant processes immediately following independence was the privatisation of labour organisations (companies) that had conducted various activities based on socially owned assets.

Privatisation in Slovenia proceeded on diverse legal bases and through various methods. Nonetheless, the unifying feature across all forms of privatisation was the transformation of socially owned labour organisations (enterprises) into commercial companies. This transformation was codified in the enactment of the Companies Act (*Zakon o gospodarskih družbah* – ZGD)[13] in 1993, which set out the forms and methods of governance of legal entities engaged in economic activities. The Act, closely modelled on the German legal system, established limited liability companies and joint-stock companies as the principal corporate forms. Its transitional provisions required all existing enterprises to bring their internal organisation and operations into conformity with the Act. Most labour organisations (companies) within the water management sector underwent transformation into either limited liability or joint-stock companies.

A particular hallmark of these newly constituted companies was was the treatment of their capital structure. The share capital of such companies was no longer

12 | See, in more detail, Pličanič 1997, 1302.
13 | Official Gazette of the Republic of Slovenia, No. 30/93.

ascribed to a specific individual or legal person as the bearer of partnership or shareholder rights, but was held in an abstract form as social capital. This capital, formerly regarded as a collective societal asset, was to be gradually privatised and distributed among designated eligible parties. The determination of such eligible beneficiaries and, in particular, the methods of allocating business stakes in limited liability companies or shares in joint-stock companies were regulated by special privatisation legislation.

Most of the former labour organisations (companies) in Slovenia were privatised under the general model introduced by the Ownership Transformation of Companies Act (*Zakon o lastninskem preoblikovanju podjetij* – ZLPP).[14] Under this model, each enterprise was required to determine the total amount of its social capital. In the majority of instances, this capital was classified entirely as social in nature. However, there were cases in which a portion had been contributed by private investors prior to privatisation or was earmarked for owners whose capital shares were expropriated under socialism (denationalisation).[15]

The decision regarding the method of privatisation lay with the enterprise's governing body, which at that stage continued to function as a representative assembly of all employees. Before implementation, however, the programme required the formal approval of the state authority designated for such matters, namely the *Agency for Restructuring and Privatisation of the Republic of Slovenia*.

The greater part of enterprises possessing social capital were converted into joint-stock companies, issuing shares representative of that capital which were subsequently allocated among the eligible recipients. Of particular note, 40 per cent of all shares were earmarked for general purposes and transferred to state-established funds or investment companies. Of these, 10 per cent of the shares were transferred free of charge to the Compensation Fund—a statutory fund established pursuant to denationalisation regulations to pay compensation for property confiscated without adequate grounds during the socialist era. A further 10 per cent of the shares were similarly transferred without charge to the Pension and Disability Insurance Capital Fund. The remaining 20 per cent was reserved for Authorised Investment Companies.

A hallmark of the Slovenian privatisation model was the issuance of ownership certificates, to which all citizens of the Republic of Slovenia were entitled. These certificates could be exchanged directly for shares in a joint-stock company or invested in an Authorised Investment Company, which would pool and convert such certificates into shares via special competitive procedures.

As for the remaining sixty per cent of social capital, its privatisation was governed by the specific provisions of each enterprise's privatisation programme. Virtually all companies included an internal share distribution programme, typically

14 | Official Gazette of the Republic of Slovenia, No. 7/93.
15 | See, in more detail, Vlahek & Damjan 2024.

covering 20 per cent of the issued shares, in which only current and former (retired) employees could participate by exchanging their ownership certificates for shares. The purchase price of shares was lower in the internal distribution scheme, thereby encouraging employee ownership. The remaining shares could be sold or transferred to a special Development Fund of the Republic of Slovenia. Sales were effected either for cash or in exchange for ownership certificates, and were conducted through a public tender or public auction to ensure that share prices were determined by market demand. Any shares that remained unsold following the conclusion of this process, together with all ownership certificates and cash proceeds derived therefrom, were transferred without charge to the Development Fund. Shares acquired through ownership certificates were subject to a mandatory *lock-up period* of two years, during which they could not be sold or otherwise alienated.[16]

For labour organisations (enterprises) engaged wholly or partly in the performance of public utility functions, general rules po privatisation. Pursuant to the Services of General Economic Interest Act (*Zakon o gospodarskih javnih službah* – ZGJS),[17] such services include, inter alia, those related to energy, transport and communications, communal and water management, and the management of other types of natural resources and environmental protection (Art. 2 ZGJS). Based on the old and still valid ZV, the entire field of water management—from the supply of drinking water to the regulation and maintenance of natural watercourses—was regarded as a service of general economic interest. The ZGJS also provided a special method of privatisation for companies operating public utility activities.[18]

Unlike the general system of privatisation provided for by the ZLPP, the legal rules on privatisation under the ZGJS did not prescribe a uniform procedure for the transformation of all social capital. Instead, the social capital of enterprises engaged in the performance of public service activities was divided into three distinct categories. The first category comprised infrastructure facilities, devices, or networks, as well as mobile and other assets used for the performance of public utility services. These infrastructure assets were transferred into the ownership of the state or the competent local community (municipality), depending on he manner of their acquisition or financing (Art. 76 ZGJS). Under the ZGJS, only infrastructure that had either been transferred free of charge to public service providers or created from self-governing funds was subject to nationalisation. The second category encompassed social capital provided to companies through the system of self-governing interest communities. This capital, following an appraisal of the relevant investments, became the ownership share of the state or local

16 | For more information on the method of ownership transformation, see Pečenko (1993) and Tinauer (1993).

17 | Official Gazette of the Republic of Slovenia, Nos. 32/93, 30/98 – ZZLPPO, 127/06 – ZJZP, 38/10 – ZUKN and 57/11 – ORZGJS40.

18 | See, in more detail, Juhart 1993, Bohinc 1993 and Markovič 1993.

community in the commercial companies—namely, limited liability companies or joint-stock companies—formed through the transformation of the original labour organisations.. The third category comprised all residual social capital not falling within the scope of the preceding two. This capital was then transferred via one of the methods prescribed by, and following the procedures set out in, the Ownership Transformation of Companies Act (ZLPP). In practice, however, this route was rarely employed. In the field of water management in particular, privatisation under both the general and special regimes was virtually non-existent. Companies were reorganised into commercial companies whose ownership shares (equity) were held exclusively by public legal entities, primarily local communities. Parallel to the privatisation process, the Republic of Slovenia also undertook a comprehensive reform of its local self-government system, significantly increasing the number of local communities (municipalities). Today, most water management companies are jointly owned by multiple local communities, with each share determined through negotiations carried out as part of these local government reforms.

1.3 Conclusion

In the Republic of Slovenia, the water management sector remained largely insulated from privatisation following the transition from a socialist system to a market economy. Throughout this period, the public interest in the sector was consistently upheld. A special Act (ZGJS) applied to companies providing public services, stipulating particular privatisation rules. Water management infrastructure became state-owned or local community-owned, depending on funding arrangements. Equity in the newly formed commercial companies were allocated to public legal entities, predominantly local communities. Moreover, reforms to local self-government influenced the ownership structures of water management companies, with ownership shares being determined by mutual agreements among the various local communities involved.

2. Other Specificities and Characteristics of the Legal Regulation of Water Management after the Independence of the Republic of Slovenia

The legal framework governing water management in the Republic of Slovenia has continuously ensured that the public interest is taken into account. This outcome has been achieved primarily through the transfer of water infrastructure into the ownership of the state and local communities, coupled with the transformation of socialist-era water management companies into commercial companies owned by these public entities. The Constitution of the Republic of Slovenia has also played a

substantial role in shaping this framework. Upon its adoption in 1991, the Constitution highlighted the special importance of natural resources and national assets. Article 70 of the Constitution addresses these two fundamental aspects in the following manner:

> "Article 70 (National Assets and Natural Resources)
> Special rights to use national assets may be acquired, subject to conditions established by law. The conditions under which natural resources may be exploited shall be established by law. The law may provide that natural resources may also be exploited by foreign persons and shall establish the conditions for such exploitation."

A key legal consequence arising from this constitutional provision is the obligation of the legislature to regulate legal relationships concerning the use of goods of particular societal relevance. Accordingly, Article 70 is inextricably linked to other constitutional provisions governing property rights and their limitations, as well as those relating to the protection of nature and the safeguarding of a healthy living environment.

Pursuant to the *Water Act* (*Zakon o vodah* – ZV) and its successor, the *Water Act* (*ZV-1*), the majority of water resources and water management infrastructure were accorded the legal status of public goods. Nonetheless, some uncertainty remained as to whether at least some water resources could be considered natural resources. In this context, the 2016 amendment to the Constitution assumed particular significance. The newly introduced Article 70a supplements Article 70 of the Constitution and reads as follows:

- Everyone shall have the right to drinking water.
- Water resources shall constitute a public good administered by the state.
- Water resources shall serve the priority and sustainable supply of the population with drinking water and water for household use, and shall not constitute marketable goods in this respect.
- The supply of the population with drinking water and water for household use shall be secured by the state through self-governing local communities, directly and on a non-profit basis.

Numerous factors underpinned the need to amend the Constitution to introduce a specific right to drinking water, encompassing aspects of environmental protection, social policy, public health, and the economy. Prior to the constitutional amendment, Slovenia had experienced financial pressures from international institutions—collectively known as the Troika, comprising the European Central Bank, the International Monetary Fund, and the European Commission. There existed a tangible risk that, in return for financial support, Slovenia would be compelled to liberalise its services market and privatise water management undertakings, including the provision of drinking water. Analogous developments

had been observed in other financially vulnerable countries (Greece, Spain, and Portugal). These concerns were further heightened by the proposed EU Directive on the award of concession contracts, which would have required the mandatory publication of any concession award with a value equal to or exceeding five million euros—a threshold that could encompass contracts for the supply of drinking water.[19]

A working document prepared as the basis for amending the Slovenian Constitution identified numerous other examples of external pressure and attempted transfers of water management responsibilities from the public to the private sector. Despite some opposition,[20] a high degree of consensus was reached in Slovenia on the proposed constitutional amendment. Incorporating the right to water into the Constitution is particularly significant in light of the likelihood of ongoing or future pressures from financial institutions and international corporations to liberalise drinking water supply and subject it to market dynamics. Given that Article 3a of the Slovenian Constitution grants EU legal acts (regulations, directives) primacy over domestic legislation, including statutes, the legislature considered that legislative protection alone would prove insufficient. Constitutional protection was thus deemed necessary, although in the EU's political and legal environment, even constitutional safeguards cannot always be guaranteed to prevail.[21]

The newly enacted Article 70a of the Constitution is situated within the chapter on economic and social relations, reflecting the breadth of its content, which extends beyond the recognition of a right to drinking water. In addition to affirming that everyone has the right to drinking water, it provides that water resources shall be a public good managed by the state, shall serve the priority and sustainable supply of the population with drinking water and water for household use, and shall not be marketable commodities in this respect. Furthermore, the responsibility for ensuring such supply is vested in the state, which is to discharge this duty through self-governing local communities, directly and on a non-profit basis.

In light of the challenges posed by climate change, Slovenia may, in future, be required to devise water supply strategies that facilitate the collection of water during periods of abundance and its distribution during times of drought.[22] Such strategies may involve the construction of artificial reservoirs, dams, embankments, and other man-made drinking water storage facilities. It was therefore necessary to protect all water resources at the constitutional level as public goods. Concessions for the economic use of certain water resources already exist, such as mineral springs and sources used for bottling. However, the constitutional amendment unequivocally states that water resources are primarily intended for the

19 | Proposal 2015.
20 | Avbelj 2016.
21 | Ude 2017, 8.
22 | Ude 2017, 12.

sustainable supply of the population with drinking water and water for household use, and that they are not marketable goods in this respect.[23]

By recognising the right to water as a fundamental human right, the state has assumed the duty and clear obligation to preserve natural resources, including Slovenian waters and water resources, for future generations. Ensuring the sustainability of water resources for the population necessarily entails implementing measures that enable future generations to have access to quality drinking water. This includes proactive efforts to prevent and reduce pollution, protect the environment, and act proactively to safeguard water.[24]

3. Applicable Regulations and Supervisory Regime

3.1 Applicable Law

Within the hierarchy of legally binding sources, Article 70a of the Constitution occupies a position of paramount authority. It not only enshrines the right of access to drinking water as a fundamental human right, but also prescribes, in clear terms, the principles by which essential services—most notably water supply—are to be provided.

In response to the constitutional amendment, the legislature undertook a comprehensive review and adaptation of the statutory framework to ensure full conformity with the new constitutional mandate. At a systemic level, the principal enactments are the Environmental Protection Act (*Zakon o varstvu okolja* – ZVO-2)[25] and ZV-1, both of which have been subject to frequent amendments, including changes introduced following the constitutional amendment by Article 70a. These legislative reforms reflect the State's acknowledgement of its constitutional obligations concerning water rights, the protection of water resources, and the modalities of public service provision.

The Water Act (ZV-1) serves as the primary instrument through which the Republic of Slovenia transposed Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000, establishing a framework for Community action in the field of water policy into Slovenian law. In addition, ZV-1 implements a number of other directives within the broader *acquis communautaire* pertaining to water management.[26]

Beyond sector-specific legislation, attention must also be drawn to several general statutory provisions relevant to the governance of public water services.

23 | Ude 2017, 12.
24 | Ude 2017, 12.
25 | Official Gazette of the Republic of Slovenia, Nos. 44/22, 18/23 – ZDU-1O, 78/23 – ZUNPEOVE and 23/24.
26 | These directives are listed in Art. 2 (4) ZV-1.

The ZGJS classifies water supply and some other water management activities as public utilities. This means that companies that carry out this activity are subject to certain special corporate governance rules. Under Slovenia's system of state administration, responsibility for water supply lies with self-governing local communities. The tasks of local communities are further detailed in the Local Self-Government Act (*Zakon o lokalni samoupravi* – ZLS).[27] The undertakings entrusted with water supply and certain ancillary water management functions are, in most cases, the legal successors to former socially owned enterprises. Ownership of these undertakings was transferred to local communities pursuant to the provisions of the ZGJS. The management of local community shares in these commercial companies is regulated by the Public Finance Act (*Zakon o javnih financah* – ZJF).[28]

3.2 Water Management

3.2.1 Starting Points

Under the prevailing statutory framework, the management of water and riparian lands encompasses water protection, water regulation, and decisions regarding water use (Art. 1 (2) ZV-1). In line with the core tenets of environmental law, the governance of water and riparian areas is guided by a set of fundamental principles enshrined in Article 3 of the Water Act (ZV-1), namely:

1. The principle of integrity, which takes into account natural processes and water dynamics, as well as the interlinked nature and interdependence of water and riparian ecosystems within a river basin;
2. The principle of long-term protection, promoting the safeguarding of water quality and the rational use of available water resources;
3. The principle of protection from water-related harm, recognising the need to shield human populations and their property from adverse hydrological effects, whilst respecting natural processes;
4. The principle of reimbursement of costs, associated with water burdens;
5. The principle of public participation, enabling public involvement in the drafting of water management plans;
6. The principle of applying the best available techniques and new scientific knowledge, regarding natural processes.

27 | Official Gazette of the Republic of Slovenia, Nos. 94/07 – official consolidated text, 76/08, 79/09, 51/10, 40/12 – ZUJF, 11/14 – corr., 14/15 – ZUUJFO, 11/18 – ZSPDSLS-1, 30/18, 61/20 – ZIUZEOP-A, 80/20 – ZIUOOPE, 62/24 – CC dec. and 102/24 – ZLV-K.
28 | Official Gazette of the Republic of Slovenia, No. 11/11 – official consolidated text, 14/13 – corr., 101/13, 55/15 – ZFisP, 96/15 – ZIPRS1617, 13/18, 195/20 – CC dec., 18/23 – ZDU-1O and 76/23.

Primary responsibility for the stewardship of water, and of water and riparian lands, lies with the state—understandably so, as most water resources span multiple local communities and are of broader public interest. Consequently, certain water management functions are statutorily designated as public services, to be performed exclusively by the State. These include:

1. The operation and maintenance of water infrastructure intended for the conservation and regulation of water quantities (Art. 81 (3) ZV-1);
2. The operation, maintenance, and monitoring of water infrastructure for protection against the harmful hydrological effects (Art. 93 (1) ZV-1);
3. The implementation of emergency measures during periods of heightened risk from the harmful hydrological effects (Art. 95 (1) ZV-1);
4. The implementation of emergency measures following a natural disaster caused by the harmful hydrological effects (Art. 96a (1) ZV-1);
5. The maintenance of water and riparian lands (Art. 98 (1) ZV-1);
6. The supervision of water protection measures (Art. 177 (1) ZV-1).

Notwithstanding the State's dominant role, local self-governing communities also bear specific responsibilities, most notably the provision of drinking water to the population. This competence derives directly from Art. 70a of the Constitution and is reaffirmed in several legal provisions (e.g., Art. 21(2) ZLS and Art. 233 (1) ZVO-2). The supply of drinking water to the population is thus designated as a local economic public service.

The implementation of core water management services may be illustrated by reference to three representative examples, each grounded in applicable legislative provisions. The first concerns the supply of drinking water to the population, a function explicitly enshrined in the Constitution as the primary responsibility of local self-governing communities. This service must be delivered as an economic public service. The second example involves water management services for maintaining water bodies and coastal lands, which is the responsibility of the state. In practice, the State has opted to discharge this responsibility by granting concessions, thereby delegating these duties as an economic public service. The third example pertains to the use of water resources for individual purposes, which is subject to the prior acquisition of a water right. Any natural or legal person who meets the conditions specified in the law or its implementing regulations can acquire a water right through a special procedure. These conditions primarily concern the ability to use and exploit water and are independent of personal characteristics. Only in exceptional cases are financial non-compliance or violations of environmental regulations considered grounds for exclusion. There exists no justification for distinguishing between locals and foreigners in establishing these conditions.

3.2.2 Implementation of Public Utilities in the Field of Water Management

Where legislation stipulates that a given activity must be performed as an economic public service, the provisions of the ZGJS apply. This Act regulates the form and manner of performing economic public services. Public services aim to provide material public goods—whose continuous and uninterrupted provision is assured in the public interest by the Republic of Slovenia, a municipality, or another local community— particularly in cases where market mechanisms are insufficient to satisfy such needs (Art. 1 ZGJS). In delivering public goods, the pursuit of profit is subordinate to the imperative of fulfilling public needs.

Economic public services may only be delivered through legally prescribed organisational forms: a public utility unit, a public utility institute, a public undertaking, or by concession. A public utility unit is organised within a local community as a legal entity and forms part of the local community's administration. A public utility institute is utilised for performing one or more public economic services that, by their nature, are not intended to be profit-driven. Due to their particular characteristics, these forms are not typically used for water management services.

The most prevalent model for delivering public services in Slovenia is through a public undertaking. A public undertaking is a commercial entity, typically structured as either a limited liability company or a joint-stock company, with shareholdings held by both the local community and the state. It is estimated that the majority of public services in the Republic of Slovenia are provided through public undertakings.[29] Public undertakings, as legal entities, are governed by specific rules outlined in the ZGJS, which operates as a *lex specialis* vis-à-vis the general corporate provisions of the ZGD-1. Only the state or a local community may establish a public undertaking. In addition to the corporate rights derived from ownership stakes as outlined in the ZGD-1, the founder of a public undertaking possesses special founder's rights as specified by the ZGJS. These include the power to impose specific conditions concerning the performance of activities, and the provision, use, and pricing of public goods (Art. 26 ZGJS). A fundamental distinction exists between founder's rights and capital rights: founder's rights are retained in full by each founding local community, irrespective of its shareholding, whereas capital rights correspond to the proportion of ownership held in the company. All founding local communities possess these rights equally, and decisions falling within the scope of founder's rights must be adopted by mutual consent, ensuring collective agreement on the execution conditions, service provision, and pricing of public goods.[30]

29 | Prodan 2015, 617.
30 | Judgment and decision of the Ljubljana Higher Court I Cpg 743/2020 of 2 February 2021.

The current legislation of the Republic of Slovenia contains no explicit prohibition on the alienation of a local community's ownership stake in a public undertaking. The ownership shares of a local community are deemed financial assets that the local community must manage in accordance with the law (Art. 67 (1) ZJF). The municipal council, as the highest representative body of the local community (Art. 29 (2) ZLS), bears overall responsibility for the management of these financial assets. The specific exercise of management rights arising from ownership shares in public companies is undertaken by the local community's administrative body responsible for finance.

In exercising these management rights, the local community is, in particular, required to: ensure the coordination of work programmes and financial plans of public undertakings, supervise their operations and the implementation of their programmes and borrowing, exercise its rights at general meetings, and propose members to the management bodies of commercial undertakings, such as the supervisory board (Art. 71 (1) ZJF). The disposal of ownership shares in public companies is, however, permissible only where the competent authority has adopted a decision that the public interest in holding the financial investment has ceased (Art. 73 (3) ZJF).

That said, in the field of water supply activities, such disposal is constitutionally impermissible. Article 70a of the Constitution obliges municipalities to provide water supply through a prescribed method of service provision. In respect of other water management services, however, such a possibility could exist, provided that a legal act is first adopted exempting the activity from the system of economic public services, or reclassifying it as a service deliverable by concession. In such circumstances, the sale of the capital investment would need to be included in a special resolution of the local community council, and the disposal itself must proceed via a competitive public tendering procedure. At the time of writing, no instances were known in which local communities had divested their shareholdings in public undertakings active in the field of water management.

The provision of a public service by granting a concession entails the transfer by the state of responsibility for the delivery of that service to a private-law entity engaged in economic activity. A concessioned public service is performed by a concessionaire (a private-law entity that provides a public service) in its own name and for its own account, based on the authorisation of the grantor (the entity awarding the concession—the state or a municipality).[31] Concessions are typically awarded through a public tender process, which ensures the selection of the most suitable concessionaire. The grantor adopts a concession act specifying the conditions and manner of providing the concessioned public service. Upon the selection of the successful tenderer, the legal relationship between the grantor and the concessionaire is formalised by mutual agreement in the form of a concession contract.

31 | Prodan 2015, 617.

3.2.3 Supply of Drinking Water to the Population

The supply of drinking water constitutes a mandatory local economic public service, meaning that each municipality or city municipality bears the responsibility for ensuring the availability of drinking water throughout its respective territory. This arrangement is consistent with Article 70a(4) of the Constitution, which mandates that the supply of the population with drinking water and water for household use must be ensured by the state directly through self-governing local communities, and on a not-for-profit basis.[32] At the national level, this obligation is implemented through a subordinate regulation—the Decree on Drinking Water Supply[33]—which governs the manner in which the public service of drinking water supply is to be performed. It sets out the procedures and conditions for connecting to the public drinking water network, as well as conditions for potential downtime in the supply.

A notable shortcoming of the current regulatory framework is its reliance on a single subordinate legal instrument, with the bulk of general provisions concerning the supply of drinking water being contained within the aforementioned Decree. Simultaneously, local communities have the authority to regulate the supply of drinking water via municipal ordinances, which set out the method and conditions of supply at the local level. Although these municipal ordinances must comply with the Constitution and national laws, they are not formally required to align with other implementing acts. This leaves municipalities with latitude to adopt divergent regulatory solutions in this field. As a compulsory economic public service, water supply must be carried out by one of the prescribed methods under the Services of General Economic Interest Act (ZGJS). In practice, the vast majority of municipalities fulfil this obligation through public undertakings, which frequently serve multiple municipalities under joint arrangements.

Infrastructure such as pumping stations, waterworks, and distribution networks, constructed prior to the introduction of the ZGJS became the property of the local community by operation of law. Some local communities subsequently transferred these assets as contributions in kind to public enterprises, while others retained ownership and leased the infrastructure to public undertakings for use, typically without remuneration.

The public utility provider is under a statutory obligation to ensure that all facilities within its service area can connect to the public water supply network. Two scenarios should be distinguished. In the first instance, where a facility is located within the coverage area of a public water supply, connection is mandatory (Art. 10 (1) of the Decree). This applies even in cases where the land on which the facility stands possesses an independent source of drinking water; in such

32 | For an interpretation of the right to water as a social right, see Jakab & Mélypataki 2019, 22–28.
33 | Official Gazette of the Republic of Slovenia, Nos. 88/12 and 44/22 – ZVO-2.

cases, using a private source is expressly prohibited (Art. 12 (1) of the Decree). The contractual relationship between the public utility provider and the consumer is formalised through a water supply contract, the substance of which is largely governed by general terms and conditions reviewed and approved by local community authorities. These authorities also exercise the power to determine pricing (Art. 26 ZGJS). However, legal mechanisms in this domain remain underdeveloped, and to date, no significant difficulties have arisen in practice. For example, the legal consequences of a public undertaking failing to comply with a price fixed by the local community remain unclear. Nor are there any specific rules if the price is set so low that the public undertaking operates at a loss. So long as operations proceed without disruption, such legal lacunae have not posed material difficulties. It is anticipated that the legislator would address them only when problems arise.

The supply of drinking water represents both a state responsibility and an individual right, although it is accepted that the supply to an individual may be lawfully suspended.[34] The Decree on Drinking Water Supply at the national level regulates instances when supply may be interrupted due to maintenance work, force majeure and similar circumstances. Should the supply interruption exceed 24 hours, the operator of the public water supply system is under a statutory duty to ensure the provision of a minimum essential quantity of drinking water to affected consumers by appropriate alternative means (Art. 23 (5) of the Decree). The supply of drinking water may also be interrupted in cases where a user's conduct jeopardises the safety or continuity of the supply to others. However, the Decree is notably silent on the issue of interruption of supply owing to non-payment. Since water supply is a service for which payment is required, each customer is obliged to pay for the water consumed.

This sensitive issue—the interruption of supply for non-payment—is primarily left to the regulatory competence of local communities. The City of Ljubljana, the capital with the largest population, serves as an illustrative example. Drinking water in Ljubljana is supplied by VO-KA d.o.o. Ljubljana, a public company wholly owned by the city municipality and certain neighbouring municipalities. The terms and conditions of water supply are specified in the Decree on Drinking Water Supply in the City of Ljubljana.[35] Under this Decree, the company may interrupt supply if a customer fails to pay within fifteen days after receipt of a payment reminder. In brief, the customer is required to pay punctually; where payment is late, the company may issue a notice of intended interruption, granting a further grace period of not less than fifteen days. Should the arrears persist, the company may then terminate supply and disconnect the customer from the public water network. While this legal framework is strict and does not make

34 | See, in more details, Sancin & Juhart 2023, 116.
35 | Official Gazette of the Republic of Slovenia, No. 59/14.

provision for any mitigating personal or social circumstances, in practice, the utility typically issues multiple reminders prior to taking formal steps towards disconnection. A final warning is usually sent before any interruption of service is executed.[36]

3.2.4 Water and Coastal Land Maintenance

The maintenance of waters and coastal lands primarily entails the reinforcement of the banks and beds of surface waters and the sea coast, the removal of sediment deposits to ensure adequate river flow, the mowing and clearing of overgrowth along banks, the removal of floating debris and refuse from surface waters, and the prevention of pollution affecting watercourses and coastal zones (Art. 98 (2) ZV-1). These measures aim to prevent or limit the harmful effects of water and to protect human life and property. As such, they form part of the broader domain of water management, which is deemed a matter of public interest and, consequently, the responsibility of the state. In accordance with this public mandate, the maintenance of water and coastal lands constitutes an economic public service performed by the state. In determining how this service would be organised, the state might have opted to establish one or more public companies; instead, it elected to award concessions. To oversee these tasks, a specialised agency, the Slovenian Water Directorate, was established within the competent ministry.[37] The Directorate is tasked with preparing proposals for legal acts, managing concession-award procedures on the state's behalf, and monitoring the performance of concession contracts.

The primary legislative instrument governing this area is the Decree on the Provision of Obligatory State Services of General Economic Interest for Water Management and on Concessions and Public Services.[38] Under this Decree, the Republic of Slovenia is territorially divided into eight concession zones, with a concession granted for the provision of the public utility service within each respective zone. The overarching objective is to ensure the preservation and regulation of water volumes in Slovenia, monitor water conditions, protect against harmful effects of water (including emergency measures during heightened risk periods), maintain water infrastructure, oversee water and coastal lands, manage water protection, and maintain the water regime. Financing is provided by the state from its budget, in accordance with the prices and scope defined within each concession contract. The concession agreement establishes the overall volume of works and services to be provided, with more detailed annual contracts concluded on this basis. Concessions are awarded for a seven-year term.

36 | See, in more details, Sancin & Juhart 2023, 120.
37 | https://www.gov.si/drzavni-organi/organi-v-sestavi/direkcija-za-vode
38 | Official Gazette of the Republic of Slovenia, Nos. 109/10, 98/11, 102/12, 89/14 and 47/17.

A concession is granted through a public-private partnership (PPP) arrangement under the Public-Private Partnership Act (*Zakon o javno-zasebnem partnerstvu* – ZJZP).[39] This entails following a public procurement procedure in accordance with the relevant regulations. A concessionaire is selected and a concession contract concluded on that basis. Selection criteria include not only the lowest initial prices for mechanical services, but also transport resources, transport distances, and wage bases, alongside the concessionaire's technical equipment, availability of depots or other storage facilities, and staffing capacity.

Throughout the term of the concession, the Water Directorate retains supervisory authority over the implementation of the contract. To this end, it may require the concessionaire to provide all necessary documentation and permit the inspection of its business records. A breach of the concessionaire's obligations can result in early termination of the concession. Revocation is effected by a decision of the Government of the Republic of Slovenia.

3.2.5 Special Water Use

The Water Act (ZV-1) draws a clear distinction between general and special water use. Natural water and water and coastal lands, which hold the legal status of public property, may be used by anyone as long as such use does not adversely affect the water itself, disrupt the water regime, or disturb the natural balance of water and riparian ecosystems, or infringe upon the equivalent rights of others (Art. 21 (1) ZV-1). Any form of economic exploitation of water is classified as a special use of water as a public good. Obtaining a water right—through either a water permit or a concession—is mandatory for such use. Water rights have a pecuniary dimension: the beneficiary is obliged to remit a fee determined by law for the granted right, with the method and degree of water exploitation serving as the principal criteria for calculating the requisite compensation.

In the case of simpler, direct forms of water use, a water permit is sufficient. This applies, inter alia, to the supply of drinking water for personal use, bathing, heat generation, irrigation of agricultural or other land, recreational fishing in commercial ponds, operation of watermills or sawmills, the farming of freshwater or marine organisms, operation of ports or entry-exit checkpoints in accordance with inland navigation regulations, artificial snow production for ski slopes, and the generation of electricity in hydroelectric plants with an installed capacity under 10 MW (Art. 125 (1) ZV-1). A water permit is issued by the competent ministry upon application by the interested party, provided the proposed use conforms to the relevant criteria for granting water rights, is consistent with approved water management plans, and does not infringe upon pre-existing rights or general water use (Art. 127 (1) ZV-1). Where such use is linked to the construction of a facility,

39 | Official Gazette of the Republic of Slovenia, No. 127/06.

the permit must be obtained prior to the issuance of any land-use or construction permits. The permit itself specifies the substance of the water right, including the source, the method of extraction, and any conditions arising nature conservation law. Water permits are issued for a finite term, not exceeding 30 years, and may be extended if current legal conditions are met. Refusals may be challenged through judicial review in administrative proceedings.

More intensive forms of special water use require obtaining water rights by concession. A concession must be secured for water used in producing beverages, for swimming pools, heating and similar purposes, if mineral, thermal or thermomineral water is involved, for generating electricity in hydroelectric plants of 10 MW or more, or for the extraction of sediment not covered by a public service mandate (Art. 136 (1) ZV-1). A concession may be granted to any party satisfying the statutory conditions and is awarded by the Government of the Republic of Slovenia for a fixed period not exceeding 50 years, with the possibility of renewal if the relevant criteria continue to be met.

The concession procedure commences with the Government adopting a concession act, on the proposal of the competent ministry. In so doing, the Government must consider the national water management plan and the principle of sustainable water use. Any interested party may submit an initiative for the Government to adopt a concession act; the Government is required to respond within three months, indicating whether it will initiate the process. A pertinent example is the Decree of the Government of the Republic of Slovenia on the Concession for the Use of Thermal Water from the Mt-2/61 Well for Heating and Swimming Pool Needs in Rimska Čarda.[40] The Decree first defines the subject and scope of the concession—namely, the use of thermal water for swimming pool heating—and then sets out eligibility criteria, which broadly exclude only those entities in arrears on public obligations, those convicted by final judgment, or those barred by binding judicial or administrative decisions from undertaking the relevant activity. Additional conditions address the method of water use and, in particular, compliance with environmental protection standards. The concessionaire's specific obligations include maintaining separate accounts and monitoring the quantity of thermal water extracted and its effects. The method for calculating the concession fee is elaborately prescribed, taking into account both the volume and the qualitative characteristics of the water. The Decree further lays down the procedure for the public tender and the criteria for selecting of the concessionaire.

Upon the adoption of the concession act, the process of awarding the concession is initiated. The concession is granted through a public tender procedure, culminating in a selection decision issued by the Government, which must be rendered with due regard to all criteria and conditions specified in the concession act. The concession act may provide that preference be afforded to a bidder

40 | Official Gazette of the Republic of Slovenia, No. 77/23.

proposing a higher concession fee or otherwise offering terms more advantageous to the grantor.

Following the selection process, the Government, acting on behalf of the State of the Republic of Slovenia, concludes a concession agreement with the successful tenderer. This contract must be fully aligned with the concession act and must in particular regulate the purpose of the concession, any special conditions for the concessionaire, the amount and payment terms of the concession fee, the duration of the concession, and the rights and obligations of both parties. The grantor may unilaterally terminate the agreement for a breach by the concessionaire, in accordance with the principles of general contract law, or alternatively, may initiate administrative procedures for revoking the concession under the rules of administrative law. Both avenues lead to the premature termination of the concession contract and extinguish the water right. The law lists various grounds upon which a concession may be withdrawn, notably non-payment of the concession fee, unauthorised modifications to water infrastructure, and violations of conditions pertaining to the purpose, scope, or standards of water use, which the holder of the water right is obliged to observe (Art. 145 (1) and 146 (1) ZV-1).

4. Ownership Relationships

The concept of a 'public good' is crucial for understanding the ownership structure of water and of immovable property associated with water management. In the Slovenian legal system, a public good occupies a special place and, as in some other areas, it involves a combination of public and private elements. Notably, Slovenian law draws no formal distinction between "public" and private property: property rights are regulated uniformly, and the same rules apply irrespective of the owner's legal status. Simultaneously, certain things are deemed of such essential public significance that they must remain accessible to all in order to secure the conditions necessary for a dignified and functional life.

A public good is defined as an object which, by its very nature, is available for use by anyone under equal conditions—this is referred to as general use (*usus publicum*). Although the term 'public good' appears in Art. 70 of the Constitution, that provision merely alludes to the conditions under which such goods may be used, without supplying a precise legal definition. The substantive characteristics of a public good are, instead, articulated in Article 19 of the Law of Property Code (*Stvarnopravni zakonik* – SPZ),[41] which stipulates that a public good is an object that may be used freely, in accordance with its designated function, and under identical conditions by all. The defining attribute of a public good is thus its general use. Substantively, this means that anyone may use an object with public good status

41 | Official Gazette of the RS, Nos. 87/02, 91/13 and 23/20.

for its intended purpose under the same conditions as all others. An individual does not require any legal title to use a public good. The owner of an object that has the status of a public good must permit such use and may not prevent it. Typical instances include roads, water, and coastlines. These are most commonly provided by the state or local community, which—while remaining owner in title—accepts both the presence and activity of others on its land and the imposition of substantial limitations on the exercise of ownership rights. It is not an indispensable requirement, however, that a public good be publicly owned. It is entirely possible for a natural or legal person in private law to hold ownership over a public good. This does not, in and of itself, affect the object's legal status as a public good. What matters is that the exercise of ownership rights over such property must conform to statutory provisions governing the public nature of the asset. These may either define how ownership rights are to be exercised or establish specific limitations thereon in the public interest.[42]

Pursuant to Article 15 of the Waters Act (ZV-1), inland waters, the sea, and water-based land are public property. Inland waters are defined as standing or flowing surface waters on the land surface and groundwater (Art. 7 ZV-1). The management of inland waters falls to the Republic of Slovenia, or—where provided for by law—to the competent local self-governing community. Water lands are tracts of land upon which inland water is permanently or occasionally present and therefore create specific hydrological, geomorphological, and biological conditions (Art. 11 (1) ZV-1). Although all water lands are categorised as public property, Article 11(5) ZV-1 expressly allows that ownership may rest with either a public or private legal person. The sea, for legal purposes, includes internal sea waters and the territorial sea up to the high-tide line. Like inland waters, the sea is designated as public property, subject to management by the State of the Republic of Slovenia. The seabed of internal sea waters and the territorial sea up to the high-tide line constitutes the water land of the sea and is owned by the state (Art. 28 (2) ZV-1).

Coastal land may also be granted the status of a public good , particularly where such land adjoins or directly abuts water lands. In order to facilitate general water use, the local community may designate portions of coastal land as natural water public goods. Notwithstanding such designation, all coastal lands are subject to particular restrictions on the exercise of ownership rights. Thus, even where water or coastal land is held in private ownership, the owner must accept limitations flowing from the principle of general use. Specifically, any owner or lawful possessor of water, coastal, or other adjoining is obliged to permit unhindered access and passage across such land for the purpose of reaching the relevant water or marine resource, and must also allow its general use—save where a facility essential to water management has been lawfully constructed thereupon (Art. 38 ZV-1). In a highly publicised case, a court held that the operator of a natural seaside

42 | Administrative Court, judgment U 2364/2002.

swimming area, which has public good status, may not charge bathers an entrance fee or otherwise prevent them from using the water for bathing.[43]

Distinct legal rules apply to ownership in the context of water exploitation. A holder of water rights for the extraction of water for beverage production becomes the owner of the extracted quantity of water specified in the official act through which they acquired these rights (Art. 119 (2) ZV-1).

5. Experience and Future Directions

In the Republic of Slovenia, issues pertaining to water management elicit acute public and professional sensitivity. It is therefore no coincidence that the Constitution was amended to include a complex regulation concerning the right to drinking water and the provision of supply. A similar depth of public concern was once again manifest during the legislative process surrounding the amendments to ZV-1. On 30 March 2021, at the proposal of the competent ministry and the Government, the Parliament adopted the Act on Amendments to the Water Act. Among its various provisions, the Act permitted the construction of structures classified as simple structures—as defined in the regulations governing building construction—on water and coastal land, as well as in areas of intermittent lakes. Under relevant construction regulations, such "simple structures" include a broad spectrum of non-residential buildings: catering establishments, business, administrative, commercial premises, and ceremonial venues, as well as buildings for service activities, transport and communication facilities, and other service-related or public-use buildings. They also encompass public spaces, including public roads, streets, squares, markets, playgrounds, car parks, cemeteries, parks, green spaces, and recreational areas. This provision substantially widened the legal scope for interventions on water and coastal land. Authority to determine the permissibility of such interventions was vested solely in the Water Directorate of the Republic of Slovenia, which acts as the competent authority for issuing water consents. Although interventions were possible before the law was passed, they were limited to land within settlements. The amendments expanded these options to include all other natural water areas of inland waters and coastal zones that are, under applicable legislation, designated as natural water public goods and are crucial for maintaining, protecting, and enhancing environmental quality.

Under the legislative procedure, the National Council (*Državni svet*—the upper chamber of Parliament in Slovenia[44]) could have imposed a suspensive veto on the newly adopted Act. Despite a strongly critical motion from some members of

43 | Supreme Court of the Republic of Slovenia judgment III U 216/2013.

44 | The National Council functions as a consultative and supervisory body, distinct from the National Assembly (*Državni zbor*), which is the lower and primary legislative chamber with full law-making powers

the National Council, the veto was not ultimately exercised. In their motion, the proponents emphasised that the adopted law, in effect, equates coastal and water lands with other types of land, thereby removing the special protective function these lands serve in shielding surface water bodies from terrestrial impacts. They further warned that, given the disproportionate influence of private capital in Slovenia, the new law might inaugurate a regime under which the general public's right of access and use would be incrementally curtailed, to the detriment of the concept of water as a public good.

In the absence of a National Council veto, widespread opposition crystallised around the civil movement *Za pitno vodo* (Drinking Water Movement). This coalition of environmental organisations and concerned citizens swiftly mobilised to challenge the law through a referendum initiative, securing in excess of 40,000 voter signatures within the time limits prescribed by law—thereby fulfilling the statutory threshold for initiating a legislative referendum. The referendum was scheduled for 11 July 2021. During the referendum campaign, the Government and some political parties argued that the law primarily facilitated interventions for constructing public facilities. They maintained that any such facilities would be built in accordance with municipal spatial plans and would pose no threat to flood safety or water conditions. By contrast, opponents asserted that its implementation would significantly increase the risk of polluting surface water and related groundwater—Slovenia's main sources of drinking water. They further warned that free and equal access to water and coastal areas—a cornerstone of public use—would be imperilled, potentially becoming restricted to those able to pay for entry. They further criticised the undemocratic nature of the law's adoption process, pointing to the shortened time for public debate and the fact that the law was passed under a fast-track procedure. A broad range of eminent voices joined the opposition—including the Slovenian Academy of Sciences and Arts and the University of Ljubljana.

Voter turnout was 45.89%, ranking among the highest in a referendum in Slovenia's history. The result was unambiguous: a mere 104,312 voters (13.25%) supported the Act, while 682,760 voters (86.75%) opposed it. The remaining ballots were deemed invalid. Consequently, the proposed amendments to the Waters Act (ZV-1) were not enacted and did not enter into force.

6. Conclusion

Water management in the Republic of Slovenia is predominantly vested within the public domain, thereby allowing the public interest to be asserted with relative efficacy. The Slovenian Constitution enshrines not only the right to drinking water as a fundamental human right but also prescribes the institutional means by which this right is to be secured. In particular, it affirms state and local community

ownership of water resources and formally designates them as the main actors in water management. A principal impetus for the constitutional codification of the right to water was the apprehension that certain water management activities might be transferred from the public to the private sector.

That water—sometimes termed "blue gold"—is deeply ingrained in the social consciousness as a universally accessible good is illustrated by events following the enshrinement of the right to drinking water in the Constitution. Slovenians are exceptionally sensitive to any changes or interventions in water management regulations that might undermine the public interest or threaten access to water. Accordingly, legislative amendments passed by Parliament were decisively overturned in a referendum, as many professionals considered the proposed changes a potential threat to the broader public interest. This opposition emerged notwithstanding the fact that the amendments merely conferred broader decision-making powers upon public authorities. The professional community, however, voiced concern that such discretionary latitude could result in state authorities yielding to other interests rather than strictly safeguarding the public interest. Consequently, limiting the scope for interventions in water management is regarded as the strongest safeguard for the public's access to water.

The sole domain within which private interests hold discernible prominence in water management is that of direct water use for economic purposes. Individuals pursuing such objectives must obtain water rights, a special form of right combining elements of both public and private law. These rights do not derive by virtue of ownership of water or coastal land; rather, they are granted following a formal procedure. State authorities, guided by water management plans, are responsible for issuing these rights. In doing so, they must give primacy to the principle of general use, ensure protection against the adverse effects of water, and uphold environmental protection standards.

Slovenia's legal framework for water management thus stands as a compelling example of a legal framework that subordinates individual economic ambitions to the collective interests of present and future generations. Ownership of immovable property associated with water resources does not provide a legal basis for exclusive benefits. Property owners must accept restrictions on their ownership rights so as to preserve water's character as a public good—one which entitles all to its general use.

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Bartosz RAKOCZY[1]

Understanding Water Service Dynamics: A Through Questionare?[2]

Abstract

This article presents a thorough examination of the contextual and legal framework governing access to water services, together with a consideration of the supplementary mechanisms available within this domain. Water services, as understood herein, are defined as services in the scope of water supply. The analysis traces the evolution of governance models, charting the progression from the state model to the local government model. Moreover, the article considers the provision of water services by private entities. Within the Polish legal system, it is the commune that bears primary responsibility for ensuring the delivery of such services.

Keywords: Water Services, Water Law, Water Supply, Local Government, Environmental Protection Law

Introduction

The ongoing transformations brought about by climate change are producing a range of diverse effects that also significantly impact human activity. One of the crucial effects of climate change is the alteration of hydrological conditions. As water constitutes the essential element of all life — human and otherwise — any shift in water dynamics inevitably bears upon the very functioning of living organisms, humankind included.

In this context, climate change and its consequences pose a challenge for a modern legislator. It becomes incumbent upon the lawmaker to ensure that legislative instruments, including those related to water supply, are crafted with due regard to these environmental shifts and their far-reaching implications.

1 | Full Professor, Nicolaus Copernicus University in Toruń, Department of Environmental Law and Public Economic Law

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From the perspective of legal regulations, the classification of natural resources according to their renewability—namely as renewable, non-renewable, or slowly renewable—is of paramount importance. In law, this classification of natural resources, originally rooted in ecological and biological sciences, is linked to regulatory protection measures focusing either on quantitative or qualitative aspects.

In the case of non-renewable resources, such as mineral deposits, the law predominantly emphasises quantitative safeguards, aiming to preserve finite reserves. Conversely, renewable resources, such as atmospheric air, are typically protected through qualitative measures. Water occupies a unique position within this legal taxonomy, being most appropriately characterised as slowly renewable. While water has renewable properties, considering the natural water cycle, this cycle is increasingly destabilised by the advancing effects of climate change. Heightened rates of evaporation combined with declining levels of precipitation—phenomena well-documented within hydrological science—now imperil the availability of water suitable for human consumption.

Additionally, bodies of water also serve as natural habitats for certain species of flora and fauna. This means that, regarding water, both quantitative and qualitative protection are essential. Legal instruments must therefore attend to both the availability and purity of water resources. Among the most significant of these legal instruments is the regulation of water services.

This article sets out to analyse the concept of water services, appraising their significance, taking into account both the ecological perspective and in relation to the protection of human health and life. Central to this inquiry is an analysis of the prevailing models for the delivery of water services, with particular attention paid to the dynamics of changes within these models. In doing so, the article will explore the underlying drivers of such change and consider the likely trajectory of future developments in the governance and provision of water services[3].

The Concept of Water Services

No universally accepted definition of "water services" exists at either the international or European level. Indeed, while the Water Framework Directive employs the term 'water services', it does so solely in the context of specific uses of water—a context that does not align with the purposes of this article. Within European Union law, the subject matter of this article is principally governed by the European Directive of the 16 December 2020 on the quality of water intended for human consumption,[4] which will be examined in greater detail hereinafter.

3 | Szilágyi 2019, 255–275.

4 | Directive (EU) 2020/2184 of the European Parliament and of the Council of 16 December 2020 on the quality of water intended for human consumption (recast) (OJ EU L 435, 2020, p. 1).

For the purposes of this article, the concept of water services is understood to encompass a range of services provided by designated entities, the primary aim of which is the supply of water intended for human consumption. In this sense, water services are primarily regulated at the national level, constituting an essentially domestic issue for each country. Therefore, water services may bear different denominations across legal systems; for instance, what is understood *de lege lata* as collective water supply in some jurisdictions corresponds to la *fornitura dell'acqua* under Italian law. Thus, this article adopts a definition of water services that diverges from the legal interpretations set forth in the Directive on the quality of water intended for human consumption. Here, water services are construed broadly to include all activities related to the abstraction of water, its treatment, and its subsequent supply for human use.

Historical Context of Water Services

Water, as a subject of legal regulation, has captivated the attention of lawmakers since antiquity. Among the most illustrious ancient legal texts—the Code of Hammurabi—devotes as many as five paragraphs to water-related matters, chiefly addressing the regulation of water relations and the protection of dykes. Meanwhile, irrigation systems were devised both in ancient Egypt and ancient Mesopotamia; in essence, these constituted rudimentary water supply networks, though their primary purpose was not to serve the populace but to irrigate agricultural lands.

The earliest legal frameworks concerning water supply to the general population emerged within Roman law. In Roman law, water was recognised as a *res publica*—a public good—but crucially, it was not subject to private trade or commerce—*res extra commercium*. The remarkable feats of Roman architecture in supplying water to the inhabitants of Rome endure to this day.

However, the genesis of modern water supply systems should be traced back to the 19th-century advancements in sanitary engineering and hydrology. The 19th century saw a rapid and dynamic economic expansion, which led to a rapid urbanisation and city expansion. It was also an era marked by numerous inventions—many of which persist in application—particularly within the fields of sanitary and environmental engineering.

This rapid and dynamic development culminated in the enactment of the first legal acts, which, which, over time, have crystallised into the distinct branch of law now known as water law. The legal regulation of matters pertaining to the natural occurrence of water became intrinsically linked with the regulation of water supply itself.

In the latter half of the 19th century, water supply systems flourished within the confines of burgeoning urban centres. The establishment of water supply

systems within city boundaries engendered an imperative to ensure the maintenance of these facilities, particularly in terms of their durability, reliability, and uninterrupted service. Thus, the first entities responsible for water supply and the maintenance of the water supply systems were established.

It should be noted, however, that the original legal, economic, and organisational solutions regarding water supply were predominantly tied to the establishment of specialised entities within municipal structures. Municipal authorities were thus the primary actors in establishing these specialised entities responsible for water supply, rendering them essentially municipal bodies. There were also solutions where the city retained direct responsibility for supplying water.

Such development unfolded with remarkable uniformity across Europe, influenced less by political considerations than by the prevailing levels of engineering and technological progress. To this day, the architects of such systems—figures such as Lindley in Warsaw—are remembered and highly respected. Nevertheless, legal and organisational changes occurred in connection with political changes.

The revolution of 1917 heralded the advent of a completely new economic paradigm, predicated upon the nationalisation of property, including that held by municipalities, and the dissolution of local self-government. On a broader scale, this process, carried out across Central and Eastern Europe in the post-war period, gave rise to a legal and organisational model whereby water services were provided by the state solely through specialised organisational units. In contrast, the model adopted in Western Europe, particularly within the European Economic Community and now the European Union, largely retained a model in which responsibility for providing water services continued to rest with local authorities.

In the case of the Western European model, the internal structure of the state was also essential. For example, in the Federal Republic of Germany, the locus of authority predominantly resides within the system of national law rather than federal law. To this day, the solutions adopted in Germany remain at the level of the individual *Länder* (German federal states) rather than the federation as a whole.

Similarly, under Italian law, water services are firmly linked to a local government unit, that is, the municipality (in Italian, *comune*), despite the state's structure bearing certain federal characteristics. The equivalent of a *Land* in the Italian structure is the *regione* (region), albeit with considerably less autonomy than its German counterpart. Therefore, within Italian politics and legal practice, it has been far more feasible to anchor water services to the structure of local government. Reflecting the historical origins of water services dating back to the 19th century, two fundamental models of water service provision have emerged in Europe. The first, characteristic of Western Europe—particularly when considering the political divisions of Europe prior to the 1990s— is a model

closely aligned with local government responsibility. The second model, prevalent in Central and Eastern Europe, is predicated on the nationalisation of the sector[5].

The model characteristic of Western Europe treated water services as an expression of local self-governance. It was grounded in the assumption that matters relating to water supply fall within the competence of the local community, which should independently handle the matter of water supply. This approach was a natural continuation of the historical trajectory of water service regulation, which, as previously outlined, originated in the larger urban centres. Accordingly, the Western European model preserved and carried forward the municipal solutions adopted in the nascent stages of organised water service provision.

By contrast, the model characteristic of Central and Eastern Europe diverged markedly. In this region, water services came to be regarded as a prerogative of the state, to be administered through its institutional apparatus and under its authority. The solutions of nationalising water services formed part of a broader context of nationalising all sectors of public life and were not an exception in this regard. The state-centric model, which underpinned the economies and governance systems of Central and Eastern European countries, subsumed the provision of water services into its wider organisational and social schemes. Water service provision, therefore, were only a part of these assumptions related to the organisation of public life in Central and Eastern European countries.

Within this model, a fundamental prerequisite was the nationalisation—or, more precisely, the establishment of state ownership—of all property and infrastructure employed in the provision of water services. It primarily concerned a wide array of technical devices, such as pipelines, filtration systems, pumping stations, submersible pumps, and other related installations.

The collapse of this economic paradigm in the 1990s ushered in a profound transformation, compelling the nations of Central and Eastern Europe to confront a series of complex dilemmas concerning the organisation and governance of water services under an entirely new political and economic order. It is important to observe that the responses to this transformation were not uniform across the region; rather, individual states pursued divergent regulatory paths. In some cases, such as in Poland, water services went through a transition from nationalisation to their recommunalisation. In the Polish legal system, the responsibility for the collective supply of water is vested in the commune (*gmina*), which constitutes the primary unit of local self-government. Accordingly, it is the commune that now bears duty to ensure the delivery of water services within its territory.

Comparable regulatory frameworks have been adopted under Czech law. By contrast, the Hungarian legal system undergoing a gradual reversion towards the nationalisation of water supply services.

5 | Koncz 2019, 203–217.

The Polish model serves as an instructive example of the direction in which legal regulations concerning water supply evolved.

An inquiry into the evolution of any legal system—or a particular segment thereof—must necessarily commence with the delineation of a clear temporal framework. Of course, research can begin with antiquity; however, such an approach generally yields insights of a primarily historical-legal character. Where, however, the objective is to evaluate the contemporary state of the law through a comparative lens, juxtaposing its current form with that of an earlier period—as is the case in this study—it is imperative to define the temporal scope with precision.

Given the nature of this study, the period under examination here is demarcated by the operational lifespan of the Polish Waterworks Chamber of Commerce. The selected timeframe spans from 1 September 1992 to 1 September 2012.

This study seeks to elucidate the evolution of the normative framework governing collective water supply and collective sewage disposal, an evolution that resulted from the transformation of the Polish legal system initiated in 1990. The study will take into account the influence of general legislative trends on the concept of collective water supply and collective sewage disposal, as well as the notable influence of European Union legislation in shaping this domain.

Traditionally, the issue of collective water supply and sewage disposal has been situated within the ambit of Water Law. This classification was justified insofar as the natural factor common to both domains—water and its utilisation—formed a conceptual nexus between them. Consequently, collective water supply and sewage disposal came to be regarded as a specialised subset of Water Law. However, this association did not preclude the emergence of distinct legislative instruments addressing these matters in their own right.

The first legislative act regulating water supply in Polish law, excluding the normative legacy of the partitioning states, was the Regulation of the President of the Republic of Poland of 16 March 1928 on public water supply[6]. That legal act was subsequently repealed and replaced by the Act of 17 February 1960 on public water supply[7]. Further legal development occurred with the adoption of the Act of 10 December 1965 on the supply of water for agricultural purposes and to rural areas[8]. Finally, the codification of these issues was achieved in the Water Law Act of 24 October 1974, which repealed both the 1960 and the 1965 statutes. Articles 98 to 108 of the 1974 Act were dedicated specifically to matters of public water supply and public sewage disposal. Hence, while issues had long been connected to the broader body of Water Law by their very nature, they only became formally integrated into it through this legislative act.

6 | Dz. U. (Journal of Laws) No. 32, item 310, as amended
7 | Dz. U. (Journal of Laws) No. 11, item 72, as amended
8 | Dz. U. (Journal of Laws) No. 51, item 314, as amended

A natural consequence of subsuming the issue of collective water supply and sewage disposal within the broader framework of Water Law was the classification of these services under the domain of administrative law—consistent with the legal character of Water Law in its entirety. As Tarasiewicz aptly observed, "The Water Law of 1974 maintained the principle that the operation of water supply and sewage disposal systems in cities and rural areas, as well as state-owned agricultural enterprises, is the responsibility of the State, which carries out these tasks at its own expense."[9]

This legislative configuration had further ramifications: it resulted in the predominance of the method of regulating legal relationships according to administrative law over methods characteristic of civil law. The legal relationship between the service provider and the service recipient was accordingly marked by an imbalance of power, with the provider occupying a superior, authoritative position.

An administrative decision should be considered a predominant legal instrument in shaping these legal relationships. Moreover, planning elements so emblematic of the prior legal regime assumed a pivotal role in the structuring of the sector. The construction of water supply and sewage disposal infrastructure also remained firmly within the remit of the state administration, whose actions in this area were carried out using authoritative, top-down instruments. The responsibility for both the construction of water and sewage infrastructure and the provision of collective water supply and sewage disposal services rested solely with the state administration.

The first change in the legislator's approach to the concept described above can be observed in the Act of 8 March 1990 on Municipal Government[10] (at the time of its adoption titled the Act on Local Government). While the regulation of collective water supply and sewage disposal id not constitute the act's primary objective, it nonetheless formed an element of a much broader and more profound transformation—namely, the reorganisation of public administration and the re-establishment of local self-government.

The establishment of local government necessitated the assignment of specific responsibilities thereto, distinct from those of state administration. It was also imperative to define, regulate, and determine the legal nature of these tasks. The legislator addressed this matter in the initial provisions of the Act on Municipal Local Government, with particular reference to Article 7 thereof.

According to the theory of administrative law, public tasks arise only where an individual is unable to meet their needs independently—whether individually, within the family unit, or, as appropriate, through other higher institutions of civil

9 | Tarasiewicz 1981, 163.
10 | Dz. U. (Journal of Laws) of 2001, No. 142, item 1591, as amended

society[11]. In such instances, it falls to the state to assume certain obligations, with local serving as the primary vehicle for discharging these duties, primarily at the lowest level, which is the commune[12].

The legislator employed the notions of the 'own task' (*zadanie własne*) and the 'public utility task' (*zadanie użyteczności publicznej*). The fundamental element of an 'own task' is that it is discharged at the expense, on behalf, and at the responsibility and risk of the commune. By contrast, a public utility task is a specific category of own task—distinguished by its aim of satisfying the collective needs of the local community. The latest literature on administrative law defines own tasks as "local government tasks, which, in accordance with the principle of subsidiarity, ought to be carried out by self-governing communities of residents rather than by hierarchical administrative structures subordinate to central state authorities".[13]

The provision of collective water supply and collective sewage disposal is explicitly specified in Article 7(1)(3) of the Act on Municipal Local Government. Notably, the legislator did not limit the scope of the commune's responsibilities merely to water supply and sewage disposal alone. Rather, distinct emphasis was placed on the necessity of developing the requisite infrastructure for water supply and sewage disposal.

With the entry into force of the Act on Municipal Local Government, collective water supply and collective sewage disposal were linked to the commune as an own task of a public utility nature. This legal characterisation has endured to the present day, as is confirmed, inter alia, by Article 3 of the Act of 7 June 2001 on Collective Water Supply and Collective Sewage Disposal[14], which provides that:

"1. Collective water supply and collective sewage disposal shall constitute own tasks of the commune.

2. Where communes undertake the performance of the task referred to in paragraph 1 jointly, the rights and obligations of the commune bodies, as set forth in the relevant legislation, shall be exercised by the competent bodies of:

1) the inter-communal association; or

2) the commune designated in the inter-communal agreement.

3. The commune shall determine the directions for the development of the network in the study of conditions and directions of spatial development of the commune and the local spatial development plan"[15].

The entry into force of the Act of 28 July 1990 amending the Civil Code exerted an indirect yet notable influence on the concept of collective water supply and

11 | Izdebski 2009, 131.
12 | Ibid. 131.
13 | Chmielnicki 2010, 943.
14 | Dz. U. (Journal of Laws) of 2006, No. 123, item 858, as amended
15 | See, i.a. Wiśniewski 2001, 11; Gałabuda 2003, 25; Woryna 2003, 109; Krzyszczak 2005, 61; Wierzbowski 2006, 50; Dziadkiewicz 2011, 147; Pawełczyk 2014, 64; Michalski 2022, 23; Rozwadowska-Palarz & Palarz 2002, 74.

collective sewage disposal[16]. This major amendment to the Civil Code fundamentally changed the role of civil law instruments in shaping legal relations, elevating civil law mechanisms to the position of primary regulatory tools, whilst correspondingly diminishing the prominence of instruments rooted in administrative law. This shift eventually found expression within the normative concept of collective water supply and collective sewage disposal, albeit with a delay of eleven years, as shall be addressed in due course.

Therefore, following the two significant changes in the legal system in 1990, it could be said that collective water supply and collective sewage disposal became categorised as an own task of a public utility nature incumbent upon the commune. Notwithstanding this reassignment of institutional responsibility from the central state to the local self-government unit, legal relations in this domain remained, at that stage, subject to the prevailing regulatory paradigm of administrative law. Nevertheless, a gradual erosion of the administrative model in favour of one grounded in civil law principles became discernible.

Another significant milestone in the evolution of the concept of collective water supply and collective sewage disposal was the enactment of the Act of 23 December 1996 on Municipal Management[17]. While this piece of legislation did not directly govern matters pertaining to collective water supply and collective sewage disposal, it exerted a significant influence on the implementation of municipal management, within which such public utility tasks are subsumed.

The primary focus of the Act on Municipal Management lies in the subjective dimension of municipal activity. It is principally concerned with regulating issues related to organisational and legal forms through which a commune may undertake municipal management[18]. The legislative solutions embedded in this Act have a direct bearing on the admissibility of organisational and legal forms recognised under the Act on Collective Water Supply and Collective Sewage Disposal.

The most extensive restructuring of the model governing collective water supply and collective sewage disposal occurred in the year 2001. The impetus for this transformation, however, did not arise directly from concerns relating to water supply and sewage disposal, but rather stemmed from broader developments in the field of environmental protection law. In the same year, on 27 April 2001, the Environmental Protection Law was enacted,[19] establishing a foundational statute for the Polish environmental legal framework. In consequence of the adoption of this cornerstone legislative act, a new Water Law was subsequently promulgated on 18 July 2001.[20]

16 | Dz. U. (Journal of Laws) No. 55, item 321
17 | Dz. U. (Journal of Laws) of 2011, No. 45, item 236, as amended
18 | See, i.a. Banasiński & Kulesza 2002; Gonet 2007; Szydło 2008; Gonet 2010.
19 | Dz. U. (Journal of Laws) of 2008, No. 25, item 150, as amended
20 | Dz. U. (Journal of Laws) of 2012, item 145

Equally consequential in assessing the evolution of the underlying concept was the enactment of the Act of 27 April 2001 on Waste[21], which, when read in conjunction with the earlier Act of 13 September 1996 on Maintaining Cleanliness and Order in the Commune[22], laid the groundwork for a comprehensive regulatory framework governing waste management. The issue of waste is inextricably linked to that of wastewater, rendering it essential to reference these two legislative instruments, both of which exerted a considerable influence on the conceptual development in question.

The most momentous reform, however, was the adoption of the new Act on Collective Water Supply and Collective Sewage Disposal, to which the Chamber of Commerce Polish Waterworks made a substantial contribution.

As aptly noted by A. Rozwadowska-Palarz and H. Palarz, "the need for adopting the Act on collective water supply and collective sewage disposal [...] arose from the absence of regulations specifying the rules for the operation of water supply and sewage disposal enterprises, as the obligations of these enterprises towards consumers and the detailed principles for setting and verifying tariffs were not defined"[23].

Wiśniewski further noted that "the Act on Collective Water Supply and Collective Sewage Disposal fills the legal gap that emerged in this field following the transformation of water supply and sewage disposal infrastructure from state ownership into municipal self-government property"[24].

However, Dziadkiewicz highlighted that "the regulation aimed to ensure the security of services—understood as guaranteeing continuity of supply and adequate water quality, reliable sewage disposal and treatment, and the development of these services—to create opportunities for complying with increasingly stringent environmental protection requirements and to improve the economic efficiency of water supply and sewage disposal enterprises"[25].

The enactment of the Act on Collective Water Supply and Collective Sewage Disposal triggered radical and profound changes in the normative framework for regulating collective water supply and collective sewage disposal. However, the legislator did not effect a complete departure from the pre-existing regulatory framework. For the first time, matters pertaining to collective water supply and collective sewage disposal were consolidated within a single legislative instrument.

This legislative development also signified a redefinition of the axiological foundations for regulating collective water supply and collective sewage disposal, with the legislator according precedence to a set of values distinct from those previously foregrounded. The shift in axiological emphasis rendered it not only

21 | Dz. U. (Journal of Laws) of 2010, No. 185, item 1243, as amended
22 | Dz. U. (Journal of Laws) of 2012, item 391
23 | Rozwadowska – Palarz & Palarz 2002, 7.
24 | Wiśniewski 2001, 7.
25 | Dziadkiewicz 2011.

possible but arguably imperative to regulate matters concerning collective water supply and collective sewage disposal by means of a separate legal act.

First and foremost, it should be noted that the legislator has designated the contract as the primary legal instrument regulating relations in the sphere of water supply and sewage disposal. As a result, the legislator abandoned the authoritative method of regulating legal relations, which was characteristic of the previous concept. This is not to suggest, however, that enterprises engaged in water supply and sewage disposal have been entirely divested of their authoritative influence over the counterparty to the legal relationship. Rather, the exercise of such authority has become peripheral and largely symbolic, rather than central or prevailing[26].

Under the current legal framework, an enterprise engaged in the provision of water supply and sewage disposal services is no longer vested with the power to issue authoritative administrative decisions defining the legal situation of the other party to the legal relationship. Nonetheless, the residual authoritative character of such enterprises is reflected, inter alia, in their capacity to issue technical conditions for connection, unilaterally specifying the obligations of a potential service recipient.

The contract, as the principal legal instrument governing water supply and sewage disposal, assumes a position of primacy not only in the legal relations between the water supply and sewage disposal enterprise and the end recipient of the service, but equally in the legal relations between the enterprise and any other entity from which the enterprise procures water or to which it discharges sewage—commonly referred to as wholesale water purchase or wholesale sewage disposal).

As a consequence of the legislator's decision to accord primacy to the contract as the primary instrument regulating water supply and sewage disposal, it became necessary to delineate more precisely the legal position of the commune within the framework of collective water supply and collective sewage disposal.

Despite the profound transformation of the normative concept, the legislator did not abandon the fundamental premise that collective water supply and collective sewage disposal constitute an own task of the commune. Nevertheless, the new emphasis placed upon the contractual basis of legal relations in this sphere necessitated a redefinition of the commune's role therein.

In undertaking this redefinition, the legislator encountered certain difficulties. As a result, the legal status of the commune under the Act on Collective Water Supply and Collective Sewage Disposal lacks clarity and precision. The commune may, therefore, find itself party to a range of legal relations—both public and private in nature—depending on the particular legal context in which it acts.

26 | Rakoczy 2007.

The emergence of the new normative concept of water supply and sewage disposal compelled the legislator to address the legal status of the entity entrusted with the provision of such services. During the era in which water supply and sewage disposal fell under the remit of the state administration, it was of relatively little consequence to determine precisely which specialised entity was to execute these functions. Accordingly, the Water Law of 1974, along with its legislative predecessors, afforded scant attention to issues concerning the entity providing the services. However, with the elevation of the contract to the position of principal legal instrument governing these relations, it became imperative to regulate the subjective—or personal—dimension of the legal framework[27].

While the conclusion of a civil law contract may, in certain respects, still be regarded as an expression of public administrative activity, this role is now secondary and peripheral. As a result, the issue of water supply and sewage disposal has assumed a tripartite structure. The commune remains the entity responsible for the performance of this own task, as reaffirmed by Article 3 of the Act on Collective Water Supply and Collective Sewage Disposal, which has already been referenced[28]. The commune may discharge this responsibility directly; alternatively, it may do so through the establishment of a municipal budgetary institution. Lastly, the commune may either found or accede to a commercial company for the purpose of executing these services.[29]

Ultimately, the commune may commission this task to an organisationally independent entity, provided such delegation is effected in a manner prescribed by law. A key element of the collective water supply and collective sewage disposal concept lies in the explicit distinction maintained between these two spheres of activity as undertaken by the relevant service enterprise. While the consolidation of water supply and sewage disposal under a single statutory instrument may, at first glance, appear somewhat artificial or counterintuitive, there exist persuasive justifications for addressing both sectors of municipal management within the framework of one legislative enactment, notwithstanding the substantive divergences that characterise them.

Chief among these justifications is the shared feature of the specialised nature of the service provider. As indicated in Articles 16 et seq. of the Act on Collective Water Supply and Collective Sewage Disposal, the entity must have the appropriate technical and organisational capacity.[30] Accordingly, it is both feasible and lawful

27 | Rakoczy 2012a.
28 | Wiśniewski 2001, 11; Gałabuda 2003, 25; Woryna 2003, 109; Kryszczak 2005, 61; Wierzbowski 2006, 50; Dziadkiewicz 2011, 147; Pawełczyk 2014, 64; Michalski, 2022, 23; Rozwadowska-Palarz & Palarz 2002, 74.
29 | Rakoczy 2009, 182–191.
30 | Wiśniewski 2001, 11; Gałabuda 2003, 25; Woryna 2003, 109; Kryszczak 2005, 61; Wierzbowski 2006, 50; Dziadkiewicz 2011, 147; Pawełczyk 2014, 64; Michalski, 2022, 23; Rozwadowska-Palarz & Palarz 2002, 74.

for a single entity to be simultaneously responsible for the supply of water and the disposal of sewage.

Both water supply and sewage disposal necessarily depend upon the existence of specialised infrastructure. Such services may be rendered solely by an entity equipped with the requisite technical facilities dedicated to water supply and sewage disposal, regardless of the nature of its legal title to those facilities.

In the Act on Collective Water Supply and Collective Sewage Disposal, however, the legislator appears to have underestimated the critical importance of such infrastructure, without which the proper delivery of these essential public services cannot be ensured. The statutory regulations concerning the status of water supply and sewage disposal facilities remain disjointed and incomplete. It is equally unclear why the legislator opted to regulate certain issues in the Act, while leaving other equally significant matters unaddressed.

This legislative inconsistency has given rise to considerable uncertainty in both scholarly commentary and judicial decisions, particularly in relation to the statutory definitions of "network" and of "connections" for water supply and sewage disposal. In this regard, the legal status of such infrastructure is instead governed by the general provisions of the Civil Code, with particular reference to Article 49 thereof.

This provision reads as follows: "§ 1. Transmission installations intended for the conveyance or discharge of liquids, steam, gas, electricity, or similar utilities shall not be deemed fixtures of the real estate if they constitute part of an enterprise.

§ 2. A party who has borne the costs of constructing such transmission installations as referred to in § 1 and holds title to them may require the entrepreneur, whose network the installations have been connected to, to acquire ownership thereof against appropriate remuneration, unless the parties have agreed otherwise. The entrepreneur may likewise demand the transfer the ownership of such installations."

The concept of collective water supply and collective sewage disposal—inseparably connected with the existence and operation of appropriate water supply and sewage disposal infrastructure—is influenced by the provisions of the Civil Code, which regulate the legal status of transmission apparatus. The evolution of these provisions evidences the legislator's growing appreciation of the critical role such infrastructure plays in the delivery of public utility services. Equally, the legislator acknowledged the legal claims of property owners—be they for remuneration, compensation, or demands for the removal of installations—as matters warranting due attention. Thus, the Polish legislator, with the active engagement and support of the Chamber of Commerce Polish Waterworks (*Izba Gospodarcza Wodociągi Polskie*, IGWP), undertook legislative reform aimed at ensuring the stability of the existence of transmission infrastructure—including water supply and sewage disposal installations—situated upon land belonging to third parties.

The culmination of these efforts was the adoption of the Act of 30 May 2008, amending the Civil Code and certain other statutes[31], through which a wholly new legal construct—the transmission easement—was introduced into the Polish legal order.

The general appraisal of this legislative approach reveals that the legislative direction is appropriate. First and foremost, the legislator achieved the result of ensuring a stable legal title, enabling the siting of transmission infrastructure on third-party land—this legal title taking the form of a limited real right, the legal certainty and durability of which must be regarded as a matter of paramount importance.

Further to this, the legislator explicitly aimed to maximally dissociate, as far as practicable, the continued existence of this legal title from the position of the property owner. As practice shows, such a position is often unstable and changeable, influenced by an array of extraneous circumstances. It would be wholly unrealistic to expect that a water supply and sewage disposal enterprise, or more broadly, a transmission system operator, could prudently base decisions regarding the siting and development of infrastructure solely based on individual consent or bilateral agreements with landowners. Such arrangements fall short of providing the legal stability that the legislator sought to secure.

Finally, at the heart of the legislator's approach lies the imperative of safeguarding legal certainty in civil transactions. To this end, the transmission easement is recorded in the land and mortgage register, ensuring that any future acquirer of the affected property is bound by and must take account of its existence.[32]

The conceptual evolution of collective water supply and collective sewage disposal has also been strongly influenced by European legislation , which has, in many respects, become the principal point of reference for the domestic legislator. However, in accordance with the principle of subsidiarity, the European legislator does not aspire to regulate all issues related to collective water supply and sewage disposal. Its intervention is both selective and purposive, primarily addressing two key concerns: first, proper sewage management, within the broader context of waste and environmental protection; and second, the maintenance of suitable quality standards for water intended for human consumption.

In the domain of wastewater management, the European legislator's principal interventions are embodied in three key directives: Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment[33], Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption[34],

31 | Dz. U. (Journal of Laws) No. 116, item 731
32 | Rakoczy 2012, 23.
33 | (OJ EU L 135, 30.05.1991),
34 | (OJ EU L 330, 05.12.1998),

and finally, Directive 2000/60/EC of 23 October 2000 establishing a framework for Community action in the field of water policy.[35]

The ongoing reconfiguration of the concept of restructuring of the concept of collective water supply and collective sewage disposal in Poland—which entails a gradual transition from regulatory methodologies characteristic of administrative law to those anchored in civil law—remains an unfinished project. As Rotko aptly observed, however, "the Act [on Water Supply – author's note] culminates the developmental trajectory of Polish regulations governing the activities of the water and sewage sector"[36].

While this conceptual framework now rests substantially upon private law foundations, the legislator has yet to find a solution regarding the role to be assigned to public entities—most notably, communes—in collective water supply and collective sewage disposal. The position of the commune in the Act on Collective Water Supply and Collective Sewage Disposal is inherently complex and at times contradictory, with certain elements of its role overlapping or even mutually excluding one another. The legislator must, and does, respond to changes across the entire legal system, such as the recent strengthening of consumer legal protection.

Moreover, changes in European law continue to exert considerable influence. Of particular concern to the Chamber of Commerce Polish Waterworks are recent and prospective changes related to the regulation of the legal status of water supply and sewage disposal facilities, especially insofar as these changes intersect with complex historical and legal considerations.

The Chamber of Commerce Polish Waterworks appears acutely aware of these manifold circumstances and has assumed an active role in the legislative field—whether by joining initiatives spearheaded by other entities or by independently advocating for legislative reform.

The eleven years during which the Act on Collective Water Supply and Collective Sewage Disposal has remained in force have afforded sufficient temporal perspective to appraise both its merits and its deficiencies. This evaluation led to the position that the legal framework governing this vital sector requires not only immediate and targeted amendments but also far-reaching, structural reform. The ultimate aim is the enactment of a contemporary and coherent statute, befitting the modern demands of water supply and sewage disposal.

35 | (OJ EU L 327, 22.12.2000).
36 | Rotko 2011, 11.

Water Services in the Polish Legal System

As previously observed, a characteristic feature of the historical evolution of legal regulations concerning water services has been the legislator's shifting approach to the placement of such provisions—oscillating, in response to various extra-legal influences, between their integration into general water law and their articulation in distinct, autonomous legislative instruments. As noted in Polish legal literature, the adopted solutions depended on whether the legislator expanded the scope of state control over water services or whether this regime was more lenient. Under current law, the issue of water services is regulated in a separate legal act, namely the Act of 7 June 2001 on Collective Water Supply and Collective Sewage Disposal[37].

Within the Polish legal order, this statute stands apart from the Act of 20 July 2017 – Water Law.[38]

While there undoubtedly exists a substantive nexus between, they do not form a monolithic body of legal solutions.

In addition to these two acts concerning water and water supply, the broader legal architecture of the water services sector is also regulated by additional legal acts. One such act is the Act of 8 March 1990 on Municipal Local Government,[39] which lays down the organisational structure and delineates the responsibilities of the local government unit—specifically, the commune—entrusted with the provision of water services under Polish law. The general principles of municipal management, including those applicable to water supply, are in turn regulated by the Act of 20 December 1996 on Municipal Management.[40]

The provisions of civil law, primarily the Act of 23 April 1964, the Civil Code[41], and the Act of 17 November 1964, the Code of Civil Procedure,[42] occupy a position of considerable importance in the regulation of water supply. These statutes are so essential that, within the Polish legal system, the primary legal instrument governing the provision of water services is a contract, a construct firmly situated within the domain of private law.

37 | Act of 7 June 2001 on Collective Water Supply and Collective Sewage Disposal (consolidated text Dz. U. (Journal of Laws) of 2024, item 757).
38 | Act of 20 July 2017 – Water Law (consolidated text Dz.U. (Journl of Laws) of 2024, item 1087 as amended).
39 | Act of 8 March 1990 on Municipal Local Government (consolidated text: Dz.U. (Journal of Laws) of 2024, item 1465 as amended).
40 | Act of 20 December 1996 on Municipal Management (consolidated text: Dz.U. (Journal of Laws) of 2021, item 679).
41 | Act of 23 April 1964 – Civil Code (consolidated text Dz.U. (Journal of Laws) of 2024, item 1061 as amended).
42 | Act of 17 November 1964 – Code of Civil Procedure (consolidated text Dz.U. (Journal of Laws) of 2024, item 1568 as amended).

Moreover, one must not overlook the statutory instruments that govern the supervision of water supply activities. Chief among these is the Act of 14 March 1985 on Sanitary Inspection. In Polish law, which designates the sanitary inspection authority as the competent body responsible for overseeing the quality of water intended for human consumption within the Polish legal system.

The Polish legislator has adopted a decentralised model whereby the provision of water services falls within the tasks and responsibilities of the lowest tier of local government, namely the commune. This is expressly affirmed in Article 3(1) of the Act on Collective Water Supply and Collective Sewage Disposal, which reads: "Collective water supply and collective sewage disposal are the commune's own tasks".[43]

Polish law characteristically incorporates collective water supply and collective sewage disposal within a single legal act. It is, however, imperative to underscore that there exists no substantive interdependence between these two spheres of activity. Each may be performed independently; nevertheless, it has been deemed expedient to vest both functions in a single entity—typically a public undertaking, namely a water supply and sewage disposal enterprise—as the prevailing model of effective service delivery.

It must be acknowledged that certain entities engage exclusively in the provision of water supply or sewage disposal services. This bifurcation of functions is not, in itself, detrimental to the efficacy of the overall system.

Under Polish law, collective water supply constitutes one of the commune's own task. This designation is of critical legal significance. An "own task" is one that the commune undertakes at its own expense, on its own account, under its own responsibility, and at its own risk. It is further characterised as a mandatory task—one from which the commune may not lawfully withdraw.

In Polish law, the attribution of responsibility for water services to the commune does not entail that the commune must perform the task personally or in isolation. Rather, the model adopted under Polish law includes three groups of entities involved in providing water services: the commune, the water supply and sewage disposal enterprise, and the individual service recipient. These three groups of entities are bound together by a web of legal relations, encompassing both public and private law dimensions. Foremost among these is the contractual relationship between the water supply and sewage disposal enterprise and the service recipient. Despite this, the commune remains the central figure in this legal and organisational framework.

The legal situation of the commune has already been described above. As previously elaborated, the provision of water services is an own task of the commune, for

43 | Wiśniewski 2001, 11; Gałabuda 2003, 25; Woryna 2003, 109; Kryszczak 2005, 61; Wierzbowski 2006, 50; Dziadkiewicz 2011, 147; Pawełczyk 2014, 64; Michalski, 2022, 23; Rozwadowska-Palarz & Palarz 2002, 74.

which it bears ultimate responsibility. While it does not function as a supervisory or regulatory authority in the strict administrative sense, its involvement imparts a public law character to the market for water services. Even where private entities serve as the immediate providers of such services, the commune retains an active and decisive role in structuring and ensuring the availability of water services to the population.

The prominent role accorded to the commune is a clear expression of the legislator's intent to preserve the provision of water services within the domain of public law, rather than surrendering it entirely to the dynamics of private law and market forces. The commune stands as a guarantor of the proper provision of water services.

In its capacity as the principal organiser of the water services market, the commune is engaged in specific legal relationships both with the water supply and sewage disposal enterprise and with the service recipients. This legal entanglement is wholly appropriate, given that the commune is carrying out its designated own task through these interactions. To this end, the legislator has endowed the commune with specific powers that enable it to determine how water services are provided.

The principal normative instrument through which the commune performs its tasks related to water supply is the regulation on water supply and sewage disposal. This regulation has the status of a local act of law, and is thus legally binding. It is adopted by the commune's legislative body, namely the local council. The statutory content of this regulation is outlined in Article 19(5) of the Act on Collective Water Supply and Collective Sewage Disposal[44], which provides as follows:

"The regulation on water supply and sewage disposal shall define the rights and obligations of the water supply and sewage disposal enterprise as well as the service recipients, including:

1) the minimum standard of water supply and sewage disposal services to be provided by the enterprise;
2) the terms and procedure for concluding contracts with service recipients;
3) the billing method based on the prices and fees set specified in the applicable tariffs;
4) the conditions for connecting to the network;
5) the technical requirements governing access to water supply and sewage disposal services;
6) the method of acceptance of network connections by the enterprise;
7) the steps to be taken in the event of service interruptions or failure to meet the required standards of supplied water and discharged sewage;

44 | Wiśniewski 2001, 11; Gałabuda 2003, 25; Woryna 2003, 109; Kryszczak 2005, 61; Wierzbowski 2006, 50; Dziadkiewicz 2011, 147; Pawełczyk 2014, 64; Michalski, 2022, 23; Rozwadowska-Palarz & Palarz 2002, 74.

8) service standards applicable to users, including the handling of complaints and the exchange of information, particularly regarding interruptions in service provision; and
9) the conditions for supplying water for fire-fighting purposes."

Another legal instrument at the commune's disposal in the governance of water supply management its competence to grant permits for conducting such activity. Pursuant to Article 16(2) of the Act on Collective Water Supply and Collective Sewage Disposal,

"A permit may be issued upon the request of a water supply and sewage disposal enterprise which:

1) possesses a registered office and address, branch, or representative office within the territory of the Republic of Poland, as defined in the Act of 6 March 2018 on the Rules for the Participation of Foreign Entrepreneurs and Other Foreigners in Economic Transactions in the Republic of Poland [Dz.U. (Journal of Laws) of 2022, item 470];
2) has the requisite financial resources or furnishes documented evidence of its capacity to secure funding in an amount necessary for the proper performance of collective water supply and collective sewage disposal services;
3) possesses technical resources commensurate with the scope of activities referred to in par. 1."

The commune is authorised to issue such permits solely to an entity that meets the statutory criteria. Should an applicant fail to satisfy these conditions, the commune's authority may lawfully refuse to issue the permit. This authorisation procedure thus functions as an initial safeguard, ensuring that entities directly providing water services to recipients comply with all prescribed legal and technical standards.

In addition to this permitting competence, the commune is further equipped with a strategic planning instrument that underpins its long-term engagement in the water services sector. Of particular relevance here is the obligation to adopt a long-term development and modernisation plan. Under Article 21(2) of the Act on Collective Water Supply and Collective Sewage Disposal, "The water supply and sewage disposal enterprise prepares a long-term plan for the development and modernisation of the water supply and sewage disposal facilities in its possession, hereinafter referred to as the 'plan'."

The long-term development and modernisation plan does not possess the character of a generally binding legal act; nevertheless, it constitutes a vital policy instrument through which the commune directs the strategic development, expansion, and upgrading of the water supply and sewage infrastructure.

An essential legal instrument through which the commune performs its duties regarding the collective water supply task lies in its competence to approve tariffs.

From the effective date of the Act on Collective Water Supply and Collective Sewage Disposal, this competence was vested in the representative body of the commune—that is, the local council. Pursuant to Article 12(8) of the Act on Collective Water Supply and Collective Sewage Disposal, a tariff is defined as "a table of publicly announced prices and charges for collective water supply and collective sewage disposal, and the conditions for their application".[45]

The process of tariff approval, understood as the formal ratification of an official price list, is entirely consistent with the legislative framework wherein collective water supply constitutes the commune's own task. The Polish legislator rightly recognised that the proper execution of this task by the commune must also include the commune's competence to establish the financial terms under which water services are provided.

Therefore, it was assumed that their approval would fall under the responsibilities of the commune's representative body.

In 2017, a significant legislative shift occurred with the amendment to the Act on Collective Water Supply and Collective Sewage Disposal, whereby the Polish legislator completely changed the model for approving tariffs. The competence to approve tariffs for collective water supply and collective sewage disposal, was transferred from the commune's representative body to a state authority—namely, the director of a regional water management board. This transition effectively removed the approval process from the domain of local self-government, vesting it in a state body independent of the commune. This change, however, gave rise to a number of undesirable consequences. Chief among these were concerns that, in the course of approving tariffs, the state authorities frequently failed to take into adequate account the actual costs associated with water production. Moreover, the approval procedures themselves became unduly protracted.

Currently, legislative efforts are underway to restore the pre-2017 model, thereby reassigning the competence to approve tariffs to the local council. This direction of change should certainly be assessed positively. If the commune is to be responsible for collective water supply, it should have a genuine influence on the proposed rates and charges applied. To deprive the commune of this competence is, in effect, to render it incapable of fulfilling its statutory task in any effective sense.

In summary, regarding the legal instruments through which the commune shapes the execution of its own task—namely, the provision of collective water supply—it should be noted that the key instruments include the ability to adopt regulations on water supply and sewage disposal, as well as the approval of tariffs.

45 | Wiśniewski 2001, 11; Gałabuda 2003, 25; Woryna 2003, 109; Kryszczak 2005, 61; Wierzbowski 2006, 50; Dziadkiewicz 2011, 147; Pawełczyk 2014, 64; Michalski, 2022, 23; Rozwadowska-Palarz & Palarz 2002, 74.

A supporting element here is an operating permit granted to a water supply and sewage disposal enterprise, and adopting a long-term development and modernisation plan. It is beyond discussion that the commune is an important, if not the most important, entity in shaping collective water supply in practice.

The second group comprises entities that directly supply water, which the legislator refers to as water supply and sewage disposal enterprises. The definition of such an enterprise is set forth in Article 2(6) of the Act on Collective Water Supply and Collective Sewage Disposal, in the following terms: "A water supply and sewage disposal enterprise is an entrepreneur within the meaning of the Act of 6 March 2018 on Entrepreneurs (Dz. U. [Journal of Laws] of 2024, 236), if it conducts business activities in the field of collective water supply or collective sewage disposal, as well as municipal organisational units without legal personality, involved in such activities".[46]

As shown in the definition presented above, a 'water supply and sewage disposal enterprise' encompasses two groups of entities. The first consists of entrepreneurs as defined by a separate law, namely the Act on Entrepreneurs. The second includes municipal organisational units which, though lacking legal personality, are nevertheless engaged in the provision of water services.

The term 'entrepreneur' is defined in Article 4 of the Act on Entrepreneurs, which reads: "1. An entrepreneur is a natural person, a legal entity, or an organisational unit that is not a legal entity, to which a separate statute grants legal capacity, and which is involved in business activity. 2. Entrepreneurs also include the partners of a civil law partnership in the scope of their business activity. 3. The rules governing the commencement, conduct, and cessation of business activities by foreigners are defined by separate legislation".

In contrast, the term "municipal organisational unit without legal personality" refers to an entity that is legally and organisationally subordinate to the commune. Such an entity does not possess the capacity to act independently in legal transactions.

Within the Polish legal system, a water supply and sewage disposal enterprise is not a distinct type of legal entity. This is because the legislator assigns the term 'water supply and sewage disposal enterprise' to legal entities engaged in legal and economic activities. The recognition of a legal entity as a water supply and sewage disposal enterprise is contingent upon the issuance of an operating permit issued by the commune, as previously mentioned. A specific entity may obtain the status of a water supply and sewage disposal enterprise only if it meets the conditions prescribed by law.

46 | Wiśniewski 2001, 11; Gałabuda 2003, 25; Woryna 2003, 109; Kryszczak 2005, 61; Wierzbowski 2006, 50; Dziadkiewicz 2011, 147; Pawełczyk 2014, 64; Michalski, 2022, 23; Rozwadowska-Palarz & Palarz 2002, 74.

One of the fundamental deficiencies with the Polish model of collective water supply and water services lies in the conspicuous absence of statutory regulation governing the legal relations between the commune and the water supply and sewage disposal enterprise. The Polish legislator remains completely silent on the matter, failing to delineate the normative framework within which these two pivotal entities. This legislative omission is especially problematic given that Polish law imposes an obligation on the commune to provide water services, while simultaneously adopting a solution where these services are, in practice, provided by an entity referred to as a water supply and sewage disposal enterprise. In this situation, it seems entirely obvious that the Polish legislator should regulate the legal relations between a commune, which is responsible for providing water services, and a water supply and sewage disposal enterprise, which carries out these services for the service recipients.

The lack of regulation by the legislator means that three different models for regulating the legal relations between a commune and a water supply and sewage disposal enterprise could be adopted. The legal foundations for these three model solutions should not be sought so much in the Act on Collective Water Supply and Collective Sewage Disposal, but rather in other statutes, such as the Act on Municipal Management, the Act on Municipal Local Government, or even the Code of Commercial Companies and Partnerships.

The statutory definition of a water supply and sewage disposal enterprise, previously cited, is also helpful in reconstructing these three models , as it makes clear that such enterprises may take one of two forms: they may be either entrepreneurs as defined under the Act on Entrepreneurs or municipal organisational units lacking legal personality.

The principal criterion for distinguishing the three models is, in fact, the degree of organisational and economic dependence on the commune. An auxiliary criterion lies in the method of establishing the legal relationship and the sources of that relationship.

The first and most frequently encountered model is one in which the commune either establishes or becomes a partner in a commercial law company, which subsequently obtains the status of a water supply and sewage disposal enterprise from the commune. This model relies predominantly upon mechanisms and instruments characteristic of commercial law. The enterprise in this model assumes the organisational form of a commercial company. The commune, in turn, participates in the enterprise solely in the capacity of a shareholder, with its influence over the company's operations being confined to the corporate rights and instruments available to it.

Where the water supply and sewage disposal takes the form of a commercial company, it constitutes an organisationally and legally independent legal entity with its own legal personality. Within this model, the commune may either enter into an agreement with such a company to perform the task of providing water

services or directly assign the task in the company's founding deed. A distinguishing hallmark of this model is that the primary legal instruments regulating the relationship between the commune and the water supply and sewage disposal enterprise are civil law instruments.

The second model, by contrast, does not involve the creation of a company but instead creating an organisational unit without legal personality. The defining feature of this model is that the commune merely establishes a specialised organisational unit, which, however, cannot participate independently in legal transactions. Consequently, it cannot, in its own name, enter into contracts, hold title to water infrastructure, or otherwise act in law. The legal entity authorised to participate in legal transactions is the commune itself. In this model, the commune carries out the water supply task independently. It only employs a specialised organisational unit to perform this task, which does not have a legal personality.

The third model dispenses with both the formation of a company and the establishment of an organisational unit. Here, the commune independently performs all the tasks and duties assigned to a water supply and sewage disposal enterprise. Such an option does not arise directly from the provisions of the law. As previously indicated, a water supply and sewage disposal enterprise can only be a legal entity that is either an entrepreneur (including a company) or a municipal organisational unit without legal personality. However, the definition of a water supply and sewage disposal enterprise cited above does not explicitly provide that the commune may perform this task individually and autonomously. However, such a possibility arises from the case law of Polish courts, primarily administrative courts.

These three models differ not only in the degree of control or influence retained by the commune over the water supply and sewage disposal enterprise but also in their legal underpinnings.

In the first model, the basis for the performance of water supply and sewage disposal tasks by a company established by the commune is the articles of association or the founding deed of the company—documents governed by private law. The second model arises exclusively where the commune assumes the role of sole shareholder in the commercial company. In such circumstances, the commune's influence on the water supply and sewage disposal enterprise, or, more precisely, the degree to which the enterprise depends on the commune, is limited solely to contractual obligations. Despite the commune's ownership, the enterprise retains full organisational and economic autonomy, operating as an independent legal entity.

This arrangement must be distinguished from the situation in which the commune creates an organisational unit without legal personality. In that case, the basis for the relationship between the commune and such a unit is not a contract or a private law instrument, but a unilateral administrative act issued by the commune. A water supply and sewage disposal enterprise, a non-personified municipal unit, therefore operates solely within the framework of administrative

law. Its dependence upon the commune is therefore significantly greater—being, in effect, total—spanning organisational, economic, and legal dimensions.

In the third model, the commune itself assumes the role of the water supply and sewage disposal enterprise, discharging the relevant duties directly. Given that the task remains legally vested in the commune, the question of dependence is rendered moot. Here, the legal basis lies in the provision of the Act on Collective Water Supply and Collective Sewage Disposal which unequivocally designates the provision of such services as a task falling within the commune's own remit, as its own task.

A distinct scenario must be considered in which a water supply and sewage disposal enterprise is neither established nor appointed, nor in any way organisationally or economically dependent on the public sector. Under Polish law, there are no legal impediments preventing a water supply and sewage disposal enterprise from being a private entity. Indeed, the statutory definition expressly provides that any entrepreneur engaged in the business of collective water supply or sewage disposal may qualify as a water supply and sewage disposal enterprise.

There is no requirement that the entity be public in nature. Nevertheless, such a private entity must, as a condition precedent to operation, obtain the requisite permit issued pursuant to the provisions previously discussed. Yet the mere possession of a permit is insufficient: there must exist a legal instrument under which the entity is both authorised and obliged to perform the commune's own statutory duties. This is ordinarily achieved through the conclusion of a contract between the commune and the private enterprise, conferring upon the latter the mandate to perform collective water supply services. The conclusion of such a contract is governed by with public procurement law.

In this case, the contract itself serves as the basis for the operation of such an entity. However, the degree of legal, organisational, and economic dependence on the commune is negligible, being confined strictly to the performance of contractual obligations.

As indicated above, a water supply and sewage disposal enterprise is the entity which directly supplies water to the service recipient, regardless of its legal form or structural affiliation. The degree of dependence on the commune is of no material consequence—nor is it of relevance whether the commune itself discharges this function in the capacity of a water supply and sewage disposal enterprise.

The legal instrument through that governs the delivery of water services in the area of collective water supply is the water supply agreement. This agreement is largely regulated within the Act on Collective Water Supply and Collective Sewage Disposal. According to Article 6(1) and (3) of this Act:

"1. The supply of water or disposal of sewage shall be effected on the basis of a written water supply or sewage disposal services agreement concluded between the water supply and sewage disposal enterprise and the service recipient."

"3. The agreement referred to in paragraph 1 shall, in particular, include provisions concerning:

1) the quantity and quality of water supply or sewage services provided and the conditions for their provision;
2) the method and timing of mutual financial settlements;
3) the rights and obligations of the parties to the agreement;
3a) the conditions for removing failures of water supply connections or sewage connections owned by the service recipient;
4) procedures and conditions for the inspection of water supply and sewage disposal facilities;
5) the arrangements set out in the permit referred to in Article 18;
6) the term of the agreement and the parties' responsibility for failing to meet the conditions of the agreement, including the conditions for its termination".[47]

As is evident from the provisions cited above, the water supply agreement is highly formalised, the content of which is largely predetermined by statute. Consequently, the principle of freedom of contract is significantly limited here. The water supply and sewage disposal enterprise is not at liberty to refuse to enter into such an agreement where the service recipient has made a written request for it and their property is connected to the network.

The final category of entities to which the water services system in Polish law applies comprises the service recipients. Pursuant to Article 2(3) of the Act on Collective Water Supply and Collective Sewage Disposal:

"Article 2. For the purposes of this Act, the terms used shall mean:

3) service recipient – any person who avails themselves of water supply and sewage disposal services in the scope of collective water supply and collective sewage disposal under a written agreement with a water supply and sewage disposal enterprise."

Under Polish law, a service recipient is any legal entity, without distinction as to type or circumstance. The Act draws no distinction between natural persons and entrepreneurs; all recipients of the service are to be treated on an equal footing. In practical terms, however, the contractual relationships between the enterprise and a service recipient who is a business undertaking may differ from those involving a natural person not engaged in economic activity. Such distinctions, nonetheless, do not arise under the Act in question, but rather flow from separate legal regimes – such as the Code of Civil Procedure or the relevant provisions of tax law.

47 | Wiśniewski 2001, 11; Gałabuda 2003, 25; Woryna 2003, 109; Kryszczak 2005, 61; Wierzbowski 2006, 50; Dziadkiewicz 2011, 147; Pawełczyk 2014, 64; Michalski, 2022, 23; Rozwadowska-Palarz & Palarz 2002, 74.

Prospects for the Development of Water Services

The regulatory framework governing water services cannot be regarded as immutable or impervious to change. The possible causes for the changes in this area should not be ascribed solely to a change in the legal model, but rather to the evolving conditions in the surrounding environment. From a legal perspective, the existing models, including the Polish model, have become relatively well established. The legislator has recognised that collective water supply is a domain that must remain within the ambit of public law with a strong and active involvement of public entities. In accordance with the principle of subsidiarity, as interpreted within the context of Polish law and governance, the public entity involved in water services provision is the commune, that is, the local government. This model enjoys widespread acceptance and is, in practice, uncontested. Collective water supply is such an essential element of public services that it should remain within the competence of public entities. This imperative is underpinned by the indispensable role water plays in sustaining human life and the broader biosphere.

The aforementioned Directive of 16 December 2020 concerning the quality of water intended for human consumption introduces a new element, namely, the elimination of social exclusion due to lack of access to water. This development lends further support to the direction, which is based on leaving the water supply in the hands of public entities.

At present, no sweeping proposals exist within the legal sciences for a radical overhaul of the water services system. However, future transformations may well be precipitated by forces beyond the scope of law—most notably, environmental dynamics.

Foremost among these external influences is climate change, a phenomenon that already presents a formidable challenge to the European Union. The repercussions of climate change are manifold, but one of the most consequential is the disruption it causes to global water management systems, particularly in relation to the availability of water suitable for human consumption. Rising global temperatures are disrupting natural hydrological cycles, thereby diminishing the volume of potable water.

In tandem with these environmental concerns are demographic pressures, including the steady growth of the human population. Looking ahead, the twin challenges of dwindling consumable water resources and a burgeoning global population will exert increasing pressure on the architecture of water services provision. In this light, the Directive of 16 December 2020 may be seen as a legislative response to these converging threats. The European legislator appears intent on addressing both the quantitative decline in available water and the demographic surge in demand. As potable water becomes more scarce, access

becomes correspondingly restricted. Moreover, the rising number of individuals dependent on these limited resources compounds the strain. Thus, the stark reality emerges: water resources are diminishing, even as the demand for them continues to grow.

The legal category of *social exclusion arising from inadequate access to water* has been established in an attempt to reconcile both phenomena. The basis for such solutions lies in the adopted priority that in the 21st century, all people should enjoy access to water—a resource essential not only for human sustenance but also for the exercise of basic personal and social functions.

The normative framework of this assumption is related to the fact that there is less water for consumption while the number of consumers is growing. Hence, the European legislator has sensitised member states to the fact that access to water is no longer solely a private matter for the citizens of member states but also a task and duty of public entities. The emerging normative framework signals a discernible shift in direction—one that envisages the involvement of public authorities not merely in the provision of water services, but in ensuring that every person receives such access as a matter of legal entitlement.

The implementation of this Directive within the Polish legal system means that water supply is no longer merely a public service but also an element of social and welfare law. In legal terms, water is not only regarded as a commodity. It is also linked to human dignity and fundamental existential needs. The visible direction of legal evolution will thus move towards strengthening the social aspect at the expense of the economic aspect.

In Polish law, communes are involved in social welfare and collective water supply. Organisational, legal, and economic connections between these two areas has not, to date, occasioned any significant systemic difficulty within the Polish legal system. Nevertheless, it is likely that the legal instruments employed in these areas will require adaptation, for the normative structures that underpin welfare provision and those governing public utilities are not interchangeable. As the "socialisation" of the water supply regime deepens, one may expect a concomitant expansion in the use of instruments characteristic of social welfare law. However, the legislator must exercise caution in this area, as it is impossible to address the water supply solely through the lens of social welfare. It is also necessary to define organisational and even systemic frameworks.

A foreseeable trend in the coming years is the consolidation of the public sector's role in the governance of water services. It should be emphasised that in Poland, this sector has never been privatised, nor has it undergone re-privatisation. It has, in essence, remained consistently in public hands. Nevertheless, notwithstanding the predominantly public character of water and sewage enterprises, the scope and intensity of public administration's involvement in the sector are steadily increasing.

Summary

Within the framework of the modern state, water services rank among the most essential functions of providing public utility services. This is not only due to the mounting scarcity of water resources, but also to the fundamental role of water in sustaining human life. Simultaneously, a marked decline in both the quantity of water available for human consumption and its qualitative parameters may be observed. These factors, taken together, present a significant challenge for the modern state.

Water services have been regulated by law since the 19th century. It is worthy of note that, since their inception, water supply systems have been considered municipal responsibilities. Post-war Central and Eastern European countries replaced this model with one where the state carried out these tasks. Therefore, in the 1990s, the restoration of these tasks to local governments became evident. The evolution of the Polish model presented in this article is the best example of the phenomena observed in this area.

The current solutions in the Polish legal system are based on a separate act, which specifies that water supply is a task of the commune, with the commune being able to perform it in various organisational and legal forms. These forms differ regarding organisational, legal, and economic dependence on the commune and the legal basis for the relationship between the commune and the water supply and sewage disposal enterprise. Such models may operate on the basis of either private law or public law instruments, with the choice of model resting with the commune.

Under the Polish model, the key entity providing water services is the water supply and sewage disposal enterprise. This entity delivers services directly to the service recipient, and the legal basis of such service provision is a contract which incorporates elements of consumer protection.

Looking ahead, the future development of the water supply model must reckon with two fundamental trends: the steadily growing number of service recipients, and the simultaneous diminution and degradation of water resources. European legal developments already reflect a discernible shift towards eliminating what is known as social exclusion due to lack of access to water. It is therefore foreseeable that, in light of values deemed to warrant heightened protection, the role of public institutions in this sphere will further expand.

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Ágota SZEKERES[1]

From Privatisation to Remunicipalisation: How Returning to Public Control of Water Services Benefits Hungarian Society[2]

Abstract

This article examines Hungary's transition from the privatisation of water services in the early 1990s to a reassertion of public control by the 2010s. It situates Hungary's trajectory within the broader context of post-Soviet Central and Eastern European reforms and explores the socio-economic and regulatory implications of privatising essential services without first establishing a stable market framework. Through a critical historical and legal analysis, the paper investigates the motivations behind water sector privatisation, the challenges encountered, and the subsequent remunicipalisation trend prompted by public dissatisfaction with private service delivery. The study highlights the continued primacy of national regulatory discretion in water governance across the European Union, in contrast to more centralised sectors such as energy or telecommunications. Comparative insights from countries like France, and the United Kingdom further contextualise Hungary's experience. Ultimately, the paper evaluates whether the consolidation of water utilities and remunicipalisation efforts served the long-term interests of Hungarian society and contributed to more equitable and efficient water service provision.
Keywords: water services, privatisation, public control, regulation, utilities, governance.

Introduction

After the collapse of Soviet-style authoritarian regimes across Central and Eastern European (CEE) countries, a swift political and economic transition began.

1 | PhD Student, Ferenc Deák Doctoral School of Law, University of Miskolc; Researcher, Central European Academy, Hungary. ORCID: https://orcid.org/0009-0003-5074-0090
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Compared to Western Europe's approach to privatisation, which occurred more organically and gradually—undertaken within a stable institutional and legal milieu—the CEE nations endeavoured to expedite their convergence with Western models. However, this approach circumvented the essential step of first establishing the foundations requisite for a functioning market economy, even as extensive privatisation programmes were being implemented. This dual challenge exerted a profound influence upon both the outcomes of privatisation processes and the resilience of the emergent, and inherently fragile, market economies.

For the purposes of our inquiry, we will explore Hungary's approach to the implementation and analysis of privatisation initiatives. Of all CEE countries, Hungary was one of the first to undertake and operationalise the privatisation process.[3] Its experience occupies a unique position and provides salient and instructive insights compared to other countries because, in the wake of the collapse of Soviet-style dictatorships, Hungary embarked on a rapid and large–scale privatisation journey. Our principal focus shall centre upon the privatisation of the water services sector and the transfer of operational and proprietary control to private entities. We aim to elucidate the underlying motivations for the privatisation of water services, the challenges and impediments confronted during its execution, the broader socio-economic ramifications thereof, and the extent to which democratic oversight and operational efficiency were affected under private administration. Additionally, we examine how the positive perspective on privatisation shifted around 2011, prompting a change in approach. Hungary's trajectory in this domain served not only as an early role model but also as an important precedent for other nations undergoing analogous transitions.

In considering the provision of water-related services—namely water supply and sewerage—within the European Union, it becomes evident that the past three decades have witnessed profound transformation.[4] Between the fall of Soviet-style dictatorships and the subsequent reconfiguration of ownership structures in the water sector, the main factor of change can also be attributed to the European Union (EU). This influence, however, must be understood not as supplanting, but rather as complementing, the legislative initiatives of individual Member States. This double-barreled influence raises questions about sovereignty, the approach towards EU–level harmonization, the principle of subsidiarity, and the enduring obligation of the state to safeguard and ensure the provision of essential public services, including access to water, for the common good. The experience across Member States in navigating this evolving landscape has been far from uniform. In several instances, transitions within the water sector were marked by turbulence and uncertainty. Some, like Hungary, experienced a trial–and–error period during which both ownership models and policy orientations were subject to substantial

3 | Boda & Scheiring, 2006, 95–101.
4 | Bolognesi 2014a, 270–281. Bolognesi 2014b, 371–391.

revision as the nation sought to address the multifaceted challenges inherent in the governance of water services.[5]

In contrast with other sectors, such as energy or telecommunications, which fall more squarely within the ambit of direct economic regulation at the level of the European Union, we can observe that the governance of water services remains more firmly rooted in national regulatory frameworks. This divergence is, in large part, attributable to the need for a centralised approach to water services.

Unlike other utilities such as electricity, which lend themselves more readily to supranational coordination, water services are intrinsically more centralised and local in their provision and management. This implies a more immediate and context-specific engagement at the local level as the complexities arising within this sector often demand bespoke, case-by-case solutions rather than uniform regulatory responses. Nevertheless, various efforts have been made to liberalise this sector within the EU. Yet, a comprehensive and binding legislative consensus at the EU level has thus far proved elusive—and, many would argue, justifiably so.[6]

The authority to determine fundamental matters, such as the manner in which a country should organise the provision of water services, allocation of responsibility for such provision, and the extent to which the private sector participation may be permitted—remains, in principle and in practice, a competence reserved to national legislation.[7]

Within the European Union, a variety of models for water service provision coexist. For example, in Germany, water services are still predominantly under public ownership, with services administered at the local level.[8] Although public ownership was not always dominant, public dissatisfaction with the performance of private operators, particularly around the year 2010, precipitated a notable shift in public sentiment—ultimately resulting in a reassertion of public control over water services.

In France, while the legal and institutional responsibility for the provision of water services rests with local authorities, the operational management of these services can be, and is frequently entrusted to private operators under public-private ownership or concession agreements. In contrast, the model adopted in England—though no longer within the European Union, yet historically influential in the broader discourse on water governance—reflects a markedly different trajectory, with water services having been fully privatised.[9] Recent concerns regarding water quality in England alone served as a cautionary tale and may dissuade other jurisdictions from pursuing further privatisation. These examples underscore the considerable diversity in approaches to water governance across

5 | Szabo & Quesada, 2017, 15.
6 | European Parliament, 2003.
7 | Szabo & Quesada, 2017, 15.
8 | Szabo & Quesada, 2017, 15.
9 | Bolognesi, 2014a, 270–281. Bolognesi 2014b, 371–391.

national and subnational contexts. Such variations in water service provision are likely to persist in the future, as an EU–wide common approach remains remote.[10]

By drawing upon comparative examples from other jurisdictions, this article seeks to engage with a central question: To what extent have Hungarian regulatory measures over the past 30 to 35 years influenced the integration of the national water utility sector —specifically through the consolidation of smaller service providers into larger, more robust entities by reducing the number of providers —and, moreover, was this trajectory indeed judicious? To address this inquiry, it is necessary not only to undertake a historical overview, but also to evaluate the broader socio-economic impacts resulting from these regulatory choices.

Historical context and understanding of water privatisation

The Great Depression of the 1930s in the Western world served as a catalyst for the emergence of the neoliberal movement. Economists attributed the market crash to overproduction and the unchecked expansion of capitalism and turned to government regulation as a corrective measure. Neoliberalism would later crystallise as a dominant economic philosophy in the United States, while under the premiership of Margaret Thatcher, the United Kingdom, along with much of Western Europe, followed suit in embracing its principles.[11] As is often the case with prevailing Western economic ideologies, neoliberalism extended its influence globally—whether through voluntary adoption or external imposition.[12] Thus, privatisation spread worldwide.[13]

One of the principal vehicles for this dissemination was conditional lending: the loans given to third-world nations, both the International Monetary Fund and the World Bank began to attach neoliberal policy prescriptions to financial assistance offered to developing nations.[14]

Throughout the 1970s and 1980s, international development agencies, multilateral organisations such as the World Bank, and governmental bodies provided the lion's share of funding for water infrastructure in developing countries.[15] In the 1980s, privatised water systems reamined the exception rather than the norm. Until the early 1990s, international financial support for water infrastructure was channelled almost exclusively to public-sector institutions.[16] The Thatcher govern-

10 | Allouche, Finger & Luís–Manso 2008, 221–238.
11 | Petrova, 2006, 591.
12 | Ramos, 2017, 190.
13 | Petrova, 2006, 577–583.
14 | Ibid, 190–191.
15 | Kerr, 1995, 91.
16 | Financing Water For All, 2003.

ment[17] in Great Britain enacted the full-scale privatisation of the country's water utilities in 1989.[18]

However, relatively few countries have adopted the British model of full-scale privatisation. Instead, many have opted for more nuanced frameworks, favouring various forms of public–private partnerships (PPPs). The French model, by contrast, is characterised by a system of concession agreements, granting private companies long-term rights to operate and manage specific functions within public water systems. A third privatisation model has emerged, and has, in some quarters, been commended for its capacity to reconcile the efficiency goals of private shareholders with the goals of equitable access and affordability of public shareholders. This model is exemplified by public water corporations with private and public shareholders (with the latter typically retaining majority shareholding).[19]

Understanding Water Privatisation

Although the term "privatisation" encompasses a range of interpretations, it generally refers to the transfer of any public duty or obligation to the private sector. In contrast, a transfer of ownership is more precisely referred to as "divestiture" or "asset sale."[20] The rise of the neoliberal movement in the 1970s heralded a general shift in favour of privatising governmental functions.[21] It was during this period that privatisation ceased to be merely an economic mechanism and instead assumed the character of a deliberate political strategy.[22]

In the context of water utility services, we adopt the definition articulated by Tamás M. Horváth, who posits that: "in the field of public services, privatisation refers to the process whereby [a] public goods become private assets, or [b] the private sector undertakes public tasks on behalf of the administration or otherwise performs tasks of community interest."[23]

Within the water sector, privatisation often takes the form of privatisation contracts, fostering industry competition and efficiency. However, it is essential to distinguish between full privatisation, privatisation of operational functions, and contractual arrangements.

The privatisation of the water sector falls within the first three of the following categories: (1) full privatisation, (2) operational privatisation, (3) contractual arrangements (4) franchising, and (5) open market competition. Full privatisation

17 | Saal, Parker & Weyman–Jones 2007, 127–139. The Economist 2003.
18 | Financing Water For All, 2003.
19 | Petrova ,2006, 583.
20 | Petrova, 2006, 583.
21 | Cohen, 2016.
22 | Ramos, 2017, 191.
23 | Horváth, 1997, 258.

denotes the outright transfer of ownership from the public to the private sector—often through the sale of public assets. This may occur through the distribution of shares to citizens at no or minimal cost, the sale of assets to a private investor, or the sale of all the shares of the company to be traded on the open market to achieve full privatisation of a government-run industry.[24] A more detailed examination reveals that several water privatisation models have been implemented or proposed worldwid,e each differing in terms of ownership structure, degree of control, and the nature of private sector involvement. While privatisation is a multifaceted phenomenon, a clear understanding of its foundational models is indispensable to any comprehensive analysis of the subject. These principal models include: A) The full privatisation model, with complete ownership and control of the water supply system, being transferred to a private company or consortium. The private operator assumes authority over the entire water cycle. B) Concession contracts, in which the government etains ownership of the physical infrastructure but grants a private company exclusive rights to operate and manage water services within a defined geographical area and for a specified duration. The private operator is responsible for maintenance, customer service, and day-to-day operations. C) Management contracts, under which the government contracts a private business to provide daily water services. The private organization handles operations. D) Public and private sectors work together to provide water services through PPPs. The allocation of responsibilities and risk-sharing mechanisms may vary widely depending on the terms of the agreement and the level of each party's involvement. E) Build–Operate–Transfer (BOT) agreements entrust water infrastructure financing, construction, and long–term management to private companies for a defined contractual period, after which ownership reverts to the public sector. BOT schemes are often deployed within concession or PPP frameworks.

The concept of water privatisation has gained increasing prominence in recent years, its trajectory shaped by the ascendancy of neoliberal economic thought.[25] Neoliberalism[26], a broad political and economic doctrine, advocates for the curtailment of state intervention, particularly in sectors such as industry, agriculture, and the stewardship of natural resources. Central to this philosophy is the conviction that private ownership is the most effective bulwark against the "tragedy of the commons", leading to the privatisation of public services and assets.[27]

Water, by its very nature a *natural monopoly*—characterised by substantial fixed costs and the irreversibility of capital investments—has witnessed increasing privatisation efforts. Among these, full privatisation, involving the outright sale of government assets to the private sector, has gained particular traction, especially in developing nations. A notable early exemplar of this trend was Chile's ambitious

24 | Ramos, 2017, 193.
25 | Ramos, 2017, 189.
26 | Harvey, 2005, 1–247.
27 | Ramos, 2017, 191.

attempt at full privatisation of the water sector under the influence of the *Chicago Boys*. This marked a significant departure from traditional models of public utility governance.[28] The successful privatisation endeavors in the United Kingdom, including British Airways, British Petroleum, and British Telecom, further exemplified the trend.[29]

The distinction between "competition for the market" and "competition in the market" is crucial in the context of water service provision.[30] Owing to the structural characteristics of water supply—typically classified as a natural monopoly due to the prohibitively high fixed costs and the impracticality of establishing parallel infrastructure—direct competition within the market s frequently unfeasible. Therefore, competitive dynamics primarily revolves around acquiring licenses rather than within the market.[31]

Approaches to the liberalisation of water services vary considerably across jurisdictions. The United Kingdom offers a singular example: it remains the only nation among the countries examined to have effected the full-scale privatisation of operational water services, though this applies solely to England and Wales. In contrast, water services in Scotland and Northern Ireland are delivered by independent entities, publicly owned yet commercially managed and, in some cases, publicly traded. France, too, presents a distinctive model. There, the regional supply areas have been divided among a variety of primarily private operating companies and municipalities.[32] Hungary, by contrast, offers a markedly different trajectory—one characterised by the (re)municipalisation and re-centralisation of water services.

A clear understanding of the various models of privatisation and their implications is essential for comprehending the evolving landscape of water services across diverse regional contexts.

Proponents of water service privatisation advance a number of arguments in support of its purported societal benefits. First, it is contended that private enterprises, by virtue of their superior financial capacity, are better positioned to effectively preserve natural resources. Second, the private sector's technical proficiency is viewed as conducive to the efficient management of water systems. Third, private contracts often include incentives for better performance and service quality. Fourth, privatisation is credited with facilitating expanded access—especially in underserved or rural regions—by attracting greater levels of capital investment. Finally, the imposition of user charges on consumers is presented as a mechanism for promoting the judicious use of finite water resources.[33]

28 | Opazo, 2016.
29 | Ramos, 2017, 193.
30 | Szilágyi, 2013, 118.
31 | Wackerbauer, 2007, 103.
32 | Wackerbauer, 2007, 104.
33 | Wade, 2008, 191.

The Case for Public Water Service

Water supply and sanitation services within the EU have achieved commendably high coverage rates, with most countries reaching close to 100% coverage in 2012. However, notable disparities persist. In particular, Romania and Bulgaria have continued to exhibit substantial shortfalls, collectively accounting for approximately ten million individuals lacking reliable access to these essential services across the Union. Additional countries with incomplete coverage include Hungary, the Czech Republic, Slovakia, Slovenia, the Baltic States, and Portugal.[34]

Throughout the EU, water and sanitation services are primarily provided by municipal or public entities owned by local, regional, or national authorities. There are instances of private sector involvement in water provision.[35]

However, the practical experience of water sector privatisation has, in numerous instances, resulted in adverse outcomes. Commonly cited consequences include increased costs for borne by consumers, the repatriation of profits to foreign shareholders, and the erosion of local employment opportunities. A salient example may be found in the case of Paris, which brought back water supply under municipal control in 2008. This decision was prompted by widespread dissatisfaction with services provided by the significant French multinationals Suez and Veolia, which had jointly held the service contract based on geographic zones. The concession arrangement was criticised for generating excessive profits. A comparable scenario unfolded in Berlin, where a concession contract with RWE and Veolia raised water costs. Public discontent culminated in a referendum, the results of which brought to light that the contract secured profits for the multinationals.[36]

The conventional markets are ill-suited to capture the intrinsic and multifaceted value of water.[37] In transactions where water is treated merely as a commodified good, it is solely the legal holder of the water rights who stands to receive financial compensation. For that person, the transaction represents a mere conversion of value—from a liquid natural resource into monetary form. Given that water is typically underpriced, the vendor —particularly in instances involving transfers from agricultural to urban use—may accrue substantial financial gains. Water bills frequently exceed the revenue that water rights holders might have realised through the use of water for irrigation purposes.

Within our legal framework, the rights and entitlements of communities in relation to natural resources—water chief among them—have seldom been afforded the scrutiny they merit. Water has long been regarded as a resource in which the community has a stake. It resists complete ownership in the conventional

34 | Berge, Boelens & Vos, 2020, 50–51.
35 | Hall & Lobina, 2004, 268–277.
36 | Bauby, Hecht & Warm, 2018, 6.
37 | Sax, 2008, 33.

legal sense, in contrast to almost every other form of property we permit to be completely privatised.[38]

In this regard, the Right to Water (R2W) movement took a stance against private and profit-oriented, cost-recovery-oriented water utilities. Under the rallying cry 'Water is a public good; not a commodity!", R2W advanced the principle that water is not a commodity that a market can provide but a human right—one which States bear a solemn obligation to guarantee and protect.

The German public began to to lend its support to the R2W initiative in response to the emergence of the proposed Concession Directive. This legislative proposal called upon Member States to liberalise markets in respect of public services, expressly identifying water services as one such area—thereby giving rise to widespread apprehension regarding the potential privatisation of water provision. The controversy surrounding the European Citizens' Initiative (ECI) was not, in its essence, directly concerned with the formal recognition of access to water as a human right[39] Rather, the debate was principally animated by a more fundamental question: whether water ought to be regarded as a communal good held in the public trust, or instead as a commodity to be allocated through market mechanisms.

Water rights are undermined by market creation. The application of market principles to water supply runs the risk of excluding vulnerable and economically disadvantaged groups, who may find themselves unable to meet the newly imposed tariffs. Thus, unless the privatisation of the water supply is accompanied by a universal—such as a statutory prohibition against disconnections—and underpinned by a robust regulatory framework governing price controls, service quality standards, infrastructure maintenance, and long-term investment therein, it stands in fundamental contradiction to the human right to water. That said, even under such conditions, a private operator holding a monopoly position would not be precluded from generating profit.

There exist compelling arguments against privatisation of water services, chief among them the risk that such arrangements may fail to cater to marginalised communities, particularly where the requisite investments are not deemed financially attractive. Privatisation may exacerbate existing socio-economic disparities, as natural monopolies—when left unchecked—tend to charge excessive prices while providing insufficient services. Also, public involvement can be excluded or reduced when water services are privatised.

A privatisation model driven primarily by profit imperatives may fail to give due regard to environmental impacts and downstream users' needs. It can

38 | Sax, 2008, 40.
39 | Berge, Boelens & Vos, 2020, 55.

compromise recognising water and sanitation as essential public goods, thereby diminishing the degree of vigilance exercised in safeguarding water quality.[40]

Historical Development of Water Services in Hungary

The evolution of the Hungarian water service sector reveals a trajectory marked not by steady progression, but by a series of abrupt shifts—neither gradual nor cohesive in nature. Here, the sector has undergone integration and fragmentation periods.[41] This reflects a recurring pattern shaped by political and economic shifts, as well as shifting public and academic attitudes concerning the ownership and governance of essential utilities, prominently water services.

This article resumes the historical narrative—our Ariadne's thread, so to speak—from the collapse of Soviet-style dictatorships. Yet, a proper understanding of that era requires us first to briefly revisit the preceding developments that laid the groundwork for the current state of affairs.

To this end, and for the sake of clarity and analytical structure, we divide the article into three major sections, each covering distinct phases in the evolution of Hungary's water utility landscape. We can distinguish three main periods from 1948 to the present day. The first, spanning from 1948 to 1989, may be referred to as the integration wave, where the number of providers drastically shrunk from 430 to 34.[42] The second period, spanning 1989 to 2010, represents a period of fragmentation, during which the number of providers skyrocketed to 450. Lastly, unfolding from 2010 to 2024, signals a renewed turn towards integration, the period of (re-) municipalisation, during which the number of operators consolidated to a comfortable 36.[43]

In defining water service integration, the number of providers serves as a principal indicator. A lower number of water service providers typically signifies a more integrated system, whereas a higher number is indicative of systemic fragmentation. Beyond mere quantity, the relative size and capacity of these providers also warrant consideration. Within an integrated sector, providers tend to be larger in scale, possessing greater resources and operational capabilities to deliver services effectively. This structural transformation also carries significant implications for regulatory oversight, consumer protection, and the long-term sustainability of water services.

Inherently, a fragmented sector is comprised of smaller-scale service providers.[44] Thus, a comprehensive assessment of the water services landscape requires

40 | Wade, 2008, 191.
41 | Szabo & Quesada, 2017, 15.
42 | Szabo & Quesada, 2017, 15.
43 | MEKH, 2018.
44 | Szabo & Quesada 2017.

not only an analysis of ownership structures but also a careful examination of the number and scale of operators.[45]

In accordance with the economic principle of supply and demand, the water services sector must respond to societal needs by enhancing both the coverage and quality of supply to secure the well-being of the population. Where ownership resides with the state, these responsibilities intervene with broader public policy objectives. Here, the questions of equitable access, affordability, and sustainable resource management come into play. The involvement of the state introduces an inherent tension between the imperatives of financial sustainability and fulfilment of public service obligations. State ownership presupposes the need to balance between economic efficiency and wider social and environmental priorities—frequently necessitating that public welfare be given precedence over private profit.

When viewed over extended temporal horizons, we can correlate the different waves of change in water service provisions to major regime changes.

It is within this legal-historical framework that one finds the necessary foundation for understanding the regulatory reforms in Hungary—an understanding that must extend beyond the domain of privatisation alone in order to capture the full complexity of the sector's evolution.

The transition from public to private ownership in the field of water utility services has long been highly debated by academia.[46] However, revisiting the points of reform highlighted earlier offers the prospect of shedding new light on this enduring discourse. It is important to highlight the role of the Hungarian state as owner, regulator, and sometimes facilitator of these reforms. his evolving role may be construed as a reorientation towards centralisation and remunicipalisation—an interpretation that shall be explored in greater detail in the ensuing chapters.

The principal focus of this inquiry shall rest upon the historical evolution, but the factors precipitating these developments will also be examined. The reforms will be presented through the prism of key legal instruments, most notably the Constitution and othen seminal legislative acts. In essence, the study aspires to offer a nuanced account of public service governance within transitional contexts.

As Szabó and Queseda[47] have already highlighted identified the principal legal instruments pertinent to this domain, this analysis shall build upon their foundational work, while also incorporating additional legislative acts which, in our assessment, merit inclusion by virtue of their relevance.

45 | Szabo & Quesada 2017, 16.
46 | Boda & Scheiring 2006, 95–101. Boda et al. 2008, 178–202.
47 | Szabo & Quesada 2017, 16.

1948–1989: The Wave of Integration

Under the socialist regime, Hungary's water service sector underwent a process of centralisation and state-led consolidation. The legal instruments of the time focused on nationalisation and systematic organisation of water management within a rigidly planned economy.

1. Decree 207.760/1948 on the Organisation of the National Water Management Office.
2. Act XX of 1949 of the proclamation of the Constitution of the Hungarian People's Republic.
3. Act IV of 1964 on Water.
4. Act IV of 1959 on the Civil Code.

1989–2010: The Wave of Fragmentation

Following the political transition in 1989, Hungary embraced a model of decentralisation and market liberalisation, which gave rise to a highly fragmented water service sector. This period was marked by legislative efforts that strengthened local autonomy and opened the sector to private participation.

The following legal instruments were of particular significance during this era.

5. Act XXXI of 1989 on the Amendment to the Constitution.
6. Act XIII of 1989 on the Transformation of Economic Organisations and Business Associations.
7. Act XXIII of 1989 on the Registration of Companies by the Court, and the Legal Supervision of Companies.
8. Act LXV of 1990 on Local Municipalities.
9. Act LXXXVII of 1990 on Pricing.
10. Act XVI of 1991 on Concessions.
11. Act XX of 1991 on the Scope of Duties and Jurisdiction of Local Governments and Their Organs, of the Delegates of the Republic and of Certain Organs of Central Subordination.
12. Act XXXIII of 1991 on the Transfer of Certain State Assets to Municipalities.
13. Act LVII of 1995 on Water Management (Vgt.).
14. Act No. LXXXIX of 2003 on Environmental Pollution Charges (Ktd. tv.).
15. Act CXXI of 2006 on Amending Various Acts Founding the Budget of the Republic of Hungary for the Year 2007.
16. Act CVI of 2007 on State Assets.

2010–2024: The Wave of Remunicipalisation

In response to the adverse consequences of the prior fragmentation era, this period witnessed a strong push toward the recentralisation and remunicipalisation of water utility services. This transformation was underpinned by a series of legislative measures designed to consolidate control under state and local public entities.

17. The Fundamental Law of Hungary (Constitution).
18. Act CCIX of 2011 on Water Utility Supply.
19. Act CXCVI of 2011 on National Assets.
20. Act XXII of 2013 on the Hungarian Energy and Public Utility Regulatory Authority (MEKH Act).
21. Act CLXXXIX of 2011 on Local Governments of Hungary (Mötv.).
22. Act LIV of 2013 on the Implementation of Utility Cost Reductions.

In addition to these, a suite of subsequent regulatory decrees served to further support the process of remunicipalisation and to enhance regulatory oversight:

- Government Decree 58/2013 (II. 27.) on the Implementation of Certain Provisions of Act CCIX of 2011 on Water Utility Services (Vhr.)
- Ministerial Decree 16/2016 (V. 12.) of the Ministry of Interior on the Water Management and Water Protection Professional Requirements, Scope of Investigations, and Content of Data Reporting to be Fulfilled during the Operation of Public Drinking Water Utilities and Public Sewerage and Wastewater Treatment Utilities
- Ministerial Decree 61/2015 (X. 21.) of the Ministry of National Development on the Detailed Content and Formal Requirements of the Renovation and Replacement Plan and the Investment Plan as Part of the Rolling Development Plan of Water Utilities
- Ministerial Decree 47/1999 (XII. 28.) of the Ministry of Transport, Communication, and Water Management on the Fees Payable for Drinking Water Supplied from State–Owned Public Water Utilities and the Use of State–Owned Public Sewerage Facilities
- Ministerial Decree 24/2023 (XII. 13.) of the Ministry of Energy on the Water Utility Development and Compensation Fund
- Ministerial Decree 25/2023 (XII. 13.) of the Ministry of Energy on the Determination of Water Utility Service Fees for Non–Residential Users
- Government Decree 5/2023 (I. 12.) on Drinking Water Quality Requirements and the Regulation of Its Monitoring

1948–1989: The Wave of Integration

Our point of departure:

In accordance with the prevailing European tradition, the local authorities in Hungary were responsible for water service provisions. By the 1940s, approximately 340 council–founded companies provided water supply where a pipeline existed, and these operated independently from each other. While this decentralised arrangement permitted a semi-functional system at the local level, it yielded a system devoid of national coordination or unified oversight.[48]

Following World War II, Hungary witnessed the first significant wave of integration within the water utility sector. This pivotal transformation entailed the assumption of direct control and ownership by the central state[49]—a development that resonated with the wider ethos of state-led economic planning characteristic of the socialist regime.

In 1948, a new National Water Management Office (*Országos Vízgazdálkodási Hivatal*) was established to oversee the provision of water services.[50] Although this entity did not constitute a regulatory authority in the strict sense, it played a formative role in integrating local water service companies into regional ones under the aegis of central government.[51] The state's intervention thus marked a decisive departure from municipally-driven service provision towards a more centralised model.

Act IV of the Hungarian Civil Code from 1959 was a major legislative milestone in the regionalisation of water service providers. The Act endowed state-owned enterprises with legal personality and delineated their competencies, including the execution of public service tasks.[52] It established the framework for the nationwide, unified administration of water utilities.

Further centralisation and regulatory refinement were achieved through Act IV of 1964 on Water, a statute of enduring influence until the end of the socialist era in 1989. The Act covered the conditions for service provision, water right licensing criteria for providers, and addressed the fiscal responsibilities for construction, renovation, maintenance, and operation of public water infrastructure—whether undertaken by the State or other public entities. Also, key regulatory tools were added that guided investment decisions and operational standards.

48 | On the creation of the Act XXIII of 1885 on the basis of which the municipal water service was established and the foundations of regulation, see Koncz, 2019, pp. 103–111.
49 | Art 6, Act XX, 1949.
50 | Decree 207.760/1948.
51 | Szabo & Quesada, 2017, 16–17.
52 | Chapter VI of the Civil Code.

State-owned management bodies were tasked with acquiring, managing, and operating large-scale public-purpose water infrastructure. While the overarching framework was centrally coordinated, provision was nonetheless made for the involvement of other legal entities—provided they conformed to the regulatory standards in force. Though fundamentally centralised, this model retained a degree of scope for local participation, albeit within the bounds of state supervision.. Post-World War II political and socio-economic realignment were the catalyst for the initial wave of integration of water services. A decisive reconfiguration of the ownership of natural assets was undertaken, and operational management was restructured under the direct authority of the central government. These were mirrored in other sectors as well. The effect of this was the birth of 34 county and city water and sewerage companies, which integrated the previous 430 individual smaller water utility council companies. We count here five regional state-owned companies as well; these were called "regional waterworks": DRV Zrt.; EDV Zrt.; DMRV Zrt.; ERV Zrt.; TRV Zrt.[53] These entities were conceived to extend water service provision to previously unserved territories, thereby addressing the stark disparities in access between urban and rural regions. Yet, notwithstanding the formal extension of service areas under this regulatory reorganisation, the sector was persistently hampered by inadequate technical, financial, and organisational conditions. These systemic deficiencies presaged the eventual deterioration of the sector. Despite the ambitious integrative intent, the sector struggled under resource constraints and inefficiencies typical of centralized models.

1989–2010: The Wave of Fragmentation

As 1989 marked the end of the Soviet-style dictatorship in Hungary, the water service utility system also underwent profound transformation. Under the auspices of market liberalisation, the previously centralised system was swiftly dismantled, with water suppliers multiplying rapidly. What had been a coherent structure of 34 integrated service providers fractured into a highly decentralised landscape comprising approximately 450 individual entities by the turn of the millennium. The centralized system was now disassembled, pointing at a fragmented landscape dominated by numerous smaller entities.

This dramatic proliferation of service providers was primarily driven by private operators interfering with water utility services. At this time, the Hungarian government also encouraged privatisation and decentralisation, which led to the fragmentation of the water utility market.[54] This shift aligned with the economic

53 | Szabo & Quesada, 2017, 16–17.
54 | Szabo & Quesada, 2017, 16–17.

reforms aimed at dismantling the planned economy and enabling competition in the market.

Under Act XXXI of 1989, the 1949 Constitution underwent extensive amendment. This reform effectively dismantled the socialist model of a planned economy, laying the legislative groundwork for the establishment of a capitalist market economy.[55] This encouraged the turn to private operators by establishing the right to private property and subsequently ending public ownership over key supply systems, like the water utility one. The private property rights created a legal foundation for private actors to enter sectors previously monopolized by the state.

Under Act LXV of 1990 on Local Municipalities, Part II, Duties sphere of authority, organs of settlement government, Section 8, point 4, explicitly mandated that: "The local government must ensure a healthy drinking water supply."[56] This provision imposed a binding obligation on municipal authorities to guarantee the availability of potable water. Further to this, Act XX of 1991 formally vested the duty of operating water utilities in municipalities. The legal basis for this devolution of competence was reinforced by Act XXXIII of 1991—commonly referred to as the Assets Act—which provided for the allocation of water infrastructure to local governments. This act established Asset Transfer Committees, tasked with the oversight of the transfer of former state assets, including water system assets, which were allocated to municipalities individually, jointly, or by technical separation, depending on their usage. Where system elements could not be distinctly attributed to a specific settlement, ownership of the infrastructure was retained by the state.[57]

It is also essential to note the significance of Act XIII of 1989, commonly referred to as the "Transformation Act", concerning the transformation of economic organisations and business associations. This legislation served as a cornerstone in Hungary's transition to a market economy, catalysing the commercialisation of assets that had previously been in the public domain by altering their legal and economic character to conform with market principles. This act imposed a statutory deadline for state-owned companies to change to limited liability companies or joint-stock companies.[58] Consequently, water utility assets were rendered subject to commercial transactions, including the transfer of corporate shares and business quotas.

The transaction was problematic in the case of water assets because of how the Act defined these concepts. The Act's definitional scope did not adequately clarify the nature or management of water utility infrastructure. These ambiguities created loopholes in the legal framework that allowed privatisation practices beyond the original intentions.

55 | Act XXXI of 1989, § 2, replacing Chapter I of the Constitution with new Articles 1, 2(1), 9(1), and 12(1).*
56 | Szabo & Quesada, 2017, 16–17.
57 | Kis & Ungvári, 2019, 79.
58 | Szabo & Quesada, 2017, 18.

However, during liquidation proceedings, the water utility assets were frequently not recognised as municipal property, thereby enabling their unfettered sale to private operators. This led to a gradual yet accelerating increase in water utility operators following the enactment of the Assets Act. The proliferation of these operators further enhanced the fragmentation of the water sector, effectively thwarting attempts to coordinate water services on a broader scale.

By the early 2000s, numerous local companies had emerged across Hungary. These developments left the sector with uneven service quality across the country, financial instability, and rising regulatory challenges. These structural deficiencies would, in time, give rise to growing demands for reintegration and systemic reform.

The Role of Foreign Investment and Concession Agreements

The privatisation of Hungarian water services was frequently characterised by the involvement of foreign capital. Multinational enterprises such as Veolia, SUEZ, RWE, E.ON, and Berlin Wasser assumed a prominent role in operating water utilities through concession agreements.[59] In some cases, local private companies also participated in the privatisation process. A principal deficiency of this model lay in the absence of robust national oversight. Unlike many of its Western European counterparts, Hungary lacked a centralised public authority endowed with the responsibility to regulate the economic and financial dimensions of water management. Consequently, the task of contracting and supervising complex concession arrangements fell to local governments, which, though endowed with broad autonomy, were often ill-equipped in terms of technical and legal expertise to discharge such duties effectively.

A further complication emerged in connection with the valuation of assets during privatisation. In numerous cases, municipal authorities acquired water systems without conducting proper assessments of either asset value or physical condition. This opacity in asset valuation compounded difficulties in both infrastructure planning and financial management.

Budgetary Considerations and Investment Challenges

One key motivation underpinning the privatisation of water services in Hungary was the aim of generating immediate fiscal revenue. As for Hungary, when Budapest Waterworks was partially privatised, it was already a well-functioning and financially stable entity, with no pressing investment needed for its operation. The decision to sell a 25% stake with management was primarily driven by the desire to generate immediate and substantial budgetary income. The Budapest municipal

59 | Boda & Scheiring, 2006, 95–101.

government opted to divest a 25% share—together with associated management rights—to a Franco-German consortium composed of RWE–Thames and SUEZ. The transaction, valued at approximately 15.5 billion Hungarian forints (circa 75 million USD), conferred management control upon the private consortium for a period of 25 years.[60]

The anticipated benefits of this arrangement, however, were not as successful as intended. Significant infrastructure investments remained reliant on public expenditure. For example, the Budapest Sewage Works, where the significant improvements were funded by the government budget rather than private capital.[61]

Similarly, the municipality of Pécs revisited its privatisation arrangement in 2004, attributing its concerns to escalating water tariffs and the private operator's failure to deliver adequate investment. In this instance, the private partner was again the widely criticised company SUEZ. Another negative example of partial privatisation was the limited access of municipalities to European Union development funds earmarked for water infrastructure projects.

2010–2024: The Wave of Remunicipalisation

The adoption of Act CCIX of 2011 on Water Utility Supply (hereinafter referred to as the "Water Utility Act") marked the commencement of a new regulatory wave that has characterised the period from 2010 to the present. This legislative shift reinstated principles of integration and regionalisation within the water services sector. Also, the principle of regionalisation is reintroduced, highlighting the shift back towards a more centralised and coordinated approach, wherein larger water operators serving broader geographical areas could concentrate more on accessibility, accountability, and financial sustainability. Although the Act does not stipulate the exact size of service providers, its provisions aim to foster consolidation in practice. Three key measures can be identified within the Act may be identified as critical to this structural transformation: (1) Clarification and Transfer of Water Utility Asset Ownership. The Act clearly defined water utility assets, designating those directly performing municipal tasks as "water utilities" while considering other assets as "operating assets" owned by enterprises and subject to sale. The legislation introduced clear procedures for the separation of these categories and the return of water utility assets to municipalities charged with the provision of water services. This legal clarity was a direct response to the uncertainties and legal loopholes that had characterised the earlier privatisation era. (2) Regulation of Service Operation Contract. The Water Utility Act delineated the permissible

60 | Boda & Scheiring, 2006, 95–101.
61 | Boda & Scheiring, 2006, 95–101.

contractual frameworks through which water services could be operated: namely, concession agreements, lease contracts, and asset management contracts. It shows a clearer delineation of rights and responsibilities between municipalities and service operators. (3) The Establishment of a National Regulatory Authority for Oversight and Enforcement. In this context, it is essential to recall the earlier introduction of concession arrangements under Act XVI of 1991 on Concessions, which conferred upon local governments the legal competence to delegate the provision of water services either to private undertakings through concession contracts or, alternatively, to state–owned enterprises. Liberalised concession-type contracts can be established without formal concession procedures (Section 2(1)). These agreements empower operators to manage water assets and collect fees in return for lease payments to the respective municipalities.[62] The mechanism thus introduced a significant degree of flexibility into the regulatory landscape by providing an open-door approach for private operators.

Prior to the onset of the third wave of transformation, lease-based operational arrangements were widely used within the framework of water utility management. These structures enabled the involvement of private capital in service provision without necessitating the initiation of a formal concession tendering process. Although private equity was initially statutorily capped at 49% in operating companies, this threshold was frequently surpassed through the use of syndicated contractual arrangements, thereby allowing investors to exercise greater influence.[63] A 2007 amendment to the law prohibited private equity participation in water utility operators in future contracts, but it did not apply retroactively.[64]

Ownership changes were largely shaped by the application of subsidiarity.[65] Local governments, as infrastructure owners, assumed the role of principal shareholders in county-level service companies, with their shareholdings proportionate to the scale of the respective systems. In regional systems, high operating costs in less populated areas prompted denser, lower-cost settlements to secede from these arrangements and set up independent providers in pursuit of more favourable pricing. This dynamic precipitated the rapid disintegration of the integrated structure of local government–owned utility enterprises.

By 2010, almost 400 organisations were engaged in the provision of drinking water and wastewater services, with the 33 most significant companies serving 85% of the population.[66]

The Water Utility Act expanded the remit of the Hungarian Energy and Public Utility Regulatory Authority (HEA), initially established in 1994 as the Hungarian Energy Office, to regulate the water sector. From 2012 onwards, the HEA has borne

62 | Szabo & Quesada, 2017, 18–19.
63 | Szabo & Quesada, 2017, 19.
64 | Act CXXI of 2006, § 10(1), replacing § 9(1) of Act LVII of 1995 (Water Act).
65 | Kis & Ungvári, 2019, 79.
66 | Ungvári & Koskovics, 2010, 305–328.

responsibility for the supervision of water utility companies, issued and managed operational licenses, ensured compliance, and proposed annual consumer water tariffs to the Ministry of National Development for final determination.

Reports issued by the State Audit Office observed that "[i]n many cases, local governments set prices below actual costs, considering the population's capacity to pay" (SAO 314, 1996). Additionally, it was noted that "the depreciation included in the fees failed to fully cover asset renovation and replacement" (SAO T/7309, 2012).

The uneven distribution of financial burdens also gave rise to a proliferation of local regulatory measures.[67] As previously discussed, price regulation was a ministerial task for the five state–owned water utilities (under Act LXXXVII of 1990); however, in the case of all other service providers, this authority was vested in local governments. This resulted in dozens of different pricing schemes under a single provider. In a sector already characterised by fragmentation, this state of affairs exacerbated disparities not only in tariffs but also in the quality of services rendered. In view of these shortcomings, there emerged an unequivocal demand for unified regulation and oversight of water utility provision. This impetus culminated in the enactment of Act CCIX of 2011, which sought to establish a more sustainable and stable water service sector that "largely vindicates consumer protection principles and the adoption of objective and transparent rules ensuring equal treatment" (Act CCIX of 2011).

The newly enacted legislation ushered in a series of pivotal reforms. It established a central water utility regulatory authority and created a licensing system based on uniform requirements. Furthermore, it brought the professional oversight of water utility operations under formal regulatory supervision. Sectoral integration was promoted through a multi-tiered stage minimum size requirement, while operators were required to prepare 15-year rolling development plans, subject to approval by the authority. The Act also ad dressed property rights issues and introduced pricing based on justified costs, aimed at ensuring the sector's long–term economic sustainability.

As previously noted, the lawmakers in the Water Utility Act set minimum size thresholds, expressed in "user equivalents"[68] (encompassing both residential and non-residential consumers), as prerequisites for operational licenses.[69] These thresholds increased exponentially over the years as part of a strategy to centralize water utility services. In 2013, the minimum was set at 50,000 user equivalents; by 2014, it rose to 100,000, and by the end of 2016, it reached 150,000. The legislation defined these minimum thresholds in three stages: fifty thousand by May 31, 2013; one hundred thousand by December 31, 2014; and one hundred and fifty thousand by December 31, 2016.[70]

67 | Kis & Ungvári, 2019, 80.
68 | Kis & Ungvári, 2019, 81.
69 | Frontier Economics, 2014.
70 | Kis & Ungvári, 2019, 81.

The establishment of these thresholds precipitated the gradual attrition of smaller utility services, who, faced with regulatory non-compliance, either amalgamated with larger entities or relinquished their operating rights by way of contractual arrangements. Research confirmed that economies of scale were most evident in water utilities serving populations between 100,000 and 1,000,000, thereby rendering mergers a pragmatically advantageous course for smaller providers confronted with the demands of the new legislative framework.[71]

Cost efficiency served as the rationale for introducing uniform pricing in the water services sector, which explains why smaller water utilities have largely disappeared. The reform measures further imposed an express prohibition on private ownership or operational involvement in the water utility domain. Henceforth, water utility infrastructure, such as treatment plants and pipelines, as well as service providers, was required to be held in public ownership, whether by the State or by municipal authorities.. Previously privatised assets were mandated to be re-transferred into public hands. Existing contracts with private operators were allowed to run their course but could not be renewed or replaced with new agreements. International practices and academic literature remain divided on the role of private investors in water utilities. Certain jurisdictions, such as the United Kingdom, have undertaken extensive privatisation initiatives, albeit with results that have been markedly varied..[72]

In parallel with the imposition of ownership restrictions, it became imperative to fortify regulatory oversight to ensure that only financially and technically competent service providers might remain active in the sector.

The Hungarian Energy and Public Utility Regulatory Authority (HEA) exercises rigorous scrutiny over water utility undertakings, evaluating financial stability, staff expertise, environmental compliance, and adherence to the "consumer equivalent" index—a statutory benchmark prescribing the minimum number of consumers a supplier must serve. The Authority is vested with the power to refuse or revoke operational licences in instances of non–compliance.

In pursuit of further sectoral consolidation, the Government imposed procedural fees and a "public utility tax" calculated on the basis of pipeline length. These measures, combined with stricter regulations, precipitated the amalgamation of numerous smaller operators into fewer, more efficient entities. As a result, the number of water service providers dropped from 450 in 2010 to 42 by 2015 and further declined to 36 by 2024, creating a sector of larger operators with better resources and capacity to meet legal requirements.[73]

Access to safe drinking water and wastewater treatment is now widely recognised as a fundamental human right. This recognition elevates water utility

71 | Ferro, Lentini & Mercadier, 2011, 179–93.
72 | Herrera & Post, 2014, 621–641.
73 | Szabo & Quesada, 2017, 19.

services beyond the confines of mere commercial transactions, underscoring their social function and public interest character..[74] Consequently, the governance and financing of such services must reconcile the imperatives of operational efficiency with the overarching duty to uphold the welfare of the publi.

Fixed and Specific Costs in Water Utility Services

In contrast with other sectors of the market economy, the provision of water utility services presents two particularly acute structural challenges. The first concerns the prevalence of fixed costs, which is primarily the construction and maintenance of the water infrastructure (pipelines, infrastructure, etc.), which could amount to as much as 70–80% of total service costs. High capital costs act as a barrier to market competition and render full cost recovery a persistent difficulty for service providers. The second challenge pertains to what may be termed specific costs, arising from the inherent heterogeneity of the sector. This includes the territorial fragmentation of water supply systems due to the geographic distribution of water sources. Also, technological divergences between two operators, variations in consumer numbers, or differing degrees of pipeline obsolescence can also cause challenges.[75] These disparities impede the implementation of standardised tariffs, complicate long-term investment planning, and compromise efforts to ensure consistent service quality across regions.

Year	Drinking water pipe length (Km)	Number of apartments connected to drinking water service (Million)
1985	44000	2,9
1990	52419	3,3
2009	65000	4
2010	66000	4,1
2016	66300	4,2
2019	66900	4,246
2023	67900	4,383

Source: Hungarian Central Statistical Office (KSH), Public Information Database, Statistics[76] The table provides a summary of the processes of the reviewed period. The investments undertaken therein have increased both the size of the network and improved access to services.

74 | Kis & Ungvári, 2019.
75 | Kis & Ungvári, 2019.
76 | Hungarian Central Statistical Office 2020. Hungarian Central Statistical Office 2024. Hungarian Central Statistical Office 2022. Hungarian Central Statistical Office 2023.

Lessons Learned

The collapse of centrally planned economic regimes in Central and Eastern Europe in 1989 and 1990 marked the end of communist governance and ushered in a period of profound economic transformation.[77] These nations collectively pursued the development of capital markets and the privatisation of commerce and industry to build resilient market economies. However, lifting the Iron Curtain compelled these countries to confront not only grave environmental issues within their own jurisdictions but also their concern for creating new political and market structures.[78]

From the 1980s onward, a significant change in international political ideology known as the "Washington Consensus"[79] emerged. This framework championed liberalisation and privatisation as universal remedies for a wide array of structural issues.[80]

Financial institutions assumed a pivotal role in the promotion and enforcement of liberalisation and privatisation within the water sector. Nevertheless, the introduction of long-term contractual arrangements in the water sector has frequently curtailed competition and created environments conducive to corrupt practices. Such corruption may not always take overtly unlawful forms but may manifest through the strategic support of political entities or other ostensibly legitimate means. The cumulative effect of these practices can significantly obstruct the implementation of essential infrastructural and institutional developments.

The Hungarian Constitution, formally designated as the *Fundamental Law*, accords particular prominence to fundamental rights, notably thosepertaining to environmental protection and public health —rights which are materially supported through the guarantee of access to potable water. Constitutional clauses that address the protection of future generations are also important. Article P) of the *Fundamental Law* declares that Hungary's water resources to form part of the nation's common heritage, expressing sovereignty over the waters within Hungary's territory.[81]

Further affirmation of the essential character of water is found in Article XX, which establishes a direct link between access to water and the constitutional right to physical and mental health. This provision asserts that the right to physical and mental health may be realised only through agriculture free from genetically

77 | Kristiansen, 1996, 627.
78 | Ibid.
79 | The "Washington Consensus" is a term used to describe a set of economic policy recommendations and principles that emerged in the 1980s and 1990s. International financial institutions, such as the International Monetary Fund and the World Bank, broadly promoted these recommendations.
80 | Szilágyi, 2013, 181.
81 | Szilágyi, 2016, 73.

modified organisms, by ensuring access to healthy food and drinking water, by organising occupational safety and health care, by supporting sports and regular exercise, and by ensuring the protection of the environment.

In the years following the political transition in Hungary, there was a movement towards privatising water utility services. Notwithstanding this trend, the process of privatisation remained incomplete, as in December 2011 the Hungarian Parliament enacted a new regulatory framework governing the operation of water utilities.[82] The new regulations were designed to rectify deficiencies inherent in earlier statutory instruments, and improve water utilities' sustainable operations and development. This included determining the value of water utilities, which was crucial due to the lack of accurate data on their condition and value.[83]

In December 2011, the Hungarian Parliament resolved to overhaul the regulatory framework governing water utilities, thereby addressing a long-standing and pressing need for comprehensive legislative provisions in this domain. Although earlier statutes—most notably the Water Act and the Water Utility Act—had sought to regulate particular facets of the sector, they failed to provide an integrated and coherent legal structure. A principal deficiency of these antecedent enactments lay in their omission of key provisions concerning several fundamental and operationally critical matters.

The new regulation sought to revamp the governance of water supply services, anchored in the fundamental legislation of the Water Utility Act of 2011. This core statute was complemented by Government Decree No. 38/1995 (IV. 5.) Korm on Drinking Water Supply and Sewage Disposal Services, and the Ministerial Decree No. 21/2002 (IV. 25.) on the Operation of Water Utilities. Additionally, other laws played a formative role in shaping the broader regulatory landscape. The overarching objectives of this renewed framework were articulated as follows: (a) to ensure that water utility assets are held exclusively in national ownership; (b) to require that newly established water utility service providers likewise be nationally owned [albeit this provision appears not to have been fully enforced in practice]; (c) to introduce a system of operational licensing for the provision of water utility services; (d) to implement uniform, state-determined pricing mechanisms;[84] (e) to prevent cross-subsidisation and to safeguard the integrity of the water tariff structure; (f) to secure the systematic maintenance and planned renewal of water infrastructure; and (g) to strengthen the role of the State in the strategic planning and development of the water utility sector.[85]

In addressing the matter of water utility ownership, the legislator unequivocally declared that water utilities may be owned solely by the state or by local municipalities. The Water Utility Act imposed a significant statutory duty on water

82 | Raisz, 2012, 47–51. Fodor, 2013, 334–345.
83 | Bándi, 2013, 11–30. Bányai, 2014, 16–55.
84 | On the pricing of water services and the role of water charges, see Nagy, 2019, pp. 171–173.
85 | Szilágyi, 2013, 198.

utility owners, requiring them to conduct valuations of their assets in order to remedy the prevailing deficit of accurate information regarding the condition and value of said utilities.

Hungarian policymakers established the regulatory body for water utility supplies tasked with the oversight of water utility services.[86] The provision of water utility services is inextricably linked to the fundamental rights to water and sanitation.[87] The sector's regularisation, nationalisation, and (re)municipalisation form the cornerstone of the new system. In practical terms, this entails the retransfer of certain competences over water service provision—formerly vested in central or regional authorities—back into the hands of local governments. Such decentralisation is intended to enable municipalities to adapt the provision of water services more closely to the particular requirements of their communities.

Also, as of 1 January 2021, the National Water Works (Nemzeti Vízművek) has been entrusted with exercising, on behalf of the Hungarian State, all ownership rights and obligations over state-owned water utility service providers and state-owned water utility systems. This institutional arrangement operates under the strategic supervision of the Ministry of Energy and is designed to ensure the broader distribution of water services across the country, while also strengthening the State's capacity to regulate tariffs and oversee service quality.

Recognising that access to drinking water constitutes a fundamental human right, as mentioned in the Fundamental Law,[88] the Government maintains that the uninterrupted provision of public services is of paramount importance. Accordingly, it is imperative that the functions entrusted to water utility service providers are executed consistently and without delay.[89]

Lessons from Comparative International Experience in Relation to Hungary

The provision of water services is predominantly governed at the local level, in closest proximity to the consumers. Typically, the components of water networks remain under the ownership of national, regional, or local governmental bodies. In contrast to other industries, the water industry has a significant public sector presence. Experience demonstrates that permitting private participation frequently results in market fragmentation and suboptimal performance. A principal cause of such market failure is the flawed planning of privatisation processes, which

86 | Szilágyi, 2014, 144–162.
87 | Szilágyi, 2016, 77.
88 | Szilágyi, 2018.
89 | Magyarország Kormánya, 2021.

frequently overlooks crucial elements such as regulated market opening, effective oversight, and ongoing monitoring.

Countries including France, the Netherlands, the United Kingdom, Spain, and Germany have undertaken extensive restructuring of their water management and pricing frameworks to ensure compliance with the cost recovery objectives set forth by relevant directives. In parallel, in Hungary, Act CCIX of 2011 comprehensively reorganised its water services market, introducing a new regulatory agency, whilst vesting a government ministry with responsibility over pricing decisions.

Over the past decade, numerous nations have begun reevaluating their water management and pricing strategies, guided principally by the full cost recovery principle enshrined in the Water Framework Directive (WFD). This principle has gained significant attention and now occupies a central place in the European Commission's policy deliberations and initiatives. Countries such as England and Wales, France, Germany, and, more recently, Hungary—following a comprehensive sectoral reform—have emerged as exemplars in Europe for implementing a national regulatory approach consistent with these objectives.

Private entities also play an influential role in determining human rights goals, especially regarding the right to water, through their participation in water development and distribution agreements. Holding private actors responsible for protecting water rights within the framework of national governance is, therefore, essential.[90] Nations are not the only players that impact human rights goals; private actors influence the right to water by contracting for water development and distribution. Accordingly, private actors should be held accountable for ensuring the right to water through national governance.

Several municipalities in France, the country from which the largest privately owned water service companies originate, have rejected privatisation. Notably, in 2010, the City of Paris decided to return water services to municipal control after these had been managed by the two principal private providers, Suez and Veolia, for some thirty-five years. Since this remunicipalisation, water prices in Paris are now lower. Cities such as Grenoble and Cherbourg have reinstated local authority management of water services, while numerous others, including Bordeaux, are actively contemplating the same course of action.

In Hungary, the city of Pécs restored water management to local authorities in 2010, terminating its contract with the subsidiary of Suez, a move subsequently mirrored by the municipality of Kaposvár.[91]

Numerous studies have sought to compare the efficiency of privately owned and state-owned water service companies across various countries. An extensive university review from 2008 showed that the majority of such studies found no

90 | Belényesi, 2014, 17.
91 | PSIRU, 2012.

material difference in either pricing or efficiency between private and state-owned companies. A comprehensive British investigation, focusing on the nation's largest water service privatisation, revealed that privately-owned companies were less efficient after 11 years of privatisation than state-owned operators, notwithstanding their access to superior technological resources.[92]

Furthermore, a global survey of empirical evidence related to water and energy services, undertaken by the World Bank in 2005, corroborates these findings by demonstrating that, statistically, no significant difference exists in efficiency between private and state-owned service providers, whether from a technical or economic perspective. The lowest water leakage rates in Europe are found in countries like the Netherlands and Germany, where service systems are mostly state-owned.[93]

Privatisation entails further expenses, such as application fees and costs of oversight arising from privatisation failures and their consequent challenges. For instance, in Hungary, notwithstanding the private ownership of water services in certain municipalities, investment expenditures were nevertheless borne by central authorities.[94]

Policy Recommendations and Concluding Remarks

i. In the Event that Privatisation Proves Unavoidable

Should a state find itself compelled to pursue the privatisation of water services—whether in whole or in part—owing to financial exigencies, a cautiously moderated approach would advocate for partial privatisation as a potentially tenable course of action. However, this process should be preceded by a multi-layered framework of transparency, open debate, and rigorously constructed procurement procedures. These measures are indispensable to prevent businesses from influencing public authorities to establish biased conditions or engage in strategic underbidding practices.[95] The privatisation process must afford due prominence to the voices of citizens, thereby ensuring that it adequately represents those who may benefit or suffer harm from the transition to a privatised utility system. Any contractual arrangement must include clear provisions to pre-empt potential service degradation, discriminatory practices, and affordability risks. It should also ensure that the human right to water takes precedence if the state opts to proceed with privatisation.[96]

92 | PSIRU, 2012.
93 | Ibid.
94 | Ibid.
95 | Sternik, 2022, p. 535.
96 | Ibid.

ii. Public–Private Partnerships (PPPs) and Their Limitations

Public–Private Partnerships (PPPs) have emerged as a favoured mechanism for retaining some government control over utilities while attracting external funding. [97] Promoted vigorously by the World Bank during the 1990s, particularly within the context of infrastructure and service development in emerging economies,[98] PPPs were heralded as a means of injecting private-sector expertise, financial resources, and operational efficiency into public service delivery. Nevertheless, the suitability of private sector involvement in the management of public utilities—especially in the water services sector—remains a matter of substantive contention.[99] While early opposition to PPPs was frequently dismissed as ideologically motivated, a growing body of empirical research has since lent credibility to those initial reservations.

Most instances of water sector privatisation are effected through the framework of PPPs, whereby the public authority retains ownership and supervisory control of the infrastructure network, whilst the operational functions and service provision are entrusted to a private undertaking.[100]

This model, however, tends to diminish the democratic influence and oversight exercised by municipalities and local residents over the governance and availability of public water services.[101] The two French multinational corporations in the water sector, Veolia and Suez, either wholly own or maintain significant stakes in nearly all private water service providers across Europe, with the exception of the United Kingdom. Such concentrated ownership has significant ramifications for tariff regulation, as well as the management and decision-making concerning water resources, as well as the threat of private monopolies, underinvestment, and corruption.[102]

In an evaluative study on the performance of PPPs in the context of urban water utilities in developing nations, the World Bank reported that "around 50 million of the 160 million people served by private operators in 2007 are served by PPP projects that can be classified as broadly successful."[103] While the report refrains from explicitly categorising the remaining initiatives as failures, it does concede the inherent limitations of the traditional PPP model. It posits that their primary contribution lies in instilling a sense of competition and accountability in the water sector. This raises questions about the necessity of traditional PPPs, when individual state advisory committees could potentially teach the economic principles

97 | The World Bank, 2021.
98 | Marin, 2009.
99 | See also: James-Leigland, 2018.
100 | van den Berge, Boelens and Vos, 2020, p. 56.
101 | Hall and Lobina, 2004.
102 | van den Berge, Boelens and Vos, 2020.
103 | Marin, 2009.

of accountability and competition without resorting to them. In light of these considerations, the continued advocacy of traditional PPPs by the World Bank may well encounter increasing scrutiny and resistance.[104]

iii. Modified hybrid PPPs

Modified or hybrid PPPs may prove suitable in developing nations where water infrastructure suffers from inadequate economic governance, limited financial viability, and substandard customer service. In such contexts, state or federal regulatory intervention should not only promote but, where appropriate, require private actors to assume enhanced responsibilities commensurate with the public interest they are expected to serve. Moreover, international pressure can also encourage private companies to prioritise the right to water.[105]

iv. The idea of remunicipalisation

The restoration of water utility control to the local level, where it can be most effectively exercised, serves to prioritise equitable, affordable, and universal access to water. Through the reassertion of public ownership, communities can significantly enhance the both the resilience and long-term sustainability of their water services. Concentrating authority closer to the needs of local communities also promotes transparency and supports vulnerable groups more directly. As evidenced by numerous international precedents, remunicipalisation is increasingly recognised as a practical solution to the challenges created by privatisation. Thus, remunicipalization emerges not only as a viable corrective measure to the shortcomings of privatisation but also as a powerful strategy to safeguard public interests, protect human rights, and enhance sustainable and equitable water governance.

Conclusion

The Hungarian experience with water privatisation offers vital insights into the intricate realities and unforeseen repercussions that may arise when public utilities are transferred to private hands. While privatisation was initially seen as a vehicle for enhanced efficiency, revenue generation, and capital influx, its practical outcomes have proved far more intricate and nuanced.

The evolution of Hungary's water utility sector may aptly be likened to a river's course, sometimes fragmented into shallow tributaries, sometimes gathering

104 | Sternik, 2022, p. 536.
105 | Ibid 537.

force by coalescing into a single, unified channel. As with many rivers shaped by both human intervention and natural forces, Hungary's path from integration to fragmentation and, more recently, to remunicipalisation mirrors broader currents in European and global public utility governance.

The initial push for centralization after 1948, much like a dam redirecting streams, aimed to create a coherent and controlled system. Yet, the tide of liberalisation following 1989 swept away these structures, unleashing a fragmented network of local providers, each carving its own bedrock without coordination. The subsequent wave of remunicipalisation post-2010 may be read as a deliberate redirection—an effort to reunite disjointed streams into a single navigable course, balancing efficiency with the protection of public interests.

Hungary's story is far from unique. Just as Paris reclaimed municipal control from private conglomerates or Berlin reasserted public stewardship over vital services, Hungary's remunicipalisation underscores a growing conviction that water—unlike electricity or telecommunications—flows best when managed with local accountability and a broader social vision.

Water privatisation is not a a matter reducible to black-or-white choice; it is fraught with nuances and complexities, which we have attempted to demystify throughout this article. Yet one principle stands resolute amid this complexity: the point where citizens' rights yield to customer prerogatives, the human dimension is threatened. Ensuring the protection of fundamental human rights proves elusive when individuals are viewed merely through the lens of market participation.

Ultimately, water is not just a commodity flowing through pipelines—it is a public trust. The sector's legal journey underscores the ongoing negotiation between economic rationality and social responsibility. Hungary's path, like that of many nations, is defined by its ongoing effort to balance the often-competing imperatives of market mechanisms and communal welfare.

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VARIOUS TOPICS

Lana OFAK[1]

The Right to a Healthy Environment in the Light of the New Case Law of the Croatian Constitutional Court[2]

Abstract

This research paper aims to investigate if notable environmental matters have, in recent years, come before the Constitutional Court of the Republic of Croatia, in light of the increasing number of similar cases brought before the highest courts in European countries (Chapter 1). Previous analyses concerning constitutional adjudication on environmental issues have revealed that the Croatian Constitutional Court has seldom invoked Article 69 of the Constitution of the Republic of Croatia, a provision which enshrines the right to a healthy life (Chapter 2). However, on 18 April 2023, the Constitutional Court rendered a landmark judgment wherein it affirmed that the Croatian Constitution protects the citizens' right to a healthy life and environment. The case involved a dispute over the constitutionality of the Decision on the Order and Dynamics of Landfill Closure. This paper will thoroughly examine and scrutinise this significant constitutional case (Chapter 3). To commence, the analysis shall delineate the magnitude of Croatia's waste management deficiencies—failings which were deemed by the Constitutional Court to violate the principle of legality and the constitutional duty to comply with EU laws (Chapter 3.1). Thereafter, the study shall address the formal inconsistency of the disputed Decision with the Constitution (Chapter 3.2). Subsequent chapters shall demonstrate how the Constitutional Court assessed point III of the contested Decisions as an excessive (and therefore disproportionate) limitation of the fundamental right to a healthy life and environment prescribed in Article 69 of the Constitution (Chapter 3.3) and further, how it encroached upon the constitutionally safeguarded right of citizens to local and regional self-government (Chapter 3.4). The concluding portion of this paper shall recount the process by which the Constitutional Court's decision took place (Chapter 3.5) and shall conclude with reflections upon the prospective influence this decision may exert upon the trajectory of environmental jurisprudence and legislative development within Croatia (Chapter 4).

Keywords: Constitutional Court of the Republic of Croatia, Waste Management, Constitution, Right to a Healthy Life and Environment, Landfills

1 | Full Professor, University of Zagreb, Faculty of Law, Department of Administrative Law
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1. Introduction

In recent years, there has been an increasing number of constitutional cases initiated in EU Member States that deal with the inadequacy of measures taken to mitigate the adverse effects of climate change. Among the most prominent of these is the internationally renowned *Urgenda* case, adjudicated by the Supreme Court of the Netherlands on 20 December 2019.[3] In that landmark ruling, the Court affirmed that the Dutch State had failed to take sufficient action to mitigate climate change and, accordingly, ordered it to reduce greenhouse gas (hereinafter referred to as 'GHG') emissions in the Netherlands by 25% by the year 2020, relative to 1990 levels. This obligation arose from the State's duties pursuant to international human rights norms, specifically Article 2 (the right to life) and Article 8 (the right to respect for private and family life) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Similarly, on 24 March 2021, the Federal Constitutional Court of Germany delivered an order in response to four constitutional complaints. It ruled that the German Climate Change Act was partly unconstitutional for not providing a coherent pathway for reducing emissions that aligned with the rights of future generations.[4] Not all such constitutional challenges have met with success. In February 2023, twelve minors ranging in age from five to sixteen years, filed a case before the Austrian Constitutional Court. The petitioners contended that, due to significant legal shortcomings, the Austrian Climate Act failed to reduce GHG emissions effectively and inadequately safeguarded them from the impacts of global warming. In support of their claim, the minors relied upon the constitutional rights of children protected by Federal Constitutional Law on Children's Rights (*Bundesverfassungsgesetz über die Rechte der Kinder* – BVG Kinderrechte), and also referred to the Charter of Fundamental Rights of the European Union. By decision dated 27 June 2023, the Austrian Constitutional Court dismissed the complaint as inadmissible.[5] The Court stated that the complaint's scope was too narrow and noted that the complainants had failed to recognise that the alleged unconstitutionality could not be eliminated by repealing disputed provisions. Furthermore, the requested repeal would, in effect, constitute an inadmissible act of legislation by the Constitutional Court itself, which is prohibited by the principle of separation of powers.[6]

Although addressing distinct legal questions,[7] climate change litigation and environmental case-law alike draw upon the same constitutional provisions when

3 | Hoge Raad, 20.12.2019., 19/00135.
4 | BVerfG, Beschluss des Ersten Senats vom 24. März 2021, 1 BvR 2656/18, Rn. 1–270.
5 | Verfassungsgerichtshof, G 123/2023-12, 27. Juni 2023.
6 | *Ibid*., paras. 46–55.
7 | For important differences between the legal questions raised by climate change litigation and those environmental cases addressed until now in the case-law of the European Court of Human Rights see case of Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, Application No.: 53600/20, Judgement of 9 April 2024, paras. 414–422.

brought before constitutional courts. Both fields are governed by the foundational legal principles and rights enshrined in the Constitution, which provide a common legal framework for addressing these issues. Against this backdrop, this research paper seeks to determine whether constitutional proceedings analogous to those brought in other European jurisdictions have been initiated before the Constitutional Court of the Republic of Croatia (hereinafter either referred to as the 'CCRC' or the 'Constitutional Court'). In pursuit of this aim, this paper draws upon existing research concerning the environmental case law of the CCRC[8] and conduct a comprehensive examination of its most recent landmark decision of 18 April 2023, regarding the unconstitutionality of the Decision on the Order and Dynamics of Landfill Closure.

2. Environmental case law of the Constitutional Court until the landmark decision of 18 April 2023

Environmental matters may be brought before the Croatian Constitutional Court through two principal procedural avenues. The first of these is the mechanism of abstract constitutional review of legal norms. Within this framework, the CCRC is empowered to determine the conformity of laws—namely, legislative acts enacted by the Croatian Parliament—with the Constitution, and, where such laws are found to contravene constitutional provisions, to repeal them. In addition to its oversight of primary legislation, the CCRC exercises jurisdiction over sub-legislative normative acts issued by state authorities. It is vested with the authority to determine whether such subordinate legislation accords with both the Constitution and statutory law, and to repeal such acts where they are found to be unconstitutional or unlawful. Pursuant to the Constitutional Act on the Constitutional Court of the Republic of Croatia,[9] both natural and legal persons are entitled to submit a proposal for instituting proceedings to review the constitutionality of laws, as well as the legality and constitutionality of other sub-legislative normative acts. Upon receipt of such a proposal, the CCRC will consider whether to admit it and continue the procedure. Subsequently, the CCRC will notify the applicant about the Constitutional Court's decision—either to proceed with the matter or to reject the proposal— depending on the circumstances.[10] The second procedural path by which environmental cases may

8 | See Blagojević & Majnarić 2023, 33–55; Staničić 2022, 127–160; Ofak 2021, 85–98; Szilágyi 2022, 479–526. For a comparative outlook of the constitutional protection of the environment see Orosz, Suri, Hrecska-Kovács & Szőke 2021, 99–120. On the importance and impact of the constitutional protection of environmental rights see Boyd 2012, 3–15.

9 | Constitutional Act on the Constitutional Court of the Republic of Croatia, Official Gazette (*Narodne novine*, hereinafter 'OG') no. 99/1999, 29/2002, 49/2002 (consolidated text), Article 38, paragraph 1.

10 | Ibid., Article 43.

come before the CCRC is by way of constitutional complaint. Any individual who believes that their human rights or fundamental freedoms, as guaranteed by the Constitution, have been violated by an individual act of a state body or other public authority has the right to file a constitutional complaint before the Court.[11]

The Croatian Constitution[12] contains a range of provisions relating to the environment, which are dispersed throughout its text. The Constitution prescribes the conservation of nature and the human environment as the highest values of the Croatian constitutional order—enumerated alongside freedom, equality, national and gender equality, peace, social justice, respect for human rights, the inviolability of ownership, the rule of law and a democratic multiparty system. These highest values serve as guiding principles for the interpretation of the Constitution.[13] Furthermore, laws can restrict entrepreneurial freedoms and proprietary rights under special circumstances to safeguard the interests and security of Croatia or protect the environment, nature, and human health.[14] The Constitution imposes a positive obligation upon the State to safeguard goods and resources of significant ecological importance. These include, inter alia, the sea, the seashore, islands, inland waters, airspace, mineral resources, other natural assets, land, forests, flora and fauna, and other components of the natural world. This category further extends to immovable property and assets of particular cultural, historical, economic or ecological value, which are designated by law as being of interest to the Republic of Croatia.[15] The Constitution states that the legal framework governing such goods of importance to the State shall be determined by legislation and subordinate legislation, thereby establishing the rules for utilising and exploiting goods that are significant to the Republic of Croatia.[16]

The 2001 Amendment to the Croatian Constitution marked a retrogressive shift, as it removed the citizens' constitutional guarantee of a "healthy environment", limiting it to the right of a "healthy life" instead. Under the original text of Article 69 of the 1990 Constitution, the right to a healthy environment was expressly protected in the following terms:

> "Everyone shall have the right to a healthy life.
>
> The Republic of Croatia shall ensure the right of citizens to a healthy environment.

11 | Ibid., Article 62.
12 | Constitution of the Republic of Croatia, OG no. 56/1990, 135/1997, 113/2000, 28/2001, 76/2010 and 5/2014.
13 | Ibid., Article 3.
14 | Ibid., Article 50, paragraph 2.
15 | Ibid., Article 52, paragraph 1.
16 | Ibid., Article 52, paragraph 2.

> Citizens, government, public and economic bodies and associations are obliged to pay special attention to protecting human health, nature and the human environment within the scope of their powers and activities."[17]

However, the Constitutional Amendment of 2001 marked a significant departure from this position. It revised the State's obligation from the active guarantee of a right to a healthy environment to the duty of ensuring conditions conducive to such an environment. Thus, since 2001, Article 69 of the Constitution has been worded as follows:

> "Everyone shall have the right to a healthy life.
> The State shall ensure conditions for a healthy environment.
> Everyone is obliged, within the scope of their powers and activities, to pay special attention to protecting human health, nature and the human environment."[18]

Despite what may be regarded as a retrogressive constitutional development, Croatian legal scholars still viewed the right to a healthy life as a specific constitutional manifestation of the broader right to a healthy environment with constitutional protection. Yet, the CCRC had not rendered a decision reflecting this interpretation until 2023 (see Chapter 3 of this paper).

As evidenced in previous studies, most environmental cases brought before the CCRC involve evaluating the compatibility of laws or regulations with the Constitution and other relevant legislation.[19] The research has established that the protection of nature and the environment constitutes a fundamental constitutional value. On this basis, it has been held that the limitation of property rights and entrepreneurial freedoms may be constitutionally permissible, provided that these limitations are necessary and proportionate in relation to the specific requirements of implementing them in individual situations within a democratic society. The constitutional and legislative framework governing goods deemed to be of interest to the Republic of Croatia includes essential components of the natural world and human environment, thus necessitating their special protection. On the one hand, this imposes a duty upon the State to shield such goods from exploitation or degradation incompatible with constitutional principles. On the other hand, it is within the rights of the State to determine and enforce appropriate legal consequences for the unlawful violations of such goods, having regard to the importance of the interest protected.

One prior study identified only a single instance in which the Constitutional Court adopted a stringent interpretative approach to Article 69 in the context

17 | Constitution of the Republic of Croatia, OG no. 56/1990.
18 | Amendments to the Constitution of the Republic of Croatia, OG no. 28/2001.
19 | Ofak 2021, 96; Blagojević & Majnarić 2023, 41–48; Staničić 2022, 142–143.

of environmental matters.[20] More than fifteen years have since elapsed, during which time environmental protection has assumed ever-greater prominence at both the European and international levels. That same study concluded that, if presented with a suitable case, the Constitutional Court would likely afford protection to the right to a healthy environment under Article 69, given that harm to the environment and exposure to environmental risks can threaten human rights.[21] The following chapter will provide a detailed description and analysis of the joint constitutional cases U-II-845/2019 and U-II-2160/2019, which confirmed this conclusion.

3. A landmark decision of the Constitutional Court on protecting the right to a healthy environment

On 18 April 2023, Constitutional Court rendered a groundbreaking decision,[22] in which it unequivocally affirmed, for the first time, that the Croatian Constitution safeguards the fundamental right of citizens to a healthy environment. The matter before the Constitutional Court concerned the constitutionality of the Decision on the Order and Dynamics of Landfill Closure,[23] adopted by the Minister responsible for environmental protection under the then-applicable Sustainable Waste Management Act.[24] With this Decision, 27 waste disposal sites—having failed to meet the necessary legal standards for health and environmental protection—were ordered to cease operations. The waste previously deposited at these sites was redirected to landfills administered by local self-government units which had duly harmonised their waste disposal practices with the applicable legal framework governing the handling of non-hazardous waste. The Decision was initially intended as an interim measure, to remain in effect only until the completion and operationalisation of regional waste management centres. However, those centres have not been constructed within the projected timeline, and their completion is still far from achieved. As a result, specific local self-government units were required to accept unsorted and unprocessed waste originating from other non-compliant units. This development led to a marked increase in the volume of waste these units were required to accommodate and dispose of. As the projects for waste management centres are still in progress, the ongoing practice of redirecting waste from non-compliant landfills to compliant ones has essentially become a long-term solution.

20 | Ofak 2021, 95–96.
21 | Ibid.
22 | Decision and Ruling of the CCRC, no. U-II-845/2019 and U-II-2160/2019 of 18 April 2023.
23 | Decision on the Order and Dynamics of Landfill Closure, OG no. 3/19 and 17/19.
24 | Sustainable Waste Management Act, OG no. 94/13, 73/17, 14/19, 98/19.

Acting upon on the proposal submitted by the City of Supetar and Bošana d.o.o. (a company for the performance of communal activities founded by the City of Biograd na Moru), the CCRC decided to initiate the procedure for assessing the constitutionality and legality of the Minister's Decision on the Order and Dynamics of Landfill Closure. Following its deliberations, the Constitutional Court determined that point III of the contested Decision violated the constitution and subsequently repealed it.[25] The Court determined that initiating the proceedings was necessary for protecting human rights and fundamental freedoms guaranteed by the Constitution and preserving nature and environmental protection, as one of the highest values underpinning the Croatian constitutional order. In the case at hand, the CCRC acted in light of the positive obligation of the State to create conditions for the effectiveness of the guarantee of healthy life and environment derived from Article 69 of the Constitution. The CCRC also examined the disputed Decision in the light of Article 16 of the Constitution, which mandates adherence to the principle of proportionality whenever restrictions are imposed upon constitutionally protected rights.[26] Finally, the Constitutional Court scrutinised the Decision for its impact upon the constitutionally guaranteed right of citizens to local and regional self-government, as set forth in Article 128 of the Constitution. The following section of this chapter will elucidate the scale and seriousness of Croatia's waste management deficiencies. It will also undertake a detailed examination of the most salient elements of the CCRC's Decision of 18 April 2023.

3.1 Croatia's waste disposal challenges – a violation of the principle of legality and the constitutional obligation to fully respect the EU legal order

Since 2017, the European Commission has issued successive communications highlighting persistent and serious challenges faced by the Republic of Croatia in implementing the requirements of European Union waste legislation. These

25 | The contested Decision, with the aim to implement the measures defined in the Waste Management Plan of the Republic of Croatia 2017 – 2022 (OG no. 3/17), determined the order and dynamics of closing non-hazardous waste landfills by county, the selection of non-hazardous waste landfills where non-hazardous municipal and industrial waste will continue to be disposed of until the disposal capacity is filled and non-hazardous waste landfills where non-hazardous municipal and production waste will continue to be disposed of until the construction and start of operation of waste management centres. Point II of the decisions listed the non-hazardous waste landfills by county that will be closed by 31 December 2018. Point III of the decision stated that the non-hazardous waste landfills where non-hazardous municipal and industrial waste will continue to be disposed of until the disposal capacity is filled and the non-hazardous waste landfills where non-hazardous municipal and industrial waste will continue to be disposed of until the start of operation of the waste management centres are listed in the document: Dynamics of closing non-hazardous waste landfills at the territory of the Republic of Croatia and form an integral part of it.

26 | Article 16 of the Constitution reads as follows: „Freedoms and rights may only be restricted by law in order to protect the freedoms and rights of others, the legal order, and public morals and health. Any restriction of freedoms or rights shall be proportionate to the nature of the need for such restriction in each individual case."

difficulties have been particularly acute in relation to the separate collection of waste, the enhancement of municipal recycling capacities, and the reduction in the amount of waste sent to landfills.[27] The singular significance of the Constitutional Court's Decision of 18 April 2023 is reflected in its thorough analysis of the specific circumstances surrounding Croatia's waste management issues. Given that the European Commission initiated several infringement procedures against Croatia for violations of EU waste law, the Constitutional Court sought the submission of documentation concerning these proceedings from both the Croatian Government and the European Commission's representative office in Zagreb. However, owing to the duty of confidentiality surrounding such materials,[28] the Constitutional Court refrained from publishing the documents in question, merely referencing information already publicly available on the Commission's official website.[29]

In the context of the case at hand, the Constitutional Court placed particular emphasis on deficiencies related to the implementation of Directive 1999/31/EC on the landfill of waste (the Landfill Directive) and Directive 2008/98/EC on waste (the Waste Framework Directive).[30] More specifically, an analysis was conducted on five landfills containing non-hazardous waste across five different counties across the Republic of Croatia. All the visited sites were found to have deficiencies, and it was discovered that municipal waste is being disposed of in landfills without undergoing any preliminary treatment. It further emerged that the counties where the landfills under investigation were situated lacked the necessary infrastructure capacities.[31]

The Constitutional Court, for its part, required the Ministry competent for waste management (namely, the Ministry of Economy and Sustainable Development) to provide detailed and precise information on several matters, including: the stage of construction of regional waste management centres; the remaining available capacity for waste disposal; measures undertaken to rehabilitate, expand and equip operational landfills receiving waste redirected from closed facilities; the existence of any obligation to accept waste that had not undergone prior recovery processes; and the measures being taken to ensure compliance with the waste management hierarchy.[32] While the Constitutional Court acknowledged the comprehensive and precise responses provided by the competent Ministry to

27 | See European Commission, EU Environmental Implementation Review Country Reports for Croatia from 2017, 2019 and 2023.
28 | C-514/11 P and C-605/11 P AJ – LPN, Judgment of 14 November 2013, ECLI:EU:C:2013:738.
29 | European Commission 2021.
30 | Point 20 of the Decision and Ruling of the CCRC of 18 April 2023 (fn. 20).
31 | See European Commission, Infringement decision, 12 November 2021.
32 | Pursuant to the Article 6, paragraph 1 of the Waste Management Act, all acts, decisions, plans, or programs adopted on the basis of this Act must align with the following priority order of waste management: (1) preventing the generation of waste, (2) preparation for reuse, (3) recycling, (4) other recovery procedures, e.g. energy recovery and (5) disposal.

these inquiries,[33] it identified certain deficiencies in the Ministry's observations that point to the unconstitutionality and illegality of how waste is disposed of in landfills in Croatia.

In its submission to the CCRC, the Ministry asserted that waste may be disposed of at landfills without prior processing or recovery. More precisely, the Ministry advanced the position that there exists no legal obligation to ensure that waste redirected from local self-government units—whose non-compliant landfills have been closed—is appropriately treated or recovered prior to its disposal at landfills located within neighbouring self-government units. The Constitutional Court unequivocally rejected this assertion, holding it to be "manifestly contrary to the Waste Management Act".[34] As such, it represents a violation of the principle of legality enshrined in Article 5 of the Constitution, as well as a violation of the constitutional obligation imposed by Article 141c to give due effect to the *acquis communautaire* and the legal order of the European Union.[35]

Furthermore, the CCRC determined that the Ministry lacked substantive knowledge concerning the measures —if any—undertaken by local self-government units to guarantee that only the essential quantity of municipal waste is deposited at the landfills of neighbouring local self-government units in accordance with the waste hierarchy and obligations from the Waste Management Act and the Waste Framework Directive.[36]

The Constitutional Court further held that the absence of any binding measures applicable to those local self-government units from which waste is redirected constitutes a critical failing. Specifically, no mechanism had been implemented to compel such units to adopt waste minimisation practices aimed at reducing the overall quantity of municipal waste destined for disposal.[37]

The CCRC took note of the State's continued failure to achieve any of the set waste management goals.[38] As of the year 2020, 56% of municipal waste was deposited in landfills, while the proportion of separately collected waste stood at 41%. However, part of the separately collected waste still ended up in landfills. Moreover, not all local self-government units had implemented separate collection

33 | See point 18.3 of the Decision and Ruling of the CCRC of 18 April 2023 (fn. 20).
34 | Ibid., point 20.1.
35 | Ibid. Article 141c of the Constitution reads as follows: "The exercise of the rights ensuing from the European Union acquis communautaire shall be made equal to the exercise of rights under the Croatian legal order. All the legal acts and decisions accepted by the Republic of Croatia in European Union institutions shall be applied in the Republic of Croatia in accordance with the European Union acquis communautaire. Croatian courts shall protect individual rights based on the European Union acquis communautaire. State bodies, bodies of local and regional self-government and legal persons vested with public authority shall apply European Union law directly."
36 | Point 20.3 of the Decision and Ruling of the CCRC of 18 April 2023 (fn. 20).
37 | Ibid., point 20.4. The Constitutional Court criticized the Ministry for not considering the measure of mandatory introduction of recycling yards, composting facilities, etc. as a possible measure to prevent the generation of municipal waste for disposal.
38 | Points 20.6.–20.7 of the Decision and Ruling of the CCRC of 18 April 2023 (fn. 20).

of valuable forms of waste fractions derived from municipal waste. In 2020, the practice of separate collection of valuable types of waste from municipal waste was observed in 92% of these units. Biodegradable municipal waste constituted an estimated 63.3% of the total municipal waste disposed of by landfilling.[39]

Finally, the Constitutional Court ascertained that the Waste Management Plan in the Republic of Croatia for the period 2007 to 2015 envisaged the establishment of 11 waste management centres, intended for the treatment and disposal of mixed municipal waste and other non-recyclable forms of waste. The deadline for fulfilling this measure has been extended in the upcoming planning period of 2023–2029. As of the time of the Court's deliberation, only two of the proposed centres had become operational, while a third was undergoing trial operations. Construction of a fourth centre was in progress, but no definitive timeline for its completion and commissioning had been determined. The remaining seven planned centres are still in the process of acquiring project documentation. The Constitutional Court observed that, should these planned centres fail to become operational in the near future, the existing landfill sites would reach their saturation point within the forthcoming decade. Accordingly, the CCRC observed that the persistent non-implementation of the plans and measures provided for in the Waste Management Plan and the repeated failure to operationalise the centres at the scheduled time gave rise to a credible and acute risk of serious disruption to waste management in Croatia.[40]

3.2 Formal inconsistency of the Decision on the Order and Dynamics of Landfill Closure with the Constitution

In the matter under review, the subject of the Constitutional Court's scrutiny was the Decision on the order and dynamics of landfill closure, a sub-legislative act enacted with the purpose of implementing statutory provisions. Where a sub-legislative act is subject to constitutional review, the CCRC is tasked with ascertaining not only whether such act complies with the Constitution, but also whether it adheres to the statutory framework from which it derives authority. Therefore, in the process of assessing the constitutionality and legality of such sub-legislative act, the CCRC shall examine whether it was adopted by an authorised body; whether the body had the legal competence to adopt such a measure (i.e. whether a proper legal basis existed); and whether the content of that act remains within the limits set by law. The first two questions address whether the disputed act is formally consistent with the Constitution, whereas the third assesses its material consistency with the Constitution.

The Court observed that, concerning the Decision's formal inconsistency with the Constitution, point V of the Decision provided that the Decision would be published in the Official Gazette (*Narodne novine)* and would enter into force on the

39 | Ibid., point 20.8.
40 | Ibid., point 21.5.

date of its adoption. Thus, the Decision entered into force before it was published in the Official Gazette. The Constitutional Court observed that the purpose of publishing legal regulations is to ensure that all relevant parties may acquaint themselves with the binding text in its authentic and final form, as adopted by the competent authority. In the present instance, the act came into effect on 21 December 2018, but was only published in Narodne novine on 9 January 2019. This contravened Article 90, paragraph 1 of the Constitution, which mandates that legal acts of state bodies must be published in the Official Gazette of the Republic of Croatia prior to their entry into force. The Constitutional Court, therefore, held that the Decision was inconsistent with the Constitution during the period between its adoption and its subsequent publication.[41]

Concerning the objections raised as to the legal authority of the Minister to adopt the disputed Decision, the Constitutional Court determined that the Minister responsible for environmental protection was unequivocally vested with the authority to do so.[42] Even though the Waste Management Act is a legal act that impacts authority in the realm of local self-government, its provisions were incorporated into the Croatian legislation because the Republic of Croatia had an obligation to align its laws with EU legal sources —specifically, the Landfill Directive and the Waste Framework Directive. Failure to meet these obligations would result in the State having to pay sanctions for infringements of EU law. Given that waste management is of interest to the Republic of Croatia, and in light of the State's constitutional duty to ensure conditions conducive to a healthy environment, the legislator rightly conferred upon the Minister, as the head of the competent central state administrative body, the formal authority to adopt decisions concerning the rehabilitation of existing landfills and the closure of those failing to meet requisite standards. Therefore, the Constitutional Court established that the Minister's Decision on the order and dynamics of closing waste disposal sites does not deprive local self-government units of their right to autonomy. In light of all the above circumstances, the CCRC concluded that the legislator had valid justifications for granting the Minister the authority to adopt the disputed Decision.[43]

The ensuing two chapters shall address the specific material inconsistencies of the Minister's Decision with the Constitution. In its assessment of the Decision's material conformity with both the Waste Management Act[44] and the Constitution, the Constitutional Court examined specific fundamental rights protected by the Constitution. The CCRC assessed point III of the contested Decisions as a limitation of the fundamental right to a healthy life and environment prescribed in Article 69 of the Constitution (see Chapter 3.3) and as the limitation of the guarantee of citizens' rights to local and regional self-government (see Chapter 3.4).

41 | Ibid., point 14.4.
42 | Ibid., point 16.3.
43 | Ibid., point 16.5.
44 | Waste Management Act, no. 84/21.

3.3 Constitutional guarantee of the fundamental right to a healthy life and environment (Article 69 of the Constitution)

As already mentioned, in the Decision dated 18 April 2023, the Constitutional Court explicitly stated for the first time that the Constitution guarantees the fundamental right to a healthy life and environment (Article 69 of the Constitution). It is noteworthy that the Constitutional Court made this pronouncement without providing an accompanying interpretation of Article 69, which, as shown in Chapter 2, does not expressly guarantee the right to a healthy environment but the right to a healthy life. The finding of the Constitutional Court that Article 69 contains a constitutional guarantee of the right to a healthy life and environment is undoubtedly a laudable development. Although Croatian legal scholars have already highlighted this conclusion in their literature, it wasn't until the Decision of 18 April 2023 that the Constitutional Court officially confirmed this interpretation of Article 69. To facilitate a fuller understanding of its ruling, it would be desirable for the Constitutional Court to provide more explanation on its determination that the right to a healthy life "and environment" is indeed a fundamental constitutional right. The absence of explicit reference to the environment in Article 69, paragraph 1, which guarantees the right to a healthy life (and not the environment), calls for some degree of clarification. It is to be hoped that this lack of detailed explanation will not give rise to a different interpretations of Article 69, particularly in the event of changes in the Constitutional Court's composition.

It appears that the Constitutional Court anchored its determination regarding the right to a healthy life and environment on the judgments of the Court of Justice of the European Union (CJEU). This approach is somewhat curious, given that the Charter of Fundamental Rights of the European Union does not recognise an individual right to a healthy environment but emphasizes the need for a high level of environmental protection.[45] Notably, as the Waste Management Act serves as an implementing law that introduces several EU directives in the regulatory area of waste management and environmental protection into the Croatian legal order, the CCRC was guided by Article 141c of the Constitution.[46] The Constitutional Court emphasised the significance of environmental protection within the EU legal framework, quoting or referring to pertinent parts from specific judgments of the CJEU.[47]

45 | Article 37 of the Charter (OJ C 326, 26.10.2012), reads as follows: „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. "
46 | Point 17.2 of the Decision and Ruling of the CCRC of 18 April 2023 (fn. 20). For Article 141c see fn. 33.
47 | C-24/19 A and others, Judgment of 25 June 2020, ECLI:EU:C:2020:503; C-323/13 European Commission v Italian Republic, Judgment of 15 October 2014., ECLI:EU:C:2014:2290; C-551/13 SETAR , Judgment of 18 December 2014, EU:C:2014:2467; and C-315/20 Regione Veneto, Judgment of 11 November 2021, ECLI:EU:C:2021:912.

In assessing the compliance of the contested decision with the constitutional guarantee of the fundamental right to a healthy life and environment, the CCRC began by acknowledging that waste disposal imposes restrictions on the right to a healthy life and a clean environment.[48] It continued to scrutinise whether the measures mandating the closure of landfills which fail to satisfy the legal standards for environmental protection, as well as the measures to redirect waste to landfills of local self-government units that have harmonised their operations with legal requirements, represent restrictions on the fundamental right to a healthy life and environment. Such restrictions would be permissible only if they accord with the principle of proportionality enshrined in Article 16 of the Constitution.[49]

The Constitutional Court did not find any constitutional infirmity in point II of the Minister's Decision, which ordered the closure of landfills that did not comply with the environmental protection requirements set by EU legislation.[50] However, the contested Decision also contains point III, which introduces a specific mechanism for diverting waste from the closed landfills to those that continue to operate and are located within the territory of other local self-government units. The CCRC construed this measure of waste diversion as an unequivocal limitation of the fundamental right to a healthy life and environment, particularly affecting the residents of local self-governing units compelled to accept diverted waste.[51]

In assessing whether such limitations on the fundamental right to a healthy life and clean environment were proportionate, the Constitutional Court acknowledged that the contested measure pursued a legitimate aim of waste disposal, which was not contested from the standpoint of health and environmental protection. However, the Constitutional Court emphasised that waste disposal will be accepted as legitimate disposal for the purpose of health and environmental protection only on condition that it is reduced to those quantities that are strictly unavoidable, namely waste that could not be otherwise processed or used in accordance with the prescribed hierarchy of waste management measures.[52] Given the established fact that waste disposal was permitted notwithstanding the absence of prior processing or recovery (see Chapter 3.1), the Constitutional Court concluded that allowing waste disposal without requiring its processing or recovery constituted a disproportionate limitation on the constitutional right to a healthy environment and a healthy life, as enshrined in Article 69.[53] In conclusion, the CCRC determined that the waste diversion mechanism, as currently formulated, fails to satisfy the proportionality requirement prescribed by Article 16 of the Constitution, insofar as it is incapable of attaining the objective of proper waste disposal. Accordingly,

48 | Point 17.3. of the Decision and Ruling of the CCRC of 18 April 2023 (fn. 20).
49 | See fn. 24.
50 | Point 18.3. of the Decision and Ruling of the CCRC of 18 April 2023 (fn. 20).
51 | Ibid., point 19. and 19.1.
52 | Ibid., point 19.3.
53 | Ibid., point 20.2.

it is inadequate to justify the imposed restriction on the right to a healthy life and environment guaranteed to citizens under Article 69 of the Constitution.[54]

3.4 Citizens' constitutional right to local and regional self-government

The Constitutional Court assessed the disputed Decision as constituting a limitation upon the guarantee enshrined in Article 128 of the Constitution, which secures to citizens the right to local and regional self-government. In doing so, the Constitutional Court examined the potential of citizens to utilise local self-government mechanisms to establish waste disposal regulations, aiming to safeguard health and the environment in the specific local areas where they reside. Given that the transport and disposal of waste represent a risk of environmental degradation and, consequently a limitation of the fundamental right to a clean environment and a healthy life, state authorities bear the obligation to ensure that only waste whose generation could not reasonably have been prevented is transported and disposed of. With the progressive closure of currently active landfill sites, a consequence which will ensue should the envisioned waste management system based on 11 waste management centres fail to materialise in the near term, the waste generated in the area of those local units that have already decommissioned their landfills will no longer be capable of being redirected to presently operational sites. In such circumstances, an entirely new solution will need to be identified to dispose of this waste. Furthermore, citizens living in local self-government units that were compelled to receive the diverted waste from other will themselves be left without a functioning local landfill and a mechanism for disposing of their own municipal waste. Such an eventuality would amount to the effective collapse of the existing municipal waste disposal system.[55]

The Constitutional Court found that there exists no statutory obligation of the central government to reimburse the local self-government units to which the waste is diverted for the costs incurred in financing the management of the landfill due to the obligation to receive the diverted waste.[56] Local self-government units cannot solely bear the burden of increased costs associated with managing a legal landfill, as the decision to redirect waste was made by the competent bodies of the central executive authority. The CCRC concluded that compensation for the increased costs of landfill management needed to be addressed within the framework of the model establishing the obligation to divert waste to landfills of other local self-government units.[57]

In addition to imposing disproportionate financial liabilities on certain local units, the Constitutional Court determined that the impugned waste diversion

54 | Ibid., point 21.
55 | Ibid., point 21.7.
56 | Ibid., point 21.12.
57 | Ibid., point 21.13.

mechanism impermissibly transfers responsibility from one set of local units to another. The representative bodies in the local self-government units that are obliged to take waste to their landfills lack any mechanisms that could influence the behaviour of those local self-government units whose waste they are compelled to accept. This structural imbalance renders it exceedingly difficult for them to fulfil the objectives of rational and controlled waste disposal. Under the disputed waste reorganisation mechanism, local self-government units must accept and manage any waste transferred to them from units that have failed to handle their landfills responsibly. These receiving units, being bereft of legal or practical instruments to influence the originators of the waste, are thus prevented from safeguarding the interests and well-being of their own citizens—particularly in circumstances where the waste they are required to receive does not even meet the legal standards for prevention or mandatory pre-disposal sorting.[58]

Thus, the Constitutional Court concluded that such an allocation of responsibility amounts to an explicit limitation of the right to democratically legitimise local self-government guaranteed by Article 128 of the Constitution—one which cannot be justified by considerations of necessity. Additionally, it contradicts the fundamental principles of the Waste Management Act and the Waste Framework Directive, which goes against the constitutional obligation outlined in Article 141c to respect the legal order of the EU.[59]

3.5 Execution of the landmark decision of the Constitutional Court

The Constitutional Court repealed point III of the contested Minister's Decision. Pursuant to Article 31 of the Constitutional Act on the Constitutional Court, all decisions and orders rendered by the Constitutional Court are binding and must be observed.[60] Moreover, under Article 55, paragraph 2 of the same Act, the Constitutional Court may set a term when the repealed provisions shall cease to

58 | Ibid., point 21.15.
59 | Ibid.
60 | Article 31 of the Constitutional Act on the Constitutional Court reads as follows: (1) The decisions and the rulings of the Constitutional Court are obligatory, and every individual or legal person shall obey them.
(2) All bodies of the central government and the local and regional self-government shall, within their constitutional and legal jurisdiction, execute the decisions and the rulings of the Constitutional Court.
(3) The Government of the Republic of Croatia ensures, through the bodies of central administration, the execution of the decisions and the rulings of the Constitutional Court.
(4) The Constitutional Court might determine which body is authorized for the execution of its decision or its ruling.
(5) The Constitutional Court may determine the manner in which its decision or its ruling shall be executed.

have legal effect.[61] Considering that repealing point III of the Minister's Decisions with the date of publication of the decision in the Official Gazette would create a constitutionally impermissible legal vacuum, the Constitutional Court decided to delay the termination of the point III for a period of six months from the date of publication.

The Ministry was accordingly obliged to adopt a new Decision within a period of six months. Moreover, the Constitutional Court determined that the Ministry, before adopting a new Decision, must take the necessary and specific measures and mechanisms by which, in all local self-government units, and especially in those local self-government units where waste disposal sites have been decommissioned and non-hazardous waste is redirected to other local self-government units, the following objectives are effectively realised:

- the prevention of waste generation;
- the prior recovery of waste;
- the recycling of such waste as could not be prevented, with a view to reducing the volume ultimately consigned to disposal; and
- the imposition of consequences upon those units of local self-government which, prior to the redirection of waste to neighbouring jurisdictions, fail to meet prescribed targets or to adhere to mandated measures.[62]

In a notably unusual intervention, the Constitutional Court took an additional step and stated that the competent Ministry possessed a range of viable options for complying with the Constitutional Court's decision within the prescribed period. By way of illustration, the Court drew attention to a series of recommendations issued by the European Commission to Member States deemed at risk of failing to meet the municipal waste targets. These include:

- the imposition of mandatory requirements for sorting biowaste and the alignment of planned or existing processing infrastructure with the corresponding collection systems;
- the promotion of inter-municipal cooperation in infrastructure planning and the procurement of services, in order to secure economies of scale and an equitable distribution of financial burdens;
- the enhancement of the extended producer responsibility scheme;
- the introduction of measures designed to incentivise waste sorting at the household level;
- the implementation of more frequent collection schedules for separated waste streams in comparison to residual mixed waste; and

61 | Article 55, paragraph 2 of the Constitutional Act on the Constitutional Court reads as follows: „The repealed law or other regulation, or their repealed separate provisions, shall lose legal force on the day of publication of the Constitutional Court decision in the Official Gazette *Narodne novine*, unless the Constitutional Court sets another term."

62 | Point 23.3. of the Decision and Ruling of the CCRC of 18 April 2023 (fn. 20).

| the more strategic and effective deployment of European Union funds in the development of waste infrastructure, ensuring that co-financing supports waste prevention, reuse, and efficient recycling practices.[63]

It is indeed a rare occurrence for the Constitutional Court to provide so detailed and comprehensive an exposition of the means by which its decision may be implemented. Such an approach is typically reserved for circumstances in which the Court seeks to forestall any misapplication of its ruling and to obviate the need for the matter to be referred back to it.

The Minister was required to implement the Decision of the CCRC by 26 October 2023, upon the expiry of the six-month compliance period. Decision on Amendments to the Decision on the Order and Dynamics of Landfill Closure was accordingly adopted on 10 October 2023,[64] published in the Official Gazette on 18 October 2023, and entered into force the following day.

Following the new Decision, the Environmental Protection and Energy Efficiency Fund[65] will assume direct responsibility for co-financing the procurement of equipment and devices for the treatment of municipal waste, in addition to supporting rehabilitation programmes and the necessary expansion of landfill capacity to ensure continued operations pending the commissioning of the waste management centres. Simultaneously, the Fund's contribution to the co-financing of eligible costs for landfill rehabilitation and equipment acquisition has been increased to 90%. In addition, the new Decision imposes enhanced monitoring obligations concerning the reduction of waste disposal by all local self-government units transferring waste to other landfills. The Fund will co-finance the procurement of specialised equipment and devices for these units, which shall, in turn, be obliged to submit annual reports detailing the implemented measures and activities in relation to waste prevention, separate collection, recycling, and recovery.

4. Conclusion

As earlier studies have demonstrated, the Constitutional Court does address environmental cases;[66] however, its primary focus continues to lie in the review of the conformity of legislation with the Constitution or the legality of other sub-legislative normative acts. In doing so, the Court exercises its mandate to determine whether the competent authority adhered to the obligations established by the Constitution, particularly those emanating from the principles of the rule of law

63 | Ibid., point 23.4.
64 | Decision on Amendments to the Decision on the Order and Dynamics of Landfill Closure, OG no. 120/23.
65 | For information about the Fund see its official website.
66 | See Blagojević & Majnarić 2023, 33–55; Staničić 2022, 127–160; and Ofak 2021, 85–98.

and the conservation of nature and the human environment as constitutionally enshrined values.

A significant constitutional shift occurred in 2001, when Croatia amended its Constitution to alter the nature of citizens' environmental rights. Prior to this amendment, the Constitution expressly recognised right of citizens to a healthy environment. Following the amendment, however, this right was reformulated as a right to a healthy life in 2001. By removing the explicit reference to a healthy environment, Croatia potentially weakened the protection afforded by the Constitution. However, in Croatian legal scholarship, the right to a healthy life is seen as an integral part of the broader right to a healthy environment. This interpretative approach holds that, despite the absence of a clear textual guarantee, the Constitution continues to safeguard environmental rights. Such a view was ultimately reaffirmed by the Decision of the Constitutional Court of 18 April 2023, which received a thorough analysis in Chapter 3 of this paper.

The CCRC's decision is distinguished by the remarkable depth and breadth with which the Constitutional Court examined the systemic challenges associated with waste disposal in Croatia. The Constitutional Court expressed serious concern that Croatia may exhaust the full capacity of its active landfills within the next decade. Through this landmark decision, the Constitutional Court provided a definitive interpretation of Article 69 of the Constitution, holding that it guarantees citizens the right to a healthy life and environment.

To date, citizens' associations in Croatia have yet to fully embrace the practice of resorting to litigation to compel governmental compliance with environmental protection regulations, particularly when compared with trends observed in other European jurisdictions, as discussed in the introduction of this paper.

Beyond the acute challenges posed by waste management, the European Commission frequently highlights other environmental problems in Croatia. These issues specifically pertain to shortcomings in flood protection, persistent non-compliance with the Urban Waste Water Treatment Directive, and widespread concerns over air quality.[67] Moreover, Croatia is increasingly impacted by climate change, a reality underscored by growing scientific and empirical evidence. Given its geographical position within the Mediterranean basin, Croatia is particularly vulnerable to the intensifying impacts of climate change.[68]

In this context, it is worth noting that climate litigation often employs a human rights-based approach.[69] Therefore, the CCRS's Decision of 18 April 2023 assumes heightened significance. In a situation where government bodies failed to take appropriate action to address pressing waste-related concerns, the Constitutional Court decisively intervened to uphold the constitutional rights of citizens to a

67 | See EU Environmental Implementation Review Country Reports for Croatia (fn. 25).
68 | Climate Change Adaptation Strategy in the Republic of Croatia for the Period Until 2040 With a View to 2070 (2020), 5.
69 | See Lewis 2018.

healthy life and environment. Citizens may now invoke Constitutional Court's arguments to demand that government authorities take swift, appropriate, and efficient actions to protect both public health and the environment from imminent risks or harm. It is thus anticipated that this Decision will have considerable influence on the trajectory of environmental adjudication and legislative development in Croatia, including with respect to climate change. Nonetheless, its true impact will depend on its invocation by the concerned public.

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Szilárd PÁLFAY[1]

On Certain Procedural Aspects of Agricultural Subsidy Law

Abstract

As a judge assigned to the Public Administration Chamber of the Győr Regional Court, I adjudicate in administrative cases, and in addition to my work, as a fourth-year student of the Doctoral School of Law and Political Sciences of the Széchenyi István University, I research the system of agricultural subsidies and judicial case law. The aim of my doctoral thesis is to provide a comprehensive overview of the Hungarian system of agricultural subsidies and the jurisprudence of agricultural subsidy law by examining the agricultural law literature, national and EU legislation, the practice of farmers' organisations, agricultural and rural development support bodies and case law collected in courts.

The questions examined in the research concern the normative clarity of legislation on agricultural subsidies, the equivalence of the functions assigned to agricultural subsidies and the precedent practice available in this specific field.

My research in this area focuses not only on the history, functions and substantive law of agricultural subsidy law, but also on its procedural law. In this study, I address the jurisdictional problems that arise in agricultural law disputes and the issues arising from the relationship between general and special administrative procedural law.

Keywords: Agricultural Subsidy, Procedural Law, Common Agricultural Policy, Court Practice

Introduction

In the course of my work on agricultural subsidy cases, I have developed the impression that, compared to the usual administrative procedures and the direct subject matter of agricultural subsidy law, the background to the cases is more extensive,

1 | Judge, Public Administration Chamber of the Győr Regional Court; fourth-year doctoral student of the Doctoral School of Law and Political Sciences, Széchenyi István University.

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deeper and more complex than usual. Over the years, as I have dealt with more and more disputes arising from the granting authorities, it has become clearer and clearer how this area of agricultural law, which receives less attention, has a fundamental influence on food security, rural policy and the fight against climate change, in addition to improving the ability of farmers to generate income.

Although it is not possible to draw overall conclusions about the functioning of agricultural subsidy law as a whole from the disputes that end up in court, it is clear to judges hearing public administration cases that the area of law, which is a common set of agricultural law, financial law, European public economic law, competition law and civil law, only appears to constitute a regulatory environment for an easily graspable legal subject. With the extension of the functions assigned to agricultural subsidies, the regulatory technique of the sources of law relating to subsidies, the complexity of the indirect subject matter of the regulation, has not only made life more difficult for producers, but has also caused problems of law enforcement for the organisations involved in the subsidy chain, the authorities and courts involved in subsidy disputes, and even the Supreme Court of Hungary (Curia), which is responsible for the unification of case-law.

Not only is the substantive legal framework for agricultural subsidies, which draws on European law and domestic sources of law, difficult and complex, but also the procedural law of agricultural subsidy law. In the area of the law covered by this article, sometimes even the most basic questions of application of the law are difficult to resolve. As will be seen below, the separation of the civil and public administration aspects of subsidy disputes and the relationship between general and special procedural law, among other things, can only be understood in cases before higher courts or in the context of the work of the working group on the unity of jurisprudence.

While preparing the study on certain procedural issues of agricultural subsidy law, I took into account the works of researchers already dealing with the topic, so in the case of CSÁK Csilla[2] I could draw on publications related to agricultural finance, and in the case of ERDŐS Éva[3] on agricultural dispute settlement. In examining the relationship of the Common Agricultural Policy (CAP) to other community activities and community procedural law, I was guided by the approach of NAGY Zoltán[4], and in examining the civil-administrative conflict of laws in agricultural subsidies by the research of OLAJOS István[5]. In the case of TANKA Endre[6], I summarised the results published in his publications when examining the constitutional context of this area of law, and in the case of WOPERA Zsuzsanna, I took into account the articles on the system of agricultural subsidy appeals. In addition to the above, I have incorporated the research findings of a number of other national and international

2 | Csák 2009, 43–50.
3 | Erdős, Jakab & Raisz 2008, 19–28.
4 | Nagy 2018, 149–163.
5 | Olajos 2006, 439–456.
6 | Tanka 2012, 148–166.

legal scholars and other professionals, listed among the sources, in order to make the thesis a natural continuation of the academic research on the subject.

1. On the law and procedural law of agricultural subsidies in general

The law of state aid is part of economic public law, in so far as economic public law is understood as an institutional system of economic intervention by public entities[7]. State aid is one form of this economic intervention. The granting of state subsidies derives, therefore, from the economic function of the state; in terms of its function[8], it is one of the means of implementing the policy of central power in the modern state. According to NAGY[9]'s categorisation of the sources of regulation, subsidy law falls within the field of financial law, and within this field, mainly fiscal financial law. The granting of subsidies is thus intended to achieve an economic or social policy objective by providing an advantage without which market operators would not carry out the activity or would do so less efficiently. State aids are subject to the market condition that the public policy objective they are intended to achieve cannot be realised by other, less market-distorting measures[10]. Although there is no universally acceptable answer today as to the extent or necessity of the state's economic involvement, as SZILÁGYI confirms, public opinion in the profession is more inclined to accept state intervention in agriculture than in other areas of the economy[11].

The Common Agricultural Policy (CAP), which is at the heart of this article, is a common, sectoral, subnational EU policy, which is integrated in its design and implementation with external trade and harmonisation policy, economic and cyclical policy, social and regional policy, environmental policy and, finally, monetary policy[12].

In the EU, the regulation of state aid serves to create a single internal market and is part of competition law[13]. The general rule prohibiting the granting of aid is laid down in Article 107 of the TFEU, which sets out the cases in which market-altering measures may be applied outside the scope of market conduct of undertakings.

In order to understand certain procedural issues of agricultural subsidies, it is necessary to clarify the concepts of subsidy, budgetary aid, state aid, EU funds and finally agricultural subsidy in the sense of public finance, as regulated by national law. The Public Finances Act[14] (Áht.) provides guidance on the delimitation. The

7 | Barabás 2017, 201.
8 | Samuelson & Northaus 2012, 273–278.
9 | Nagy 2018, 149.
10 | Nyikos 2018, 22.
11 | Szilágyi 2016, 33.
12 | Kurucz 1999, 213.
13 | Barabás 2017, 325.
14 | Act CXCV. of 2011 on Public finances.

broadest definition is that of subsidies, which are grants from the central or local government sub-system of the state budget in any form whatsoever, without any payment being made in return[15]. A narrower scope is covered by so-called budgetary aid, which is defined as aid granted in cash from the central government sub-system without consideration other than social security funds[16]. State aid for the purposes of this thesis is a benefit granted by the national budget as de minimis aid within the meaning of Article 107 (1) of TFEU or under a directly applicable EU legal act[17]. The first three terms refer to a grant from the national budget at source.

In the national legislation, procedural law related to agricultural support schemes is laid down in laws, government regulations and ministerial decrees. For the periods that are currently ongoing or in the process of being settled, the highest in the hierarchy of legal sources are Act LXV of 2022[18], Act XVII of 2007[19] and Act CL of 2016[20], while at the ministerial level, general procedural rules are found in Government Decree No. 256/2021 (V.18.)[21], Government Decree No. 481/2023 (X.31.)[22], and at the ministerial level in FVM Decree 23/2007 (IV.17.)[23], and finally in AM Decree 54/2023 (IX.13.)[24].

In the following, after a general description of the characteristics of agricultural subsidy law, I will illustrate the difficulties of procedural law in this field by means of two examples.

2. Remedies in the procedures for agricultural subsidies

Article XXVIII (7) of the Fundamental Law establishes the fundamental rights framework for legal remedies against acts of public authorities establishing a subsidy relationship[25]. As the Constitutional Court has pointed out[26], the essential

15 | Áht. 1. (19) paragraph.
16 | Áht. 1. (14) paragraph.
17 | Áht. 1. (2) paragraph.
18 | Act LXV. of 2022 on the procedure for agricultural subsidies provided by the Common Agricultural Policy and the national budget (KAP Act).
19 | Act XVII of 2007 on certain issues of the procedure related to agricultural, agro-rural development and fisheries subsidies and other measures (Subsidy Act).
20 | Act CL of 2016. on the general administrative procedure.
21 | Government Decree No. 256/2021 (V. 18.) on the procedure for using subsidies from individual European Union funds in the 2021–2027 programming period.
22 | Government Decree No. 481/2023 (X. 31.) on the financial, accounting and administration procedure of agricultural subsidies provided from the financial foundations of the Common Agricultural Policy and the national budget.
23 | FVM Decree No. 23/2007 (IV. 17.) on the general rules for the use of grants co-financed by the European Agricultural Fund for Rural Development.
24 | FVM Decree No. 54/2023 (IX. 13.) on the procedure for using agricultural subsidies provided by the Common Agricultural Policy and the national budget.
25 | Based on the provision, everyone has the right to appeal against a court, official or other administrative decision that violates their right or legitimate interest.
26 | Decision of a Constitutional Court No. 35/2013. (XI. 22.).

content of the right to judicial remedy requires the legislature to provide that, in respect of substantive, case-law decisions of public authorities or courts, it is possible to apply to another body or a higher forum within the same organisation for a decision which is capable of reviewing the decision complained of and, if the harm is established, of remedying the harm by retroactive action. The remedies available in agricultural support cases have multiple constitutional implications. Firstly, because the possibility of legal remedy is a component of the paradigms of the rule of law and constitutionality, and secondly, because the Fundamental Law presents the right to legal remedy as a subjective constitutional right, without which the right to official proceedings would not be constitutional[27].

In the case of agricultural subsidy procedures, there is a system of multi-directional appeals against the first instance decision of the authority. Among the normal legal remedies, an appeal against the first instance decision of the Hungarian State Treasury (MÁK) in a subsidy case can be lodged with the Minister of Agriculture, while decisions which cannot be challenged in the official procedure can be challenged in an administrative lawsuit before the competent court with an administrative college. As WOPERA[28] has pointed out, in accordance with the rules laid down in the Administrative Court Procedure Code (Kp.), in a case concerning the review of an agricultural subsidy decision, the court must decide whether the body which took the administrative decision, in the context of the matter raised by the applicant, took its decision on the basis of the legislation in force at the time when the decision challenged in the proceedings was taken, in the possession of the available statements, data and documents, drawing an incorrect conclusion from them, and applying the relevant provisions of the legislation in breach of the law. The extraordinary remedy against a court decision in a subsidy case falls within the competence of the Curia, but a constitutional complaint against a court decision in a subsidy case that violates the Fundamental Law can also be lodged with the Constitutional Court. A preliminary ruling procedure before the Court of Justice of the European Union (CJEU) on an EU provision applicable to an agricultural subsidy case is not a normal form of appeal, but is subject to judicial review. In other agricultural matters, arbitration may be a form of dispute settlement, but this is excluded by the provision on the prohibition of administrative proceedings.

3. The collision of civil law and administrative law in our writing on agricultural subsidies

The problems of jurisdiction in financial aid disputes date back to the last years of the 2000s. State aid litigations were brought before the civil first instance division

27 | Varga Zs. 2011, 39.
28 | Wopera 2008, 95.

of the county courts of the time, and their courts, having established their jurisdiction, mostly ruled on the merits[29].

In support cases, the collision of civil and administrative law was first revealed in a decision of the Debrecen Court of Appeal[30] in 2007, and then the Budapest Court of Appeal also found in several decisions[31] that it lacked jurisdiction in civil enforcement, referring to the possibility of administrative enforcement.

In order to ensure uniform jurisprudence, the President of the Curia ordered an examination of the case law in civil and administrative cases in order to clarify jurisdictional issues related to the enforcement of claims in court. In 2012, the Jurisprudence Evaluation Group (JECS) of the Curia issued a summary opinion on the jurisprudence of civil and administrative cases concerning financial support[32]. In its analysis of the case law, the High Court examined the concept of financial aid, the main types of state aid, the specificities of the aid regulation, analysed the practice of the regional courts, the courts of appeal and the Curia, and finally made a proposal for the unification of the case law. The analysis itself has already shown that financial aid is a field of intersection between civil law and administrative law, where the emphasis is on the contractual nature of civil law and the financial law elements of administrative law.

The JECS highlighted the fact that state aid creates a sui generis legal relationship between the beneficiary and the recipient, which combines the instruments of different branches of law in a specific way. It may be said that, where the legal relationship of the grant is created by an administrative procedure, the imbalance, which is characteristic of administrative law, is always imbalanced and the contractual element can always be traced. The reverse is also true: in the case of civil-law legal relationships established by administrative bodies in their judicial capacity and giving rise to state aid, especially when the legal consequences of a breach of the grant contract or the grant instrument by the beneficiary are at stake, one can speak of a latent administrative relationship[33]. According to the analysis, the beneficiary in the grant relationship is an autonomous economic entity in civil law terms, but the intervening organisations may also be quasi-public authorities, for example if they are involved in the tender procedure but are not public administrations. As a solution to this problem, the JECS proposed the generalisation of public authority contracts in the legal relationship or the creation of a new legal instrument, the administrative contract, which would take account of both specific private and public law requirements.

29 | Summary report, 3.
30 | Summary report, 3.
31 | Summary report, 3.
32 | „Legal practice in civil and administrative cases related to financial support" Summary report 2012.
33 | Summary report, 17.

In agricultural subsidy cases, the concept of public administration act poses a jurisdictional problem when the specific forms of civil law and administrative law meet. There are three conjunctive conditions for the concept of an administrative act, the first being that the act must be carried out by an administrative body, the second that the act must be governed by administrative law and the third that the administrative act must produce legal effects[34]. In the administrative act challenged in the proceedings, the administrative nature of the administrative act or of another branch of law must be assessed by reference to the existence of the three conditions. In agricultural subsidy cases, this arises when the managing authority has approved the application for aid and issued a grant instrument.

According to the Curia's decision[35], the nature of the legal relationship prior to the issuance of the grant agreement is not defined by the Áht. or other legislation. The process leading to the grant decision falls outside the scope of the property turnover, since in this case the managing authority is not acting in accordance with an economic interest but is pursuing a public objective. The grant instrument establishes a bilateral civil-law relationship between the grantor and the applicant, whereby the grantor undertakes to provide the aid and the beneficiary undertakes to carry out the agreed task and to create the output. Claims for reimbursement of the aid, typically after the conclusion of the grant agreement or the issuance of the grant instrument, are generally considered to be administrative acts, which are subject to review by the administrative courts.

However, under the above-mentioned provision of the Áht., a distinction must be made between the period before and after the conclusion of the grant agreement. The period prior to the conclusion of the grant agreement, i.e. the decision on the grant, is an administrative matter and therefore disputes relating to it fall within the scope of the administrative procedure. If a grant agreement is concluded, it is a civil law relationship. Legal protection is then provided in civil proceedings.

According to the opinion of the KMK-PK in the case[36], litigation relating to financial support can be classified as a civil or public administration matter on the basis of whether a specific provision of the legislation confers administrative authority powers on an organisation in relation to the grant relationship. Administrative jurisdiction can be established only if the law clearly provides for it, by designating the authority acting in the first instance. On the basis of the guidelines referred to, the existence of elements of public law in the legal relationship or the public authority status of any of the participants does not in itself make the grant decision an administrative decision, and administrative proceedings may be brought only if the conditions laid down in the Kp. are fully met. However, if the aid legislation does not expressly confer administrative competence on the body involved in the

34 | Kp. 4. (3) paragraph.
35 | Decision of a Kúria No. Kpk.IV.39.341/2020/3.
36 | 1/2012. (XII. 10.) KMK-PK report (KMK-PK report).

aid relationship, the relationship is a civil law relationship under the Civil Code, notwithstanding the public law elements, and the dispute falls within the jurisdiction of the civil court.

Despite the JECS summary report referred to earlier, the problem of the conflict of civil and administrative law in state aid cases is addressed in a number of first and second instance decisions. The public nature of state aid and the legal status of the defendant mean that the administrative, public authority character of the aid application is predominant[37]. Until such time as a civil, contractual legal relationship is established between the parties (the issuance of a grant instrument or the conclusion of a grant contract), the public-law nature of the legal relationship is exclusive. A decision rejecting a grant application is an administrative act, which may be reviewed by means of an administrative procedure[38]. Consequently, a decision to refuse assistance from EU funds may be an administrative act, the subject of an administrative dispute[39]. The contract resulting from the grant instrument is therefore a civil law legal relation, in which the provisions of the General Administrative Procedure Code (Ákr.) do not apply as an underlying rule. The beneficiary may bring a civil action to enforce its claim for payment of the grant after an unsuccessful objection. The decision rejecting the objection[40] cannot be the subject of an administrative dispute[41]. In the event of withdrawal from a grant agreement as a civil law contract, the findings of non-compliance may be challenged before the civil courts, but in the absence of an administrative law relationship, an action for failure to act to enforce a decision may not be brought in the absence of jurisdiction[42].

As it is clear from the decision of the Curia[43]: in order to determine the dispute concerning the objection as an important legal instrument of the aid procedure, it is necessary to examine whether there is a ground for administrative dispute concerning the rejection of the applicant's objection to the refusal of the payment claim based on the grant instrument. According to the precedential decision, the subject matter of an administrative dispute, as provided for in the Kp., is the legality of an act of an administrative body governed by administrative law which seeks to change the legal situation of the legal entity concerned by it, or which has the effect of changing it, or the legality of the failure to act. Based on the definition of administrative litigation in the Kp., three conjunctive conceptual elements of administrative action can be identified. The first of these is that the activity is carried out by an administrative body, the second conceptual element presupposes

37 | Decision of a Kúria No. Kfv.35.433/2020/2.
38 | Decision of a Kúria No. Kfv.35.428/2020/6.
39 | Decision of a Kúria No. Kfv.35.452/2020/7.
40 | Decision of a Kúria No. Kfv.39.649/2020/2.
41 | Decision of a Kúria No. Kfv.35.400/2020/10.
42 | Decision of a Kúria No. Kfv.39.306/2021/2.
43 | Decision of a Kúria No. Kpkf. 35.105/2022/2.

that the activity is regulated by administrative law, while the third conceptual element presupposes that it is capable of producing legal effects, by which it is intended to change or has the effect of changing the legal situation of the legal entity concerned. By drawing up the grant instrument, the parties themselves created a bilateral civil-law relationship, whereby the grantor undertook to grant the aid and the applicant, as the beneficiary, undertook to fulfil the obligation laid down. The specific provision of the legal regulation did not grant any administrative authority competence in relation to the contractual relationship of the grant, on the contrary, it referred to the contractual relationships after the conclusion of the grant instrument as civil law contracts. In such a case, therefore, it is incorrect to refer to the public authority case governed by Section 7 (1) to (2) of the Ákr. or, in view of the embedded nature of the control procedure, to the capacity to produce legal effects. This is borne out by the fact that the Áht. draws a distinction between aid relationships under administrative law (public law) and those under civil law. Where the grant relationship is established by a grant instrument or a grant agreement, no administrative jurisdiction can be established. Act LXXXIX of 2021[44] clearly defers the resolution of disputes related to the decisions of the sponsor to civil litigation. The original legislative proposal clarified the procedural law of the establishment of a grant relationship by means of a grant instrument or a grant agreement by introducing a rule on jurisdiction in court proceedings, and that the non-formalised decision of the grantor (e.g. rejecting a grant application) taken during this period is to be decided by a civil court in civil proceedings in the dispute between the parties. The amendment also clarified, in view of the mixed legal nature of the grant relationship, that, in relation to legal declarations and procedures prior to the establishment of the grant relationship, the dispute is not subject to Act I of 2017 on the Code of Administrative Court Procedure, unlike the procedures relating to grant relationships established by administrative decisions and contracts.

4. The relationship between general and special procedural law in agricultural subsidy procedures

In addition to the above jurisdictional problem, a procedural question to be decided is whether the procedural law of agricultural subsidy law is governed solely by sectoral legislation or whether the provisions of the Ákr. can be applied as background legislation. In order to answer this question, it is necessary to examine the provisions of the Ákr. and the provisions applicable to the scope of the Aid Act in the pending court proceedings.

44 | Act LXXXIX of 2021 on the foundation of Hungary's 2022 central budget.

First of all, it should be clarified which procedural law was applicable for each programming period, taking into account the Fund as the source of the aid. For the truncated period between 2005 and 2007, the provisions of the Procedures Act[45] applied to procedures relating to agricultural subsidies, as they did for the entire period between 2007 and 2013. Between 2014 and 2020, payments from the EAGGF were subject to the provisions of the Procedures Act, while payments from the EAGF were subject to the provisions of Government Regulation No. 272/2014[46]. For the period between 2021 and 2027, the CAP Act and AM Decree No. 54/2023[47] shall apply, irrespective of the Fund as the source of the aid. Given that no precedent case law has yet been developed for the procedural law applicable in the last programming period, the problem of the application of the Ákr. as background legislation is presented in conjunction with the Aid Act.

At the time of the entry into force of the Aid Act[48], the provisions of the Ket.[49] were applicable to administrative authority proceedings covered by the Act, with certain exceptions. However, this provision was repealed by Act CCV of 2017[50] with effect from 1 January 2018. The legislator later clarified, in Act LX of 2021[51], that the agricultural and rural development and support procedure is separate from the other administrative procedures. As indicated in the Aid Act[52], the purpose of the Act was to regulate the procedures for receiving aid from community and national sources and for participating in other CAP market regulation measures, the rights and obligations of the client and of the bodies performing management and implementation tasks in a single, separate special procedural regime. The phrase "in a separate special procedural system", however, should only be interpreted in the context of Article 8 (2) and (3) of the Ákr, based on the precedent-setting decision of the Curia[53]. According to court practice, the sectoral procedure cannot therefore be a separate procedure, but only within the framework of the general procedure, i.e. the Ákr., in such a way that it cannot be deviated from in the absence of a permitting provision. The repeal of the provision on the applicability of the former Ket. as underlying legislation is therefore of no significance, nor is the fact that, according to the explanatory memorandum to Sections 20-21 of Act LX of 2021, the aid

45 | Act XVII of 2007 on certain issues of the procedure related to agricultural, agro-rural development and fisheries subsidies and other measures.
46 | Government Decree No. 272/2014 (XI. 5.) on In the 2014–2020 programming period, on the procedure for using subsidies from individual European Union funds.
47 | AM Decree No. 54/2023 (IX. 13.) on the procedure for using agricultural subsidies provided by the Common Agricultural Policy and the national budget.
48 | Subdidy Act 12. (1) paragraph.
49 | Act CXL of 2004 on the general rules of public administrative authority procedure and service.
50 | Act CCV of 2017 on the amendment of certain laws on agricultural regulation related to the Act on General Administrative Procedures and for other purposes 119. d) paragraph.
51 | Act LX of 2021 on the amendment of certain agricultural laws.
52 | Subsidy Act 1. paragraph.
53 | Decision of a Kúria No. Kfv.35.394/2022/5.

procedure is a sui generis type of procedure and the application of the Ákr. cannot arise even in a subsidiary manner.

The Ministerial Explanatory Memorandum to the Procedures Act also refers to the legislation as a modern, flexible, sui generis regime for procedures under the CAP, applicable only to the receipt of agricultural subsidies.

According to the Curia, the relationship of the Aid Act to the Ákr. had to be derived from the provisions on the scope of the Ákr. This is defined by the Ákr.[54] by negative taxation, in that the legislation on administrative authority procedures not mentioned in the list may only deviate from the provisions of this Act if this is permitted by this Act. Since the provisions of the Ákr. apply to administrative matters and the set of agricultural subsidy matters described above is a matter for the public authorities, the Ákr. continues to apply as background legislation in subsidy matters. The discrepancy between the legislator's intention and the legislative practice is thus caused by the fact that while the ministerial explanatory memorandum of Act LX of 2021 supported the need for a separate procedural system, this was not followed by the amendment of the Ákr. The Curia[55] confirmed the application of the Ákr. as the underlying legislation, pointing out that the Ákr. continues to provide the "core" of the rules applicable to all proceedings in public authority matters, which is at a high level of generalisation and the guarantee requirements it contains can only be departed from in the manner permitted by the Ákr. Consequently, according to the Curia, the principle lex specialis derogat generalis can only be applied to a limited extent in procedural matters, also as a consequence of Section 8 of the Ákr. In its decision, the Curia also referred to the fact that Section 12 (1) of the Aid Act was repealed only because it was no longer necessary to present the Ákr. in a legislative-technical manner identical to the former Ket. The possibility of the application of the Act as underlying legislation is also, according to the Curia decision cited, not precluded by the interpretation under Article XXVIII of the Fundamental Law, since the explanatory memorandum of Act LX of 2021 provides an explanation that is not in line with Section 1 of the Aid Act, and Section 1 of the Aid Act does not contain any provision that would render the system of the Ákr. inapplicable.

On the relationship between the Aid Act and the Ákr., and on the application of the general administrative procedural rules in matters not covered by the sui generis procedural rules, the Curia has also taken a position in several precedent-setting decisions. According to the established case law of the higher courts, legislation on administrative authority procedures not covered by the exception rules under Section 8 (1) of the Ákr. may only deviate from the provisions of the Ákr. if this is permitted by the Act[56]. It is also clear that, when interpreting a statu-

54 | Ákr. 8. paragraph.
55 | Decision of a Kúria No. Kfv.35.393/2022/6.
56 | Decision of a Kúria No. Kfv.35.444/2022/7.

tory provision, the part of the explanatory memorandum accompanying the draft statutory provision that is contrary to the wording of the statutory provision must be disregarded[57]. In this context, the provisions in the explanatory memorandum to the provision of the Act amending the Aid Act that "the aid procedure is a sui generis procedure, i.e. the application of the Ákr. cannot arise even on a subsidiary basis" must be disregarded, since the wording is contrary to the normative wording of the statutory provision[58]. It follows from the foregoing that the public authority procedure cannot be excluded from the scope of the Ákr. by an interpretation of the law based on the reasoning of the statutory provision[59].

Summary

In the course of my research, it became clear to me that it is not simply an error on the part of the legislator, but the diversity of the subject matter, the multifunctionality of agricultural subsidies law and the result-oriented nature of the CAP that inevitably leads to multi-level and often incomprehensibly complex procedural law. However, this should not be accepted, as it is in the interest of all those applying the law, from the national legislator to the farmer submitting an aid application, to be able to know, understand and comprehend the substantive and procedural legal system which they are called upon to apply or use.

It should have become clear from the article that in the current regulatory environment, the resolution of disputes in relation to state aid disputes and the determination of the applicable procedural law is often a problem for the courts. The same can be said when examining first instance decisions of the paying agency in subsidy cases and second instance decisions of the Minister of Agriculture, but also when analysing the work of lawyers representing the Minister of Agriculture. It follows that, in order to ensure the quality of the operation of this area of law, changes are needed in a number of areas, from higher education in agricultural law to the application of the law by the authorities and courts, from legislation to the provision of legal information on agricultural subsidies, so that this exceptionally rich and complex area of law can be applied in a way that is comprehensible to the lay citizen seeking legal advice.

57 | Decision of a Kúria No. Kfv.35.393/2022/6.
58 | Decision of a Kúria No. Kfv.37.598/2020/4., Kfv.37.598/2020/4.
59 | Decision of a Kúria No. Kfv.35.394/2022/5.

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Milan SUDZINA[1]

Restitution Process in the Slovak Republic[2]

Abstract

The paper examines the restitution process in the Slovak Republic, focusing on the restitution of agricultural and forest land. The purpose of restitution was to restore the original legal status of the ownership of the expropriated real property. The author also specifies the historical circumstances that led to the adoption of the restitution legislation (land reforms and nationalisation). Furthermore, the related issues of church restitution and the settlement of property claims in cooperatives are addressed. At present, it is no longer possible to file a restitution claim under the restitution laws, as the time limits for restitution provided for in the restitution laws have already expired. However, in judicial practice, there are cases of restoration of ownership of real property expropriated during the period of non-freedom after the time limits for restitution expired, by means of an action for the establishment of ownership brought under the general rules of civil law. In this context, the paper analyses the current issue of the competition between a restitution action and an ownership action by referring to various opinions on the solution of the issue. Finally, it analyses not only the decision-making practice of the courts of the Slovak Republic in this area, but it also includes a comparison with the relevant case law of the Czech Republic.
Keywords: land, real estate, restitution proceedings, ownership, civil law

1. Introduction

During the so-called 'relevant period', the period of non-freedom,[3] the state committed extensive property injustices on the territory of the Slovak Republic, which consisted of depriving natural and legal persons of the ownership of land and other real property, with the aim of gradually eliminating private ownership of land. After the end of socialism and the transition to a democratic system in 1990, it was

1 | Associate Professor, Pavol Jozef Šafárik University in Košice, Department of Civil Law. https://orcid.org/0000-0001-9038-8018
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3 | Act No. 480/1991 Coll. on the period of non-freedom.

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necessary to redress the property injustices by means of restitution legislation. Land restitution is the process of restoring the ownership of land or other real property taken by the state during the so-called 'relevant period' (the period of non-freedom) to the original owner or, if that is not possible, either the provision of adequate compensation (in the form of replacement land), or the provision of cash compensation (if the entitled person does not agree with the allocation of replacement land) is ensured. The restitution alleviated the consequences of certain pre-1990 property injustices. The purpose of the restitution is to restore the original legal status of the expropriated real property. The legal content of the restitution was to remove the unlawfulness of the transfer of ownership or the unlawful interference with ownership by restoring the property to its original legal status.[4]

The first restitution laws, under which it was possible to seek redress for certain property injustices of the previous regime, date back to the period of the Czech and Slovak Federal Republic. The restoration of ownership was regulated under Act No. 403/1990 Coll. on the alleviation of the consequences of certain property injustices, Act No. 87/1991 Coll. on extrajudicial rehabilitation, and Act No. 229/1991 Coll. on the regulation of ownership of land and other agricultural property (Land Act). The restitution of land used by cooperatives was regulated by Act No. 42/1992 Coll. on the regulation of property relations and the settlement of property claims in cooperatives (Transformation Act).

Constitutional Act No. 542/1992 Coll. resulted in the dissolution of the Czech and Slovak Federative Republic and the establishment of the independent Slovak Republic on 1 September 1993.[5] Since then, the Constitution of the Slovak Republic of 1 September 1992 (Constitutional Act No. 460/1992 Coll.) has been in force in Slovakia, which guarantees the equality of all subjects of the ownership rights.[6] Important restitution laws from the period of the independent Slovak Republic were church restitution laws, namely Act No. 282/1993 Coll. on the alleviation of certain property injustices caused to churches and religious communities and Act No. 161/2005 Coll. on the restoration of the ownership of real property to churches and religious communities and the transfer of ownership of certain real property. The restoration of the ownership of agricultural and forest land, which the entitled persons did not claim under the Land Act (Act No. 229/1991 Coll.), was regulated by Act No. 503/2003 Coll. on the restoration of the ownership of land, amending Act No. 180/1995 Coll. on certain measures for the arrangement of the ownership of land.

The application of the restoration of ownership by the restitution was time-limited. The time limits for the filing of restitution claims were of a mandatory nature. If the entitled persons did not file their claims within the statutory time limit, their restitution claims were extinguished. In case law, it is possible to sporadically

4 | Gaisbacher 2003, 34.
5 | Krunková 2017, 55–66.
6 | Krunková 2022, 161–169.

encounter cases of restoration of the ownership of real property expropriated during the period of non-freedom even after the expiry of the restitution time limits (referring to the non-limitation of the ownership right) if the expropriation, during the period of non-freedom, occurred without legal justification. In legal practice, the question arises whether it is possible in the Slovak Republic to claim the restoration of the ownership of real property after the expiry of the restitution time limits. We use the basic hypothesis that it is not possible to claim such ownership under the general rules of civil law after the time limits set by the special restitution laws have expired.

The paper focuses on the different opinions on the possibility of filing claims by the entitled persons after the expiry of the mandatory restitution time limits by means of an ownership action and the possible problems in filing the claims in this way. The aim of this paper is to analyse these two opinions and to offer a solution to the relationship between a restitution action and an ownership action, given that, in practice, there is competition between them.[7] Furthermore, it explores the issue of consistency with legal principles, legal norms, and judicial practice. In order to assess the relationship between the two actions, it is necessary to start from the relationship between the restitution laws and the Civil Code. The method of analysis and synthesis, as well as the comparative method, are mainly used in the paper. The paper analyses the relevant case law of the Supreme Court of the Slovak Republic and the Constitutional Court of the Slovak Republic, as well as a comparison with the case law of the Supreme Court of the Czech Republic and the Constitutional Court of the Czech Republic, which deal with similar issues.

2. Historical aspects

After the establishment of the independent Czechoslovak state on 28 October 1918, an important role of the state was to implement the land reform. The interwar land reform sought to parcel out large estates and, subsequently, create small and medium-sized agricultural estates and redistribute land among landless and small peasants.[8] Land belonging to German and Hungarian owners was taken over without compensation.[9] The aim of the first land reform was to allocate agricultural and forest land to the domestic population, especially to small farmers.[10] From a legal point of view, the basis of the first land reform was formed by three laws, namely the Expropriation Act (Act No. 215/1919 Coll.), the Allocation Act (Act No. 81/1920 Coll.), and the Compensation Act (Act No. 329/1920 Coll.).[11] Its aims were

7 | Jehlička, Švestka & Škárová 2004, 436.
8 | Sombati 2020, 55.
9 | Gunst 2001, 63; Csák 2007, 3.
10 | Fajnor & Záturecký 1998, 98.
11 | Beňa 2001, 19.

only partially fulfilled. The allocation of land to the landless and peasants did not reflect the actual demand for land.[12] Even after the actual creation of new small and medium-sized agricultural estates, the structure of land ownership did not change fundamentally, as the large estates retained a relatively important position due to the survival of the so-called residual estates.[13]

Already during the Second World War, the idea of implementing a second land reform resonated, which was to consist of confiscating the land of selected owners without compensation. The second land reform consisted of three stages. The legal framework for the first stage was Decree of the Presidency of the Slovak National Council No. 4/1945 Coll. on the confiscation and expedited allotment of agricultural land of Germans, Hungarians, and traitors and enemies of the Slovak people of 27 February 1945, and other legal norms.[14] Klement Gottwald's Building Government Programme, presented to the Constituent National Assembly on 8 July 1946, was the starting point for the second stage of the land reform. It was to focus on the revision of the interwar land reform, namely the revision of the residual estate allocations and the release of land from expropriation according to Section 11 of the Expropriation Act.[15] The legal framework for the revision of the first land reform was Act No. 142/1947 Coll. on the revision of the first land reform of 11 July 1947. Land was allocated to small peasants for agricultural production, and it was also possible to allocate land for the construction of houses or gardens. Forest land was mainly allocated to the state. Land was allocated to persons with Czechoslovak citizenship. For the land covered by the Land Reform Revision Act, the original owner was entitled to cash compensation. The revision of the first land reform resulted in the acquisition of much more forest land than agricultural land, which was of interest to peasants and the landless. Of the total amount of the agricultural land expropriated, only 8% was distributed among those interested in the land.[16] Most of the agricultural land became the property of the state.

The third stage of the land reform was to implement a process of changing the land ownership relations through the distribution of all land above the maximum area of 50 hectares and, in justified cases, also below this area, through the distribution of so-called speculative land (on which the owner was not actively farming). The third stage of the land reform was regulated by Act No. 46/1948 Coll. on the new land reform. The Act introduced a permanent regulation of the ownership of agricultural and forest land according to the principle that the land should belong to those who work on it. It stipulated that no more than 50 hectares of land could be privately owned by any one person, including members of a joint farming family. Under the New Land Reform Act, land over 50 hectares was expropriated from the

12 | Krajčovičová 1994, 14.
13 | Janšák 1931, 324–325.
14 | Průcha 2009, 60–63.
15 | Cambel 1972, 134.
16 | Zeman 2013, 85–86.

owners who were engaged in agricultural production. The land of those owners who did not work on it was expropriated in its entirety, regardless of the area of the land. At their request, these persons were allowed to retain 1 hectare of land.

The land covered by the New Land Reform Act was purchased by the state for compensation and then allocated to interested persons. The local peasant commission first had to conclude an agreement with the owner. If no agreement was concluded, or if the agreement was not approved by the district national committee, this committee would decide on purchasing the land. The land was allocated to small farmers who could prove they had Czechoslovak citizenship. Before the redistribution was completed, the collectivisation of agriculture began to take place.

The issues related to nationalisation are linked to the events of February 1948, when the transition from a democratic system to a Soviet-style totalitarian system began, and the demand for the introduction of the institution of national administration in the fields of private wholesale trade, medium-sized industrial enterprises, and handicraft production emerged. At the time of nationalisation, the Czechoslovak state acquired ownership.[17] The nationalisation laws of 1948, which followed on from the decrees of the President of the Republic of 1945, continued the nationalisation process and, in their introductory provisions, provided the list of enterprises subject to nationalisation according to their economic sector. In 1948, seed and plant breeding enterprises and agricultural and forestry research institutes were nationalised. By the end of 1948, 94% of all enterprises had been nationalised. Most enterprises were nationalised without compensation – the compensation was paid only in exceptional cases.

During the Second World War, the communists were extensively preparing to take power in Czechoslovakia. After the events of February 1948, the communists assumed power throughout the country. On 9 May 1948, the new Constitution of the Czechoslovak Republic was adopted (Constitutional Act No. 150/1948 Coll.). Czechoslovakia was declared a people's democratic republic. The Constitution stipulated that the maximum permissible area of land that could be privately owned by an individual, joint owners, or a family farming together was 50 hectares. Private ownership of land was guaranteed up to 50 hectares for farmers who worked on the land. The state began to favour cooperative land management.[18]

The adoption of Act No. 69/1949 Coll. on unified agricultural cooperatives was important for the introduction of collectivisation in agriculture.[19] The aim of the Act was to gradually deprive the peasants of their land. The cooperatives were joined voluntarily, mainly by landless persons. Landowners were not interested in joining a cooperative, but were forced by the State to join it. The establishment of the

17 | Gábriš 2015, 17–53.
18 | Pekárek & Průchová 2000, 69.
19 | Švecová 2009, 53–63.

unified agricultural cooperatives was to be the basis for the introduction of large-scale production in agriculture. In addition to the unified agricultural cooperatives, agriculture was also practised on the so-called 'state farms'. The state farms used land owned by the state. The state had acquired this land by confiscation or nationalisation, and the state farms also used land that had been acquired under the land reform but had not been allocated to anyone. In the beginning, joining a cooperative was supposed to be voluntary. From 1950 onwards, growing opinions advocated speeding up the collectivisation by imposing harsher penalties on those who refused to join the cooperative. The land associated with the cooperative remained the property of the individual members, but the cooperative acquired an unrestricted right of usufruct over it. Crops, machinery, and animals were the property of the cooperative. There were cases of forced evictions of the families of the richest farmers from the village. Political trials were conducted against the enemies of collectivisation.

In 1955, further measures were taken to promote the collectivisation of land management. According to Government Regulation No. 50/1955 Coll. on certain measures to ensure agricultural production, the district national committee was to convince the peasants of the advantages of cooperative agricultural production and of joining the unified agricultural cooperatives. Moreover, the district national committee was to convince the landowners to give their land to the cooperative for use. If a landowner did not agree to this and, in the opinion of the district national committee, could not ensure the proper management of the agricultural land, the land could be transferred to the unified agricultural cooperative.[20]

In order to strengthen cooperative land management, Act No. 49/1959 Coll. on unified agricultural cooperatives was adopted. The members of the cooperative were obliged to give all their land to the cooperative for use. Its ownership by the members of the cooperative was preserved. Machinery and animals were handed over to the cooperative, which acquired the ownership of them. Act No. 122/1975 Coll. on agricultural cooperatives was adopted with a view of extending cooperative land management.

The adoption of Constitutional Act No. 100/1960 Coll., the Constitution of the Czechoslovak Socialist Republic, on 11 July 1960 marked the transition from a people's democratic state to a socialist republic. State ownership and cooperative ownership were considered the basic forms of ownership in the spirit of socialist ideology.[21] Private ownership was to be gradually liquidated. Act No. 40/1964 Coll. Civil Code, in force from 1 April 1964, stipulated that land could not be privately owned, as it was a basic means of production, and the means of production could only be in socialist society ownership. In order to suppress the ownership of land by natural persons, the institution of personal use of land was created as a substitute

20 | Kolesár 1980, 57.
21 | Kuklík 2008, 536.

for ownership. There was a gradual disappearance of the institution of private ownership, since in the spirit of socialist ideology, the needs of natural persons would be met exclusively through socialist society ownership. A contract for the transfer or lease of agricultural or forest land required the consent of the district national committee. All these measures were designed to gradually deprive natural persons of private ownership.

After the period of non-freedom, it was necessary to redress the property injustices that had occurred, particularly the deprivation of ownership from the original owners. Constitutional Act No. 100/1990 Coll. abolished the distinction between different forms of ownership that had been applied during the period of non-freedom. Equality of all forms of ownership was introduced. Act No. 114/1990 Coll. (amending Act No. 123/1975 Coll. on the use of land and other agricultural property for production) enabled owners to demand the return of their land, which had been used by socialist organisations. In order to redress the property injustices of the previous period, it was necessary to implement a restitution process, which required the adoption of special restitution laws.

3. Restitution legislation

3.1. Alleviation of the consequences of certain property injustices

The first restitution law is Act No. 403/1990 Coll. on the alleviation of the consequences of certain property injustices, as amended (the Act on the Alleviation of the Consequences of Certain Property Injustices), which entered into force on 1 November 1990. This Act covered the consequences of property injustices caused to natural persons and private legal persons by the deprivation of ownership of real property and, where applicable, movable property as a result of nationalisation on the basis of ministerial decrees issued after 1955 and referring to the nationalisation laws of 1948.

The alleviation of the consequences of property injustices consisted in the restitution of the property to the natural or legal person from whom it had been expropriated, the payment of cash compensation or the reimbursement of the purchase price, or the payment of the difference between the cash compensation and the purchase price. The entitled person could be not only the owner of the property, but also his or her legal successor (testate heir, children, spouse, parents, or siblings).[22] A person who was a foreign citizen or a permanent resident outside the territory of the Czech and Slovak Federative Republic could also be an entitled person under this Act. The condition of having Czechoslovak citizenship was not required for a

22 | Judgment of the Supreme Court of the Slovak Republic in Case No. 3 Cdo 70/92 of 30 September 1992.

restitution claim under this Act. A legal person could also be an entitled person. The obliged person was a legal person who was in possession of the property as at the date of entry into force of the Act.

The procedure for restitution required the entitled person to submit a request to the obliged person[23] within six months from the entry into force of the Act. Otherwise, the claim was extinguished,[24] as this was a mandatory time limit. The obliged person had to return the property to the entitled person without delay at the latter's written request. Subsequently, both parties had to conclude an agreement on the return of the property and the mutual settlement of claims, with the obliged person required to return the property within thirty days. If the obliged person failed to comply with these obligations, the entitled person could file his or her claims to the court within one year of the entry into force of the Act. As the time limit for filing a restitution claim was short, it was extended until 31 August 1991.

If the real property could not be returned, the entitled person could claim cash compensation from the Ministry of National Property Administration and Privatisation. According to the Act, it was not possible to return the land on which the right of personal use had been established or the land on which a structure[25] was built after the state had taken over the land.[26]

3.2. Extrajudicial rehabilitation

Act No. 87/1991 Coll. on extrajudicial rehabilitation, as amended (the Extrajudicial Rehabilitation Act), entered into force on 1 April 1991. The Act covered the alleviation of the consequences of certain property injustices caused by civil and administrative acts during the so-called relevant period, i.e. between 25 February 1948 and 1 January 1990, which were contrary to the principles of a democratic society (respecting the rights of citizens as expressed in the Charter of the United Nations, the Universal Declaration of Human Rights, and the subsequent international covenants on civil, political, economic, social and cultural rights).

The alleviation of the consequences of the property injustices consisted in the return of property, cash compensation, or the annulment of certain administrative acts. In contrast to Act No. 403/1990 Coll. on the alleviation of the consequences of the property injustices, only a natural person[27] with Czechoslovak citizenship and permanent residence on the territory of the Czech and Slovak Federative Republic could be an entitled person. According to the Extrajudicial Rehabilitation Act, the

23 | Judgment of the Supreme Court of the Slovak Republic in Case No. 3 Cz 2/92 of 29 January 1992.
24 | Judgment of the Supreme Court of the Slovak Republic in Case No. 2 Cdo 98/92 of 27 November 1992.
25 | Judgment of the Supreme Court of the Slovak Republic in Case No. 3 Cdo 188/96 of 21 February 1997.
26 | Judgment of the Supreme Court of the Slovak Republic in Case No. 1 Cdo 49/92 of 27 August 1992.
27 | Judgment of the Supreme Court of the Slovak Republic in Case No. 2 Cdo 25/93 of 29 June 1993.

entitled person could not be a foreign citizen or a legal person. The legal successor of the original owner (testate heir, children, spouse, parents, or siblings) could also be an entitled person. The obliged person was the state or legal persons who were in possession of the property as at the date of entry into force of this Act.[28]

Upon written request, the obliged person had to return the property to the entitled person, who had to prove his or her claim to the property and indicate the manner in which it was taken over by the state. The entitled person had to request the obliged person to return the property within six months of the entry into force of this Act, as this was a mandatory time limit. If the right was not exercised within this time limit, the restitution claim was extinguished. Subsequently, the obliged person had to conclude with the entitled person an agreement on the return of the property and to return the property within thirty days. If the obliged person failed to comply with the request, the entitled person could file his or her claims to the court. The action had to be brought within one year of the entry into force of the Extrajudicial Rehabilitation Act. As the time limit for filing a restitution claim was short, subsequent amendments extended the time limit for filing an application for compensation to 31 December 1992 and later to 31 March 1997.

The entitled person could claim the return of real property if he or she could prove the so-called restitution title.[29] The obligation to return the property applied in cases where, during the relevant period, the property had been transferred to the state:

- by means of a contract of donation of real property concluded by the donor under duress;
- on the basis of a court decision declaring null and void a contract of transfer of property by means of which a citizen had transferred the property to a third party before leaving the country;
- by means of a contract of sale concluded under duress and under manifestly unfavourable conditions;
- on the basis of a refusal to accept the inheritance in succession proceedings made under duress;[30]
- by expropriation[31] with compensation, provided that the property exists and has never served the purpose for which it was expropriated;
- by expropriation[32] without compensation; or
- by nationalisation carried out in violation of the legal provisions in force at the time.

28 | Peceň 1995, 17.
29 | Judgment of the Supreme Court of the Slovak Republic in Case No. 5 Cdo 22/2000 of 30 November 2000.
30 | Judgment of the Supreme Court of the Slovak Republic in Case No. 5 Cdo 93/97 of 30 October 1997.
31 | Tomaš 2019, 71–83.
32 | Palšová 2011, 206–210.

There was also an obligation to return the real property if the state had taken it without legal justification.

If the original real property could not be returned, the entitled person was entitled to cash compensation. Cash compensation could be claimed if the real property to be returned had been devalued in the meantime to the extent that it was unfit for use,[33] if the structure had lost its original structural and technical nature as a result of extensive reconstruction,[34] or if neither the land on which a structure had been built after the state took over, nor the land on which the right of personal use had been established, was returned.

3.3. Restitution under the Land Act

The restitution of agricultural and forest land was regulated by a special restitution law. Act No. 229/1991 Coll. on the regulation of ownership of land and other agricultural property, as amended (Land Act), was intended to alleviate the consequences of certain property injustices caused to the owners of agricultural and forest land between 1948 and 1989 and to improve the management of agricultural and forest land by restoring the original ownership of the land. The Act covered the restitution of agricultural or forest land, the restitution of residential buildings, farm buildings and other buildings belonging to the original farmstead, including built-up land, the restitution of residential and farm buildings and structures used for agricultural and forestry production or related water management, including built-up land, and the restitution of other agricultural property (e.g. agricultural machinery and animals).[35]

Only a natural person with Czechoslovak citizenship and permanent residence on the territory of the Czech and Slovak Federative Republic could be an entitled person, i.e. a person who could file a restitution claim. At the same time, the condition had to be met that the land, buildings, and structures belonging to the original farmstead had been transferred to the state or to other legal persons in the relevant period,[36] i.e. between 25 February 1948 and 1 January 1990. The entitled person could also be the legal successor of the original owner listed in the Land Act (testate heir, children, spouse, parents, siblings). Agricultural and forest land could not be returned to foreign citizens or persons not permanently resident on the territory of the Czech and Slovak Federative Republic. Legal persons could not be entitled persons under this Act. The obliged persons against whom a restitution claim could be filed were the state or legal persons who were in possession of the real property as at the date of entry into force of the Land Act.[37]

33 | Judgment of the Supreme Court of the Slovak Republic in Case No. 2 Cdo 149/96 of 27 March 1997.
34 | Judgment of the Supreme Court of the Slovak Republic in Case No. 3 Cdo 27/96 of 1 January 1997.
35 | Judgment of the Supreme Court of the Slovak Republic in Case No. M Cdo 16/2003 of 1 May 2006.
36 | Judgment of the Supreme Court of the Slovak Republic in Case No. 9Sžr/132/2015 of 24 June 2015.
37 | Průchová 1997, 47.

The entitled person had to prove the restitution title, i.e. the legal basis on which the real property had been transferred to the state during the relevant period. The restitution titles were formulated more broadly than in the Extrajudicial Rehabilitation Act.[38] The Land Act also extended the restitution titles to cases where the entitled persons were to be given back real property which had been transferred to the state or another legal person as a result of an expropriation without compensation pursuant to Act No. 142/1947 Coll. on the revision of the first land reform or Act No. 46/1948 Coll. on the new land reform, as a result of political persecution or a practice violating universally recognised human rights and freedoms, or as a result of the transfer of the property to the ownership of a cooperative. Land that had been transferred to the state or another legal person could be returned to any entitled person up to a maximum of 150 hectares of agricultural land or 250 hectares of all land (agricultural and forest land). However, between 18 February 1992 and 15 July 1993, the provision on the maximum area was deleted from the Land Act. Therefore, during this period, entitled persons could claim the full area of the land.

The procedure for filing a restitution claim was that the entitled person had to file the claim with the district office[39] and, at the same time, request the obliged person to return the real property. The obliged person had to conclude with the entitled person an agreement on the return of the real property within sixty days of the request. The agreement was subject to approval by the district office in the form of an administrative decision. If the agreement was not concluded, the district office decided on the ownership of the real property by the entitled person. If necessary, the district office could establish or abolish an easement (e.g. a right of way) on the transferred real property. The right for restitution of real property had to be exercised by 31 December 1992.[40] If the right was not exercised within this time limit, the restitution claim was extinguished. Evidence of the restitution claim filed had to be submitted to the Land Office by the substantive time limit of 31 December 1995.[41]

In comparison with the Extrajudicial Rehabilitation Act, the Land Act formulated cases in which it was not possible to return the original real property on a wider scale. Land or parts of land could not be returned:

- if the land was owned by a natural person or if a right of personal use had been established over the land;
- if there was a cemetery on the land;

38 | Judgment of the Supreme Court of the Slovak Republic in Case No. 2 Sžo-KS 1/2004 of 1 November 2006.
39 | Bandlerová et al. 2013, 353.
40 | Judgment of the Regional Court in Banská Bystrica in Case No. 23 S 16/2001 of 1 November 2003.
41 | Judgment of the Regional Court in Banská Bystrica in Case No. 23 S 89/01 of 11 April 2002.

- if the land was located in the sanitary protection zone of first-class water sources, formed the bed of a watercourse, or if there were natural curative springs and sources of naturally occurring table mineral waters on the land;
- if the land was built-up after it had been transferred to the ownership of the state or another legal person (however, the land could be returned if the structure did not interfere with agricultural or forest use);[42]
- if allotment gardens or cottage settlements were established on the land;
- if physical education and sports facilities were located on the land;
- if the land could be expropriated in the public interest, and;
- if the land was located within the perimeter of the land improvement project, and the implementation of the land improvement project was approved.

In these cases, the entitled person was entitled to be allocated replacement land, and if he or she did not agree with the allocation of replacement land, he or she could claim cash compensation. The Slovak Land Fund was responsible for allocating replacement land of adequate size and quality or granting cash compensation.

The right to cash compensation could also be exercised in the case of destroyed or substantially damaged structures and forest plantations. Compensation was granted to the entitled person within six months from the date of delivery of the request. It was also possible to claim cash compensation for equipment and livestock (agricultural machinery and animals). In order to ensure the agricultural or forestry production, the original owner of equipment and livestock was entitled to compensation if they had been brought into the agricultural cooperative by the original owner or taken away from the original owner between 25 February 1948 and 1 January 1990. If the original owner died or was declared dead, the legal successor of the entitled person under the Land Act was entitled to compensation to ensure the agricultural or forestry production.

3.4. Restoration of the ownership of land

The time limits for filing restitution claims under the Land Act were short and mandatory. Not everyone who met the conditions for restitution could file a claim within this time limit, and the ownership of many agricultural and forest lands remained unsettled. With the adoption of Act No. 503/2003 Coll. on the restoration of the ownership of land, amending Act No. 180/1995 Coll. on certain measures for the arrangement of the ownership of land, as amended (the Act on the Restoration of the Ownership of Land), the time limits for filing restitution claims were renewed. The Act entered into force on 1 January 2004. Its purpose was to enable the entitled persons who had not filed their restitution claims

42 | Ruling of the Supreme Court of the Slovak Republic in Case No. Sž-o-KS 90/2003 of 1 September 2004.

within the time limit set by the Land Act to file their claims within the new one-year time limit.

The Act on the Restoration of the Ownership of Land regulates cases of restitution of agricultural and forest property. It provides for the restoration of the ownership of agricultural land (the unpaved roads were included)[43] and of forest land, provided that such land was not returned in accordance with the previous restitution laws. In legal practice, the question of whether land should have the nature of agricultural or forest land at the time of its expropriation by the state or at the time of the entry into force of the Act on the Restoration of the Ownership of Land was hard to answer. It was a shortcoming not only of this Act but also of the Land Act that this question was not explicitly addressed. In legal practice, the prevailing opinion was that land which, at the time of its expropriation by the state, had the nature of agricultural or forest land should be subject to restitution. Thus, it was the nature of the land at the time of the expropriation (not at the time of the decision on the restitution claim) that was relevant. The subject of the restoration of ownership was land for which restitution claims had not been filed or had been filed after the statutory time limit.[44] Unlike the Land Act, the Act on the Restoration of the Ownership of Land did not provide for the restoration of the ownership of structures, but only for the restoration of the ownership of land, and it did not allow for the restoration of the ownership of equipment and livestock (machinery and animals). Under the Act on the Restoration of the Ownership of Land, it was not even possible to claim compensation for destroyed real property.

The eligible persons for the restoration of the ownership of real property were defined in the same way as in the Land Act. Only a natural person who was a citizen of the Slovak Republic with permanent residence on its territory and whose land was transferred to the state or another legal person between 25 February 1948 and 1 January 1990 could exercise the right to restoration of the ownership of land under the Act on the Restoration of the Ownership of Land. Dual citizenship was not excluded, but the permanent residence had to be on the territory of the Slovak Republic. With regard to the question of the date as at which the person filing the restitution claim had to meet the conditions of an entitled person, it was sufficient if he or she met the characteristics of an entitled person as at the date on which he or she filed the restitution claim. Thus, the entitled person did not have to meet all the conditions as at the date of entry into force of the Act on the Restoration of the Ownership of Land. In the event of the death of the entitled person, the restitution claim could be filed by a legal successor, i.e. the testate heir, children, spouse, parents, or siblings.[45] The obliged persons were legal persons that had the right to

43 | Judgment of the Supreme Court of the Slovak Republic in Case No. 6 Sžo 95/2009 of 16 December 2009.
44 | Judgment of the Supreme Court of the Slovak Republic in Case No. 3 Sžo 100/2015 of 26 May 2016.
45 | Judgment of the Supreme Court of the Slovak Republic in Case No. 1 Sžo 67/2007 of 18 December 2007.

manage or administer land owned by the Slovak Republic and agricultural cooperatives. According to the Act on the Restoration of the Ownership of Land, not every legal person administering land subject to restitution was an obliged person. In contrast to the Land Act, municipalities and towns were no longer obliged persons (even if they administered land subject to restitution).

According to the Land Act, if there was more than one entitled person (several co-owners of the real property) and only one person filed a restitution claim, the entire real property was returned to that person. According to the Act on the Restoration of the Ownership of Land, an entitled person could only claim his or her share, not more. Thus, if an entitled person claimed his or her share and the other entitled persons did not claim their shares, the entitled person did not receive the entire real property but only his or her ownership share. The maximum area of land to be returned was the same as in the Land Act (150 hectares of agricultural land and a maximum of 250 hectares of agricultural and forest land in total). In order to file a claim under the Act on the Restoration of the Ownership of Land, it was necessary to prove one of the restitution titles. These were listed exhaustively, could not be extended by analogy, and their definition corresponded to that in the Land Act. The restitution titles were thus similar to the restitution titles under the Land Act.

Like the Land Act, the Act on the Restoration of the Ownership of Land defined land that could not be returned to the original owner. The cases where the original land could not be returned were listed exhaustively. In the case of agricultural land, replacement land was allocated by the Slovak Land Fund. Where forest land was the subject of restitution, replacement land was allocated by the state forestry organisation (Lesy Slovenskej republiky, štátny podnik). If the entitled person did not agree with the allocation of replacement land, he or she was entitled to cash compensation. The Slovak Land Fund was responsible for paying the cash compensation.

The Act on the Restoration of the Ownership of Land, like all previous restitution laws, provided for a prohibition on the transfer of land covered by the restitution law. If the obliged person transferred such land to a third party (whether by purchase or by donation, regardless of the agreed price), such a legal act was absolutely null and void from the outset as an act contrary to the law in terms of its content.[46]

According to the Act on the Restoration of the Ownership of Land, a restitution claim had to be filed with the district land office in whose district the land was located. The time limit for filing a restitution claim was 31 December 2004. This time limit was mandatory, i.e. the entitled person's restitution claim was extinguished upon its expiry in vain. The time limit was of a substantive nature, i.e. it

46 | Judgment of the Supreme Court of the Slovak Republic in Case No. 3Sžr/102/2014 of 7 September 2015.

was not sufficient to send the claim by post on the last day of the time limit, but the entitled person's claim for restitution of his or her land had to be delivered to the district land office on the last day of the time limit at the latest. The district land office decided either to return the original land to the entitled person or to transfer to the entitled person, free of charge, replacement land of similar quality and size to the original land, if possible in the same municipality where most of the original land was located (provided that the entitled person agreed, or the entitled person received cash compensation).

The proceedings before the district land office were also governed, as under the previous restitution laws, by Act No. 71/1967 Coll. on administrative proceedings (Code of Administrative Procedure), as amended.[47] They were, therefore, typical administrative proceedings. Proceedings before the district land office could only be initiated upon application, not *ex officio*. The decision of the district land office could be appealed to the court. In such cases, the decision was made within the administrative justice system.[48]

As far as the costs of the restitution proceedings were concerned, there was a difference with the Land Act. Under the Land Act, the costs related to the valuation of the real property, the identification of the parcels, and the demarcation of the boundaries of land were borne by the state. The Act on the Restoration of the Ownership of Land exempted the entitled persons from paying some, but not all, of these costs. If an entitled person needed the identification of a parcel or requested an extract from the land register, these acts were exempt from an administrative fee pursuant to Act No. 145/1995 Coll. on administrative fees, as amended. Similarly, if an appeal was lodged against a decision of the district land office, it was decided within the administrative justice system,[49] and these proceedings were exempt from a court fee pursuant to Act No. 71/1992 Coll. on court fees and the fee for an extract from the criminal records, as amended.[50] If it was not possible to return the original land and the entitled person claimed cash compensation, such cash compensation was also exempt from income tax.[51] [52] However, the cost of the demarcation of the boundaries of land had to be borne by the entitled person. The same applied to the costs of land valuation if the entitled person did not agree with the allocation of replacement land. The Slovak Land Fund paid cash compensation in the amount determined in accordance with the price regulation valid as at the date of entry into force of the Land Act, i.e. Decree of the Ministry of Finance of the Slovak Republic No. 465/1991 Coll. on the prices of structures, land, permanent crops, payments for establishing the right of personal use of land and

47 | Jakab 2018, 13–21.
48 | Tomaš 2022, 469–496.
49 | Orosz 2009, 262.
50 | Štrkolec 2006.
51 | Vartašová & Červená 2019, 75.
52 | Štrkolec & Prievozníková 2008, 189–197.

compensation for temporary use of land, as amended. The Decree regulated the official price of land, which was lower than the market price of land, so it was more advantageous for the entitled person to claim replacement land rather than cash compensation.

3.5. Cooperative land and the Transformation Act

Before 1990, land was used extensively by cooperatives because, during the period of non-freedom, the state forced natural persons to hand over land to the cooperative. It was also necessary to hand over agricultural machinery and animals to the cooperative. As a result, the landowners suffered property injustices because the cooperatives had permanent free use of other people's land. Only the so-called bare ownership (*nuda proprietas*) remained to the owners. Cooperatives violated the ownership rights of the landowners. Agricultural cooperatives carried out agricultural production on other people's land in the form of the right of cooperative land use. Housing cooperatives built residential and non-residential buildings on other people's land. Consumer and producer cooperatives also often had their buildings constructed on other people's land without the consent of the landowners. This resulted in property injustice to the landowners.

After 1990, it was necessary to transform the cooperatives into their present form and to alleviate the property injustices caused to landowners during the period of non-freedom. In connection with the transition of cooperatives to the new legal regime after 1990, Act No. 42/1992 Coll. on the regulation of property relations and the settlement of property claims in cooperatives, as amended (the Transformation Act), was adopted. This Act provided for the alleviation of property injustices suffered by entitled persons because cooperatives used other people's land during the period of non-freedom.

According to the Transformation Act, any person whose land was used by a cooperative as at the date of entry into force of Act No. 229/1991 Coll. on land (24 June 1991) became an entitled person towards the cooperative. The Transformation Act provided for the distribution of the cooperative's assets among the entitled persons by establishing the key according to which the cooperative's assets were to be distributed. Fifty per cent of the cooperative's assets were distributed among the entitled persons according to the area of land used by the cooperative, irrespective of the quality of the land or the length of time the land had been used by the cooperative. Thirty per cent of the cooperative's assets were distributed among the entitled persons according to the equipment and livestock used by the cooperative, while twenty per cent were distributed among the entitled persons according to the number of years worked in the cooperative.

The entitled person under the Transformation Act received a share in the cooperative's assets, expressed in monetary terms. The final amount of the

entitled person's share in the cooperative's assets was determined in a transformation project. According to the Transformation Act, the entitled person was the person who filed a claim against the cooperative by 28 April 1992. Anyone who did not register his or her claim with the cooperative within this time limit did not become an entitled person and could not receive a share in the cooperative's assets, as this was a mandatory time limit. The transformation project was decided at a joint general meeting, which all entitled persons were to attend. At this joint general meeting, a vote was taken to approve the transformation project. The transformation project included a list of entitled persons and their share in the cooperative's assets.[53]

The Transformation Act recognised two forms of alleviation of property injustices suffered by entitled persons.[54] The first form was for people who worked as self-employed peasants.[55] These persons could request the cooperative to return their land, equipment, and livestock or to pay them cash compensation. The entitled person had to receive the property share within 90 days from the date of the written request.[56] Other persons were subject to the second form of alleviation of property injustices – the issuance of share certificates, i.e. an entitled person who had not started agricultural activities was entitled to a share certificate. A share certificate was a security that stated the amount of the entitled person's share in the cooperative's assets, expressed in monetary terms. The cooperatives were obliged to issue share certificates to the entitled persons by 30 June 1996 at the latest. The obligation to issue share certificates was fulfilled by notifying the Securities Centre of the information required for registration.

The share certificate entitled its holder to apply to the cooperative for membership, and the cooperative could not refuse membership without a substantive reason. Otherwise, membership was decided by the court. The share certificates could be sold on the stock exchange or, after a period of seven years from the approval of the transformation project, the entitled person could offer the share certificate to the cooperative for redemption. In practice, the entitled persons who used the first form of alleviation of property injustices were in a more advantageous position, as they received cash compensation. The entitled persons who offered their share certificates to the cooperative for redemption had a less favourable outcome, as many cooperatives went bankrupt in the 1990s. In practice, most share certificates were not registered with the Securities Centre, so they could not even be traded on the stock exchange.

53 | Pokorný & Holub 2000, 51.
54 | Judgment of the Supreme Court of the Slovak Republic in Case No. 5Obdo/24/2020 of 16 February 2021.
55 | Judgment of the Supreme Court of the Slovak Republic in Case No. 2 Cdo 156/96 of 18 February 1997.
56 | Judgment of the Supreme Court of the Slovak Republic in Case No. 3 Cdo 130/2005 of 27 October 2005.

3.6. Restitution of church property

After 1948, all church land came under the administration of the state authorities, forest land was taken over by state forestry organisations, and agricultural land was given to state farms or unified agricultural cooperatives. Property injustices before 1990 did not only affect natural persons. Legal persons were not exempted from the unlawful expropriation of real property, and thus, churches and religious communities also lost their real property. Since the legal personality of churches and religious communities was fully restored after the fall of the socialist regime, the issue of returning church real property to its rightful owners – churches and religious communities – had to be addressed within restitution proceedings.

The restitution of church property differed from the restitution of real property of natural persons. In general, the restitution laws can be divided into those relating to the restitution of the property of natural persons and those relating to the restitution of the property of legal persons. These laws differ, in particular, in regard to granting the so-called replacement compensation. The question of replacement compensation arose when it was not possible to return the original real property to the entitled person in the cases provided for by law. Unlike in the case of restitution to natural persons where, if it was not possible to return the original real property, replacement compensation was granted (either in the form of replacement land or cash compensation), in the case of restitution of property to legal persons (churches and religious communities), the real property was returned in the condition in which it was as at the date of entry into force of the Restitution Act, and where it was not possible to return the real property (in the cases exhaustively listed in the Act), the church or religious community was not entitled to any replacement compensation.

An important property law was Act No. 298/1990 Coll. on the regulation of certain property relations of religious orders and congregations and of the Archbishopric of Olomouc. The purpose of the Act was to redress the property injustices caused by the unlawful expropriation of mainly real property in the 1950s. It provided for the restitution of property exhaustively listed in the Annexes to the Act. Restitution of other property was not possible. The property was returned in the condition in which it was as at the date of entry into force of the Act. The real property was transferred to the entitled persons directly *ex lege*. No decision by a state authority or agreement between the entitled person and the obliged person was required for the acquisition of ownership.

The general church restitution law was Act No. 282/1993 Coll. on the alleviation of certain property injustices caused to churches and religious communities, as amended (Act No. 282/1993 Coll.). This Act was the general restitution law because it did not apply only to specific religious orders and congregations but defined an entitled person, in general terms, as a registered church or religious community

that was unlawfully deprived of its property during the period precisely defined by the Act. No specific real property which was to be subject to restitution was enumerated in this Act.

The purpose of Act No. 282/1993 Coll. was to alleviate the property injustices caused to churches and religious communities by the deprivation of their ownership during the relevant period in violation of the principles of a democratic society and the documents on fundamental rights and freedoms. The relevant period was from 8 May 1945 but, in the case of Jewish religious communities, from 2 November 1938 to 1 January 1990. Only registered churches and religious communities (registered by the Ministry of Culture of the Slovak Republic) were entitled persons, provided that they were deprived of their property for the benefit of the state or a municipality during the relevant period. The obliged person was the state or a municipality, or a legal person established by the state or a municipality, which was in possession of the property subject to restitution as at the date of entry into force of the Church Restitution Act. Natural persons were obliged to return the property only if they had acquired it from the state or the municipality in violation of the laws in force at that time, or if the person acquiring the property had been unlawfully favoured.

The procedure for the restitution of property was such that the entitled person had to request the obliged person to return the property, and the request had to be made in writing and contain the specification of the property, the names of the entitled person and the obliged person, the manner in which the property was taken, when the taking took place, and the restitution title. The property was returned to the entitled person in the condition in which it was as at the date of entry into force of the Restitution Act. If the real property subject to restitution was devalued, the entitled person was not entitled to compensation from the obliged person. The entitled person could not file any claims against the obliged person for restitution other than those stipulated in this Act. For example, the entitled person could not claim damages, unjust enrichment, or rent for the use of real property against the obliged person.

The restitution claim (as in other restitution laws) could not be filed directly in court. Instead, the entitled person had to first request the obliged person to return the property.[57] The Act gave the entitled person a time limit of 12 months from the date of entry into force of the Act (it entered into force on 1 January 1994) to make a written request to the obliged person. This time limit was mandatory, i.e. after its expiry the restitution claim was extinguished. On the date of delivery of the request to the obliged person, an agreement on the return of the property had to be concluded between the entitled person and the obliged person within the period of 90 days.[58] If no agreement on the return of the property was reached

57 | Finding of the Constitutional Court of the Slovak Republic in Case No. 1 ÚS 12/2010 of 7 July 2010.
58 | Judgment of the Supreme Court of the Slovak Republic in Case No. 1 Sž-o-KS 2/04 of 29 June 2004.

within this 90-day period, only then could the restitution claim be filed in court. The time limit for bringing a restitution action was 15 months from the date of delivery of the request to the obliged person. Act No. 282/1993 Coll. also provided for cases in which land or parts of land were not to be returned. These cases were exhaustively listed. In these cases, the entitled person was not entitled to replacement land or cash compensation (unlike in the case of restitution to natural persons).

Within the church property restitution process in the Slovak Republic, the most recent law was Act No. 161/2005 Coll. on the restoration of the ownership of real property to churches and religious communities and the transfer of ownership of certain real property (Act No. 161/2005 Coll.). The Act entered into force on 1 May 2005. The purpose of the Act was to restore the ownership of real property that had not been returned under the previous restitution law (Act No. 282/1993 Coll.). Entitled persons could exercise their right to the restoration of ownership until 30 April 2006. In contrast to Act No. 282/1993 Coll., the subject of restitution under Act No. 161/2005 Coll. was real property only. It could be agricultural and forest land, including farm buildings and related structures. The definition of the entitled person and the restitution title were the same as in the previous restitution law. The real property was also returned in the condition in which it was as at the date of entry into force of Act No. 161/2005 Coll. Furthermore, the entitled person could not file any claims under Act No. 161/2005 Coll. other than those directly provided for in the Act. For example, it was not possible to claim damages or unjust enrichment. A similar provision was made for cases where real property was not returned. In this case, there was no claim for the replacement real property or cash compensation. In contrast to Act No. 282/1993 Coll., the new Act defined the obliged person differently. It could not be a natural person, but only a legal person who administered the real property owned by the Slovak Republic or a municipality or who was in possession of such real property.

The right to the restoration of the ownership of real property could not be claimed directly in court. Firstly, the entitled person had to deliver a written request to the obliged person to return the real property. The Act provided for a mandatory time limit of 30 April 2006 for delivering the request to the obliged person. The entitled person had to conclude an agreement on the return of the real property with the obliged person. If no agreement on the return of the real property was concluded, the entitled person could file the restitution claim in court within 12 months of the delivery of the written request to the obliged person. On 17 March 2005, the National Council of the Slovak Republic adopted Resolution No. 1551 on Act No. 161/2005 Coll., which included a declaration that the process of restitution of property belonging to churches and religious communities would be considered closed with the entry into force of this Act.

4. Restitution proceedings and current practice

4.1. Competition between an ownership action and a restitution action

In view of the fact that the time limits for filing restitution claims under the restitution laws have already expired, it is of particular interest, from the perspective of legal theory and judicial practice, to address the question of the relationship between a restitution action and an ownership action.[59] It should be reiterated that the restitution time limits were of a mandatory nature. All the restitution laws contained the rule that if a restitution claim was not filed within the time limit, it would be extinguished.[60] In 1999, the Constitutional Court of the Slovak Republic ruled that the setting of the time limits for filing restitution claims did not violate Article 20 or Article 46 of the Constitution of the Slovak Republic (Constitutional Act No. 460/1992 Coll., as amended).[61] The restitution laws are, in relation to Act No. 40/1964 Coll. Civil Code, as amended (the Civil Code), special laws. In practice, it often happens that the entitled person who has missed the time limit for filing a restitution claim according to the restitution laws files the claim even now by means of a general ownership action. In such cases, the entitled persons file their claims by means of an action for the establishment of ownership[62], referring to the non-limitation of the ownership right pursuant to Section 100(1) of the Civil Code.

In the decision-making practice of the courts (both common courts and the Constitutional Court), not only in the Slovak Republic but also in the Czech Republic, there are two opposing opinions on the solution of this issue. According to the first opinion, if the time limit for filing a restitution claim has expired in vain, the entitled person can file his or her claim by means of an ownership action under the Civil Code, arguing that the ownership right is not subject to statutory limitation and that the Civil Code, as a general law, contains provisions on the protection of the ownership right, which can be used in the event that it is not possible to use the protection under a special (restitution) law. According to the opposite opinion, once the restitution time limits have expired, it is no longer possible to file a claim by means of an ownership action because if there is a special law (restitution law), a general law (Civil Code) cannot be applied; an ownership action cannot circumvent the purpose and meaning of the restitution laws.

59 | Kindl 1993, 7.
60 | Pekárek 1996, 459.
61 | Ruling of the Plenary Session of the Constitutional Court of the Slovak Republic in Case No. PL. ÚS 23/1998 of 1 July 1999.
62 | Holub, Pokorný & Bičovský 2002, 59.

4.2. The first opinion: Possibility to file a claim by means of an ownership action

The essence of this opinion lies in resolving the question of whether the adoption of the restitution laws extinguished the ownership rights of persons whose property had previously been taken by the state without legal justification. The proponents of this opinion argue that the taking of real property by the state without legal justification has not extinguished the ownership right and that, therefore, there is nothing to prevent the entitled person from filing his or her claim by means of an action under the general rules of civil law. According to some opinions, the claim may be filed by means of an action under the Civil Code, particularly in cases where there is no document, decision, or legal provision justifying the conclusion that the state or another legal person has acquired ownership of the real property.[63]

In 1998, the Supreme Court of the Slovak Republic[64] stated that, in the case of restitution laws, there is a relationship between general and special laws. On the one hand the principle applies that restitution laws have the nature of a special law in relation to the Civil Code (*lex specialis derogat legi generali*), but on the other hand if the restitution laws do not apply to certain persons or cases, then the general law, i.e. the Civil Code, applies.

It follows from the Judgment of the Supreme Court of the Slovak Republic in Case No. 5 Cdo 36/99 of 20 August 1999 that the filing of claims under the Civil Code cannot be excluded if the extinction of the ownership right of the original owner has not been proven and the property has only been taken *de facto* by the state or a legal person. The restitution laws are intended only to facilitate the filing of claims by the entitled persons, not to exclude them under general laws.

In another decision[65], the Supreme Court of the Slovak Republic concluded that although the restitution laws have the nature of a *lex specialis* in relation to the Civil Code, they do not exclude the possibility of seeking protection of the ownership right under the provisions of the Civil Code by means of an action for the establishment of ownership after the expiry of the restitution time limits if it is ascertained that the provisions of the *lex specialis* cannot be applied to a particular case.

Moreover, in the case law of the Constitutional Court of the Slovak Republic, in its earlier decisions, there was an opinion that it was possible to file an action for the establishment of ownership according to the general rules of civil law if the time limit for filing a restitution claim according to the restitution laws had already expired. In general, the proponents of this opinion argue that where property has

63 | Spáčil 2002, 90.
64 | Judgment of the Supreme Court of the Slovak Republic in Case No. Cdo 1/98 of 29 April 1998.
65 | Ruling of the Supreme Court of the Slovak Republic in Case No. 3 Cdo 205/2009 of 17 February 2011.

been taken by the state without legal justification, the entitled person has not lost his or her ownership of that property and there is nothing preventing him or her from filing his or her claim or seeking cash compensation by means of an action based on the general rules of civil law.[66] In 2009, the Constitutional Court of the Slovak Republic came to the same conclusion as in the case of Decision III. ÚS 178/06, i.e. it is possible to seek the ownership by means of an action to obtain a declaratory ruling even if the entitled person did not make use of the possibility to file his or her claim on the basis of the restitution laws.[67]

In a further finding in 2011, the Constitutional Court of the Slovak Republic stated that if the legislature provided in Section 6(1)(p) of the Land Act a separate restitution ground consisting in the fact that the real property which was transferred to the state or another legal person as a result of taking the real property without legal justification, the purpose of this provision was to facilitate the registration of the entitled persons as owners in the Land Register in cases where the state, abusing its position in the period of non-freedom, allowed the change of the registration of the ownership in the Land Register without fulfilling the basic requirements arising from the law in force at that time. The facilitation of the position of the entitled persons was also intended to allow them to obtain the correction of the registration of their (still existing) ownership right in a relatively simple administrative procedure and not to be obligated to seek judicial protection of their ownership right. It was not the purpose of the Land Act to provide for a prohibition of obtaining a revision of the state's actions during the relevant period after the expiry of the time limit for filing a restitution claim.[68]

4.3. Opposing opinion: Impossibility to file a claim by means of an ownership action

Controversial opinions on the relationship between a restitution action and an ownership action can also be found in the decision-making practice of the Supreme Court of the Czech Republic and the Constitutional Court of the Czech Republic. They ruled in 2003–2005 that an entitled person whose real property was taken over by the state in the relevant period under the conditions set out in the restitution laws cannot seek protection of the ownership right under the general laws.[69] At the same time, it has often been pointed out in the decision-making practice of Czech courts that the European Court of Human Rights has accepted

66 | Ruling of the Constitutional Court of the Slovak Republic No. III. ÚS 178/06-5 of 20 June 2006.
67 | Ruling of the Constitutional Court of the Slovak Republic No. II. ÚS 231/09-29 of 11 June 2009.
68 | Finding of the Constitutional Court of the Slovak Republic No. II ÚS 249/2011-30 of 29 September 2011.
69 | Judgment of the Supreme Court of the Czech Republic in Case No. 31 Cdo 1222/2001 of 11 September 2003, Ruling of the Supreme Court of the Czech Republic in Case No. 28 Cdo 1782/2002 of 15 April 2003, Finding of the Constitutional Court of the Czech Republic in Case No. IV ÚS 298/05 of 8 August 2005.

in its decisions that states have the right to set their own conditions for the legal restitution of property.[70]

In the past, the Supreme Court of the Slovak Republic issued several decisions on the question of the impossibility of filing a restitution claim by means of an ownership action under the Civil Code. For example, it follows from the operative part of Decision No. R 28/2001 *argumentum a contrario* that if the restitution law establishes a certain legal fact as a ground for restitution, the claimant may not seek in a lawsuit the invalidity of a contract on the transfer of real property concluded during the so-called relevant period under the general law (pursuant to Section 126 of the Civil Code).[71]

The Supreme Court of the Slovak Republic in its decisions in 2009–2010 (Case No. 4 Cdo 130/2007 of 25 February 2009, Case No. 5 Mcdo 4/2009 of 24 February 2010, and Case No. 4 Cdo 300/2008 of 27 October 2010) unified the decision-making practice on the competition between a restitution action and an ownership action. It argued that:

1. If the protection of a right may be sought through a procedure under a restitution law as a special law, i.e. if a restitution claim is filed, a claim for the protection of property under general laws may not be filed.
2. Only in cases expressly provided for in the restitution laws was there a ground for the return of property. At the same time, this precluded the possibility of exercising this right in any other way, i.e. under the general laws.
3. Failure to make use of the possibility of claiming restitution within the statutory time limit results in the irreversible extinguishment of the right and, thus, in the impossibility of obtaining a revision of the state's actions during the so-called relevant period by means of an action for the establishment of ownership.
4. After the expiry of the restitution time limits in vain, the entitled person can no longer be considered as the owner of the property.
5. One of the fundamental principles of the rule of law is the principle of legal certainty. At a certain point in time, the obliged person must be sure who owns the real property.
6. It cannot be said that the rights of the original owners have been violated. These owners had the opportunity to exercise their ownership right within sufficiently long periods of time and under the conditions laid down in the restitution laws, and if they did not do so or were unsuccessful, their ownership right was extinguished (in the same way the ownership right is extinguished as a result of acquisition of ownership by another person by prescription).

70 | For example, Kopecký v. Slovakia, Zvolský and Zvolská v. Czech Republic, Jantner v. Slovakia. See Hubálková 2004, 63.

71 | Judgment of the Supreme Court of the Slovak Republic in Case No. 5 Cdo 36/99 of 20 August 1999.

On the competition between a restitution action and an ownership action, the Plenary Session of the Constitutional Court of the Czech Republic issued a unifying position in 2005,[72] according to which, an action for the establishment of ownership cannot circumvent the meaning and purpose of the restitution laws. This position was also reflected in another finding of the Constitutional Court of the Czech Republic in 2006, published in the Collection of Findings and Rulings of the Constitutional Court of the Czech Republic.[73] However, despite the above-mentioned unifying position of the Constitutional Court of the Czech Republic, there are also occasional decisions to the contrary, according to which it is possible to file a claim even after the expiry of the restitution time limits by means of an action for the establishment of ownership.[74]

The Constitutional Court of the Slovak Republic adopted a position on the competition between a restitution action and an ownership action in 2013.[75] It follows from this decision that after the expiry of the restitution time limits, it is no longer possible to bring a general ownership action for the establishment of ownership of real property. If it were still possible to seek the return of the property (eviction) under Section 126 of the Civil Code, which could have been claimed under a restitution law, or to seek the establishment of ownership of such property, the legal certainty of persons who acquired the real property after it had become clear that the real property could no longer be returned under the restitution law would be collectively undermined.

4.4. Current decision-making practice

A shift in opinion can be observed in the current decision-making practice. A change of opinion in the decision-making practice of the Constitutional Court of the Slovak Republic occurred in some decisions issued in 2017 and 2020 (decisions in Cases No. I. ÚS 460/2017 and No. IV. ÚS 628/2020), when the Constitutional Court tended to the opinion that each case of claim for the return of real property under the general laws must be assessed individually. According to the Constitutional Court of the Slovak Republic, it is necessary to focus on the question of whether there are specific circumstances in each case for which the claimants could not realistically make use of the restitution laws. In these decisions, the Constitutional Court bases its opinion on the different position published on the Ruling of the Constitutional Court of the Slovak Republic in Case No. III. ÚS 177/2013 of 24 April

72 | Position of the Plenary Session of the Constitutional Court of the Czech Republic in Case No. Pl. 21/05 of 1 November 2005.
73 | Decision of the Constitutional Court of the Czech Republic in Case No II. ÚS 14/04 of 25 January 2006.
74 | Decision of the Constitutional Court of the Czech Republic in Case No. I. ÚS 89/07 of 25 June 2009 and Case No. I. ÚS 3503/10 of 19 April 2012.
75 | Ruling of the Constitutional Court of the Slovak Republic in Case No. III. ÚS 177/2013 of 24 April 2013.

2013,[76] according to which the entitled person could not lose his or her ownership right if the property was taken over by the state without legal justification. It should be noted that this could reopen the way for the filing of restitution claims in respect of real property that was not returned to the entitled persons under the previous restitution laws.

5. Conclusion

Contrary to some recent decisions of the Constitutional Court of the Slovak Republic, we are inclined to take the opposite opinion. In our opinion, protection by means of an ownership action under the Civil Code should not be allowed after the expiry of the restitution time limits laid down in the restitution laws, as this would undermine the principle of legal certainty in legal relations concerning real property. This would mean a reopening of the restitution process in Slovakia. One of the fundamental pillars of the rule of law is legal certainty. Disputes over ownership shall be judged in this light, particularly where the grounds for challenging it are not found in the present, but in events that occurred decades ago. Allowing claims covered by the restitution laws to be filed by means of an ownership action under the general rules of civil law could have adverse legal consequences. It would also lead to the possibility that persons who were unsuccessful in the restitution proceedings, persons who did not file their claim in the restitution proceedings within the statutory time limit, and persons who could not file their claim in the restitution proceedings because they did not meet one of the conditions necessary for filing a restitution claim (e.g. the condition of citizenship or the condition of permanent residence in the territory of the Slovak Republic) could file their claim.[77]

A restitution claim could only be filed under the restitution laws on exhaustively specified grounds. If the claim could be filed through an ownership action, it would be possible to claim the return of real property or cash compensation on grounds other than those set out in the restitution laws. It would also be possible to claim the return of real property which was not returned under the restitution laws and for which only cash compensation or adequate replacement land was provided. Furthermore, it would be possible to claim the return of land over the maximum areas specified in Act No. 229/1991 Coll. on the regulation of the ownership of land and other agricultural property, as amended, or Act No. 503/2003 Coll. on the restoration of the ownership of land, as amended (e.g. it would be possible to claim the ownership of agricultural land over an area of 150 hectares). The obliged person would not only be the state, legal persons that have the right to manage or

76 | The author of the paper participated in the drafting of this decision as an external advisor to the Constitutional Court of the Slovak Republic.
77 | Decision of the Supreme Court of the Czech Republic in Case No. 28 Cdo 2166/2006.

administer the real property, municipalities and agricultural cooperatives, but also any person who was in possession of the real property in question. It would also be possible to claim the return of real property that has been transferred to a third party in the meantime (unless the real property was acquired by prescription). Such persons would have to be compensated.

If the return of the original real property was not possible (e.g. the real property was demolished), the question arises as to the amount of cash compensation – should it be based on the current market price or the official price according to the restitution laws? The legislation governing the official price of real property (Decree of the Ministry of Finance No. 465/1991 Coll. on the prices of structures, land, permanent crops, payments for establishing the right of personal use of land and compensation for temporary use of land) was repealed on 31 December 2003. If the cash compensation were to be granted to the entitled person at the current market price, this would favour persons who filed their claims late, i.e. after the expiry of the restitution time limits, since according to the restitution laws the cash compensation was granted to the entitled persons in the restitution proceedings only at the official price, which was lower than the market price. Entitled persons who filed their claims in due time (i.e. within the time limits set by the restitution laws) would then be able to claim the difference between the current market price and the official price.

For the final resolution of the issue of the relationship between the restitution action and the ownership action, it is essential that the restitution legislation has the nature of *lex specialis* in relation to the Civil Code, which is *lex generalis*. If the entitled person missed the time limit for filing a claim covered by the restitution legislation or was unsuccessful in the restitution proceedings, he or she could not defend himself or herself under Section 126 of the Civil Code by bringing an action for the return of the property (eviction), referring to the non-limitation of the ownership right (Section 100(2) of the Civil Code) and the subsidiary application of the provisions of the Civil Code, which governs the protection of the ownership right in general. A claim that was provided for in the restitution legislation for the return of real property expropriated during the relevant period cannot be filed either on the basis of an action for the return of the property (eviction of the real property), or on the basis of an action for the establishment of ownership. An action for the establishment of ownership cannot circumvent the purpose and meaning of the restitution legislation, which has the nature of *lex specialis*. Therefore, there is no compelling interest in bringing such an action to obtain a declaratory judgment as required by Section 137(b) of Act No. 160/2015 Coll. Code of Civil Adversarial Procedure, as amended.

We are of the opinion that allowing the entitled persons to file the claims provided for in the restitution laws by means of actions under the general rules of civil law would reopen the entire restitution process, which would ultimately significantly undermine the principle of legal certainty in legal relations concerning

real property, since in such a case restitution claims could be filed indefinitely. In view of the fact that in Slovakia there are still different opinions on the competition of a restitution action and an ownership action in the decisions of the chambers of the Constitutional Court, it can be assumed that the Plenary Session of the Constitutional Court of the Slovak Republic will adopt a definitive position on this issue in the future.

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Francesco TEDIOLI[1]

Network Contracts in Italian Agriculture: Legal Insights, Operational Strategies, and European Perspectives

Abstract

This article examines the network contract in the Italian agricultural sector, a distinctive legal instrument introduced by Decree-Law No. 5/2009 and adapted to agriculture through Decree-Law No. 91/2014, which enables small and medium-sized agricultural enterprises to cooperate while preserving their legal and operational autonomy. The study analyzes the regulatory framework, structural characteristics, and operational mechanisms of agricultural network contracts, including the common network program, methods of collaboration, legal requirements for participation, labor law implications, and relations with public administration. Through comparative analysis with similar models in other European legal systems, the research highlights the distinctive flexibility of the Italian approach, demonstrating that while the network contract offers significant advantages for resource optimization and enhanced competitiveness, its effectiveness ultimately depends on careful contract drafting, clear governance mechanisms, and proper understanding of its legal implications in the agricultural context.
Keywords: Agricultural Law; Network Contract; Business Aggregation; Agricultural Enterprises; Italian Law

1. Introduction

In recent years, the Italian agricultural sector has faced increasingly complex challenges, stemming from growing global competition, the need for technological innovation, and the constraints imposed by environmental and sustainability

1 | Lawyer, independent arbitrator and Professor of Commercial law at the University of Mantova https://orcid.org/0000-0002-0593-852X

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regulations. In a context dominated by small and medium-sized agricultural enterprises, often family-run, the necessity for new organizational models enabling operators to collaborate, share resources and expertise, and gain easier access to markets and public funding has emerged with particular urgency.

Among the solutions introduced by the legislator to support this transformation, the network contract has assumed a central role. This legal instrument was designed to foster structured forms of cooperation among enterprises while preserving their legal and financial autonomy[2]. Its application to the agricultural sector was specifically regulated by Decree-Law No. 91/2014, which adapted the instrument to the particularities of the primary sector, allowing agricultural enterprises to combine forces and expertise to face market challenges with greater resilience.

The agricultural network contract[3] distinguishes itself by enabling the sharing of productive activities, know-how, and resources, thus promoting cooperative models that extend beyond traditional associative forms such as cooperatives and consortia[4]. Compared to these instruments, the network contract is characterized by greater operational flexibility: participants may choose between a contractual form, which regulates collaboration without creating a new legal entity, and a subjective configuration, which grants the network independent legal personality.

In the agricultural sector, where small business size often limits access to markets and financial instruments, the network contract represents a strategic opportunity to enhance competitiveness and foster innovation among participating enterprises. This form of aggregation not only strengthens entrepreneurial capacity but also facilitates compliance with the sustainability objectives set by the Common Agricultural Policy (CAP) and European directives, thereby accelerating the transition towards more efficient and environmentally sustainable production models.

The objective of this study is to conduct an in-depth analysis of the agricultural network contract, examining its purposes, regulatory framework, advantages, and critical aspects, with particular attention to recent jurisprudential and practical developments. The following sections will explore the legal and operational aspects, the procedures for joining and managing the network, and the labor law implications, with the aim of providing a comprehensive and up-to-date overview of this essential tool for the modernization of Italian agriculture

2 | Article 3 of Law No. 33/2009 defines the network contract as an agreement through which multiple entrepreneurs pursue the goal of increasing their innovative capacity and market competitiveness. To this end, the parties adhering to the network must collaborate in predetermined forms and areas related to the exercise of their respective businesses, exchange technical, commercial, or industrial information, or jointly conduct one or more activities within their business scope based on a common program.

3 | Lucifero 2021, 355, D'Angelo, 2020, 346 who defines the network contract as a "modern form of agricultural sharecropping agreement."

4 | Russo 2015, 1018, Caprara 2019, 124 ss.); on the protective role of agricultural consortia, see Jannarelli 2009, 449; on producer organizations, see Casadei 2009, 349.

2. The Regulatory Evolution of the Network Contract in Agriculture

The introduction of the network contract into the Italian legal system is part of a broader process of progressive modernization of contractual instruments available to enterprises, aimed at enhancing their competitiveness and fostering innovation. Initially introduced by Decree-Law No. 5/2009[5], this legal instrument has undergone significant evolution over the years, particularly with respect to the agricultural sector, where the specificities of production and the need for aggregation among enterprises have necessitated an adaptation of the general framework to the concrete needs of industry operator.

A significant step in this direction was taken with Decree-Law No. 91/2014[6], which introduced a specific regulatory framework for agricultural network contracts. The legislation established that agricultural enterprises, provided they fall within the definition of small and medium-sized enterprises under Regulation (EC) No. 800/2008, may enter into a network contract aimed at the common agricultural production, based on the sharing of resources and productive factors. The most notable innovation introduced by the legislator was the possibility for network participants to divide the production obtained within the network on an original basis, allocating shares to each participant according to the agreements set forth in the network program, without this division constituting a transfer of goods with translational effects.

The distinction between the *network-contract* and the *network-entity*[7], introduced by Decree-Law No. 83/2012 and further refined by Decree-Law No. 179/2012, has also had a significant impact on agricultural networks. The choice between these two models depends on the specific needs of the participating enterprises: if the primary goal is merely to share means of production and knowledge, the network-contract offers greater flexibility; conversely, if the objective is to establish an autonomous entity capable of operating directly in the market, the network-entity is the more appropriate structure.

Another important regulatory development occurred with Ministerial Decree of March 27, 2014, which regulated the joint employment (codatorialità) of workers within agricultural networks, allowing network enterprises to hire employees

5 | The legislation contained in Art. 3, para. 4-ter et seq. of Decree-Law No. 5 of 10 February 2009, converted into Law No. 33 of 9 April 2009, was subsequently amended and supplemented by Law No. 99 of 23 July 2009 and by Decree-Law No. 78 of 31 May 2010 (so-called "Competitiveness Decree"), which was converted with amendments into Law No. 122 of 30 July 2010. Further modifications were introduced by Decree-Law No. 83 of 22 June 2012, converted into Law No. 134 of 7 August 2012. Finally, the legal framework was revised by Decree-Law No. 179 of 18 October 2012, converted into Law No. 221 of 17 December 2012.

6 | Decree-Law No. 91/2014 was converted into Law No. 116/2014

7 | For a more in-depth analysis, see paragraph 6.2.

jointly and allocate them across multiple farms within the network. This mechanism has helped to overcome the rigidities of traditional labor regulations, enabling a more efficient management of seasonal and specialized labor, which is particularly crucial in the agricultural sector.

In light of this evolutionary trajectory, the network contract today stands as one of the most innovative legal instruments for fostering collaboration among agricultural enterprises, offering a flexible legal framework that balances entrepreneurial autonomy with operational integration. However, the constant regulatory changes and judicial interpretations necessitate a careful assessment of how this instrument is applied, ensuring that it effectively addresses the needs of the sector without being misused for purposes inconsistent with its intended function.

3. Structure and Content of the Agricultural Network Contract

The agricultural network contract represents a legal instrument of significant relevance to the primary sector, aimed at promoting innovative forms of cooperation among enterprises without compromising their managerial autonomy

Although it falls within the category of multilateral contracts with a common purpose[8], its primary nature is essentially obligational. A textual analysis of the relevant legislation reveals no elements of property transfer or real effects; rather, it is configured as an agreement binding the parties to the implementation of a common program without directly affecting ownership rights over the assets employed within the network. From a causal perspective, legal scholarship has highlighted that, moving beyond the traditional approach based on the economic and social function of the contract, it is necessary to identify its concrete cause[9]. In the case of the network contract, the cause cannot be reduced merely to an associative purpose but consists in the joint exercise of an economic activity aimed at achieving an objective that extends beyond ordinary production—namely, the enhancement of both individual and collective competitiveness and innovative capacity.

Another distinguishing feature of the network contract is its duration, as it is a contract designed to produce effects over a continuous period. The implementation of the common program presupposes a lasting commitment from the network participants, whose coordination must be maintained over time to ensure the

8 | See Guerrera 2014, 397; Mosco 2010, 839–863; Villa, 2009. According to Cafaggi & Iamicelli 2009, 597, the network contract is a 'trans-typical figure, a hybrid between contract and organization, corresponding to associative contracts and those with a common purpose.' Conversely, G. Vettori, 2009, 390–396, and C. Camardi, 2009, 928–934, argue that the network contract does not constitute a new contractual type but rather a set of rules intended to merge with those of other types. Finally, another perspective suggests that Law No. 33 of 2009 regulates a typical consortium with external activity and public relevance. On this point, see Musso, 2009.

9 | Compagnucci, Cavicchi, & Spigarelli 2016, 5.

achievement of the established objectives. Furthermore, the contractual structure may vary depending on the number of participating enterprises, assuming either a bilateral or multilateral form. However, even in cases where the network consists of a limited number of enterprises, the requirement of a stable and organized collaborative relationship remains essential, as this element differentiates the network contract from more traditional contractual forms[10].

Unlike traditional associative structures such as cooperatives and consortia, the network contract is characterized by greater organizational flexibility, allowing participants to define a common network program that specifically regulates the methods of collaboration. The legislator has, in fact, sought to establish an aggregative model capable of adapting to the needs of individual enterprises, granting them the freedom to define the scope of cooperation and the corresponding obligations, while respecting the general principles of the legal system.

From a structural perspective, the agricultural network contract must contain certain essential elements[11] to ensure its validity and effectiveness, as established by Article 3, paragraph 4-ter, of Decree-Law No. 5/2009[12]. A fundamental element is the common network program, which sets out the strategic objectives of the collaboration and the activities that network participants commit to carrying out jointly. This program must be detailed and designed to foster the growth of the innovative and competitive capacity of the participating agricultural enterprises. Another crucial aspect concerns the modalities of collaboration, which must be clearly and transparently regulated, specifying whether the aggregation is limited to the exchange of information and resources or entails deeper operational integration, such as the sharing of production means, land, infrastructure, and personnel

A further distinctive feature of the agricultural network contract concerns the contribution of production factors and the original allocation of production among the network participants. The legislation allows participants to receive their respective shares of production without this constituting a transfer of goods between enterprises, thereby preserving their managerial autonomy. In some cases, the contract may also provide for the establishment of a common asset fund and a governing body. Although not mandatory, these instruments can be particularly useful for managing shared activities. If a common asset fund is established, it must have financial autonomy and may be used exclusively to achieve the objectives defined in the network program.

10 | Cuffaro 2013, 1.
11 | Micozzi & Di Diego 2013, 17.
12 | The article stipulates, in fact, that through the network contract, multiple entrepreneurs pursue the objective of enhancing, both individually and collectively, their innovative capacity and market competitiveness. The *causa* (purpose) of the contract is, therefore, the enhancement of the enterprises' innovative capacity and competitiveness.

For the agricultural network contract to produce legal effects, it must be executed in written form *ad substantiam*, meaning by means of a public deed, an authenticated private agreement, or a digitally signed document[13], and subsequently registered with the Business Register. Registration is a fundamental step, as it ensures the transparency of the operation and allows third parties to ascertain the existence of the network and its objectives.

In conclusion, the structure of the agricultural network contract is based on elements of flexibility and customization, with the objective of responding to the specific needs of the participating enterprises. However, to fully express its potential, the contractual framework must be detailed and compliant with regulatory provisions, avoiding excessively generic solutions that could undermine its effectiveness and proper application.

3.1 The Common Network Program: Characteristics and Objectives

The common network program constitutes the core of the agricultural network contract, outlining the strategic objectives that the participating enterprises intend to pursue through cooperation. It serves not only as an essential requirement for the contract's validity, as established by Article 3, paragraph 4-*ter,* of Decree-Law No. 5/2009, but also as the operational tool through which the integration of the participating agricultural enterprises is effectively realized. The formulation of a detailed and structured network program is crucial to ensuring that the network effectively responds to the needs of the primary sector, fostering increased competitiveness and innovation in the agricultural industry.

The program must first and foremost clearly state the objectives that the network aims to achieve. These objectives typically include the optimization of productive resources, shared access to innovative tools and technologies, enhanced market penetration capabilities, and improved access to public funding dedicated to agriculture. Unlike other forms of aggregation, such as consortia or cooperatives, the network contract allows enterprises to maintain their managerial and legal autonomy, avoiding excessively rigid constraints while enabling greater operational flexibility.

A key aspect in drafting the network program concerns the specification of the activities that will be jointly carried out by the participating enterprises. The regulatory framework permits a wide range of operational models, extending from the shared use of production factors, such as land, equipment, and machinery, to the joint execution of agricultural activities, livestock farming, or agri-food

13 | Pursuant to Legislative Decree No. 82/2005, it should be noted that the legislator, with the aim of promoting a wider dissemination of the network contract in the agri-food sector, has provided for the possibility of concluding the agreement also in electronic form. In this case, the contract may be digitally signed by the parties and supported, as well as countersigned with a digital signature, by a trade association, thereby ensuring greater simplicity and accessibility in its formalization.

processing. The program may also provide for the exchange of know-how among network members, facilitating the dissemination of innovative and sustainable practices in line with recent European directives on the ecological and digital transition of the agricultural sector.

Another fundamental feature of the network program is the definition of implementation and monitoring mechanisms for the set objectives. The network must establish verification tools to assess the achievement of its stated goals, identify measurable performance indicators, and adopt mechanisms to adjust the program in response to evolving market conditions. In this regard, the contract may include provisions allowing modifications to the common program with the majority consent of network members, thereby ensuring the flexibility necessary to adapt to a sector characterized by high volatility and unpredictable climatic and commercial conditions.

Furthermore, to ensure the network's efficient operation, the program must clearly define the rights and obligations of each participant, regulating key aspects such as the allocation of resources, the financial contributions of each enterprise, and the procedures for joining and leaving the network. Clarity in defining these aspects is essential to preventing conflicts among network members and ensuring robust governance of the aggregation. Some networks opt to establish a common management body responsible for overseeing program implementation and coordinating activities among participants; however, this solution is not mandatory and depends on the legal configuration adopted.

The common network program, therefore, is not merely a formal document but represents the foundation upon which the entire operation of the agricultural network is built. Its meticulous formulation and effective implementation are determining factors for the success of the aggregation, ensuring that it effectively contributes to strengthening the competitiveness of agricultural enterprises, fostering innovation in the sector, and creating virtuous synergies among industry operators.

3.2. Methods of Collaboration Among Participating Agricultural Enterprises

The agricultural network contract is distinguished by the flexibility of the collaboration methods it offers to participating enterprises, allowing them to develop synergies without compromising their legal and economic autonomy. This aspect is particularly relevant in the agricultural sector, where enterprises are often of small scale and have limited resources. By joining a network, agricultural businesses can overcome these constraints, fostering cooperation at both operational and strategic levels.

One of the primary forms of collaboration concerns the joint management of production phases, enabling enterprises to optimize the use of production factors, reduce operating costs, and enhance overall production efficiency. Through the

common network program, enterprises can establish rules for the shared use of land, equipment, and machinery, as well as define uniform agronomic practices to ensure production quality and sustainability. In this respect, the agricultural network contract stands out for its ability to promote a more rational and integrated production model, which is particularly valuable in a context characterized by increasing global competition and challenges related to climate change.

Another significant area of collaboration involves the integration of research and development activities, which is essential for stimulating innovation and facilitating the adoption of new technologies in the primary sector. Networked enterprises can share knowledge, advanced agronomic techniques, and digital solutions to improve both productivity and sustainability in farming practices. This collaborative approach is crucial in a context where access to innovation is often limited for small and medium-sized agricultural enterprises, which can benefit from shared information and joint experimentation with innovative practices such as precision agriculture and the use of sustainable biotechnologies.

At the same time, enterprises within the network can develop common market strategies, thereby enhancing their ability to access both national and international markets[14]. This form of collaboration is reflected in the adoption of collective brands, shared quality certifications, and the implementation of coordinated promotional strategies. In doing so, agricultural networks can strengthen their market presence, increase their bargaining power with large-scale retail chains, and promote the joint commercialization of their products. Experience from existing business networks has demonstrated that aggregation enables enterprises to overcome the sector's typical fragmentation of supply, reducing dependence on major intermediaries and fostering more direct sales models, such as short supply chains and solidarity-based purchasing groups.

It is crucial to emphasize that collaboration among agricultural enterprises within a network contract must not undermine the legal autonomy of each participant. Each enterprise maintains its individual legal identity and continues to operate as a distinct entity, while simultaneously benefiting from structured integration. This balance between autonomy and cooperation is ensured through a clear definition of the rights and obligations of network participants within the common network program, preventing managerial overlaps that could generate conflicts or operational difficulties.

3.3. The Contribution of Productive Factors and the Allocation of Production on an Original Basis

One of the distinctive elements of the agricultural network contract is the possibility for participating enterprises to jointly contribute specific productive

14 | In the international literature, regarding networks in agriculture, see Murdoch 2000, 407.

factors, creating a shared resource management system that enhances production efficiency and reduces operational costs. This form of collaboration is particularly advantageous for small and medium-sized agricultural enterprises, which often operate with limited resources and face challenges in accessing advanced production means. By entering into a network contract, these businesses can overcome such obstacles by fostering a more rational and optimized use of available resources.

Among the main productive factors that can be shared within the network are agricultural land and infrastructure. Participating enterprises may decide to share plots of land for the joint cultivation of specific crops or for livestock farming, thereby ensuring more efficient land use and a more rational management of water and energy resources. In some cases, the common network program may include the adoption of innovative agricultural practices, such as coordinated crop rotation or integrated production management, with the aim of improving sustainability and enhancing the quality of agricultural products.

Another key aspect concerns the sharing of agricultural equipment and machinery. Mechanization represents a significant cost for agricultural enterprises, particularly for smaller businesses that may lack the financial capacity to invest independently in technologically advanced tools. The network contract provides a solution to this issue by allowing members to access modern machinery through a shared-use system, thereby reducing the costs associated with acquisition, maintenance, and depreciation. This approach improves the operational efficiency of the participating enterprises, facilitates the adoption of innovative technologies, and increases the overall productivity of the agricultural sector.

Beyond material assets, the agricultural network contract also allows for the sharing of labor and know-how. The shortage of specialized labor is one of the most pressing issues in the agricultural sector, especially for seasonal activities requiring specific skills for limited periods of time. Through the network contract, participating enterprises can organize the joint employment of specialized workers, optimizing workforce management and ensuring greater operational continuity. Furthermore, the exchange of technical knowledge and agronomic expertise among network members fosters the adoption of innovative practices and advanced technological solutions, thereby contributing to the modernization of the agricultural sector and improving production quality.

A fundamental aspect of the agricultural network contract concerns the allocation of production obtained within the network. Article 1-bis, paragraph 3, of Decree-Law No. 91/2014 establishes that agricultural production resulting from the joint exercise of activities may be distributed among the participants on an original basis, meaning that no transfer of goods with translational effects is

involved[15]. This implies that each network member receives a share of the production proportionate to their contribution to the network, without such allocation being classified as a sale between participants. The correct implementation of this distribution mechanism is therefore essential to ensure compliance with the applicable regulations and to prevent potential disputes with regulatory authorities. This mechanism markedly differs from other associative forms in the sector, such as cooperatives, where the products contributed by members are centrally managed and marketed by the organization.

3.4. The Possible Establishment of a Common Patrimonial Fund and a Common Governing Body

The agricultural network contract may, among its optional provisions, include the establishment of a common patrimonial fund and a common governing body, elements that provide the network with greater operational and managerial stability. The adoption of these instruments depends on the nature and objectives of the collaboration among the network members, as well as on the choice between the *rete-contratto* (contract-based network) and *rete-soggetto* (entity-based network) configurations, with corresponding implications in terms of legal and patrimonial autonomy.

The common patrimonial fund constitutes a financial endowment formed by contributions from the participating enterprises and is designated to finance the activities outlined in the common network program. It may be used to support investments in technological innovation, the acquisition of equipment, the development of joint commercial strategies, or any other initiatives agreed upon by the network members. The amount and management procedures of the fund are established in the network contract, which must clearly regulate its intended use, conditions for potential reintegration, and the distribution of remaining assets among participants in the event of the network's dissolution.

The establishment of a common patrimonial fund also carries significant legal implications. If the network contract provides for both a common fund and a governing body, the network may acquire autonomous legal personality, thereby transforming into a rete-soggetto. In such cases, the network must be registered in the ordinary section of the Companies Register and obtain its own tax code and VAT number, becoming an independent holder of rights and obligations in relations with third parties. This structure allows for greater autonomy in managing

15 | Case law has clarified that, for the allocation on an original title basis to be considered legitimate, it must occur proportionally to the contributions of each network participant, in accordance with the provisions of the common network program. Should the production obtained be transferred among the participants through commercial transactions, the network contract could be reclassified as an instrument aimed at irregular labor supply or the elusive sale of agricultural products, with the risk of sanctions for the involved enterprises (Trib. Perugia, 16 October 2024, No. 378).

activities and financial resources but also entails stricter accounting obligations, such as the preparation of an annual financial statement in accordance with the regulations applicable to corporate financial reporting.

Another fundamental element of the organizational model of the agricultural network contract is the **common governing body**[16], which may be established to ensure coordination of activities and representation of the network in dealings with third parties[17]. This body may take a monocratic form, with a single representative, or a collegial structure, comprising multiple members with specific responsibilities. Its primary function is to oversee the implementation of the common network program, ensuring that the strategic objectives are pursued effectively and in accordance with the contractual provisions.

The common governing body plays a crucial role in the operational management of the network, performing functions such as coordinating production activities among network members, managing relationships with suppliers and clients, administering the financial resources of the common patrimonial fund, and representing the network in institutional and commercial dealings. Additionally, in cases where employees are jointly hired by the network enterprises, the governing body may be responsible for the administrative management of personnel, ensuring compliance with social security and contractual obligations. .

3.5. The Liability Regime Among Network Members

The agricultural network contract establishes a detailed liability regime among participating enterprises, aiming to strike a balance between operational collaboration and the protection of individual members' assets. The fundamental distinction lies in the configuration of the network itself. In the case of a *rete-contratto*, which lacks separate legal personality, the participating enterprises bear direct and joint liability for obligations undertaken within the network, as the latter does not constitute an independent entity capable of holding patrimonial rights and obligations. Consequently, creditors may assert claims directly against each individual network member, enforcing their unlimited liability, similarly to what is provided for *consorzi con attività esterna* (consortia engaging in external activities) under Article 2615, paragraph 2, of the Italian Civil Code

Conversely, in a *rete-soggetto*, which is endowed with a common patrimonial fund, creditors of the network may only seek satisfaction of their claims against that fund, unless otherwise stipulated in the contract. This structure limits the

16 | This refers to a subject entrusted with managing, in the name and on behalf of the participants, the execution of the contract or specific parts or phases thereof.

17 | In the absence of legislative specifications, the common body may be composed of both natural and legal persons, may have an individual or collegial composition, and may include subjects both internal and external to the participating enterprises. On this point, see Tunisini Capuano Arrigo & Bertani 2013, 113.

financial exposure of individual members, shielding their personal assets from liabilities incurred by the network, while simultaneously necessitating stringent financial management to prevent insolvency risks.

Furthermore, if the network does not provide for a common patrimonial fund or a governing body, operational decisions must be taken directly by the network members, which may result in inefficiencies in management and coordination. Therefore, the decision to incorporate these instruments into the agricultural network contract must be carefully assessed by the participating enterprises, taking into account their organizational needs and the long-term viability of their collaboration.

However, where the network contract establishes a common patrimonial fund, the liability regime undergoes a significant transformation. In such cases, obligations assumed by the common governing body in executing the network program may be satisfied solely through the patrimonial fund, without affecting the individual assets of the participating enterprises. This arrangement mitigates individual liability risks for network members, protecting them from financial exposure resulting from the joint activities of the network. Nevertheless, to ensure the effectiveness of such liability limitations, it is crucial that the patrimonial fund is adequately resourced to support the proper execution of the planned activities, thereby preventing insolvency situations that could compromise the functionality of the network itself .

An additional layer of complexity arises when the network contract is misused to circumvent existing labor law regulations or tax obligations. Case law has repeatedly emphasized the need to verify that the network is not employed as a mere instrument to disguise illicit labor supply arrangements or to artificially shift burdens and responsibilities among members. In particular, the *Corte di Cassazione* (Italian Supreme Court) has affirmed that where it is established that the network has been created solely to evade labor supply regulations, the penalties provided for under Legislative Decree No. 276/2003 shall apply, resulting in the reclassification of employment relationships as directly attributable to the individual enterprises involved [18].

Similarly, for the network contract to be deemed legitimate, all participating enterprises must be actively operational and contribute meaningfully to the execution of the common network program. Otherwise, the contract risks being considered a mere legal façade used to conceal other economic operations, potentially triggering significant administrative and criminal liability for the involved enterprises [19].

From a practical standpoint, the proper management of liability within an agricultural network necessitates the adoption of clear and transparent governance

18 | Cass. 27 June 2024, No. 17736.
19 | Trib. Perugia, 16 October 2024, No. 378, cit.

mechanisms. The contract must explicitly define the allocation of liabilities arising within the network and the distribution of risks among members. Moreover, the establishment of monitoring and control mechanisms concerning the network's economic and financial management can help prevent financial distress and ensure the balanced and sustainable operation of the network arrangement.

4. Subjective Requirements and Conditions of Admissibility

Despite its inherent flexibility and innovative nature as a form of business aggregation, the agricultural network contract is subject to specific conditions of admissibility that delineate its scope of application and define its subjective requirements. This legal instrument is not universally accessible to all economic operators; rather, it is exclusively reserved for entities engaged in agricultural activities, as defined under Article 2135 of the Italian Civil Code, which distinguishes agricultural enterprises from commercial or industrial ones. This legislative limitation serves to safeguard the intended function of the network contract within the primary sector, preventing its misuse for purposes unrelated to agriculture.

A key aspect in determining admissibility to the agricultural network contract concerns the legal status of participating entities. The legislation permits the participation of individual agricultural enterprises, agricultural companies, cooperatives, and consortia, provided that these entities are effectively operational and engaged in agricultural production. In particular, Article 1-bis, paragraph 3, of Decree-Law No. 91/2014 introduced a specific regulatory framework for agricultural networks, establishing that participating enterprises must qualify as small and medium-sized enterprises (SMEs) according to the criteria set forth in Regulation (EC) No. 800/2008. This size-related constraint was introduced to ensure that the network contract is not exploited by large agri-industrial groups for speculative purposes but rather serves as a mechanism to enhance the competitiveness of smaller agricultural enterprises[20].

In addition to the legal and dimensional qualification of participating enterprises, the regulatory framework requires a substantive coherence between the activities carried out by network members and the objectives outlined in the network program. The primary function of the contract is to foster productive cooperation through the sharing of resources, expertise, and market strategies. Accordingly, participating enterprises must operate in related or complementary sectors, ensuring effective synergy among network members and improving their collective competitiveness. The inclusion of entities that lack actual agricultural operations or do not actively contribute to the common objectives may expose the

20 | Caprara 2022, 27.

contract to legal reclassification, potentially leading to sanctions against participating enterprises.

In this context, particular attention must be paid to the risk of abusive use of the network contract as a means to circumvent labor law provisions and regulations governing the supply of labor. Judicial authorities have repeatedly emphasized that the network contract must be employed exclusively for productive purposes and not as a mere instrument for managing labor flexibly in a manner inconsistent with employment regulations. In particular, case law has clarified that should a network contract be structured in such a way as to conceal a mere labor intermediation scheme, it may be reclassified under Legislative Decree No. 276/2003, with the resulting application of the sanctions provided for unlawful labor supply arrangements[21].

Finally, the agricultural network contract may also establish additional constraints and specific conditions, as determined by the parties within the network's common program. This document serves as the operational cornerstone of the network and must clearly outline the strategic objectives, the rights and obligations of participants, the shared resources, and the implementation modalities of the common purpose. The proper drafting of this program is crucial to ensuring the validity and effectiveness of the network, as well as to preventing potential disputes with regulatory authorities.

4.1. Agricultural Enterprises Admitted to the Network Contract

The agricultural network contract is an instrument reserved exclusively for enterprises operating within the primary sector, provided they meet specific legal and economic requirements. The relevant legal framework establishes that only enterprises engaged in land cultivation, animal husbandry, and forestry may participate in the network contract, in accordance with the definition of an agricultural entrepreneur set forth in Article 2135 of the Italian Civil Code. Additionally, enterprises engaged in related activities may also be admitted[22], provided that these activities are strictly connected to primary production and do not assume a predominant role over agricultural operations[23]. In this regard, any processing and

21 | Should one of the companies participating in the network not be an actual agricultural enterprise, a case of irregular labor supply arises, with the consequent application of the sanctions provided for by Legislative Decree No. 276/2003. This principle was reaffirmed by the Italian Supreme Court (*Corte di Cassazione*) in Decision No. 17736 of 27 June 2024, which clarified that the network contract cannot be used to conceal subordinate employment relationships without complying with the guarantees established by law.

22 | Indeed, it cannot be ruled out that a network-entity, composed solely of agricultural entrepreneurs and exclusively engaged in connected activities on the products supplied by the agricultural entrepreneurs participating in the network, may be classified as an agricultural network. On this point, see also D'Angelo, 2020, 353.

23 | Article 1-bis, paragraph 3, of Decree-Law No. 91/2014, converted with amendments by Law No. 116/2014, provides that for "agricultural enterprises, defined as small and medium-sized enterprises

commercialization of agricultural products must remain subsidiary and complementary to primary production.

Beyond a clearly defined legal qualification, the regulatory framework imposes a size-related restriction on enterprises seeking to join an agricultural network. Only small and medium-sized enterprises (SMEs) are eligible to participate, in line with the criteria set out in Regulation (EC) No. 800/2008. Accordingly, an enterprise qualifies if it employs fewer than 250 workers and has an annual turnover of less than €50 million or a total annual balance sheet not exceeding €43 million. This limitation means that agricultural entrepreneurs, whether operating as sole proprietors or as part of collective structures such as partnerships, corporations, consortia, and cooperatives, may enter into a network contract. However, large enterprises, even if they operate within the agricultural sector, are excluded from benefiting from the facilitated legal framework specifically designed for SMEs. Through this restriction, the legislator has sought to prioritize smaller agricultural enterprises, which often face greater challenges in accessing markets, financing, and technological innovation. By joining a network, these smaller entities can overcome such obstacles and enhance their competitive capacity.

From a legal-structural perspective, the agricultural network contract is open to a wide range of participants, including family-run farms, agricultural companies, and cooperatives, regardless of whether they are structured as partnerships or corporations. Agricultural cooperatives may join the network either individually or as representatives of their members, while consortia of agricultural entrepreneurs can play a central role in promoting and managing networks, facilitating coordination between participants.

The admission of an enterprise into an agricultural network is not automatic but requires an assessment of its suitability in relation to the objectives established in the network's common program. In this regard, judicial rulings have clarified that mere formal adhesion is insufficient; enterprises must actively contribute to the achievement of shared objectives. If an enterprise joins a network without providing a tangible contribution, instead merely exploiting the benefits of

pursuant to Commission Regulation (EC) No. 800/2008 of 6 August 2008, in network contracts, as referred to in Article 3, paragraph 4-ter, of Decree-Law No. 5 of 10 February 2009, converted, with amendments, by Law No. 33 of 9 April 2009, and subsequent amendments, formed by individual and associated agricultural enterprises, the agricultural production resulting from the joint exercise of activities, in accordance with the common network program, may be divided among the contracting parties in kind, with the allocation to each, on an original title basis, of the agreed share of the product as stipulated in the network contract." For agricultural SMEs, the network contract results in the acquisition of the product of the jointly carried out activity "on an original title basis" by each participant. It follows that the production, attributable to the joint exercise according to the network program, is to be considered, from the outset, as belonging to each agricultural entrepreneur participating in the network contract. In this way, if the participants meet the characteristics specified by law, the objective limits of agricultural activity are expanded and, above all, the limits of the connected activities provided for under Article 2135 of the Italian Civil Code (c.c.), insofar as the "share of the product" to be allocated is agreed upon in the network program.

participation without engaging in operational activities, the network contract may be reclassified as an abusive or evasive scheme. This judicial scrutiny serves to prevent distortions in the application of the network contract, ensuring that it remains a genuine instrument of productive collaboration within the agricultural sector[24].

4.2. The Requirement of Productive Homogeneity Among Participants

One of the fundamental principles underlying the agricultural network contract is the productive coherence among the participating enterprises. Unlike other aggregation models, such as cooperatives or consortia, agricultural networks are not bound by a rigid uniformity among members. However, a common productive basis remains essential, ensuring that collaboration is sustainable while maintaining the individual autonomy of the network participants. The rationale behind this requirement lies in the very purpose of the network contract, which is designed to facilitate the sharing of productive resources and the pursuit of common objectives, without altering the legal and operational independence of the participating enterprises.

Productive homogeneity manifests itself primarily in two key aspects: first, in the type of agricultural activities performed by the participants; second, in the operational compatibility among them. With regard to the first aspect, the legal framework stipulates that the agricultural network contract must be limited to activities falling within Article 2135 of the Italian Civil Code, which includes land cultivation, forestry, animal husbandry, and related activities. This means that network participants must share a common productive identity, ensuring that collaboration remains viable and preventing enterprises from sectors too distant from agriculture from disrupting the network's balance.

The second aspect concerns operational compatibility among the participating enterprises. The network's common program must be structured in a way that ensures genuine cooperation, avoiding imbalances among participants. The sharing of productive factors, such as land, machinery, workforce, and know-how, must be carried out proportionally and exclusively for the achievement of shared objectives. In this regard, case law has clarified that the inclusion of enterprises whose activities are entirely unrelated to the network's program may lead to the risk of misuse of the instrument, potentially resulting in the legal reclassification of the agreement.

The requirement of productive homogeneity becomes particularly relevant in cases involving the allocation of production on an original basis[25]. The ability

24 | In particular, should one of the enterprises participating in the network not be an actual operating entity, there is a risk of reclassification of the network in terms of illicit labor supply.

25 | Such allocation may occur according to various methods: 1)Equal allocation among all participating enterprises; 2)Allocation among the participating enterprises based on a parameter, which may be, for example, the value of the contribution to the realization of the common product.

to allocate agricultural production without transfer effects is subject to specific conditions imposed by tax authorities. In particular: 1) network participants must qualify as agricultural enterprises under Article 2135 of the Italian Civil Code, with related activities remaining ancillary rather than predominant; 2) the joint use of land must be mandatory and substantial for all participants; 3) each participant must contribute equally to the network's objectives, with shared human and technical resources, avoiding any form of monetary compensation; 4) the division of production must be proportional to each participant's contribution; 5) the products must not be transferred between participants, as the network's purpose is collective production, not commercial transactions among its members. Therefore, original allocation is not permitted if the products are sold or transferred between network members, as this would undermine the fundamental purpose of the network, which is joint production, not internal commercialization

To ensure that the division of production among network participants is legally valid, all enterprises must effectively contribute to the production process, whether through the provision of assets, labor, or services that align with the agricultural activities of the network. Failure to meet this requirement could result in the reclassification of the contract as a mechanism for circumventing tax regulations or labor laws related to the irregular supply of manpower.

Another key consideration concerns the implications of agricultural networks in accessing public funding and participating in public tenders. Certain financial incentives are reserved for networks composed of enterprises belonging to homogeneous production chains, to ensure that public resources effectively strengthen the agricultural sector. As a result, networks must demonstrate clear strategic and productive coherence among participants to avoid disputes regarding eligibility for benefits.

4.3. The Risk of Reclassification of the Network Contract as Unlawful Labor Supply

The use of the network contract in the agricultural sector offers numerous advantages, particularly in terms of resource sharing and production optimization. However, it also presents risks associated with its misuse, particularly concerning labor management. A major risk arises when the network contract is misapplied as a means to circumvent labor regulations, effectively disguising an unlawful supply of manpower rather than fostering genuine productive cooperation among participants.

The risk of reclassification of the network contract as unlawful labor supply occurs when the network is used primarily for the mere transfer of workers from one enterprise to another, without a genuine sharing of productive and organizational objectives as outlined in the network's common program. Under the applicable legal framework, particularly Legislative Decree No. 276/2003, the posting

of personnel between enterprises is only permissible if the posting entity retains a legitimate business interest in the operation, remaining effectively involved in the network's productive activities. If such a requirement is not met, the employment relationship is reclassified as an illicit labor supply arrangement, triggering administrative sanctions and joint liability among the enterprises involved[26].

Despite its inherent flexibility, the network contract cannot be used to circumvent the statutory limitations imposed by labor supply regulations.[27]. In this respect, case law has emphasized that any arrangement that enables one enterprise to provide labor to another, without an actual sharing of business risk and organizational structure, may be deemed unlawful. Consequently, in order to prevent the risk of reclassification, agricultural enterprises adhering to a network contract must ensure that their common program is structured in a clear and detailed manner, explicitly defining the collaborative arrangements and the role of each participant in labor management. The adoption of transparent workforce management practices, coupled with strict compliance with labor regulations governing posting (*distacco*) and joint employment (*codatorialità*), can serve as critical safeguards to ensure the legitimacy of the network contract. Such measures not only protect the participating enterprises from legal disputes, but also strengthen the credibility and sustainability of the network as a lawful mechanism for agricultural cooperation.

5. Employment Law Aspects and Joint Employment in Agricultural Networks

The network contract in agriculture not only regulates cooperation between enterprises in productive and commercial matters, but also affects organizational and labor law aspects within participating businesses. The legislator has introduced specific mechanisms to facilitate workforce management in agricultural networks, aiming to increase labor efficiency and allow greater flexibility in the distribution of workers among the networked enterprises. In this context, two legal institutions play a crucial role in the employment law framework applicable to agricultural networks: joint employment (*codatorialità*) and employee secondment (*distacco del personale*) among participating enterprises.

26 | According to Trib. Perugia, 16 October 2024, No. 378, should one of the enterprises participating in the network not actually carry out entrepreneurial activity, the network contract loses its validity and becomes an instrument for circumventing labor law regulations. The existence of a network contract cannot, therefore, in itself constitute sufficient justification for the transfer of workers among the participating enterprises, unless a genuine common productive and organizational interest is demonstrated.

27 | It is, therefore, necessary to ensure the effective involvement of all participating enterprises in the management of shared human resources, preventing the network from becoming a mere intermediary for labor supply.

The introduction of joint employment within agricultural networks responds to the need to overcome the rigid constraints of traditional workforce management in individual farming enterprises, enabling a more dynamic sharing of human resources among network participants. Ministerial Decree of March 27, 2014[28] expressly allows agricultural enterprises to jointly employ workers, provided that at least 50% of the participating businesses qualify as agricultural enterprises. This provision enables network members to distribute labor costs based on their actual production needs, preventing excessive financial burdens on individual enterprises while ensuring optimal utilization of the available workforce.

The joint employment mechanism entails that workers are formally employed either by the network itself or by one of the participating enterprises, yet they may perform their work for multiple network members, in accordance with the common program and the agreements established among the participants. This system is particularly beneficial in agriculture, where seasonal production cycles necessitate flexible labor management. However, for joint employment arrangements to be deemed legitimate, the network contract must clearly specify: the terms of worker allocation; the enterprise responsible for payroll and social security contributions and the distribution of labor-related obligations among the network participants.

Failure to explicitly regulate these aspects may lead to the reclassification of the network as a mere instrument to circumvent employment laws, particularly those governing subordinate labor contracts and temporary labor supply *(somministrazione di manodopera*).

Another key instrument in labor organization within agricultural networks is employee secondment (*distacco del personale*). Under Article 30 of Legislative Decree No. 276/2003[29], secondment allows an employer to temporarily assign one or more employees to another enterprise, provided that the assigning company maintains a legitimate business interest in doing so. However, in the specific case of business networks, the legislator has established an irrefutable presumption of legitimate interest (*iuris et de iure*), meaning that when secondment occurs between network participants, there is no requirement to demonstrate the assigning company's direct interest in the worker's temporary transfer[30]. This statutory presumption significantly simplifies workforce mobility within the network, reducing legal disputes and avoiding objections from labor inspection bodies or social security authorities.

28 | Ministerial Decree of 27 March 2014. Implementation of Article 9, paragraph 11, of Decree-Law No. 76 of 28 June 2013, converted, with amendments, by Law No. 99 of 9 August 2013, concerning the operational procedures for joint hiring in the agricultural sector.
29 | Legislative Decree No. 276 of 10 September 2003. Implementation of the delegations concerning employment and the labor market, as provided for by Law No. 30 of 14 February 2003.
30 | Trib. Taranto, 17 November 2022, No. 2371; Cass. 21 April 2016, No. 8068.

A further critical aspect concerns the principle of joint liability (*solidarietà*) for contractual and social security obligations. Article 29, paragraph 2, of Legislative Decree No. 276/2003 provides that in cases of unlawful contracting (*appalto illecito*) or improper use of network contracts, both the contracting party and the contractor—or, in the case of networks, the networked enterprises themselves—are held jointly liable for the payment of workers' wages and social security contributions. While the current legal framework does not expressly establish a generalized joint liability among network participants for all labor-related obligations, courts have consistently applied this principle in cases where business networks are misused to evade labor costs or social security contributions. Thus, in instances where the network contract serves as a tool for circumventing employment regulations, joint liability extends to all enterprises involved, reinforcing compliance obligations and ensuring the protection of workers' rights[31].

5.1. Joint Employment of Workers: Legal Framework

The institution of joint employment (*codatorialità*) in agricultural business networks represents a significant innovation in workforce management, introducing a system of labor-sharing among participating enterprises. This mechanism was designed to address the specific needs of the agricultural sector, which is characterized by strong seasonal fluctuations and the necessity to optimize human resource utilization. Its formal legal framework was established by Ministerial Decree of March 27, 2014, which allows businesses within a network to jointly employ workers, provided that at least half of the participating enterprises qualify as agricultural businesses.

Unlike traditional subordinate employment, in which an employee is contractually bound to a single employer, joint employment allows a worker to be engaged by multiple enterprises within the network while maintaining a single employment contract. This structural flexibility enables a more efficient allocation of personnel among network members, ensuring that labor resources are distributed based on the production needs of each enterprise. However, for this system to function legally and effectively, the network contract must clearly define the terms of labor-sharing, specifying the duration, conditions, and locations of employment within each participating business. Additionally, it is mandatory to designate a lead enterprise responsible for payroll, social security contributions[32], and administrative management of employment relationships. The costs associated with joint employment must be equitably distributed among network participants,

31 | Cass. 27 June 2024, No. 17736, cit.
32 | Gli adempimenti previdenziali, riferiti a questa tipologia di assunzione, sono illustrati nella Circ. INPS 2 luglio 2015, n.131.

preventing any enterprise from benefiting from labor resources without bearing its share of the financial burden

.Joint employment is particularly advantageous in the agricultural sector, where labor demand fluctuates seasonally depending on crop cycles and production phases. Through this legal mechanism, enterprises can avoid resorting to short-term contracts or intermittent employment, thereby ensuring greater job stability and providing workers with more continuous employment opportunities. However, for this model to be fully compliant with labor regulations, it is crucial that worker allocation genuinely aligns with the objectives of the network's common program and that labor-sharing does not serve as a disguised form of illegal labor supply (*somministrazione illecita di manodopera*). If workers are exclusively assigned to a single enterprise within the network, without actual redistribution of tasks and workforce mobility among the participants, the contract may be reclassified as an unlawful labor subcontracting arrangement, triggering sanctions under Legislative Decree No. 276/2003.

Another key legal concern relates to the joint liability (*solidarietà*) of network participants for obligations towards jointly employed workers. Although current legislation does not explicitly establish a general rule of joint liability, case law has progressively extended liability among network participants. Courts have determined that if the designated lead enterprise fails to meet its wage and social security obligations, the other enterprises within the network may be held liable for unpaid labor-related costs. This legal interpretation reinforces the importance of compliance with employment regulations, ensuring that the joint employment framework operates in a transparent and legally sound manner.

5.2. Secondment of Workers Among Agricultural Enterprises in the Network

The secondment of workers is one of the most significant legal instruments within agricultural business networks, allowing participating enterprises to temporarily assign one or more employees to another enterprise within the network without interrupting the original employment relationship. This mechanism, governed by Article 30 of Legislative Decree No. 276/2003, applies to business networks through a specific regulatory adaptation that establishes a presumption of legitimacy when secondment occurs among enterprises connected by a network contract.

Unlike traditional secondment, which requires the employer to demonstrate a legitimate business interest in assigning a worker to another company, within agricultural business networks, such interest is presumed to exist automatically by virtue of the network's collaborative purpose. This principle was introduced by Decree-Law No. 76/2013 (the so-called "*Decreto Fare*"), which amended Article 30 of Legislative Decree No. 276/2003 by adding paragraph 4-*ter*. The provision states that, when secondment takes place between enterprises belonging to a business

network, the employer's interest in the transfer does not need to be demonstrated, as it is inherently linked to the cooperation and integration objectives established in the network's common program.

Despite the explicit legal recognition of secondment within agricultural networks, its application must comply with essential conditions. The seconded worker remains formally employed by the original employer, which retains full responsibility for salary payments, social security contributions, and employment-related obligations. At the same time, the worker must operate under the functional direction of the host enterprise, which is responsible for ensuring compliance with labor protection standards and workplace safety regulations[33].

One of the most delicate aspects concerns the duration of the secondment, which must be limited in time and justified by production or organizational needs within the network. Case law has clarified that an indefinite secondment period may indicate an abusive use of the mechanism, potentially aimed at circumventing regulations on labor supply (somministrazione illecita di manodopera). If a secondment is prolonged indefinitely or is not linked to the objectives of the network's common program, the competent authorities may reclassify the arrangement as an unlawful labor subcontracting scheme, exposing the involved enterprises to administrative penalties and civil liabilities[34].

Another key aspect is the economic and legal treatment of the seconded worker. Labor regulations require that, during secondment, the employee retains the same salary and social security rights as provided by the collective bargaining agreement (CBA) applicable to the original employer. In cases where the CBAs of the two enterprises differ, the most favorable contractual terms must be applied. Furthermore, secondment cannot result in a demotion or a reduction in job duties. Under Article 2103 of the Italian Civil Code, if the secondment involves a change in job responsibilities, the employer must justify it with valid technical, organizational, or production-related reasons, and, in certain cases, obtain the worker's consent. This requirement may create legal complexities, since, although the employer's interest in secondment does not need to be demonstrated, the concrete reasons justifying the worker's transfer must still be substantiated.

The use of secondment in agricultural networks can provide a strategic advantage by optimizing labor force allocation, particularly in highly seasonal production cycles. Through this instrument, enterprises can respond more efficiently to peak workloads, avoid the need for additional short-term hires, and reduce labor management costs. However, its application must align with

33 | There is an obligation to register the posting in the section of the business register where each participant is registered. On this point, see Appeal Court of Sassari, Section I, 20 September 2023, No. 311

34 | In this regard, Trib. Perugia, 16 October 2024, No. 378 reaffirmed that, if the posting is used systematically to transfer workers between enterprises without a genuine common productive need, it constitutes illicit labor supply, sanctioned under Legislative Decree No. 276/2003. .

the legitimate purposes of the network contract, ensuring full compliance with employment law and avoiding practices that could lead to legal challenges or sanctions.

Finally, it is important to distinguish secondment from joint employment (*codatorialità*). In secondment, the worker remains contractually bound to the original employer, whereas in joint employment, the employment relationship is shared among multiple enterprises within the network. While both mechanisms serve as flexible workforce management tools, they have distinct legal and operational characteristics and must be applied in accordance with the network's organizational needs and the relevant legal framework

5.3. The Principle of Joint Liability in Contractual and Social Security Obligations

The agricultural business network contract not only facilitates cooperation among enterprises, but also introduces a specific regime of joint liability among network participants, with significant contractual and social security implications. The joint liability principle applies to both obligations arising from the implementation of the network's common program and those related to workforce management, particularly in cases of joint employment (*codatorialità*) or secondment (*distacco*). This principle, rooted in Articles 2614 and 2615 of the Italian Civil Code, entails that each participating enterprise may be held liable for obligations undertaken within the network, subject to the limits and conditions established in the contract.

From a contractual perspective, joint liability implies that if one of the enterprises fails to fulfill an obligation under the common program, creditors may seek enforcement against any of the other network participants, unless a common asset fund (*fondo patrimoniale comune*) has been established, to which the network's obligations have been assigned. In such a case, creditors may only recover debts from the fund itself, without recourse to the individual assets of the participating enterprises[35].

From a social security and labor law perspective, joint liability takes on even greater significance. Italian labor law recognizes that enterprises adhering to a network contract may be held jointly liable for wage payments, social security contributions, and other employment-related obligations. This means that, if one of the network's enterprises fails to pay salaries or remit social security contributions, employees and social security institutions (such as INPS) may recover the unpaid amounts from any other enterprise within the network.

35 | The presence of the endowment fund may limit the liability of the individual participating enterprises, restricting creditors' actions to the assets of the network alone, provided that this is expressly stipulated in the contract and clearly publicized in the relevant registers.

The application of the joint liability principle is particularly relevant in cases of joint employment, where a worker is formally employed by multiple enterprises within the network. In such cases, all participating enterprises are jointly responsible for fulfilling salary and social security obligations, regardless of how working hours are distributed among them. Both the Ministry of Labor and INPS have affirmed that, in the absence of a clear allocation of responsibilities among network participants, all enterprises may be held liable for any irregularities in workforce management.

Another critical issue concerns the potential misuse of business networks for contractual dumping, where enterprises attempt to apply less protective collective labor agreements to workers, rather than those properly aligned with the sector in which they operate. The Italian Supreme Court (*Corte di Cassazione*) has clarified that membership in a business network cannot justify the application of less favorable contractual terms, requiring enterprises to adopt the most appropriate collective agreement based on the actual nature of their business activities[36].

To ensure the proper application of the joint liability principle, the legislator and administrative authorities have introduced protective measures. Specifically, the network contract must contain clear provisions on the allocation of obligations and the management of joint employment relationships. Furthermore, INPS has mandated that networks utilizing joint employment must designate a lead enterprise (*impresa referente*), which is responsible for managing mandatory employment notifications and acting as the primary interlocutor for social security compliance.

6. Publicity Obligations and Registration of the Network Contract

The network contract, regardless of the sector in which it is concluded, is a formal contract subject to specific publicity obligations, aimed at ensuring transparency and enforceability against third parties. However, these obligations may be partially derogated when the contract is established in the agricultural sector, due to certain legislative provisions that simplify registration requirements for agricultural enterprises.

As a general rule, the legislator has established that registration with the Companies Register (*Registro delle Imprese*) is an essential requirement for the contract to produce legal effects, both among the participating enterprises and towards external operators. Article 3, paragraphs 4-ter and 4-quater, of Decree-Law

36 | Cass. 27 June 2024, No. 17736, cit.

No. 5/2009 differentiates publicity obligations based on the legal nature of the network:

- In the case of a network-contract (*rete-contratto*), which lacks separate legal personality, registration occurs under the individual company profile of each participating enterprise.
- In the case of a network-entity (*rete-soggetto*), which has autonomous legal personality, the contract must be registered in the ordinary section of the Companies Register, with the attribution of a legal name, registered office, tax code, and VAT number.

However, in the agricultural sector, the rules governing legal publicity present certain specificities. Article 36, paragraph 5, of Decree-Law No. 179/2012 (as amended by Law No. 221/2012) introduced a derogation from standard publicity obligations, providing that an agricultural network contract may be signed with the assistance of one or more nationally representative professional agricultural organizations, provided that these organizations have participated in the final drafting of the agreement. This provision is aimed at facilitating the adoption of network contracts among agricultural enterprises, simplifying registration procedures, and ensuring qualified oversight by sector associations.

An additional simplification was introduced by Article 3, paragraph 4-*octies*, of Decree-Law No. 5/2009 (as amended by Law No. 77/2020), which provides that for network contracts aimed at preserving employment levels in supply chains affected by economic crises, the contract may be signed using a simple digital signature, without requiring notarial authentication, provided that the agreement is assisted and co-signed by employer organizations.

In addition to initial registration, any modification to the network contract must also be registered with the Companies Register. This applies, for instance, to: the entry or exit of new participants; changes to the common network program; the establishment of a common asset fund.

The timely updating of information ensures transparency, prevents disputes regarding the actual operation of the network, and guarantees compliance with applicable regulations.

6.1. The Form of the Contract: Public Deed, Authenticated Private Agreement, or Digital Signature

The legal framework governing the agricultural network contract establishes specific formal requirements for its validity and enforceability. The legislator, through Article 3, paragraph 4-*ter*, of Decree-Law No. 5/2009, as subsequently amended, has stipulated that the contract must be executed in one of the following

forms: public deed, authenticated private agreement[37], or digital signature. This requirement is intended to ensure legal certainty and enforceability against third parties, thereby preventing disputes regarding the contract's existence and validity

The public deed[38] is often the preferred choice when the network contract provides for the establishment of a common asset fund or a common governing body, as registration with the Companies Register results in the acquisition of legal personality by the network entity. In such cases, the intervention of a notary is required, ensuring a higher level of formality and reliability in the contractual process

Conversely, digitally signed contracts represent an innovative and simplified execution method, introduced to promote the dematerialization of documents and expedite registration procedures. For this method to be valid, the contract must be signed by all participants using a qualified electronic signature and transmitted to the Companies Register via a dedicated telematic system. The legislator has also introduced a standardized contractual model, governed by Ministerial Decree No. 122 of April 10, 2014, which harmonizes the structure of the contract and simplifies the registration process.

The choice of contractual form depends on the specific needs of the participating enterprises and the complexity of the network. If the contract solely governs collaboration between enterprises without creating a separate legal entity, the digital signature may be the most practical and cost-effective option. Conversely, if the contract regulates significant patrimonial aspects or establishes a structured governance framework, opting for a public deed or an authenticated private agreement is preferable, as these forms offer a higher level of legal certainty and protection.

Regardless of the chosen form, the network contract must include all essential elements required by law, including: Identification of the participating enterprises; strategic objectives of the network; the common network program; rules governing the admission of new participants; decision-making procedures and governance mechanisms. A properly formalized contract is a fundamental prerequisite for its legal and operational effectiveness, ensuring the full legitimacy of the business aggregation and its enforceability against third parties.

37 | The authenticated private deed represents an intermediate solution, requiring the intervention of a notary or other public official to certify the identity of the parties and the conformity of the deed to the expressed will of the signatories. This instrument provides formal protection while maintaining a higher degree of flexibility compared to a public deed

38 | The public deed, drafted by a notary or an authorized public official, constitutes the most solemn form and offers the highest level of guarantee in terms of legal certainty and probative value.

6.2. The Legal Personality of the Network and Its Operational Implications

The issue of legal personality in the network contract plays a crucial role in defining the legal and operational effects of business aggregation in the agricultural sector. Under the current legal framework, enterprises participating in a network contract can choose between two distinct models, each with different legal and economic implications.

The network-as-a-contract (*rete-contratto*) represents the simplest form of collaboration, as it does not create a new legal entity and preserves the independent legal personality of each participating enterprise. In this configuration, obligations undertaken in the execution of the contract remain directly attributable to each agricultural entrepreneur, without establishing a separate legal subject. This model offers greater managerial flexibility and is particularly suitable for small and medium-sized enterprises (SMEs) that seek to experiment with collaborative initiatives without being bound to a separate entity. However, the lack of legal personality entails certain limitations, including the inability to participate directly in public procurement procedures or to enter into contractual obligations in the name of the network itself.

By contrast, the network-as-a-legal-entity (*rete-soggetto*) constitutes a separate legal entity, distinct from the individual enterprises, and is capable of acting in its own name. For a network to acquire legal personality, the contract must explicitly provide for the establishment of a common asset fund and a common governing body. This configuration is particularly advantageous for networks aiming to operate on a stable and structured basis, apply for funding programs, or access credit instruments reserved for legally recognized entities.

The operational implications of choosing between network-as-a-contract and network-as-a-legal-entity are numerous and must be carefully assessed by the agricultural enterprises involved. For example, the network-as-a-legal-entity is subject to specific administrative and accounting obligations, such as the preparation of an annual financial statement and the adoption of an organizational model that ensures the proper management of the common asset fund. Furthermore, a network with legal personality is liable for its contractual obligations solely with its own assets, thereby limiting the personal liability of individual participants, unless otherwise agreed in the contract[39].

Another significant aspect concerns the tax regime applicable to the different network configurations. In a network-as-a-contract, income derived from the network's activities is allocated proportionally to the individual participants, who are taxed on their respective shares. Conversely, in a network-as-a-legal-entity, income is determined at the network level and taxed according to the general rules applicable to legal entities. This distinction may significantly impact the financial

39 | Russo 2022, 353.

and economic strategies of the participating enterprises, influencing the choice between the two models based on tax efficiency considerations.

6.3. Registration in the Business Register: Legal Effects

The registration of the network contract in the Business Register constitutes a fundamental requirement for ensuring its legal effectiveness and enforceability against third parties. This obligation, established under Article 3, paragraph 4-*ter*, of Decree-Law No. 5/2009, serves transparency and publicity purposes, allowing external stakeholders to verify the existence of the network and its related obligations, while also certifying the contractual relationship among the participating enterprises. The contract only becomes legally effective upon the completion of the registration process by all the participating enterprises, ensuring compliance with publicity obligations and preventing the network from operating without adequate safeguards for third parties.

The registration procedure varies depending on the type of network adopted. In the network-as-a-contract (*rete-contratto*), where enterprises retain their independent legal personality, each participant must individually register the contract in its own business position within the Business Register. In this case, the network does not acquire autonomous legal personality, and all obligations arising from the execution of the network program remain directly attributable to the individual participants. Conversely, if the contract provides for the establishment of a network-as-a-legal-entity (*rete-soggetto)*, the registration is carried out under a separate entry in the ordinary section of the Business Register. In this case, the network acquires legal personality, provided that it is endowed with a common asset fund and a common governing body, which are essential elements allowing the network to act as a distinct legal entity separate from the participating enterprises.

Another crucial aspect concerns the obligation to update the Business Register in case of substantial modifications to the network contract. Any changes affecting the essential elements of the agreement—such as the admission of new participants, amendments to the common program, or the potential dissolution of the network—must be promptly registered to ensure the continuity of the contract's legal publicity. The registration requirement is not merely a formal obligation but has significant legal consequences, including the enforceability of the contract and its obligations against third parties. Furthermore, registration grants access to specific fiscal benefits and public incentives designed to promote business aggregations.

For network-as-a-legal-entity structures, registration provides the network with the capacity to enter into contracts, participate in public procurement procedures, and manage its own assets independently. The transparency and publicity of the network contract are thus essential elements to ensure legal certainty, economic trust, and institutional recognition, ultimately fostering a greater integration of enterprise networks into the economic and commercial system.

6.4. The Relationship Between the Agricultural Network Contract and Competition Law

Although the network contract is primarily intended as a cooperation tool between enterprises, it could theoretically fall within the scope of an anti-competitive agreement under Article 101 TFEU, as it involves a form of coordination between economic operators that may compete with each other[40]. However, the European legislator has introduced specific exemptions for the agricultural sector, acknowledging that collaboration among agricultural enterprises can contribute to the objectives of the Common Agricultural Policy (CAP) and enhance market efficiency without necessarily harming competition.

Article 209 of Regulation (EU) No. 1308/2013 establishes that agreements, decisions, and concerted practices between farmers or farmers' associations are exempt from the prohibition on restrictive agreements under Article 101(1) TFEU, provided they meet certain conditions. Specifically, for an agricultural network contract to qualify for this exemption, the following three fundamental requirements must be satisfied: 1) the contract must exclusively involve agricultural enterprises or their associations; 2) it must concern the production, sale of agricultural products, or the use of common facilities for the storage, handling, or processing of agricultural goods; 3) it must not undermine the objectives of the CAP, such as market stabilization, the protection of farmers' incomes, and increased sector productivity.

This exemption mechanism ensures that agricultural enterprises can enter into network contracts without the risk that such agreements will be deemed unlawful under antitrust law. The European legislator's objective is to promote cooperation among agricultural producers, encouraging the adoption of more efficient and sustainable organizational models that enhance sector competitiveness without distorting normal market operations.

However, for an agricultural network contract to effectively benefit from the exemption under Article 209 of Regulation (EU) No. 1308/2013, it must not be misused to disguise anti-competitive practices or circumvent market rules. The European Commission[41] and national competition authorities retain the power to intervene if they determine that a particular agreement—even if formally structured as a network contract—has a distortive effect on competition that cannot be justified under the objectives of the CAP.

40 | Garilli 2017, Libertini 2014, 405.

41 | Italian legislation on the network contract has been studied by the European Commission, which, on the one hand, excluded the possibility of it constituting State aid and, on the other hand, admitted the applicability of the favorable tax regime associated with such a contract. Indeed, the national framework "does not impose territorial constraints, does not discriminate between Italian and foreign enterprises, nor based on the size, the number of enterprises forming the network, or the sector in which the enterprises operate." On this topic, see Trape 2014, 522–552.

7. The Agricultural Network Contract in Relations with Public Administration

The agricultural network contract not only promotes cooperation among enterprises in the primary sector but also serves as an effective tool for engaging with public administration, particularly in relation to public procurement procedures and access to public funding and incentives. Through a series of legislative interventions, the legislator has acknowledged the specific characteristics of agricultural networks, establishing the rules under which they can operate within public procedures and economic support mechanisms.

The inclusion of network contracts within the Public Procurement Code has marked a significant advancement for agricultural enterprises that adopt this form of aggregation. Article 68, paragraph 20, of Legislative Decree No. 36/2023 provides that business networks may participate in public contract award procedures, provided they meet the same requirements applicable to permanent consortia. In particular, for an agricultural network to compete in a public tender, the contract must include a clear allocation of tasks among the participating enterprises, and the network program must be structured in a way that ensures the proper execution of the obligations required by the contracting authority.

A fundamental issue concerns the attribution of participation requirements. The legislation specifies that the economic-financial and technical-professional capacity requirements must be jointly possessed by the enterprises within the network, thereby allowing them to combine their expertise and resources to meet the tender specifications. However, the network must demonstrate genuine operational integration among its members, preventing the misuse of the network contract as a mere formal aggregation tool lacking an actual common management structure.

Alongside public procurement participation, the agricultural network contract facilitates access to specific financial and economic incentives. The legal framework provides various benefits for business networks operating in the agricultural sector, including non-repayable grants, tax credits, and subsidized financing. The Development Decree (Decreto Sviluppo[42]) introduced preferential measures for agricultural networks, such as priority access to revolving funds for SMEs and specific incentives for investments in innovation and environmental sustainability.

One of the key advantages of joining an agricultural network is the ability to collectively access rural development programs co-financed by the European Union. In this regard, agricultural networks can apply for funding programs that

42 | Decree-Law No. 91 of 24 June 2014. Urgent provisions for the agricultural sector, environmental protection, energy efficiency in school and university buildings, the revival and development of enterprises, the containment of costs affecting electricity tariffs, as well as the immediate fulfillment of obligations arising from European legislation.

promote cooperation among enterprises, thereby facilitating the adoption of more efficient and sustainable agricultural practices. However, to be eligible for these funding instruments, the network contract must explicitly define a common program that aligns with the strategic objectives of European agricultural and rural development funds.

The interaction between agricultural networks and public administration also raises legal issues concerning the liability of the network in obligations undertaken with public authorities. In the case of network contracts without legal personality, each participating enterprise is individually liable for its proportional share of obligations arising from a public contract or received funding. Conversely, in networks with legal personality, liability is attributed to the network as an autonomous legal entity. This distinction has significant operational implications, particularly regarding the management of contractual commitments and the reporting of expenditures covered by public funds.

7.1. Participation in Public Procurement and the Public Contracts Code

The inclusion of network contracts within the Public Contracts Code represents a significant legal development, granting this form of business aggregation the ability to directly participate in public tenders. Article 68, paragraph 20, of Legislative Decree No. 36/2023 establishes that business networks may compete for public contracts, provided they meet the requirements applicable to permanent consortia and demonstrate a clear operational integration among their members[43]. This regulatory opening is particularly relevant for agricultural networks, as it enables them to access public procurement opportunities, both for the supply of agricultural goods and services and for the management of rural development projects funded by public entities and European funds

A central aspect of the regulatory framework concerns the allocation of participation requirements in public tenders. The law allows agricultural networks to satisfy economic-financial and technical-professional capacity requirements on a cumulative basis, meaning that the combined qualifications of the participating enterprises may be considered. This mechanism enables small and medium-sized agricultural enterprises to participate in tenders that they would not be able to compete for individually. However, for the network to be considered an eligible participant, the network program must demonstrate genuine cooperation among its members, and each enterprise must have a clearly defined role in the execution of the contract

43 | Regional Administrative Court of Florence, Tuscany (T.A.R. Firenze, Toscana) 25 February 2016, No. 346 establishes that the competitor must produce the network contract, as this obligation responds to the need for the contracting authority to assess the seriousness and reliability of the bid, as well as to the need to avoid a weakening of the safeguards system provided for by anti-mafia legislation.

The National Anti-Corruption Authority (ANAC) has clarified, in various decisions, that the participation of business networks in public tenders must comply with principles of transparency and competition. Specifically, ANAC has emphasized that, for an agricultural network to be admitted to a tendering procedure, the network contract must explicitly provide for the possibility of joint participation in public procurement and specify how the participating enterprises will contribute to fulfilling the contractual obligations. Additionally, each participating enterprise must individually meet the general eligibility requirements set forth in Articles 94 and 95 of the Public Contracts Code, thereby avoiding the risk of exclusion due to a lack of individual qualifications.

Another crucial aspect concerns the liability regime in the execution of public contracts. In network contracts without legal personality, each enterprise is individually liable for its share of the obligations undertaken with the public administration. Conversely, in networks with legal personality, the network itself is regarded as the contracting party, bearing full responsibility for contract execution. As a result, in network contracts, potential breaches or disputes may directly affect the individual enterprises, potentially impacting their ability to continue operating in the public procurement market.

From an operational perspective, the participation of agricultural networks in public tenders requires careful planning, both during the drafting of the network contract and in the management of the contract once awarded. It is essential for the network to clearly allocate responsibilities among its members, defining roles and obligations in detail to prevent internal conflicts and ensure proper execution of the contractual obligations required by the public administration.

7.2. Access to Public Funding and Incentives for Agricultural Networks

The introduction of the network contract in the agricultural sector has enabled participating enterprises to access specific public funding and incentives aimed at promoting cooperation and innovation within the industry. The current regulatory framework provides a range of support measures for agricultural business networks, with the objective of encouraging aggregation among sector operators and enhancing the competitiveness of the national agricultural system.

One of the primary financial instruments available to agricultural networks is the Strategic Plan for the CAP 2023-2027[44], which places particular emphasis on

44 | Cf. Regulation (EU) No. 2115/2021 of the European Parliament and of the Council of 2 December 2021, laying down rules on support for strategic plans to be drawn up by Member States under the Common Agricultural Policy (CAP strategic plans) and financed by the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD). It repeals Regulations (EU) No. 1305/2013 and No. 1307/2013 of the European Parliament and of the Council of 17

business aggregation models within the agricultural sector. Rural development funds, disbursed through Regional Rural Development Programs (PSRs), include specific support measures for agricultural networks, particularly for innovation, digitalization, and environmental sustainability projects. Enterprises forming part of a network may submit joint projects to obtain non-repayable grants for the purchase of machinery, modernization of production infrastructure, and employee training within the network.

In addition to CAP funding, the legislator has introduced fiscal incentives for agricultural networks. Among these, the tax credit for research and development investments stands out as one of the most significant measures. Enterprises adhering to a network contract may benefit from tax deductions on expenses incurred for the adoption of new technologies, the implementation of precision agriculture systems, and the introduction of sustainable practices in production process management.

Furthermore, the Fund for Development and Cohesion (FSC) and EU structural funds designated for innovation in the agri-food sector offer additional funding opportunities for agricultural networks. Several national and regional calls for proposals provide preferential treatment to businesses operating within a network, recognizing this organizational model as a strategic asset for improving productivity and product quality in the agricultural sector.

An additional incentive was introduced with the "*Decreto Rilancio*" (Recovery Decree)[45], which established specific benefits for business networks operating in the agricultural sector, with a particular focus on ecological transition and digitalization of production chains. Among the most significant measures is the opportunity to access low-interest loans for the sustainable conversion of agricultural production and the adoption of circular economy models within networks.

Despite the numerous funding and incentive opportunities, the participation of agricultural networks in these programs requires careful administrative and managerial planning. Participating enterprises must prepare comprehensive documentation demonstrating the effective collaboration within the network and the implementation of projects aligned with the objectives of public funding programs. Additionally, access to EU funds is often subject to the submission of projects with a significant territorial and environmental impact, necessitating an integrated planning approach among network participants.

December 2013. On 2 December 2021, the agreement on the reform of the Common Agricultural Policy (CAP) was formally adopted. The new legislation, which entered into force on 1 January 2023, paves the way for a fairer, greener, and more performance-based CAP

45 | Decree-Law No. 34 of 19 May 2020. Urgent measures in the areas of health, support for work and the economy, as well as social policies related to the COVID-19 epidemiological emergency.

8. The Strategic Role of the Network Contract in the Future of Italian Agriculture

In light of the ongoing transformations in the agricultural sector, the network contract emerges as a strategic tool to address the critical challenges facing the industry. Enhancing competitiveness, expanding market access, and fostering investments in technological innovation are among the primary advantages derived from participating in a business network. Integration among enterprises helps overcome the structural fragmentation of Italian agricultural businesses, which often operate on a small scale with limited economic resources

In particular, the shared use of productive factors and resources allows for the optimization of agricultural activities, improving the overall profitability of participating enterprises. The adoption of sustainable farming practices and the digitalization of the sector can be significantly facilitated through the network contract, especially in relation to funding opportunities provided by the Common Agricultural Policy (CAP) and rural development programs. Access to public incentives can be greatly facilitated by joining a well-structured business network that can demonstrate genuine productive and commercial integration.

However, the success of the agricultural network contract also depends on the ability of enterprises to effectively manage internal relationships within the network and comply with regulatory requirements. The risk of misuse and abusive practices, as evidenced by recent case law, necessitates a high level of diligence in the drafting and implementation of network programs. The involvement of specialized legal and tax advisors becomes a key factor in ensuring that the network operates in full compliance with the applicable regulations and can effectively generate the expected benefits.

Despite legislative developments progressively refining the legal framework of the agricultural network contract, certain uncertainties remain, which may require future legislative interventions. One key aspect concerns the need for further simplification of bureaucratic procedures in the establishment and management of agricultural networks. The requirement to register with the Business Register and the rules governing the legal personality of the network, for example, could be clarified and streamlined to encourage broader adoption of this instrument among small and medium-sized agricultural enterprises.

Another potential area for regulatory improvement concerns labor regulations within networks. The legal framework for joint employment (*codatorialità*) and other forms of collaboration among networked enterprises requires further clarification to ensure that joint hiring and worker secondment are carried out in full compliance with employment laws. Strengthening monitoring mechanisms could help prevent the misuse of the network contract as a means to circumvent labor supply regulations, an issue recently highlighted in case law.

Finally, the future of the agricultural network contract will likely be influenced by EU policies on sustainability and digitalization in agriculture. The adoption of innovative tools such as precision agriculture, integrated water resource management, and advanced technologies for crop monitoring could receive a significant boost through business networks. Introducing specific incentives for networks investing in sustainability and innovation could further drive the adoption of this instrument within the agricultural sector.

The agricultural network contract is thus reaffirmed as a high-potential tool for the future of the primary sector, enabling enterprises to tackle market challenges with greater resilience and innovative capacity. However, to ensure that this instrument fully realizes its benefits, it is essential to continuously refine the legal framework and enforce strict compliance with existing regulations. Case law has already provided important clarifications on the boundaries of permissible use of the network contract, but further legislative interventions could help make the instrument even more effective and secure for participating enterprises. In this context, the role of industry operators and legal professionals will be crucial in guiding agricultural businesses toward a correct and strategic use of the network contract.

9. Models of Agricultural Business Aggregation in Europe and the Network Contract

The Italian experience with the network contract in agriculture, while characterized by the specific features of the national legal system, fits into a broader European context marked by increasing attention to cooperation tools among agricultural enterprises. The common objective of these models is to enhance competitiveness, innovation, and sustainability in the primary sector, enabling operators to overcome structural limitations related to farm size and to respond more effectively to global market challenges and rural development policies promoted by the European Union. However, the legal frameworks governing these cooperative models vary across jurisdictions, reflecting the distinct legal, economic, and productive traditions of each country.

In France, the mechanism closest to the Italian network contract is the "*contrat de filière*", which strengthens the agri-food supply chain through agreements among producers, processors, and distributors[46]. The goal of this model is to ensure a fairer distribution of value along the production chain, establishing shared rules on pricing, quality, and sustainability. This type of agreement is strongly linked to national and EU agricultural policies and often includes public incentives for participating enterprises. Alongside this model, *coopératives agricoles* are widespread

46 | Magrini et al. 2023, 119.

in France, structured entities that operate in production, marketing, and financial sectors, ensuring better market conditions and greater access to credit for farmers.

In Germany, agricultural cooperation is primarily structured through the *Genossenschaften*, agricultural cooperatives that allow producers to optimize operational costs and access shared services. This model is notable for its stability, with cooperatives playing a central role in the agri-food sector, managing significant market segments directly. Another unique feature of the German system is the Maschinenringe, organizations that enable farmers to share machinery and equipment, reducing the capital burden on individual operators.

In Spain, the regulation of agricultural business aggregation is based on Producer Organizations (*Organizaciones de Productores* – OP) and Agricultural Associations, which strengthen farmers' bargaining power with large-scale distributors and facilitate access to public financing. Although the Italian network contract model has not been widely adopted in Spain, the underlying rationale of these structures shares similarities with the Italian experience, particularly regarding resource sharing and joint production management.

A peculiar model has developed in the Netherlands, where agricultural enterprise organization is highly innovative and specialized. Dutch business networks are strongly oriented toward research and technological development, with a focus on precision agriculture and environmental sustainability. The Dutch cooperative system is one of the most advanced in Europe, enabling agricultural businesses to leverage economies of scale and gain access to well-structured international marketing channels.

In Denmark, the dominant model consists of agricultural cooperatives, which operate with strong institutional support. These cooperative structures not only ensure more efficient resource management but also play a key role in promoting sustainability, aligning with the European Union's environmental objectives for agriculture.

In Poland, agricultural business aggregation is structured around agricultural producer groups, which facilitate market access and EU funding opportunities. The logic behind these structures closely resembles that of Spain's Producer Organizations, with a strong connection to rural development policies under the Common Agricultural Policy (CAP)

Before Brexit, the United Kingdom employed mechanisms similar to the Italian network contract, including Producer Organizations (POs), which enabled farmers to collaborate to enhance competitiveness and access EU funds allocated to the agri-food sector. Following the UK's withdrawal from the EU, its legislation on agricultural aggregations has undergone progressive reform, favoring collaborative models directly supported by national institutions.

A comparative analysis of the various European legal systems highlights how the Italian agricultural network contract represents a particularly flexible

aggregation model, adaptable to enterprises' specific needs and capable of fostering growth and innovation. Although no exact counterpart exists in other legal systems, the cooperative mechanisms adopted across different EU countries reflect similar principles, albeit with distinct implementation methods. The widespread adoption of cooperative models in agriculture underscores the growing importance of such legal instruments in rural development policies and in supporting competitiveness in the primary sector. This reinforces the need for continuous legal monitoring to ensure effective harmonization of these diverse regulatory frameworks at the European level.

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István TEMESI[1] – Ágoston KOROM[2]

Lessons Learned From Askos Properties Eood Judgement[3]

Force majeure, exceptional circumstances, definition of expropriation of agricultural holding in the scope of EAFRD

Abstract

The main proceedings concern a farmer in Bulgaria who, under a rural development programme, undertook to maintain the lands leased through agreements concluded for five years with the municipality in good agricultural and environmental condition and engage in agricultural activities in those areas. After the amendment of national legislation, meadows or grasslands owned by municipalities or the state were to be leased exclusively to owners or users of farms with herbivorous animals based on the number and type of their declared livestock. Since the concerned party of the main proceedings failed to meet these requirements after the amendment, the municipality terminated the agreements in question. The paying agency of the member state claimed reimbursement of 50% of the amount already paid under the rural development programme. In contrast, the concerned party of the main proceedings considered that the amendment to the national legislation constituted force majeure, exceptional circumstances or expropriation of agricultural holding. The present study examines the CJEU's decision on this matter.

Keywords: force majeure and exceptional circumstances, expropriation of agricultural holding, deprivation of property provided for in Article 17 of the Charter, obligations undertaken under EAFRD, definition of reparcelling measures

1 | Dr. Habil. TEMESI, István, Head of Department, MATE AGI Department of International Regulation and Business Law

2 | Dr. KOROM, Ágoston PhD, assistant professor, Károli Gáspár University, Faculty of Law, Institute of Private Legal Sciences

3 | Court of Justice of the European Union (2024) *Case C-656/22, Askos Properties EOOD v Zamestnik izpalnitelen direktor na Darzhaven fond "Zemedelie"*, ECLI:EU:C:2024:56.

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Introduction

The research primarily seeks to answer the question of whether, within the scope of the EAFRD, if an agricultural producer undertakes a multiannual commitment concerning a specific plot of land, the subsequent abandonment of this commitment – due to an amendment of national legislation – can be considered a circumstance that may create an exemption from the repayment obligation, especially in light of the relatively strict repayment practice established in the case law.[4] The main proceedings concern a Bulgarian farmer who applied for rural development support between 2013 and 2015. In that context, the farmer undertook to maintain.[5]

The Bulgarian legislation was amended in 2015, according to which the lands of the state or the municipality were to be leased or distributed exclusively to owners or users of agricultural holdings who owned herbivores concerning the number and type of their declared livestock. In connection with the amendment, a deadline of February 2016 was given to comply with this amendment, which the party of the main proceedings did not meet. Therefore, the municipality terminated the lease contracts that were concluded. The national paying agency decided that the economic operator had to repay half the amount paid between 2013 and 2015.

The concerned party in the main proceedings considered that the termination of the lease agreements due to national legislation constituted force majeure or exceptional circumstances, and the aid shall not be reimbursed accordingly.

The first question referred for a preliminary ruling was essentially whether the relevant provisions of the applicable regulation[6] must be interpreted as meaning that the termination of the lease of the agricultural land in question, which was the subject of aid granted under the EAFRD, and the new conditions imposed by the new legislation of the Member State, constitute *force majeure,*[7] exceptional circumstances or expropriation of the agricultural holding within the meaning of the relevant regulation.

The relevant interpretation is that where the Member State may recognise the existence of *force majeure* or exceptional circumstances, it may not require repayment of all or part of the aid.

The judgment stands apart from the land policy framework, where EU law considers national land policy measures regarding fundamental economic freedoms, including the free movement of capital, the freedom of establishment, or

4 | For more about the practice of national and EU law, see: Ujhelyi-Gyurán, Lele & Pártay-Czap 2024, 203; Korom 2023, 86; Szinek Csütörtöki 2023, 128.

5 | In the light of the decision, Regulations 1974/2006, 1305/2013 and 1698/2005 apply.

6 | Article 47(1) of Commission Regulation (EC) No 1974/2006 of 15 December 2006 laying down detailed rules for the application of Council Regulation (EC) No 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (hereinafter referred to as Regulation (EU) No 1974/2006)

7 | Article 47 of Regulation (EU) No 1974/2006

the Services Directive.[8] While these principles are generally applicable, the key difference lies in the necessity of a cross-border element, which is not required under the Services Directive.[9]

In contrast, it also diverges from applying the principles of legitimate expectation and legal certainty in the context of the EAFRD, particularly concerning subsidies that are wrongly paid or unduly granted. These principles typically do not apply except in exceptional circumstances. Nonetheless, the judgments in question may grant exemptions from sanctions related to repayment.

The paper's determining method is the analysis of the judgment, from which we can learn how similar cases should be resolved in the future and what legal practice should be taken into account. In this regard, some uncertainty remains, which will most likely be clarified by future similar decisions. Regarding the literature review, it can be concluded that this topic has not been addressed before, it represents a new perspective.

Opinion of the CJEU

According to the case law of the CJEU,[10] "any event being outside the control of the operator, resulting from abnormal and unforeseeable circumstances, and the consequences of which, despite the exercise of all due care, could not have been avoided" may constitute *force majeure* or exceptional circumstances, within the meaning of Article 47(1) of Regulation No 1974/2006, in the context of the EAFRD.[11] As interpreted by the CJEU, it also follows from recital 37 and Article 47(1) of Regulation (EC) No 1974/2006, considering that the list referred to in the latter provision is non-exhaustive, that *force majeure* or exceptional circumstances can cover cases not included on that list. Therefore, they can also cover the conduct of the public authorities.[12] According to the case law,[13] it is also a condition of exceptional circumstances or *force majeure* that the concerned one has taken appropriate measures against the event's consequences.[14]

8 | It should be noted that the ASKOS case is not concerning land policy. For more about the issues regarding land policy, see Korom 2021c.
9 | For more about this issue see: Korom 2023.
10 | In this regard, CJEU referred to judgments of Szemerey case (C-330/14), Zamestnik case (C-343/21) and Greenland Poultry case (C-169/22).
11 | Court of Justice of the European Union, C-656/22, Section 47.
12 | Ibid, Section 48.
13 | Court of Justice of the European Union (2019) *Case C-660/17 P, RF v European Commission*, ECLI:EU:C:2019:509; However, it must be noted that the judgement in question does not fall within the scope of the Common Agriculture Policy.
14 | The criteria developed by the CJEU as set out above must be assessed by the national court in the Member State of origin, as well as whether the concerned party in the main proceedings had the opportunity to acquire a livestock holding, or whether it could have acquired other land, including from private individuals.

Reviewing the question of whether the termination of the agreement in the main proceedings can fall under the concept of "expropriation of agricultural holding", within the meaning of Article 47(1)(c) of Regulation No 1947/2006, the CJEU states that concept is not defined either in that regulation or by reference to the national laws of the Member States. Thus, that concept must be regarded as an autonomous concept of EU law[15] regarding the teleological interpretation of the objectives of the regulation. CJEU referred to the judgement of the Venezuela v. Council case, but that case does not fall within the scope of the Common Agriculture Policy.

As mentioned above, Regulation (EC) No 1947/2006 does not provide any useful information on the expropriation of agricultural holdings. Still, it is clear from the use of a teleological interpretation that this regulation lays down detailed rules for the implementation of Regulation (EC) No 1698/2005,[16] which aims to provide support for farmers in mountainous areas with handicaps who undertake to conclude a lease for a minimum period of five years and to use the agricultural land concerned during that period.[17]

From its case law, the CJEU concluded that the concept of expropriation in Article 47(1) Regulation (EC) No 1947/2006 covers not only measures depriving a person of property rights but also those that are treated in the same way.[18]

The CJEU recalled its case law according to which the forced, total and definitive extinguishment of a usufructuary right may be considered a deprivation of property under Article 17 of the Charter of Fundamental Rights of the European Union[19] where the rights in question confer on the concerned one the right to use the property and to receive the benefits.[20]

From the above, the CJEU derived by analogy that if, in the present case, the examined national legislation definitively and completely abolishes the right of use and the right to receive the benefits of the land in question by the concerned party in the main proceedings, the national legislation in question constitutes a breach of the right to property enshrined in Article 17 of the Charter of Fundamental Rights of the European Union. It must, therefore, be considered to be an expropriation of an agricultural holding within the meaning of the Regulation, i.e.

15 | Court of Justice of the European Union, C-656/22 Section 53.
16 | Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD).
17 | Court of Justice of the European Union, C-656/22, Section 55.
18 | CJEU referred to the judgement of Laan-Velzeboer case (C-285/89), which fall within the scope of the Common Agriculture Policy.
19 | It is important to point out that the judgment in this regard examines the applicability of Article 17 of the Charter of Fundamental Rights of the European Union in relation to implementation by Member States. In the context of the application of the CAP, property rights and the general principles of EU law have a much more limited application in the case of review by the CJEU of EU legislative acts. See in Bianchi 2012, 50–72.
20 | Court of Justice of the European Union, C-656/22, Section 57,

Article 47(1)(c) of Regulation (EC) No 1974/2006.[21] However, the legislation of the Member State in question provides for the termination of lease agreements only if they are not brought into conformity with the requirements laid down within the prescribed period.

Based on the judgement, the acting national court[22] has to examine whether the lease agreement's termination, under the Member State's law, entailed the compulsory, complete and definitive extinction of the tenant's rights. Still, this court has to examine not only the occurrence of the deprivation of the property regulated by Article 17 of the Charter but also that whether, based on the case law, the situation in question may be considered as a de facto expropriation.[23] The acting national court also has to examine whether the concerned party of the main proceedings had the opportunity to take measures to comply with the new requirements or whether it made such measures, as well as, the effects of the introduction of the new requirements regarding the concerned party of the main proceedings also has to be examined taking into account all circumstances to determine whether the deprivation of the right to property has occurred.[24]

The second question asked in the proceedings was whether Article 45(4) of Regulation No 1947/2006 can be applied in a situation in which the considered party is unable to fulfil its obligations because its agricultural holding is the subject of public land-consolidation measures or of land-consolidation measures approved by the competent public authorities. The CJEU referred to the judgement of Zamestik case,[25] which, inter alia, determined that any operation which has as its purpose the reconfiguration and rearrangement of agricultural parcels to form more rational agricultural holdings in terms of land use and which is decided upon or approved by the competent public authorities is likely to fall within the concepts of 'reparcelling and public land-consolidation measures' or of 'land-consolidation measures' approved by the competent public authorities.[26] CJEU gave a clear answer: the above provision does not apply where the aid beneficiary cannot fulfil its obligations due to the new requirements, i.e. the obligation to have a livestock facility provided by the legislator.

21 | Ibid, Section 59.
22 | Court of Justice of the European Union, C-656/22, Sections 59–60.
23 | Court of Justice of the European Union (2022) *Case C-83/20, BPC Lux 2 Sàrl and Others v Banco de Portugal and Others*, ECLI:EU:C:2022:346.
24 | Court of Justice of the European Union, C-656/22, Section 61.
25 | Court of Justice of the European Union (2022) *Case C-343/21, RS v Pensionsversicherungsanstalt*, ECLI:EU:C:2022:757. E.
26 | Court of Justice of the European Union, C-656/22, Section 65.

Relations to judgement of Järvelaev case[27]

In its judgement in Askos Properties Eood case, CJEU repeatedly referred to the judgement in Järvelaev case. Hence, how it may be relevant to the present case is examined hereby. In the case of Järvelaev, the concerned party of the main proceedings was awarded a grant for purchasing a sailing boat within the frames of a measure related to Leader axis, where the beneficiary. However, no condition in the relevant regulation,[28] also undertook to create jobs. The concerned party, Järvelaev, a not-for-profit association, leased the asset, which led the authorities to claim back the amount of the grant received. Several questions have been raised in the proceedings, including whether this leasing should be considered a substantial operation change. This was a question for the national court to decide. It was also for the national court to decide whether there had been a substantial modification of the operation in terms of job creation, taking into account the fact that the rural development objective pursued by the Leader axis, namely the development of rural tourism services, had been met.

CJEU stated that to protect the financial interests of the European Union and to ensure effective control, the Member State may not require the assets in question to be used for five years without allowing for an individual assessment, but it is for the national court to assess whether the failure to create jobs, which is not one of the objectives of the regulation or of the Estonian legislation but which the beneficiary has undertaken to create, constitutes a significant modification which, because of the irregularity, requires the grant in question to be recovered. This decision can be considered unusual insomuch as neither the Charter of Fundamental Rights of the European Union nor the general principles of EU law, such as proportionality, legal certainty and legitimate expectations, were applied. Still, the CJEU based its decision almost exclusively on the discretion ensured by the relevant regulations.

It is common in the two cases that they concern rural development aid and that there have been some changes to the commitments. However, a difference is that in the Askos case, the farmer could not meet the obligations under the EAFRD due to a change in national legislation. In contrast, in the Järvelaev case, the beneficiary changed its obligations. Neither the job creation nor the leasing of the asset can be considered as entirely bona fide, irrespective of the interpretation of the CJEU, in particular the criteria relating to the discretionary power of the Member State. Furthermore, in the Askos case, the CJEU interpreted the concepts of the

27 | Court of Justice of the European Union (2019) *Case C-580/17, Mittetulundusühing Järvelaev v Põllumajanduse Registrite ja Informatsiooni Amet (PRIA)*, ECLI:EU:C:2019:382.
28 | Council of the European Union (2005) *Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD).* Official Journal of the European Union, L 277, 21.10.2005, 1–40.

relevant regulation using the property rights enshrined in Article 17 of the Charter of Fundamental Rights of the European Union and the interpretations applied in the scope of the CAP and in the EU legal order as a whole. In the Järvelaev judgment, the Member States' margin of manoeuvre in implementing the regulations in the Member States played an important role almost exclusively. Consequently, it is not entirely clear what the CJEU "saw as common ground" in Järvelaev and Askos judgments.

Requirements related to reimbursement of aid paid under the EAFRD

The importance of the dispute "decided" in the Askos Properties judgment is that if the amendment of the national legislation in question does not constitute force majeure, exceptional circumstances, expropriation of the agricultural holding, or a possible reparcelling measure, the farmer will have to repay part of the aid received under the EAFRD. The case law examined below analyses the case law on the repayment of aid paid unlawfully or without justification under the EAFRD.

However, as a general rule, in cases where a Member State directly applies EU regulations within the scope of the Common Agricultural Policy, the general principles protecting economic operators[29] are generally given a limited role, and the protection of the financial interests of the European Union is more prominent. In cases where the Member State does not implement the regulations directly but through various implementing measures, the protection of the financial interests of the European Union is generally overshadowed in the event of any irregularity, and the role of the general principles protecting economic operators and agricultural operators is given priority.[30] An exception to this general rule is the area of rural development, including the judgement in Ministru kabinets, Erzeugerorganisation, Martin Huber or SC Avicravil Farms case. In these decisions, as a general rule, rigorous criteria apply to recovering rural development funds paid illegally or without a proper legal basis.

In the judgment of Ministru kabinets case,[31] the rural development programme of the given Member State – i.e. Latvia – allowed that, if the beneficiary

29 | With regard to the discretion of the Member States and the applicability of the general principles, Aude Bouveresse explains the interplay of economic factors. This case law certainly has a dual economic objective: on the one hand, it is intended to prevent abuse and therefore, as a general rule, it imposes very strict requirements on the Member States as regards amounts paid illegally or without justification. On the other hand, it also allows this case law to be nuanced in individual cases, taking into account the economic situation of the farmers who are operators. See Bouveresse 2010, 19–23.

30 | Korom 2021a, 641–656; Korom 2021b, 413–426.

31 | Court of Justice of the European Union (2018) *Case C-120/17, Administratīvā rajona tiesa v Ministru kabinets*, ECLI:EU:C:2018:638.

died during the period of the aid in question, his/her heirs could benefit from an early retirement pension for the remaining period. The national legislation was amended, which meant that heirs who had honoured their commitments also lost their rights. The CJEU concluded, by means of a purposive interpretation of the provisions of the underlying regulation, that the heritability of the aid in question was not lawful. As a general rule, economic operators cannot rely on the principle of protection of legitimate expectations against a clear provision in an EU legal text, nor can the conduct of national authorities give rise to legitimate expectations. However, the CJEU "took into account" the fact that the European Commission had approved the programme in question and that the parties concerned were not informed of the fact that the European Commission had subsequently notified the Member State of its objections to the inheritability of the aid in question. Consequently, the principle of legitimate expectations could exceptionally apply.

In the main proceedings of Erzeugerorganisation case[32], a producer organisation received aid for purchasing food processing equipment. The equipment was installed on the premises of a subcontractor of the beneficiary of the aid, based on a lease contract, under the supervision and responsibility of the beneficiary. It was with this knowledge that the Austrian authorities approved the programme in question and paid the first instalments of the grants. The authorities later ordered the reimbursement of the aid paid, as they found that the person concerned was not entitled to get the aid in question. The CJEU relied on a teleological interpretation to conclude that the person concerned in the main proceedings was not entitled to the aid.[33] As a general rule, the Member State has no discretion to recover aid granted without legal basis or unlawfully and, also as a consequence of settled case law, it follows that an economic operator cannot invoke the general principle of the protection of legitimate expectations against an unambiguous provision of an EU text. Moreover, the cases relating to the bearing by the Union of the costs of the Common Agricultural Policy must be interpreted strictly since otherwise, the Member State would place its operators in a more favourable position. The CJEU, in the light of the circumstances of the case, ordered the application of the general principle of legal certainty, subject to the following conditions: the Union's right to recovery must be taken into account, the good faith of the person concerned must be established beyond reasonable doubt, and the law of the Member State concerned must provide for a similar possibility in the case of aid granted by that Member State alone.

32 | Court of Justice of the European Union (2017) *Case C-516/16, Erzeugerorganisation Tiefkühlgemüse eGen v Agrarmarkt Austria*, ECLI:EU:C:2017:1011.

33 | However, such situations must be decided on a case-by-case basis, as the CJEU has also held that the mere fact that a producer organisation does not own the site of an investment does not necessarily mean that the investment in question was not made for the beneficiary.

In the Martin Huber case,[34] an Austrian farmer received aid, which was withdrawn after three years because the farmer used products prohibited by the relevant directive. The farmer concerned did not contest the use of the prohibited products in question but argued that he had not committed an infringement because the directive in question had not been made available to him, and the authorities had been aware of the use of those products all along. According to the farmer, the information was only available on the Ministry's bulletin board. The European Commission has approved the programme in question, including its content, but this approval does not confer EU status on the Member State's act in question, and, according to the practice of the CJEU, the Commission's approval is only relevant for the Member State in question. In its judgment, the CJEU recalled that, inter alia, the principle of effectiveness must apply in this area in the case of recovery of aid paid without legal basis or unlawfully, which means that national legislation must not render impossible or excessively difficult the recovery of the amounts in question.

In the judgement of the SC Avicravil Farms SRL case[35] the party concerned with the main proceedings has received aid for undertaking animal welfare measures. The European Court of Auditors has carried out audits in Romania, which also found significant overpayments in relation to the measure in question. Subsequently, the authorities reduced the level of the fee in their decisions also for the person concerned by the main proceedings. The application of the general principle of legal certainty was also raised in relation to the reduction of overcharges resulting from calculation errors before the European Commission adopted a decision. The CJEU has applied, inter alia, the principles established in the Erzeugerorganization judgment, according to which Member States do not have discretionary powers to recover amounts unduly or unlawfully paid under the Common Agricultural Policy.

This case law, like the judgments already examined, does not exclude that the Member States apply the principles of legal certainty and legitimate expectations when recovering the aid in question. As regards the question of whether the administrative authorities could have created legitimate expectations in the economic operators, the case law is clear: contrary to a clear provision of EU law, legitimate expectations cannot be based on the existence of a pre-existing situation[36], even if the economic operator in question was acting in good faith. Nor could the principle of legal certainty be applied since the relevant EU legislation is clear that the payments under examination can only be intended to compensate for benefits foregone as a result of the commitment.

34 | Court of Justice of the European Union (2002) *Case C-336/00, Republik Österreich v Martin Huber*, ECLI:EU:C:2002:509.
35 | Court of Justice of the European Union (2022) *Case C-443/21, Avicarvil Farms*, ECLI:EU:C:2022:1234.
36 | The related EU provisions prescribed, inter alia, that the aid in question is to compensate the costs that occurred in relation to the obligation undertaken.

Concept of force majeure and exceptional circumstances

The question is what lessons, besides the specific legal provisions, can be drawn which lessons go beyond the resolution of situations such as the one in the main proceedings of the CJEU judgment under review.

To determine what constitutes force majeure or exceptional circumstances within the scope of Article 47(1) of Regulation (EC) No 1974/2006 for the purposes of the application of the EAFRD, the CJEU has taken as a basis the case law. In doing so, it has considered the judgements in the Szemerey case[37], Zamestnik case[38], and Greenland case[39]. According to these, *force majeure* or exceptional circumstances are defined as any event outside the control of the economic operator, the result of exceptional and unforeseeable circumstances, the consequences of which it could not have been avoided even if it had taken the greatest possible care. Of the judgments cited, the judgment in Szemerey did not apply Article 47(1) of Regulation (EC) No 1947/2006, but Regulation (EC) No 1698/2005 and Regulation (EC) No 1122/2009[40]. In the Zamestik judgment, the CJEU examined the concept of *force majeure* in the context of applying Regulation (EC) No 73/2009. In the Greenland Poultry judgment, the CJEU also examined the conditions for the application of *force majeure* in the context of the application of Article 47(1) of Regulation (EC) No 1947/2006 to the EAFRD. Consequently, the concepts and case law examined above apply only in the context of applying the Common Agricultural Policy[41] and in the field of EAFRD aid.[42]

Recital 37 of Regulation (EC) No 1974/2006 provides for the establishment of common rules for, inter alia, *force majeure* or exceptional circumstances, and Article 47(1) of the same Regulation provides that Member States may recognise categories of *force majeure* or exceptional circumstances in the cases listed by way of example. From these two provisions, the CJEU has deduced that the concepts of force majeure and exceptional circumstances may also include cases not listed,[43] which may thus include the conduct of public authorities.

The CJEU, drawing on case law, has set the additional criterion that the person concerned must take appropriate measures to avoid the event's consequences. The

37 | Court of Justice of the European Union (2015) *Case C-330/14, Szemerey Gergely v Miniszterelnökséget vezető miniszter*, ECLI:EU:C:2015:826.
38 | Court of Justice of the European Union (2022) *Case C-343/21, Zamestnik izpalnitelen direktor na Darzhaven fond "Zemedelie"*, ECLI:EU:C:2022:696.
39 | Court of Justice of the European Union (2023) *Case C-169/22, Groenland Poultry SRL*, ECLI:EU:C:2023:638.
40 | In this case, CJEU applied the concept of force majeure, inter alia, in the scope of Regulation (EC) No 1122/2009
41 | There are principles in the EU legal order that are not specific to one area, but it is not the case here.
42 | The judgement in Szemerey case falls only partly within the scope of EAFRD.
43 | Article 47(1) of the Regulation was permissive in principle, as confirmed by recital 37.

judgment cited in this case, P-RF v Commission,[44] does not fall within the scope of the Common Agricultural Policy, which appears to be a cross-cutting concept of an entire EU legal regulation. It is this practice, developed outside the scope of the Common Agricultural Policy that the national court must take into account to determine whether the person concerned has taken appropriate measures to counter the consequences of the event. In this specific case, it means that the national court had to examine whether the person concerned had the possibility of acquiring a livestock holding or whether it had the possibility of acquiring the land in question from a private individual.

Concept of expropriation of agricultural holding

According to the interpretation of the CJEU, the concept of expropriation of agricultural holding must be regarded as an autonomous concept of EU law and must be interpreted uniformly throughout the territory of the European Union since Article 47(1) of Regulation (EC) No 1947/2006 neither provided a definition regarding the concept in question, nor referred to the law of Member States. CJEU referred to the judgment of the Venezuela v Council case, but this judgment does not fall within the scope of the Common Agriculture Policy but within the Common Foreign and Security Policy (CFSP). However, the CJEU did not refer to the judgment in question in the context of expropriation or expropriation of agricultural holdings, but in the sense that if a secondary EU act does not define a concept, it must be considered as an autonomous concept within the Union, taking into account the objectives and context of the given secondary EU act. It seems that the teleological interpretation applies not only to the provisions of the relevant secondary Union act but also to the implementing regulation of the relevant regulation. The objective of the implementing regulation is, inter alia, that farmers who receive aid in the areas with handicaps should undertake to continue their activity and to use the land in question for at least five years.

In this context, CJEU has concluded that expropriation within the meaning of Article 47(1)(c) of Regulation (EC) No 1974/2006, in the light of the case law, includes not only the deprivation of property but also measures which are equivalent thereto. The referred judgment in the van der Laan-Velzeboer case[45] falls within the scope of the Common Agricultural Policy, in which a measure of a Member State reduced the territory of land belonging to a dairy farm. In the view of the CJEU, the measure in question could restrict property rights because it could lead to a reduction in milk production.

44 | Court of Justice of the European Union, C-660/17
45 | Court of Justice of the European Union (1991) *Case C-285/89, Metalgesellschaft and Others v Commission of the European Communities*, ECLI:EU:C:1991:361.

Within the meaning of the judgment in the Commission v Hungary case,[46] the forced termination of a right of usufruct can be considered as a deprivation of property within the meaning of Article 17 of the Charter of Fundamental Rights of the European Union, provided that this right confers on its holders the right to use the property and to receive the benefits thereof. The main issue in the referred judgment in the Commission v Hungary case[47] was the abolition of usufructuary rights in agricultural land, which was a measure of a Member State penalising the circumvention of provisions of the Treaty of Accession of Hungary which restricted the acquisition of agricultural land by persons resident in other Member States and which was not aimed at an objective of property policy.[48] In any event, as regards the deprivation of property criterion in Article 17 of the Charter, the case law of the CJEU is based on the private law of the Member State concerned, i.e. if the national law in question abolishes rights which, under the private law of that Member State, guarantee the use of the thing in question, there is a deprivation of property.

This is the practice the CJEU used: i.e. there is a deprivation of property under Article 17 of the Charter, and therefore it constitutes "expropriation of agriculture holding" within the meaning of Article 47(1)(c) of Regulation (EC) No 1974/2006, where the legislation of a Member State, by its very content or because of a coercive measure adopted by the authorities of a Member State, completely and definitively terminates the right of a farmer who has concluded a lease contract to acquire land corresponding to the obligations entered into under the EAFRD to use and benefit from the land concerned.

Several conclusions can be drawn from this finding: the case law does not distinguish between restrictions imposed by Member States in the context of the application of fundamental economic freedoms and the deprivation of property imposed by the CAP, in particular by the EAFRD. In neither case can only the deprivation of property rights be considered as expropriation, but a situation which abolishes the right to use and benefit from the land in question. In the present case, the case law treats as an essential distinction that the deprivation of property provided for in Article 17 of the Charter must be interpreted in the light of the provisions applicable to the EAFRD, within the framework of which the farmer has undertaken an obligation. Within this framework, the recognition of a breach of the right to property because of the obligations imposed under the EAFRD appears to be recognised by the CJEU in the case of less restrictive measures by Member States.

On the other hand, it must also be interpreted in the context of the above that it is not only the "classic" case of Member States having to take into account the

46 | Court of Justice of the European Union (2019) *Case C-235/17, European Commission v Hungary*, ECLI:EU: C:2019:432.
47 | Ibid.
48 | This is understood in the sense that the national legislation in question was not aimed at regulating the structure of agricultural holdings, nor was it directly linked to CAP support.

requirements of the general principles of EU law and the relevant provisions of the Charter of Fundamental Rights of the European Union when implementing secondary EU law provisions,[49] but also the practice of Article 17 of the Charter in relation to agricultural land in the context of the application of fundamental economic freedoms, when interpreting the concepts of the EAFRD Regulation, i.e. the definition of expropriation of a farm.

Meanwhile, the CJEU recalled that the amendment of the relevant national legislation only terminates the leases in question if the new conditions are not met within the prescribed time limit. However, in the context of the application of Article 17 of the Charter, it is necessary to examine not only whether there has been a dispossession or a formal expropriation, but also whether the situation in dispute constitutes an actual expropriation. In this respect, an account should be taken of the judgment in BPC Lux 2 and Others,[50] which examined, inter alia, compliance with Article 17 of the Charter in the area of the Banking Union, Resolution of Credit Institutions. It follows that this concept, i.e. the concept of effective expropriation, must be interpreted in a uniform manner throughout the EU legal order.

The procedure did not reveal whether the concerned party in the main proceedings could comply with the new requirements imposed by the change in national law. Therefore, it is necessary to examine all relevant circumstances, including whether the concerned party in the main proceedings could obtain the missing land from private persons. Thus, the court in the Member State must examine on a case-by-case basis whether there has been a deprivation of property or not.

Summary

The CJEU "summarized" the "decision" in the operative part as follows: The termination of the contracts in question as a result of a change in the legislation of a Member State may be considered to be *force majeure* or exceptional circumstances within the meaning of the relevant regulation, provided that it constitutes an extraordinary and unforeseeable event outside the control of the rightsholder and that the rightsholder has made every effort, without excessive sacrifice, to bring the contracts in question into line with the new requirements.

The case law[51] seems to have developed a uniform interpretation of the concepts of *force majeure* and exceptional circumstances in the context of applying the

49 | Court of Justice of the European Union (2014) *Case C-135/13, Szatmári Malom Kft v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, ECLI:EU:C:2014:327.
50 | Court of Justice of the European Union (2022) *Case C-83/20, BPC Lux 2 Sàrl és társai kontra Banco de Portugal és társai*, ECLI:EU:C:2022:346.
51 | Therefore, a de lege ferenda proposal is difficult to formulate, as the very essence of this line of case law lies in providing case-by-case guidance to national courts on how to proceed in similar situations.

EAFRD, irrespective of the regulation concerned. However, the concepts of *force majeure* and exceptional circumstances are interpreted broadly, including, inter alia, acts of the State.

According to the relevant regulation, the CJEU interprets a measure of a member state as an expropriation of an agricultural holding if the termination of the contract constitutes a measure involving the deprivation of property, which deprives the person concerned of the use and enjoyment of the agricultural land concerned. As regards the additional condition that the concerned one must take appropriate measures against the occurrence of the event, a uniform interpretation should be applied not only in the context of the application of the CAP and the EAFRD, but also in the entire EU case law.

The concept of expropriation of agricultural holdings should be considered autonomous and interpreted uniformly throughout the EU, as the relevant regulation neither refers to national law nor defines the concept. In interpreting the law, an account must be taken not only of the objectives and context of the regulation in question but also, where appropriate, of the implementing regulation.

In this case, the CJEU considered the objectives of the implementing regulation, which support farmers in areas with handicaps to ensure the continuation of their activities and the use of the land concerned. This interpretation is linked to the specificities of the case, but it is likely to be a relatively frequent objective in the context of applying the EAFRD.

From the above objective and from a judgment concerning a judgement regarding the reduction in milk production within the scope of the CAP, in which a Member State measure was capable of restricting property rights because it reduced milk production, the CJEU concluded that expropriation within the scope of the relevant regulation includes not only the deprivation of property but also measures which are equivalent to it.

The CJEU has developed a practice in the field of the free movement of capital, according to which a measure of a Member State which abolishes usufructuary rights in agricultural land constitutes a deprivation of property within the meaning of Article 17 of the Charter, if the private law of that Member State ensures the use and enjoyment of the property in question. The principle developed in the above judgment has been given a specific interpretation by the CJEU in the present case, in the context of the objectives of the EAFRD, namely that the relevant regulation constitutes an expropriation of agricultural holding within the meaning of Article 17 of the Charter where, as a result of the legislation of a Member State or of coercive measures taken by the public authorities in application thereof, the right to use and benefit from the land in question is definitively withdrawn from farmers who have concluded leases in respect of the land in question to fulfil obligations undertaken under the EAFRD.

It follows that the deprivation of property provided for in Article 17 of the Charter in the context of the negative form of integration, i.e. both in the judgment in

Commission v Hungary and in the present case, is made conditional on the private law of the Member States according to the same criteria: that is if the measure of the Member State definitively terminates the right to use the land and to receive the benefits of that land.

On the contrary, there are also important differences between the application of the negative form of integration, i.e. free movement of capital, and the application of positive integration in the context of the application of the EAFRD. In the judgment in Commission v Hungary, the national legislation in question permanently terminated the right of the persons concerned to use and benefit from the land in question. By contrast, in the context of the application of the positive form of integration, i.e. in the present case, the expropriation of agricultural holding, i.e. the deprivation of property, is deemed to be the expropriation of a holding if the legislature of a Member State imposes a condition on the leasing of land owned by the municipality or by the state which, in the present case, relating to livestock farming, may prevent the leasing of land necessary to meet the commitments entered into under the EAFRD during the period of the commitment.

This practice can, of course, be applied only in situations relating to the EAFRD commitment, and not to all the conditions imposed by the national legislator which would impose conditions on the lease of public or municipal land. Another interesting difference is that one of the most important results of the judgment in the Commission v. Hungary case is that, in addition to the free movement of capital, the fundamental economic freedoms of the EU were examined independently in relation to the property rights under Article 17 of the Charter, whereas in the present judgment the CJEU "used" the interpretation of Article 17 of the Charter, as developed in the Commission v Hungary case, to interpret the concept of expropriation of agricultural holdings in the EAFRD Regulation. In other words, it is not only the usual, albeit less known, obligation for Member States to take into account the requirements of the Charter and the general principles of EU law when implementing primary and secondary EU acts, but also the interpretation of the Charter provisions, in certain circumstances, that determines the applicability and interpretation of the concepts defined in secondary EU acts.

The case law on the deprivation of property developed under Article 17 of the Charter must examine not only the practice of the Common Agricultural Policy and Member States' operations on agricultural land but also the case law in a broader sense of EU law, which covers cases that are known as de facto expropriation if the case cannot be classified as a deprivation of property or formal expropriation.

In any event, in similar cases, the national court must consider the situation of the farmers in question on an individual basis to determine whether the property has been deprived, for example, whether they have been able to obtain the missing land from private individuals.

Although the CJEU has referred to the Järvelaev judgment, we have not yet found any similarities in the main proceedings or in the legal principles and

jurisprudence applied. The decision's importance is highlighted by the relatively strict case law on the recovery of aid paid without justification or unlawfully in the context of the EAFRD.

On the one hand, it differs from the scope of action in land policy, where EU law controls measures targeting national land policies from the perspective of economic fundamental freedoms. This may involve the free movement of capital, the freedom of establishment, or even the so-called Services Directive. These always apply, with the only difference being the requirement of a cross-border element, which is not necessary within the scope of the Services Directive.

On the other hand, it also differs from the applicability of the principles of legitimate expectation and legal certainty in the area of the EAFRD concerning wrongly paid or unduly granted subsidies, as these principles generally do not apply or only in exceptional cases. The examined judgments, however, may provide an exemption from sanctions related to repayment.

In its judgment in the *Askos* case, the CJEU referred to the right to property enshrined in Article 17 of the Charter, as applied in the *Segro* and *Commission v. Hungary* cases. These decisions are not related to the scope of action in national land policy but rather to the internal market. Nevertheless, they were applied in this case, even though case law interprets property rights within the scope of the CAP specifically.

The essence of the *Askos* case is that a Member State's law which could be considered as a national land policy measure, prevented a farmer from complying with the commitments voluntarily undertaken under the EAFRD. This does not mean that it is affecting the scope of the national land policy and there is no deterrent effect regarding the Member State. In cases like this, the sanctions serve the purpose of ensuring voluntary commitments in a specific area for several years to achieve the desired outcomes. The exemption from sanctions aims to prevent the farmers from being discouraged from making voluntary commitments.

In conclusion, the abovementioned distinctions are relevant, and the Member States' scope of action is not impacted. In a legal dispute, the court's approach and actions are clearly defined.

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Elise Nicoleta VÂLCU[1] –
Laura-Cristiana SPĂTARU-NEGURĂ[2]

EU and Corporate Sustainability: Meeting the European Standards – CSRD and CSDDD Explained

Abstract

It is more and more obvious that multinational enterprises play a very important role in the international investment. We also believe that through international cooperation the foreign investment climate can be improved, and multinational enterprises can bring a positive contribution to economic, social and environment, minimising the bad effects brought by their operations.

Governments are interested in encouraging responsible trade and investment through responsible business conduct of enterprises, in order to achieve sustainable development outcomes: better jobs, better job conditions, skills development, creation and provision of products and services that improve living conditions, technology for digital and green transitions.

Therefore, through this study, we would like to explain the most recent directives in the area of corporate sustainability and to promote sustainable development in the European Union and worldwide, because we strongly believe that the EU legislation in this direction represents a good example for other continents. Environmental, social and governance (ESG[3]) policy coherence at the international level could foster responsible business conduct and protection of the environment.

1 | Associate Professor, Ph.D, Faculty of Economic Sciences and Law, within the National University of Science and Technology Politehnica Bucharest, Romania, Pitești University Center; arbitrator at the Court of Arbitration attached to the Chamber of Commerce, Industry and Agriculture Arges, Romania; and lawyer at the Argeș Bar, Romania; (e-mail: elisevalcu@yahoo.com); ORCID ID: https://orcid.org/0000-0001-6255-164X.

2 | Associate Professor, Ph.D., Faculty of Law, "Nicolae Titulescu" University of Bucharest, and lawyer at the Bucharest Bar (e-mail: negura_laura@yahoo.com), ORCID ID: https://orcid.org/0000-0002-6707-1888.

3 | For ESG official ratings, please see: https://tinyurl.com/mr3sax83.

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As expressly provided in the study, we consider that the Directives (EU) 2022/2464 (CSRD) and (EU) 2024/1760 (CSDDD), together with other international guidelines adopted by other international organizations represent the leading international instruments on responsible business conduct.
So time for applying these directives is ticking, but do not worry – we are here for you to help you in navigating the EU rules applicable. Please take into consideration that our study intends to be an overall presentation of the topic, and we could not pretend to be able to exhaust it, especially when in Brussels, it is currently discussed a Proposal for a Directive of the European Parliament and of the Council amending CSRD and CSDDD.
Keywords: companies, corporate sustainability, CSRD, CSDDD, due diligence, ESG, EU law, human rights, Omnibus.

1. Introductory considerations on the imperative of sustainable corporate governance

Corporate governance[4] is a set of rules on which the management system of an enterprise is based, which define its strategic objectives, while identifying the means to achieve them, including the ways in which economic performance is monitored.

Good corporate governance creates transparent practices and controls, helping to build trust among investors, customers, suppliers, community, authorities[5] and all stakeholders[6].

In a corporate context, a sustainability-focused approach implies that enterprises must devote time, energy and human resources to general societal and environmental concerns, since their long-term performance, resilience and even survival may depend on how well they respond to them. An example of this is the duty of care of directors towards their own enterprise, which we see defined not only in relation to short-term profit maximization but also in relation to sustainability concerns, among which we can mention the protection of ecosystems but

4 | According to a Romanian author, "*[t]he term corporate governance designates the system of administration and control of companies, the set of relations of a company with its shareholders, or, in an extended sense, with its partners (creditors, suppliers, customers, employees, administrative authorities). It involves a complex system of rights, obligations, attributions and control measures established with the aim of protecting shareholders and investors, viewed as a collective and ensuring the accountability of administrators and managers towards shareholders*" – please see Țurlea 2011, 55–57.

5 | Please see Investopedia 2025

6 | Please note that "*the notion of stakeholder should be interpreted broadly and include all persons whose rights and interests may be affected by the decisions of the enterprise, such as employees, trade unions, local communities, indigenous peoples, citizens' associations, shareholders, civil society and environmental organisations.*" – point 26 of the European Parliament Resolution of 17 December 2020 on sustainable corporate governance.

also of relevant stakeholders, including employees. Companies must also show a change of attitude in relation to long-term concerns, which implies the integration of sustainability interests and risks, impacts, opportunities and dependencies in their overall strategy.

Therefore, in the aforementioned context, the sustainability strategies of companies aim to identify and address, in accordance with their due diligence obligations, on the one hand, the significant aspects mentioned in the non-financial reporting requirements and, on the other hand, the significant impacts that these companies could have on the environment, climate, society and employees, arising from their business models.

Faced with these concerns to change the behaviour of companies and to direct them towards sustainability, the legislative bodies of the European Union have not remained indifferent, therefore they have constantly sought legislative solutions in response to the numerous international initiatives to promote sustainable corporate governance, but which have proven largely ineffective.

In this regard, a series of legislative initiatives are highlighted that have either corrected existing legislation or innovated in the matter, in an effort to promote a "sustainable approach to corporate governance" that takes into account both the legal obligation of enterprises to provide non-financial information on environmental, social and personnel aspects, but also the obligation to respect human rights, avoiding causing or taking part in the negative impact on human rights through their own activities or directly related to the activities of products or services through business relationships[7].

In its Resolutions of 6 February 2013 on *Corporate social responsibility: responsible and transparent business conduct and sustainable economic growth* and on *Corporate social responsibility: promoting the interests of society and a path towards a sustainable and inclusive economic recovery*, the European Parliament reaffirmed the need for companies to disseminate relevant non-financial information on sustainability, such as social, environmental, labour and human rights factors, in order to increase the trust of business partners in the economic chain and to ensure that consumers have easy access to information on the impact of companies on the society.

In this context, on June 26, 2013, the European Parliament and the Council adopted the Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council

7 | For further information, see paragraph 13 "*Business Responsibilities to Respect Human Rights*" of the UN *Guiding Principles on Business and Human Rights Implementing the Framework – Protect, Respect and Remedy*, Geneva, 2011.

and repealing Directives 78/660/EEC and 83/349/EEC[8] (hereinafter referred to as the "***Accounting Directive***") in response to the need for simultaneous coordination of legislative provisions regarding the presentation and content of annual financial statements and directors' reports for certain types of undertakings, without, however, solving the problem of reporting non-financial information, except to a very small extent.

Although the importance of Directive 2013/34/EU on the business environment was recognized, the European legislator felt the need to amend the aforementioned legislative framework, in the context of which it highlighted the benefits offered to companies by reporting reliable, comparable and relevant information on risks, opportunities and impacts in terms of sustainability.

Thus, on October 22, 2014, it was adopted the Directive 2014/95/EU of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups[9] (hereinafter referred to as the "***Non-Financial Reporting Directive***" or "***NFRD***").

Specifically, the NFRD introduced the obligation for companies to report information on at least environmental, social and personnel aspects, respect for human rights and the fight against corruption and bribery, taking into account reporting areas such as: business model; policies, including due diligence processes; risks and risk management; key performance indicators relevant to the company's activity, etc.

The European Union's unconditional commitment to the "sustainability imperative" was achieved with the adoption on November 22, 2016, by the European Commission of the Communication entitled "*Next steps towards a sustainable European future: European action for sustainability*"[10], a reference document that represents an "extension" at the European Union's level of the Resolution of 25 September 2015 adopted by the United Nations (UN) General Assembly and entitled "*Transforming the world we live in: the 2030 Agenda for Sustainable Development*"[11] (hereinafter the "***2030 Agenda***") and which materializes a "bridge" between the UN sustainable development goals and the sustainability policy framework at the European Union level.

8 | Published in the OJ L 182, 29.06.2013, pp. 19–76, current consolidated version: 28.05.2024. The adoption of the Directive 2013/34/EU was achieved in line with the objective assumed by the European Commission in the Communication entitled "Single Market Act", adopted in April 2011, which proposed to simplify the Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54, paragraph (3), letter (g) of the Treaty on the annual accounts of certain types of companies and the Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54, paragraph (3), letter (g) of the Treaty on consolidated accounts (hereinafter the "***Accounting Directives***") as regards financial reporting obligations and to reduce administrative burdens, with particular regard to micro, small and medium-size undertakings (SMEs").

9 | Published in the OJ L 330, 15.11.2014, 1–9, current consolidated version: 05.12.2014.

10 | European Commission 2016

11 | United Nations 2015

In the following years, the Union co-legislator has shown interest in developing reporting requirements for reliable, comparable and relevant non-financial information on sustainability risks, opportunities and impacts, relevant in this regard being the Council Conclusions on the deepening of the Capital Markets Union of 5 December 2019 and the European Parliament Resolution of 17 December 2020 on sustainable corporate governance, inviting at each opportunity the Commission to consider developing a standard for non-financial reporting in the European Union.

Faced with these realities, the European Commission has not remained indifferent, so in December 2020, the President of the European Commission, Mrs. Ursula von der Leyen, presented an ambitious plan to transform Europe into the first climate-neutral continent by 2050.

In recent years, the European legislator has shown a strong commitment to sustainability, especially when it launched the plan called the European Green Deal[12], which reaffirms the Commission's commitment to review the provisions on the reporting of non-financial information in Directive 2013/34/EU. Thus, the Green Deal comprises a package of laws and policies (to be) adopted for enhancing sustainability in three major directions: environmental, social and governance (hereinafter "***ESG***").

Two of these pieces of legislation are the following directives (hereinafter the "***Directives***"):

- **i.** the Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting[13] (hereinafter the "***CSRD***"), and
- **ii.** the Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859[14] (hereinafter the "***CSDDD***").

The effect of the Directives is that the companies covered are obliged to gather all the relevant information and report it accordingly, therefore they cannot anymore cherry-pick the sustainability information they want to share outside the organization.

12 | For more information regarding the Green Deal, please see European Commission 2025, and Zębek 2024, 329–350.

13 | Please see Directive 2022/2464/EU of the European Parliament and of the Council of 14 December 2022 amending Regulation no. 537/2014/EU, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU with regard to corporate sustainability reporting, OJ L 322, 16.12.2022.

14 | Please see Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive 2019/1937/EU and Regulation 2023/2858/EU, OJ L, 2024/1760, 5.7.2024.

In this respect, please note that the Directives are closely interrelated, and they complement each other. In this study, we shall present them and we shall explain how the Directives work together and where they part.

2. What Is the CSRD?

2.1. Background to the adoption of the CSRD

The European Commission report of April 21, 2021 on the review clauses provided for in Directives 2013/34/EU, 2014/95/EU and 2013/50/EU and the related fitness check of the EU framework for public reporting by companies (hereinafter the "***Commission report on the review clauses and the accompanying fitness check***") identified gaps in the implementation of the Directive 2014/95/EU.

Thus, the report highlighted, among others, the common practice of many companies not to disclose significant information on sustainability-related topics, including climate-related information, factors affecting biodiversity. In addition, the European Commission identified in the reference document as specific issues to the topic under review, the limited comparability and reliability of sustainability information.

In the same context, the European Commission found that many companies were not providing users with sustainability information, even though they needed it, because, under the applicable legal framework, those companies were not required to report such information.

In summary, the Commission concluded that there is a pressing need to legislate for a robust and accessible reporting framework, accompanied by effective auditing practices to ensure the reliability of data and to avoid environmental misinformation and double counting.

The issue of "*recalibrating the legislative framework*" beyond the institutional perspective is also based on contextual elements of the economic market, the social, environmental and climate aspects. Thus, in the context of the adoption of the CSRD, there was a significant increase in the demand for sustainability[15] information provided by companies, especially in the field of investments, determined by the financial risks generated by climate change. The level of awareness of citizens and consumer preferences for products subject to sustainability standards also represented a basis for reflection for requesting information.

Last but not least, companies themselves have found that they can benefit from the presence of coherent bases for sustainability reporting, which facilitate

15 | Ensuring consistency with the objectives of the Paris Agreement under the United Nations Framework Convention on Climate Change adopted on December 12, 2015 (hereinafter the "***Paris Agreement***"), the UN Convention on Biological Diversity and the Policies of the Union.

the identification and implicit management of their own risks and opportunities related to sustainability issues.

Therefore, better reporting of sustainability information presented in annual reports will facilitate the main categories of users to achieve their own objectives:

i. *as regards the business partners of enterprises in the value chain*, they will be able to rely on sustainability information to understand and, if necessary, to disseminate the risks and impacts related to this phenomenon within their own value chains;
ii. *in the case of non-governmental organisations and social partners*, the non-rigour of sustainability information will give them the possibility to trigger corporate liability actions regarding their impact on people and the environment.

As underlined in the legal doctrine, "*preambular paragraph 6 of Directive 2022/2464 (CSRD) constitutes the link between the quasi-federal 'EU' type quasi-federal norm and the international or inter-state norm*."[16].

In conclusion, the CSRD is part of the EU strategy to support the transition to a sustainable and climate-neutral economy, amending the Non-Financial Reporting Directive (NFRD) by introducing new standards and requirements for enterprises to disclose information on their ESG impacts and risks.

2.2. General Information Regarding the CSRD

We totally agree that:

> "*Within the framework of the EU Green Deal, the Corporate Reporting Directive (CSRD) emerges as a pivotal EU legislation aimed at improving the quality and consistency of sustainable development reporting for companies operating in the EU. The CSRD is set to replace the Non-Financial Reporting Directive (NFRD), and it has introduced new standards and requirements for companies to disclose information on their environmental, social and governance (ESG) impacts and risks.*"[17].

When discussing about the sustainable development[18] in the European Union, special attention should be given to the CSRD which introduced significant changes to the reporting practices existing in the European Union, and focuses on expanding sustainability reporting.

In January 2023 the CSRD came into effect, becoming mandatory for approximately 50,000 companies operating in the European Union who became obliged to adhere to a new sustainability reporting requirements.

16 | Please see Bobei 2025
17 | Please see Ernst & Young 2025
18 | For more information on sustainable development, please see Csák & Jakab 2012, 50–78, and Jakab 2016, 28–33.

2.3. Personal and Material Scope of the CSRD

If the scope of the NFRD included entities with over 500 employees during the financial year, with the obligation to present some non-financial information, the CSRD provides that the sustainability reporting requirements apply to large enterprises and small and medium-sized enterprises with securities admitted to trading on a regulated market in the European Union as well as to the parent undertakings of large groups, as defined in the Directive 2013/34/EU.

Under the provisions of the CSRD, these sustainability requirements also apply to enterprises regulated by the laws of third countries, which either have securities admitted to trading on a regulated market in the European Union (with the exception of micro-enterprises) or which have activities in the territory of the Union above certain thresholds[19].

Returning to the typologies of enterprises entering within the scope of the CSRD, they can be summarized as follows:

i. ***large undertakings*** within the meaning of Article 3, paragraph (4) of the Directive 2013/34/EU as amended by Article 1, paragraph (4) of the Delegated Directive 2023/2775/EU[20] are defined as those "*undertakings which, on the balance sheet date, exceed the limits of at least two of the following three criteria:*
   (a) balance sheet total: EUR 25 000 000;
   (b) net turnover: EUR 50 000 000;
   (c) *average number of employees during the financial year: 250*";
ii. ***large groups*** within the meaning of Article 3, paragraph (7) of the Directive 2013/34/EU as amended by Article 1, paragraph (2) of the Delegated Directive 2023/2775/EU are "*groups consisting of parent undertakings and subsidiaries to be included in the consolidation which, on a consolidated basis, exceed the limits of at least two of the following three criteria at the balance sheet date of the parent undertaking:*
   (a) balance sheet total: EUR 25 000 000;
   (b) net turnover: EUR 50 000 000;
   (c) *average number of employees during the financial year: 250*";
iii. ***small enterprises*** within the meaning of Article 3, paragraph (2) of the Directive 2013/34/EU as amended by Article 1, paragraph (2) of the Delegated Directive 2023/2775/EU are defined as those "*undertakings which, on the*

19 | Relevant reporting requirements for undertakings governed by the law of a third country are found in Article 4, paragraph (5) of the CSRD, which cross-references Articles 19a and 29a and 40a of the NFRD.

20 | Please see the Commission Delegated Directive 2023/2775/EU of October 17, 2023 amending the Directive 2013/34/EU of the European Parliament and of the Council as regards the adjustment of the size criteria for micro, small, medium-sized and large undertakings or groups, published in the OJ L, 2023/2775, 21.12.2023.

balance sheet date, do not exceed the limits of at least two of the following three criteria:
(a) balance sheet total: EUR 5 000 000;
(b) net turnover: EUR 10 000 000;
(c) *average number of employees during the financial year: 50*";

iv. ***medium-sized enterprises*** within the meaning of Article 3, paragraph (3) of the Directive 2013/34/EU as amended by Article 1, paragraph (3) of the Delegated Directive 2023/2775/EU are defined as those "*undertakings which are not micro or small enterprises and which, on the balance sheet date, do not exceed the limits of at least two of the following three criteria:*
(a) balance sheet total: EUR 25 000 000;
(b) net turnover: EUR 50 000 000;
(c) *average number of employees during the financial year: 250*.".

2.4. Applicability of the CSRD

The date of application of these sustainability reporting requirements varies depending on the specific reporting requirement and the category of undertaking, so the legislator indicates in Article 5 of the Directive 2022/2464/EU, as follows:

(a) from 1 January 2024:

(i) for large undertakings within the meaning of Article 3, paragraph (4) of the Directive 2013/34/EU, which are public-interest entities as defined in Article 2, paragraph (1) of the same Directive and which exceed, on the balance sheet date, an average number of 500 employees during the financial year;

(ii) for public-interest entities[21] as defined in Article 2, paragraph (1) of Directive 2013/34/EU, which are parent undertakings of a large group within the meaning of Article 3, paragraph (7) of the same Directive, which exceed, on the balance sheet date, on the basis of consolidated, the average number of 500 employees during the financial year[22];

(b) from 1 January 2025:

(i) for large undertakings within the meaning of Article 3, paragraph (4) of the Directive 2013/34/EU, other than those referred to in point (a) (i) above;

21 | "Public-interest entities" means, according to Article 2 point 13 of the Directive 2006/43/EC, "*entities governed by the law of a Member State whose transferable securities are admitted to trading on a regulated market of any Member State within the meaning of point 14 of Article 4(1) of Directive 2004/39/EC, credit institutions as defined in point 1 of Article 1of Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (16) and insurance undertakings within the meaning of Article 2(1) of Directive 91/674/EEC. Member States may also designate other entities as public-interest entities, for instance entities that are of significant public relevance because of the nature of their business, their size or the number of their employees;*".
22 | Please see in this regard, Article 5, paragraph (2), letter (a) of the CSRD.

(ii) for parent undertakings of a large group within the meaning of Article 3, paragraph (7) of the Directive 2013/34/EU, other than those referred to in point (a)(ii) above[23].

(c) from 1 January 2026:

(i) for small and medium-sized undertakings within the meaning of Article 3, paragraphs (2) and (3) of the Directive 2013/34/EU, which are public-interest entities as defined in point (a) of Article 2 of the same Directive and which are not micro-enterprises[24] as defined in Article 3, paragraph (1) of the Directive;

(ii) for small and less complex institutions as defined in point (145) of Article 4(1) of Regulation (EU) no 575/2013[25], provided that they are large undertakings within the meaning of Article 3, paragraph (4) of the Directive 2013/34/EU or small and medium-sized undertakings within the meaning of Article 3, paragraphs (2) and (3) of the same Directive, which are public-interest entities as defined in point (a) of Article 2, paragraph (1) of the Directive and which are not micro-undertakings as defined in Article 3, paragraph (1) of the Directive;

(iii) for insurance undertakings as defined in point (2) of Article 13 of the Directive 2009/138/EC[26] and captive reinsurance undertakings as defined in point (5) of Article 13 of the same Directive, provided that they are large undertakings within the meaning of Article 3, paragraph (4) of the Directive 2013/34/EU or small and medium-sized undertakings within the meaning of Article 3, paragraphs (2) and (3) of the Directive, which are public-interest entities as defined in point (a) of Article 2, paragraph (1) of the Directive and which are not micro-undertakings as defined in Article 3, paragraph (1) of the Directive[27].

Given the relevant texts mentioned above, some clarifications are required, namely, the date of January 1, 2024, is identified as ***a first stage of transposition*** of the provisions of the directive, for large enterprises that were previously subject

23 | Please see in this regard, Article 5, paragraph (2), letter b of the CSRD.

24 | Under Article 3, paragraph (1) of the CSRD as amended by Article 1, paragraph (3) of the Delegated Directive 2023/2775/EU, micro-enterprises are defined as "*undertakings which, at their balance sheet date, do not exceed the limits of at least two of the following three criteria:*
(a) *balance sheet total: EUR 450 000;*
(b) *net turnover: EUR 900 000;*
(c) *average number of employees during the financial year: 10*".

25 | Regulation no. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) no. 648/2012, published in the OJ L 176, 27/06/2013, pp. 1–337, current consolidated version: 01.01.2025.

26 | The Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast), published in the OJ L 335, 17.12.2009, pp. 1–155, current consolidated version: 17.01.2025.

27 | Please see in this regard, Article 5, paragraph (2), letter (b) of the CSRD.

to the Non-Financial Reporting Directive (NFRD), large enterprises listed on a regulated market, credit institutions or large insurance enterprises – all if they have more than 500 employees, as well as for large companies listed on the stock exchange outside the European Union that have over 500 employees. In their case, the reports are due for the first time in 2025.

Also from the text of Article 5, ***a second stage of transposition*** emerges, namely, January 1, 2025, the relevant date for other large undertakings not subject to the Non-Financial Reporting Directive (NFRD) and having more than 250 employees and/or EUR 50 million in turnover and/or EUR 25 million in total assets; the reports are due for the first time in 2026.

January 2026 is another deadline given by the legislator to the business environment, specifically to small and medium-sized enterprises listed on regulated markets, including those listed on stock exchanges outside the European Union. In their case, reports must be submitted for the first time in 2027 (small and medium-sized enterprises can choose not to participate until 2028).

Finally, the provisions of the CSRD apply from 1 January 2028, to enterprises outside the European Union that generate more than EUR 150 million per year in the Union and that have either a branch with a turnover of more than EUR 50 million, or a subsidiary that is a large company or an SME[28] listed on the stock exchange. In their case, reports are due for the first time in 2029[29].

2.5. General Principles and Duties Established by the CSRD

(a) Sustainability requirements. Individual sustainability statement – consolidated sustainability statement

(a1) Pursuant to Article 19a of the CSRD, undertakings must include in a dedicated section of the management report the necessary information on the undertaking's impact on sustainability aspects, adopted in accordance with the sustainability reporting standards starting from the financial year indicated in Article 5, paragraph (2) of the CSRD, for each category of undertaking.

The information is included in the *individual sustainability statement* which must comply with the following requirements:

(i) it must be included in a dedicated section of the undertaking's management report;

28 | By "SME", the European legislator understands "*a micro, small or a medium-sized undertaking, irrespective of its legal form, that is not part of a large group, as those terms are defined according to Article 3(1), (2), (3) and (7) of Directive 2013/34/EU;*" according to Article 3, paragraph (1), letter (i) of the CSDDD.
29 | Please see SAP 2025

(ii) it must be designed in accordance with the Union Sustainability Reporting Standards (ESRS)[30];
(iii) it must be in accordance with a digital taxonomy[31] adopted by an amendment to the Commission Delegated Regulation on the European Single Electronic Format (ESEF) [32] and the management report including the sustainability statement shall be prepared in XHTML format[33];
(iv) it must be subject to assurance by statutory auditors or independent assurance[34] service providers (IASPs).

SMEs (except micro-enterprises) with securities admitted to trading on a regulated market in the EU may waive these requirements until financial years starting before January 1, 2028, provided that they briefly state in the management report why sustainability reporting has not been provided.

In the same context, the undertaking is exempted from the obligation to publish an individual sustainability statement where the information is included in the consolidated sustainability statement of a parent undertaking, with the requirement that certain conditions are met regarding the content of the exempted undertaking's management report and the publication of sustainability information by the parent undertaking[35].

30 | Please see in this regard Article 29b of the CSRD. The European sustainability reporting standards include a set of *sector-agnostic ESRS* adopted by Commission Delegated Regulation 2023/2772/EU as well as *sector-specific ESRS* to be adopted by the European Commission by 30 June 2026; https://tinyurl.com/52dvvsmz.

31 | According to https://www.sap.com/romania/products/sustainability/csrd-guide.html#faq – "*The EU taxonomy defines a general framework for what economic activities qualify as 'environmentally sustainable', based on six objectives: (1) climate change mitigation, (2) climate change adaptation; (3) promoting the sustainable use and production of water and marine resources; (4) transition to a circular economy; (5) pollution prevention and control; and (6) protection and restoration of biodiversity and ecosystems. To qualify as "environmentally sustainable", companies must assess the extent to which their economic activities make a substantial contribution to at least one of the six environmental objectives, do not cause "significant harm" to any of the environmental objectives, comply with robust technical and scientific screening criteria, and comply with minimum social and governance safeguards. The EU taxonomy provides industry-specific criteria and key performance indicators (KPIs) related to turnover, capital expenditure (CapEx) and operational expenditure (OpEx) that non-financial companies must report in relation to their economic activities. By analysing these KPIs, companies can determine the percentage of each KPI that aligns with the EU taxonomy, allowing them to communicate their level of compliance with the taxonomy criteria.*". A "digital taxonomy" is a set of rules to be adopted through an amendment to Commission Delegated Regulation 2019/815, which will establish the way to mark up the information in the sustainability statement that will be included in a management report prepared in XHTML format.

32 | Commission Delegated Regulation 2018/815/EU of 17 December 2018 supplementing Directive 2004/109/EC of the European Parliament and of the Council with regard to regulatory technical standards for the specification of a single electronic reporting format, published in the OJ L 143, 29.5.2019, p. 1–792, current consolidated version: 01.01.2025.

33 | See for more details, Article 29d of the CSRD.

34 | See for more details, Article 34 of the CSRD.

35 | These conditions are set out in Article 19a, paragraph (9) of the CSRD.

As regulated by the legislator in Article 19a, paragraph (9) of the CSRD, large undertakings with transferable securities admitted to trading on a regulated market in the EU, including small and non-complex institutions, captive insurance undertakings and captive reinsurance undertakings and including undertakings from third countries – cannot benefit from this exemption.

(a2) Consolidated sustainability statement. A distinct situation is regulated in Article 29a of the CSRD, which requires a parent undertaking of a large group to report sustainability information at consolidated level on how sustainability aspects affect the development, performance and position of the parent undertaking. And in the specific case of the parent undertaking of a large group, the consolidated sustainability statement must meet the same requirements as identified for the individual sustainability statement.

(b) On reporting standardization and proportional application under the CSRD

Regarding reporting standards, we find relevant information in Article 29b of the CSRD, thus in paragraph 2, the European legislator provides that in order to ensure the quality of the reported information, it must be "*understandable, relevant, verifiable, comparable and represented in a faithful manner*".

Therefore, we can state that, for the detailed assessment of responsible behavior but also for the assessment of the sustainability or performance of an enterprise, information will be taken into account regarding:

(a) environmental factors:
- *(i) "climate change mitigation, including as regards scope 1, scope 2 and, where relevant, scope 3 greenhouse gas emissions;*
- *(ii) climate change adaptation;*
- *(iii) water and marine resources;*
- *(iv) resource use and the circular economy;*
- *(v) pollution;*
- (vi) *biodiversity and ecosystems;*"[36].

(b) social and human rights factors:
- *(i) "equal treatment and opportunities for all, including gender equality and equal pay for work of equal value, training and skills development, the employment and inclusion of people with disabilities, measures against violence and harassment in the workplace, and diversity;*
- *(ii) working conditions, including secure employment, working time, adequate wages, social dialogue, freedom of association, existence of works councils, collective bargaining, including the proportion of workers covered by collective agreements, the information, consultation and participation rights of workers, work-life balance, and health and safety;*

36 | Please see for more information Article 29b, paragraph (2), letter (a) of the CSRD.

(iii) respect for the human rights, fundamental freedoms, democratic principles and standards established in the International Bill of Human Rights and other core UN human rights conventions, including the UN Convention on the Rights of Persons with Disabilities, the UN Declaration on the Rights of Indigenous Peoples, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work and the fundamental conventions of the International Labour Organization, the European Convention for the protection of Human Rights and Fundamental Freedoms, the European Social Charter, and the Charter of Fundamental Rights of the European Union;"[37].

(c) governance factors:

(i) "the role of the undertaking's administrative, management and supervisory bodies with regard to sustainability matters, and their composition, as well as their expertise and skills in relation to fulfilling that role or the access such bodies have to such expertise and skills;

(ii) the main features of the undertaking's internal control and risk management systems, in relation to the sustainability reporting and decision-making process;

(iii) business ethics and corporate culture, including anti-corruption and anti-bribery, the protection of whistleblowers and animal welfare;

(iv) activities and commitments of the undertaking related to exerting its political influence, including its lobbying activities;

(v) *the management and quality of relationships with customers, suppliers and communities affected by the activities of the undertaking, including payment practices, especially with regard to late payment to small and medium-sized undertakings."*[38].

In the same context, the European legislator ensures that the information reported by companies meets the needs of users and does not create a disproportionate burden in terms of effort and costs for reporting companies, or for those indirectly involved as part of the value chain of those companies.

Sustainability reporting standards must also take into account the possible difficulties that companies may face in collecting information from actors throughout their value chain, with particular regard to those who are not subject to sustainability reporting requirements.

Last but not least, to minimize the "imbalances" that may occur for companies that already report sustainability information, reporting standards should take into account, where appropriate, "*existing standards and frameworks for sustainability reporting and accounting (...) include the Global Reporting Initiative, the*

37 | Please see for more information Article 29b, paragraph (2), letter (b) of the CSRD.
38 | Please see for more information Article 29b, paragraph (2), letter (c) of the CSRD.

Sustainability Accounting Standards Board, the International Integrated Reporting Council, the International Accounting Standards Board, the Task Force on Climate-related Financial Disclosures, the Carbon Disclosure Standards Board, and CDP, formerly known as the Carbon Disclosure Project"[39].

(c) Standardization of reporting through ESRS (European Sustainability Reporting Standards)

The CSRD provides in Article 29b, paragraph 1, subparagraphs (6) and (7), the use of the European Sustainability Reporting Standards (ESRS)[40], developed by the European Financial Reporting Advisory Group (EFRAG)[41].

Therefore, a first set of ESRS standards was published in the form of the Commission Delegated Regulation 2772/2023/EU of July 31, 2023, supplementing the Directive 2013/34/EU of the European Parliament and of the Council with regard to sustainability reporting standards[42], applicable to all companies falling under the CSRD, regardless of their sector of activity.

The objective of the EU Sustainability Reporting Standards (ESRS) is to specify the relevant information that an enterprise must disclose on its significant impacts, risks and opportunities in relation to environmental, social and governance sustainability aspects.

Specifically, references to the triptych of standard categories can be found in Annex I[43], point 1.1, part of the Delegated Regulation, which are classified into *cross-cutting standards*, *topical standards* (environmental, social and governance – ESG standards) and *sector-specific standards*.

The cross-cutting standards (ESRS1 and ESRS2) set out the disclosure requirements that an enterprise must provide at a general level on all significant sustainability aspects of the reporting areas, namely governance, strategy, management of impacts, risks and opportunities, as well as on indicators and targets.

39 | Please see for more information Recital 43 of the CSRD.

40 | According to the NFRD, entities may rely on national, Union or international frameworks when presenting non-financial information, without being obliged to use a specific reporting framework or format.

41 | According to Recital 39 of the CSRD, "*The European Financial Reporting Advisory Group (EFRAG) is a non-profit association established under Belgian law that serves the public interest by providing advice to the Commission on the endorsement of international financial reporting standards. EFRAG has established a reputation as a European centre of expertise on corporate reporting and is well placed to foster coordination between Union sustainability reporting standards and international initiatives that seek to develop standards that are consistent across the world.*".

42 | Published in the JO L, 2023/2772, 22.12.2023, current consolidated version: 22.12.2023.

43 | Commission Delegated Regulation 2023/2772/EU of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council with regard to sustainability reporting standards.

Topical standards establish indicators and requirements for reporting on environmental, social and governance (ESG) aspects with a focus on comparability and transparency of information, reducing the risk of *greenwashing*[44].

Unlike cross-cutting and topical standards that apply to all companies, regardless of the sectors in which they operate, sector-specific standards are applicable only to companies in a specific sector and target the most relevant topics for that sector, the objective being to identify impacts, risks and opportunities that are likely to be significant for all these companies and that are not or insufficiently covered by thematic standards.

(d) Introduction of the principle of double materiality as the basis for the presentation of sustainability information ("double materiality")

According to Article 19a, paragraph (1) of the CSRD, companies must include in a separate section, within the management report, "*information necessary to understand the undertaking's impacts on sustainability matters, and information necessary to understand how sustainability matters affect the undertaking's development, performance and position*".

Thus, they must assess and report the impact of their activities from two perspectives:

(i) the "significance of the impact" (inside-out) impact perspective: this focuses on the effects that the company's activities generate in the short, medium and long term, on people and the environment. It analyzes how the decisions taken at the company level but also its business relationships[45] influence the climate, biodiversity, natural resources, local communities and other social and environmental elements;

(ii) the "financial significance" (outside-in) financial perspective: it concerns the way in which sustainability issues, such as climate change, access to resources or environmental regulations, can generate risks or opportunities "*that have a significant influence or that can be reasonably expected to have a significant influence on the development of the enterprise, its financial position, its financial performance, its cash flows, access to financing or the*

44 | As Acaroglu puts it in her work *"What is Greenwashing? How to Spot it and Stop it" — "when companies invest more time and money on marketing their products or brand as "green" rather than actually doing the hard work to ensure that it is sustainable — this is called greenwashing"*. Also, as the concept is defined in Cambridge Dictionary, greenwashing is designed *"to make people believe that your company is doing more to protect the environment than it really is"*; Many companies use greenwashing as a way to improve public perception of their brand. Disclosure by companies is done in a biased manner to maximize the perception of legitimacy. However, there is a growing number of social and environmental audits that take a stand and expose fraud in the absence of external public oversight and verification. For more details, see Laufer 2003, 253–261, Seele & Gatti 2017, 239–252.

45 | Business relationships include relationships in the upstream and downstream value chain of the undertaking and are not limited to direct contractual relationships". For more details, see point 3.5. (43) of Annex 1 to Delegated Regulation 2772/2023/EU.

cost of capital in the short, medium or long term" [46]. Therefore, financial significance is not limited to issues under the control of the enterprise but takes into account reference information regarding opportunities but also significant risks circumscribed by business relationships outside the scope of consolidation used in the preparation of the financial statements.

(e) Statutory audit and assurance opinion circumscribed by the CSRD

Pursuant to Article 34, paragraph (1) of the Accounting Directive as amended by the CSRD, the financial and sustainability statements of large undertakings, SMEs including parent companies subject to the requirements set out in Article 29a, shall be audited by one or more statutory auditors[47] or audit firms[48] authorised by the Member States to carry out statutory audits pursuant to Article 1 of Directive 2006/43/EC[49] according to which:

> "*This Directive establishes rules concerning the statutory audit of annual and consolidated accounts and the assurance of annual and consolidated sustainability reporting.*".

Specifically, in light of Article 34, paragraph (1) of the Accounting Directive as amended by the CSRD we find provisions according to which statutory auditors or audit firms have the powers to verify the financial statements and the management report, in this regard expressing an opinion on:

(i) "whether the management report is consistent with the financial statements for the same financial year, and

(ii) whether the management report has been prepared in accordance with the applicable legal requirements".

The remit of statutory auditors or audit firms, in the new circular context, therefore also includes ensuring sustainability reporting in order to help ensure

46 | For more details, see point 3.5., subpoint 49 of the Annex I to the Delegated Regulation 2023/2772.

47 | As regulated in Article 2, point (2) of the Directive 2006/43/EC as amended by Directive 2023/2864/EU of the European Parliament and of the Council of 13 December 2023 amending certain directives as regards the establishment and operation of the European single access point: "statutory auditor" means " *natural person who is approved in accordance with this Directive by the competent authorities of a Member State to carry out statutory audits and, where applicable, the assurance of sustainability reporting*".

48 | As regulated in Article 2, point (3) of the Directive 2006/43/EC as amended by Directive 2023/2864/EU of the European Parliament and of the Council of 13 December 2023 amending certain directives as regards the establishment and operation of the European single access point: "audit firm" means "*a legal person or any other entity, regardless of its legal form, that is approved in accordance with this Directive by the competent authorities of a Member State to carry out statutory audits and, where applicable, the assurance of sustainability reporting*".

49 | Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC, published in the OJ L 157, 09.06.2006, p. 87, current consolidated version: 09.01.2024.

the coherence of financial and sustainability information, such *professional engagement* contributing to ensuring the information of users on sustainability.

According to Article 34, paragraph (1), second subparagraph, point (aa) of the CSRD, any undertaking subject to sustainability reporting under Articles 19a and 29a must obtain *an assurance opinion on the sustainability reporting*, which must be included in its management report[50].

The assurance opinion must be based on an assurance engagement with reference to the compliance of the sustainability statement with the following requirements: the sustainability reporting requirements set out in the CSRD (including the compliance of sustainability reporting with the ESRS adopted under Articles 29b/29c; the reporting requirements set out in Article 8 of the Taxonomy Regulation[51].

From the study of the text of Article 34 of the CSRD, we conclude that sustainability reporting can be carried out by the following categories of assurance providers:

(a) the statutory auditor who audits the financial statements of the relevant undertaking[52];
(b) a statutory auditor other than the one who audits the financial statements[53];
(c) an Independent Assurance Service Provider "IASP" (where the Member State allows it)[54].

50 | "*The statutory auditor(s) or audit firm(s) shall also: [...] (aa) where applicable, express an opinion based on a limited assurance engagement on the compliance of the sustainability reporting with the requirements of this Directive [...].*".

51 | "*The statutory auditor(s) or audit firm(s) shall also: [...] (aa) where applicable, express an opinion based on a limited assurance engagement as regards the compliance of the sustainability reporting with the requirements of this Directive, including the compliance of the sustainability reporting with the sustainability reporting standards adopted pursuant to Article 29b or Article 29c, the process carried out by the undertaking to identify the information reported pursuant to those sustainability reporting standards, and the compliance with the requirement to mark up sustainability reporting in accordance with Article 29d, and as regards the compliance with the reporting requirements provided for in Article 8 of Regulation (EU) 2020/852;*".

52 | Article 34, paragraph (1), first subparagraph of the CSRD:
"*Member States shall ensure that the financial statements of public-interest entities, medium-sized and large undertakings are audited by one or more statutory auditors or audit firms authorised by the Member States to carry out statutory audits in accordance with Directive 2006/43/EC.*"

53 | Article 34, paragraph (3) of the Accounting Directive:
"*Member States may allow a statutory auditor or an audit firm other than the one carrying out the statutory audit of the financial statements to express the opinion referred to in point (aa) of the second subparagraph of paragraph 1.*".

54 | Article 34, paragraph (4), sixth subparagraph of the Accounting Directive:
"*Where a Member State, pursuant to the first subparagraph, decides to allow an independent assurance service provider to express the opinion referred to in point (aa) of the second subparagraph of paragraph 1, it shall also allow a statutory auditor other than the one carrying out the statutory audit of the financial statements as provided for in paragraph 3*".

From this perspective, the European legislator, in Recital 61 of the CSRD, draws attention to the risk of increasing audit fees or fees related to ensuring sustainability reporting in the context of the new challenges generated by conferring additional tasks on statutory auditors or audit firms located on the relevant European Union market.

Faced with this concern, the European Commission announced that it would create a more open and diversified audit market, precisely in order to guarantee the proper implementation of the CSRD.

(f) Introduction of the single electronic reporting format

The CSRD promotes, under Article 29d, digital reporting using the European Single Electronic Format (ESEF), in order to facilitate access to sustainability data by investors and other stakeholders. This format also supports the objectives of the European Commission to create a single database of ESG information at the European Union level.

Specifically, large enterprises and SMEs including parent companies subject to the requirements set out in Article 29a, except micro-enterprises that do not have securities traded on the markets, are obliged, pursuant to Article 29 paragraphs (1) and (2) of the CSRD, to draw up the management report, respectively the consolidated management report, in the electronic reporting format[55] regulated by the Commission Delegated Regulation 2018/815/EU.

We believe that the obligation to draw up the management report must be analysed by placing it within the scope of the provisions of Article 33, paragraph (1) letters (a) and (b) of the CSRD in the sense that the administrative, management and supervisory bodies of an undertaking, among those established by the legislator in Articles 19a and 29a:

> "[...] *have collective responsibility for ensuring that the following documents are drawn up and published in accordance with the requirements of this Directive and, where applicable, with the international accounting standards adopted pursuant to Regulation (EC) No 1606/2002, with Delegated Regulation (EU) 2019/815, with the sustainability reporting standards referred to in Article 29b or Article 29c of this Directive, and with the requirements of Article 29d of this Directive:*
>
> *(a) the annual financial statements, the management report and the corporate governance statement when provided separately; and*
>
> *(b) the consolidated financial statements, the consolidated management reports and the consolidated corporate governance statement when provided separately.".*

55 | As provided for in Article 3 of the Delegated Regulation 2018/815/EU:
"*Issuers shall prepare their annual financial reports in their entirety in XHTML format". As clarified in recital 2 of the Delegated Regulation "Extensible Hypertext Markup Language (XHTML) does not require specific mechanisms to be rendered in a human-readable format. As it is an electronic reporting format that is not subject to intellectual property rights, XHTML can be used free of charge*".

(g) Integration with financial reporting: **Regarding the terminological versions "non-financial reporting" versus "sustainability reporting", we welcome the intervention of the European legislator who opts for the second version in the CSRD. In this context, we consider that the term "non-financial" is not in line with the practical reality in the sense that it suggests that the reported information has no financial relevance in the context of sustainability. Or such an approach is not viable since such information has increasingly more financial relevance.**

The CSRD also requires that sustainability information be integrated into companies' annual reports, providing an overview of the impact of ESG on financial performance. This approach promotes the integration of sustainability aspects into the overall business strategy.

2.6. What is the Impact of the CSRD?

Accessibility and comparability for investors: the CSRD facilitates comparability of sustainability information across companies. Investors and other stakeholders will have easier access to standardized and verifiable data and will better understand the risks and opportunities that sustainability aspects present for their investments and the impact of those investments on people and the environment.

Impact on the supply chain: the CSRD also emphasizes the responsibility of companies to identify and assess significant sustainability impacts, risks and opportunities in the company's value chain, upstream and downstream. This aspect encourages companies to collaborate with their suppliers and business partners to ensure sustainable practices throughout the value chain, thus promoting sustainability in a more comprehensive way.

Reporting climate and transition risks: the CSRD requires companies to provide information about the risks associated with climate change and the transition to a low-carbon economy.

3. What Is CSDDD?

According to Article 1, paragraph 1 of the CSDDD, this directive establishes rules on:

"*(a) obligations for companies regarding* ***actual and potential human rights adverse impacts and environmental adverse impacts****, with respect* ***to their own operations****,* ***the operations of their subsidiaries****, and the operations carried out* ***by their business partners in the chains of activities*** *of those companies;*

(b) liability for violations of the obligations as referred to in point (a); and

(c) the obligation for companies to adopt and put into effect a transition plan for climate change mitigation which aims to ensure, through best efforts,

compatibility of the business model and of the strategy of the company with the transition to a sustainable economy and with the limiting of global warming to 1,5° C in line with the Paris Agreement.".

Therefore, the CSDDD aims to ensure that EU and non-EU large companies to take responsibility for the negative impacts on human rights and environmental issues of their activities. Thus, it creates a uniform EU-wide standard, imposing due diligence duty for large companies on these two aspects. Thus, it requires to identify and address adverse[56] impacts on human rights and the environment within the company's operations, subsidiaries[57] and "*their chains of activities*"[58] (business partners[59]).

3.1. General Information Regarding the CSDDD

Published in the EU's Official Journal on 5 July 2024, it already entered into force on 25 July 2024. But please note that, according to Article 37, paragraph (1) of

56 | Please note that according to Article 3, paragraph (1), letter (c) of the directive, by 'adverse human rights impact' means "*an impact on persons resulting from:*
(i) an abuse of one of the human rights listed in Part I, Section 1, of the Annex to this Directive, as those human rights are enshrined in the international instruments listed in Part I, Section 2, of the Annex to this Directive;
(ii) an abuse of a human right not listed in Part I, Section 1, of the Annex to this Directive, but enshrined in the human rights instruments listed in Part I, Section 2, of the Annex to this Directive, provided that:
– the human right can be abused by a company or legal entity;
– the human right abuse directly impairs a legal interest protected in the human rights instruments listed in Part I, Section 2, of the Annex to this Directive; and
– the company could have reasonably foreseen the risk that such human right may be affected, taking into account the circumstances of the specific case, including the nature and extent of the company's business operations and its chain of activities, the characteristics of the economic sector and the geographical and operational context;".
57 | According to Article 3, paragraph (1), letter (e) of the directive, a 'subsidiary' means "*a legal person, as defined in Article 2, point (10), of Directive 2013/34/EU, and a legal person through which the activity of a controlled undertaking, as defined in Article 2(1), point (f), of Directive 2004/109/EC of the European Parliament and of the Council (46), is exercised*".
58 | According to Article 3, paragraph (1), letter (g) of the directive, 'chain of activities' means:
(i) "activities of a company's upstream business partners related to the production of goods or the provision of services by that company, including the design, extraction, sourcing, manufacture, transport, storage and supply of raw materials, products or parts of products and the development of the product or the service; and
(ii) *activities of a company's downstream business partners related to the distribution, transport and storage of a product of that company, where the business partners carry out those activities for the company or on behalf of the company, and excluding the distribution, transport and storage of a product that is subject to export controls under Regulation (EU) 2021/821 or to the export controls relating to weapons, munitions or war materials, once the export of the product is authorised;*".
59 | According to Article 3, paragraph (1), letter (f) of the directive, 'business partner' means "*an entity:*
(i) with which the company has a commercial agreement related to the operations, products or services of the company or to which the company provides services pursuant to point (g) ('direct business partner'); or
(ii) *which is not a direct business partner but which performs business operations related to the operations, products or services of the company ('indirect business partner')*".

the CSDDD, the transposition into national law shall be 26 July 2026 and the directive shall start to apply to companies from 26 July 2027, depending on the size of the companies:

i. for EU companies with more than 5,000 employees on average[60] and generated a net worldwide turnover of more than EUR 1,500 million, as well as for non-EU companies generated a net turnover of more than EUR 1,500 million in the EU: **3 years after the entry into force** (i.e. 26 July 2027);
ii. for EU companies with more than 3,000 employees on average and generated a net worldwide turnover of more than EUR 900 million, as well as for non-EU companies generated a net turnover of more than EUR 900 million in the EU: **4 years after the entry into force** (i.e. 26 July 2028);
iii. for all other companies in scope: **5 years after the entry into force** (i.e. 26 July 2029).

3.2. Personal and Material Scope of the CSDDD

Regarding the *personal scope* of the CSDDD, please be informed that, according to Article 2 of the Directive, this directive is applicable for:

i. **EU-based companies** (approximately 6,000 large limited liability companies and partnerships[61] that have more than 1,000 employees on average, and had more than 450 million EUR net worldwide turnover in the last financial year). It shall also be applicable to ultimate parent companies[62] of a corporate group[63] that meets the thresholds on a consolidated basis, or to franchisors/licensors meeting certain conditions and thresholds[64];

60 | Please note that, according to the consideration 65 of the Preamble, "*for the purposes of this Directive, employees should be understood as including temporary agency workers, and other workers in non-standard forms of employment provided that they fulfil the criteria for determining the status of worker established by the CJEU.*".

61 | This directive shall not be directly applicable to micro, small or medium-size (SMEs) undertakings, but it shall be indirectly applicable if in the chain of activities there shall be such companies. Please note that by SME the European legislator understands "*a micro, small or a medium-sized undertaking, irrespective of its legal form, that is not part of a large group, as those terms are defined according to Article 3(1), (2), (3) and (7) of Directive 2013/34/EU;*" according to Article 3, paragraph (1), letter (i) of CSDDD.

62 | According to Article 3, paragraph (1), letter (r) of the directive, an 'ultimate parent company' means "*a parent company that controls, either directly or indirectly in accordance with the criteria set out in Article 22(1) to (5) of Directive 2013/34/EU, one or more subsidiaries and is not controlled by another company*".

63 | According to Article 3, paragraph (1), letter (s) of the directive, 'group of companies' or 'group' means a parent company and all its subsidiaries.

64 | If (i) they have a common identity, common business concept, uniform business methods applied, (ii) they generate royalties of more than EUR 22,500,000 in the last financial year, and (iii) the company had or is the ultimate parent company of a group that had a net worldwide turnover of more than EUR 80 million in the last financial year.

ii. **non-EU companies** (approximately 900 companies similar to large limited liability companies and partnerships that have more than 450 million EUR net turnover in the EU[65])[66].

Please note that the competent supervisory authority for such companies shall be the Member State in which the company generated most of its net turnover in the EU, and each non-EU company must designate an authorized representative[67].

Regarding the *material scope* of the CSDDD, firstly, please be informed that according to Article 1 paragraph 1 letter (a) of this directive, it is applicable for potential human rights adverse impacts and environmental adverse impacts.

By *human rights adverse impacts*, it should be understood for the human rights recognised by listed global international human rights and labour conventions – please see in Annex, Part I, Section 1 of the directive (e.g. right to life, prohibition of torture, cruel, inhuman or degrading treatment, right to liberty and security, prohibition of arbitrary or unlawful interference with a person's privacy, family, home or correspondence, prohibition of child labour, right to enjoy just and favourable conditions of work, the prohibition of forced or compulsory labour), and for additional human rights recognised by one of the global international conventions, under certain conditions – please see in Annex, Part I, Section 2 of the Directive (e.g. the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Rights of the Child; the International Labour Organization's core/fundamental conventions);

By *environmental adverse impacts* it should be understood for the exhaustive list of prohibitions and obligations set out in international environment treaties – please see Annex, Part II of the Directive (e.g. harmful soil change, water or air pollution, harmful emissions, excessive water consumption, degradation of land and any other impact on natural resources – that impairs human rights or substantially affects ecosystem services that contribute to human wellbeing), and for the environmental-related human rights – please see Annex, Part I, Section 1, points 15 and 16 of the Directive (e.g. the prohibition of causing any measurable environmental degradation, such as harmful soil change, water or air pollution, harmful emissions, excessive water consumption, degradation of land, or other impact on natural resources, such as deforestation; the right of individuals, groupings and communities to lands and resources and the right not to be deprived of means of subsistence, which entails the prohibition to unlawfully evict or take land, forests and waters when acquiring, developing or otherwise using land, forests and waters, including by deforestation, the use of which secures the livelihood of a person).

65 | Please note that no employee threshold is required for the non-EU companies, because it would be very complicated to check the number, since there are different national rules

66 | The rules for ultimate parent companies of a corporate group and for franchisors/licensors mentioned at EU based companies are also applicable for non-EU companies.

67 | Please see Article 23 of the Directive.

Regarding the *material scope* of the CSDDD, secondly, please be informed that according to Article 3 paragraph 1 letter (g) of this directive, it is applicable for the chain of activities, both upstream and downstream.

The activities of *upstream* business partners (including indirect partners) related to the production of goods or the provision of services, and it applies to activities such as design, extraction, manufacture, development, sourcing, transport and storage of raw materials, products or parts of products, and development of the service.

The activities of *downstream* business partners (including for indirect partners), it applies to activities (are much narrow than upstream business partners) such as: distribution, transport and storage of a product, and only where the business partner carries out those activities "*for the company or on behalf of the company*".

The obligations set up in this directive are not applicable to financial undertakings with respect to the provision of financial services and investment activities, and according to Article 36 paragraph (1):

> "*The Commission shall submit a report to the European Parliament and to the Council on* ***the necessity of laying down additional sustainability due diligence requirements tailored to regulated financial undertakings with respect to the provision of financial services and investment activities****, and the options for such due diligence requirements as well as their impacts, in line with the objectives of this Directive.*".

3.3. General Principles and Duties Established by the CSDDD

According to the CSDDD, companies can prioritize their actions when they cannot address all impacts, and they have to adopt appropriate measures when identifying and addressing adverse impacts.

In this respect, please note that by `appropriate measures` it should be understood the "*measures that are capable of achieving the objectives of due diligence by effectively addressing adverse impacts in a manner commensurate to the degree of severity and the likelihood of the adverse impact, and reasonably available to the company, taking into account the circumstances of the specific case, including the nature and extent of the adverse impact and relevant risk factors*" – Article 3, paragraph 1, letter (o) of the CSDDDD.

Of course, that the measures taken by companies must be effective, reasonably available and proportionate, taking into consideration all circumstances of the situation (e.g. level of involvement, ability to influence, risk factors).

We also underline that integrating due diligence into a company's policies and risk management systems, requires drafting a specific due diligence policy according to Article 7 of the CSDDD, in prior consultation with the company's employees and their representatives, which shall contain:

(a) *"a description of the company's approach, including in the long term, to due diligence;*
(b) *a code of conduct describing rules and principles to be followed throughout the company and its subsidiaries, and the company's direct or indirect business partners in accordance with Article 10(2), point (b), Article 10(4), Article 11(3), point (c), or Article 11(5); and*
(c) *a description of the processes put in place to integrate due diligence into the company's relevant policies and to implement due diligence, including the measures taken to verify compliance with the code of conduct referred to in point (b) and to extend that code's application to business partners."*[68].

Moreover, each company shall update its due diligence policy without undue delay, after a significant change occurs, and reviews and, where necessary, updates such policy at least every 24 months, according to Article 7, paragraph (3) of the CSDDD.

Please note that, according to the Directive, "*severity of an adverse impact should be assessed based on the scale, scope or irremediable character of the adverse impact, taking into account the gravity of the impact, including the number of individuals that are or will be affected, the extent to which the environment is or may be damaged or otherwise affected, its irreversibility and the limits on the ability to restore affected individuals or the environment to a situation equivalent to their situation prior to the impact within a reasonable period of time. Once the most severe and likely adverse impacts are addressed in reasonable time, the company should address less severe and less likely adverse impacts. On the other hand, actual or potential influence of the company on its business partners, the level of involvement of the company in the adverse impact, the proximity to the subsidiary or the business partner, or its potential liability should not be considered relevant factors in the prioritisation of adverse impacts.*"[69].

As part of the obligation of a company to take appropriate measures to identify and assess actual and potential adverse impacts, taking into account relevant risk factors, it shall take appropriate measures to:

(a) map its own operations, those of its subsidiaries and, where related to its chain of activity, those of its business partners, in order to identify general areas where adverse impacts are most likely to occur and to be most severe;
(b) based on the results of the mapping, to carry out an in-depth assessment of its own operations, those of its subsidiaries and, where related to its chain of activities, those of its business partners, in the areas where adverse impacts were identified to be most likely to occur and most severe.

68 | Please see Article 7, paragraph (2), letters (a) – (c) of the CSDDD.
69 | Please see the consideration 44 of the Preamble.

Therefore, please note that addressing negative impacts that have or should have been identified, supposes to prevent "*or where prevention is not possible or not immediately possible, adequately mitigate, potential adverse impacts that have been, or should have been, identified*"[70], and if negative impacts have occurred, to bring them to an end or at least minimize their extent, as well as to provide remedies if they caused the adverse impact or contributed to it through acts or omissions.

The "*appropriate measures*" to prevent or mitigate potential impacts or to bring to an end or minimize the extent of actual impacts could imply the following:

- contractual cascading[71] by seeking contractual assurances from a direct business partner that it will ensure compliance with the company's code of conduct; as regards potential adverse impacts that could not be prevented or adequately mitigated by the appropriate measures, the company may seek contractual assurances from an indirect business partner also, with a view to achieving compliance with the company's code of conduct or a prevention action plan; please note that for the purposes of verifying compliance, the company may refer to independent third-party verification[72], including through industry or multi-stakeholder initiatives;
- prevention/corrective action plan, contractual assurances on fair and reasonable terms, financial investments, modifications to strategies/operations, support for SMEs, collaboration with other entities;
- make necessary financial/non-financial investments in, adjustments or upgrades of, for example, facilities, production or other operational processes and infrastructures;
- make necessary modifications/improvements to, the company's own business plan, overall strategies and operations, including purchasing practices, design and distribution practices;
- in case of actual adverse impact: remediation of actual adverse impacts; please note that 2 where the actual adverse impact is caused only by the company's business partner, voluntary remediation may be provided by the company and it may also use its ability to influence the business partner that is causing the adverse impact to provide remediation[73];
- last resort, in case of severe impacts – temporary suspension or termination of the business relationship: prior to this decision, "*the company shall assess*

70 | According to Article 10, paragraph (1) of the CSDDD.
71 | The European Commission shall adopt guidance about voluntary model contractual clauses by 26 January 2027.
72 | According to Article 3, paragraph (1), letter (h) of the CSDDD, 'independent third-party verification' means "*verification of the compliance by a company, or parts of its chain of activities, with human rights and environmental requirements resulting from this Directive by an expert that is objective, completely independent from the company, free from any conflicts of interest and from external influence, has experience and competence in environmental or human rights matters, according to the nature of the adverse impact, and is accountable for the quality and reliability of the verification;*".
73 | According to Article 12, paragraph (2) of the CSDDD.

whether the adverse impacts from doing so can be reasonably expected to be manifestly more severe than the adverse impact that could not be prevented or adequately mitigated. Should that be the case, the company shall not be required to suspend or to terminate the business relationship, and shall be in a position to report to the competent supervisory authority about the duly justified reasons for such decision."[74]. Please note that in such case, the company is obliged to take steps to prevent, mitigate or bring to an end the impacts of the suspension or termination, and to provide reasonable notice to the business partner concerned and to keep that decision under review. Moreover, if the company decides "*not to temporarily suspend or terminate the business relationship (...), it shall monitor the potential adverse impact and periodically assess its decision and whether further appropriate measures are available.*"[75].

We strongly advise our clients to proceed to meaningful engagement with stakeholders according to Article 13 of the CSDD at certain due-diligence stages, by providing them with relevant and comprehensive information, in order to consult them during the identification of impacts. This consultation shall take place at different stages such as:

(a) "*when gathering the necessary information on actual or potential adverse impacts, in order to identify, assess and prioritise adverse impacts pursuant to Articles 8 and 9;*
(b) when developing prevention and corrective action plans pursuant to Article 10(2) and Article 11(3), and developing enhanced prevention and corrective action plans pursuant to Article 10(6) and Article 11(7);
(c) when deciding to terminate or suspend a business relationship pursuant to Article 10(6) and Article 11(7);
(d) when adopting appropriate measures to remediate adverse impacts pursuant to Article 12;
(e) *as appropriate, when developing qualitative and quantitative indicators for the monitoring required under Article 15.*"[76].

If consultation with stakeholders is not reasonably possible to be carried out, "*companies shall consult additionally with experts who can provide credible insights into actual or potential adverse impacts.*"[77].

According to Article 14 of the CSDDD, each company must establish and maintain a complaints procedure for affected persons to submit complaints (e.g. natural or legal persons affected, trade unions or other workers' representatives, environmental civil society organizations) if they have legitimate concerns

74 | According to Article 10, paragraph (6), second thesis, of the CSDDD.
75 | According to Article 10, final paragraph.
76 | According to Article 13, paragraph (3) of the CSDDD.
77 | According to Article 13, paragraph (4) of the CSDDD.

regarding actual or potential adverse impacts, and must put in place a notification mechanism (including anonymously), in order to monitor the effectiveness of the due diligence measures.

Each company must establish a fair, publicly available, accessible, predictable and transparent procedure for dealing with the complaints, including a procedure for unfounded complaints, and inform the relevant workers representatives and trade unions of that procedure. In order to prevent any form of retaliation, each company shall ensure the confidentiality of the identity of the person or organisation submitting the complaint. But, where such information must be shared, it shall be in a manner that does not endanger the complainant's safety, including by not disclosing that complainant's identity.

If the complaint is well-founded, the adverse impact subject matter of the complaint is deemed to be identified and the company shall take appropriate measures in order to mitigate it.

Moreover, according to Article 14, paragraph (4) of CSDDD, complainants are entitled to:

(a) "*request appropriate follow-up on the complaint from the company with which they have filed a complaint (...);*
(b) *meet with the company's representatives at an appropriate level to discuss actual or potential severe adverse impacts that are the subject matter of the complaint, and potential remediation (...);*
(c) *be provided by the company with the reasons a complaint has been considered founded or unfounded and, where considered founded, with information on the steps and actions taken or to be taken.*".

Please note that according to Article 4 of CSDDD – *Level of harmonization*:

> "*1. Without prejudice to Article 1(2) and (3), Member States shall not introduce, in their national law, provisions within the field covered by this Directive laying down human rights and environmental due diligence obligations diverging from those laid down in Article 8(1) and (2), Article 10(1) and Article 11(1).*
> *2. Notwithstanding paragraph 1, this Directive shall not preclude Member States from introducing, in their national law, more stringent provisions diverging from those laid down in provisions other than Article 8(1) and (2), Article 10(1) and Article 11(1), or provisions that are more specific in terms of the objective or the field covered, in order to achieve a different level of protection of human, employment and social rights, the environment or the climate.*".

3.4. What Are Required Companies to Do? Are They Required to Disengage?

Firstly, in order to identify general areas where adverse impacts are most likely to occur and to be most severe, each company covered by the CSDDD is required to

take appropriate measures to map its own operations, those of its subsidiaries and, where related to its chain of activities, those of its business partners.

Secondly, based on the results of such mapping, each company covered by the CSDDD shall carry out an in-depth assessment of its own operations, those of its subsidiaries and, where related to its chain of activities, those of its business partners, in the areas where adverse impacts were identified to be most likely to occur and most severe.

Thirdly, following identification, where a company is not able to address all identified impacts at the same time, it is required to prioritise among them, taking into account their severity and likelihood.

Fourtly, such company needs to adopt in order to prevent, mitigate and bring to an end adverse impacts the following practical measures:

a) to develop and implement prevention and corrective action plans (only for complex issues);
b) to seek to obtain contractual assurances from a direct business partner, including cascading requirements through the chain of activities;
c) to make the necessary financial or non-financial investments, including in its chain of activities (e.g. upgrading infrastructures);
d) to provide support (such as capacity building) to its SME business partners where necessary in light of the resources, knowledge and constraints of the SMEs;
e) to provide financial support (such as direct financing, low-interest loans, guarantees of continued sourcing, or assistance in securing financing) to its SME business partners where compliance with the code of conduct or the prevention action plan would jeopardise the viability of the SMEs;
f) to adapt its business plan, strategies and operations (including purchasing practices, design and distribution practices);
g) to collaborate with other entities to resolve the issues including with a view to increase its leverage over business partners.

Fiftly, when conducting a due diligence, such company should proceed to sending questionnaires to its significant suppliers and service providers to the extent such supplier or service provider qualifies as `*business partner*` in the meaning of the CSDDD and could have an environmental or human rights impact as result of his relation with the company (`*risk-based approach*`). Moreover, such company should request to such supplier or service provider to confirm his compliance with the `code of conduct`, according to Article 7, paragraph 2, letter (b) of the CSDDD.

Sixtly, according to Article 16, paragraph (1) of the CSDDD, companies **must report on the matters covered by this directive by publishing on their website**

an annual statement[78], in one of the official languages of the Union used in the Member State of the supervisory authority designated, and within a reasonable period of time, but no later than 12 months after the balance sheet date of the financial year for which the statement is drawn up, or, for companies voluntarily reporting in accordance with Directive 2013/34/EU, by the date of publication of the annual financial statements. For non-EU companies, the statement shall also include the information regarding the company's authorised representative as regulated by Article 23 of the CSDDD[79].

According to Article 16, paragraph (2) of the CSDDD, the publication of the annual statement shall not apply to companies that are subject to sustainability reporting requirements in accordance with Article 19a, 29a or 40a of Directive 2013/34/EU, including those that are exempted in accordance with Article 19a(9) or Article 29a(8) of that directive.

Sevently, when all other actions have failed, and where severe impacts are at stake and only where these impacts outweigh the foreseeable negative consequences of disengagement, as a measure of last resort, companies are required **to suspend or terminate a business relationship**.

In this respect, please note that we are looking forward that the European Commission[80] issues guidelines on these aspects, including for the model contract

78 | By 31 March 2027, the Commission (assisted by a committee) shall adopt delegated acts (for an indeterminate period of time from 25 July 2024, according to Article 34 of the CSDDD – but this delegation power can be revoked at any time by the European Parliament or by the Council) by laying down the content and criteria for the reporting. In preparing these delegated acts, the Commission shall, on one hand, consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making, and, on the other hand, shall take due account of, and align them as appropriate with, the sustainability reporting standards adopted pursuant to Articles 29b and 40b of Directive 2013/34/EU. According to Article 34, paragraphs (5) and (6) of the CSDDD, these delegated acts shall be notified, simultaneously, as soon as adopted, to the European Parliament and to the Council, and "*shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.*".

79 | Please note that such authorised representative shall be a natural or legal person that is established or domiciled in one of the Member States where it operates. The designation shall be valid when confirmed as accepted by the authorised representative. The authorised representative or the company shall notify the name, address, email address and telephone number of the authorised representative to a supervisory authority in the Member State where the authorised representative is domiciled or established and, where it is different. Please note that each Member State may designate one or more supervisory authorities, and these authorities shall have the powers to initiate an investigation on its own initiative or as a result of substantiated concerns communicated and to conduct inspections (even on the territory of another Member State, case in which it shall seek assistance from the supervisory authority in that Member State) – for details on the supervisory authorities, please see Articles 24 and 25 of the CSDDD.

80 | According to the consideration 66 of this Directive, "*In order to give companies tools to help them comply with their due diligence requirements through their chains of activities, the Commission, in consultation with Member States and stakeholders, should provide guidance on model contractual clauses,*

clauses that ensure a fair allocation of tasks and avoid burden shifting to business partners.

Thus, please note that in this compliance process, the companies shall be guided by the European Commission which, "*in order to provide support to companies or to Member State authorities on how companies should fulfil their due diligence obligations in a practical manner, and to provide support to stakeholders, (…), in consultation with Member States and stakeholders, the European Union Agency for Fundamental Rights, the European Environment Agency, the European Labour Authority, and where appropriate with international organisations and other bodies having expertise in due diligence, shall issue guidelines, including general guidelines and sector-specific guidelines or guidelines for specific adverse impacts*"[81] that shall include, according to Article 19, paragraph (2) of the CSDDD:

(a) **guidance and best practices on how to conduct due diligence** – shall be made available by **26 January 2027**;
(b) **practical guidance on the transition plan** – shall be made available by **26 July 2027**;
(c) **sector-specific guidance –** no deadline provided by the CSDDD;
(d) **guidance on the assessment of company-level, business operations, geographic and contextual, product and service, and sectoral risk factors**, including those associated with conflict-affected and high-risk areas – shall be made available by **26 January 2027**;
(e) **references to data and information sources available for the compliance** with the obligations provided for in this Directive, **and to digital tools and technologies that could facilitate and support compliance** – shall be made available by **26 January 2027**;
(f) **information on how to share resources and information among companies and other legal entities for the purpose of compliance** with the provisions of national law adopted pursuant to this Directive, in a manner that is **in accordance with the protection of trade secrets** – shall be made available by **26 July 2027**;
(g) **information for stakeholders and their representatives on how to engage throughout the due diligence process** – shall be made available by **26 July 2027**.

which can be used voluntarily by companies as a tool to help fulfil their obligations in Articles 10 and 11. The guidance should aim to facilitate a clear allocation of tasks between contracting parties and ongoing cooperation, in a way that avoids the transfer of the obligations provided for in this Directive to a business partner and automatically rendering the contract void in case of a breach. The guidance should reflect the principle that the mere use of contractual assurances cannot, on its own, satisfy the due diligence standards provided for in this Directive.".

81 | According to Article 19, paragraph (1) of the CSDDD.

Please note that these guidelines shall be made available in all the official languages of the European Union, and shall be periodically reviewed and adapted by the European Commission.

Moreover, the companies shall be helped, on one hand, by the European Commission which will establish *a single helpdesk*[82] through which companies may seek information, guidance and support with regard to fulfilling their obligations, and on the other hand, by the Member States which shall set up and operate individually or jointly *dedicated websites, platforms or portals*[83], in order to provide information and support.

If a supervisory authority identifies a failure to comply with the provisions of national law adopted pursuant to this directive, it shall grant the company an appropriate period of time to take remedial action, if such action is possible, but this shall not preclude the imposition of penalties in accordance with Article 27 or the triggering of civil liability in accordance with Article 29.

According to Article 25, paragraphs (5) and (6) of the CSDDD, the companies must respect the decision of the supervisory authorities, taken directly, in cooperation with other authorities, or by application to the competent judicial authorities, which have at least the power to take decisions engaging the company's civil liability:

(a) order the company to:
  (i) cease infringements by performing an action or ceasing conduct;
  (ii) refrain from any repetition of the relevant conduct; and
  (iii) provide remediation proportionate to the infringement and necessary to bring it to an end;
(b) impose effective, proportionate and dissuasive penalties[84] in accordance with Article 27 of the CSDDD; and
(c) adopt interim measures in the event of an imminent risk of severe and irreparable harm.

In accordance with the national law, each natural or legal person shall have the right to submit substantiated concerns according to Article 26 of the CSDDD or to an effective judicial remedy against a legally binding decision[85] taken by a

82 | According to Article 21 of the CSDDD.
83 | According to Article 20 of the CSDDD.
84 | At least pecuniary penalties [not less than 5% of the net worldwide turnover of the (ultimate parent) company in the financial year preceding that of the decision to impose the fine] or, if a company fails to comply with a decision imposing a pecuniary penalty within the applicable time limit, a public statement indicating the company responsible for the infringement and the nature of the infringement.
85 | According to Article 27, paragraph (5) of the CSDDD, any decision of the supervisory authority concerning penalties related to such infringements shall be published, shall remain publicly available for at least five years and shall be sent to the European Network of Supervisory Authorities (i.e. composed of representatives of the supervisory authorities).

supervisory authority concerning them, pursuant to Article 25, paragraph (7) of the CSDDD.

If companies shall be imposed penalties, please note that in determining their nature and appropriate level, in accordance to Article 27, paragraph (2) of the CSDDD, due account shall be taken of:

(a) the nature, gravity and duration of the infringement, and the severity of the impacts resulting;
(b) any investments made and any targeted support provided;
(c) any collaboration with other entities to address the impacts concerned;
(d) the extent to which prioritisation decisions were made;
(e) any relevant previous infringements by the company of the provisions of national law adopted pursuant to this Directive found by a final decision;
(f) the extent to which the company carried out any remedial action with regard to the subject matter concerned;
(g) the financial benefits gained or losses avoided by the company due to the infringement;
(h) any other aggravating or mitigating factors applicable to the circumstances of the case concerned.

If a company shall not comply with the obligations set out in the CSDDD, its civil liability shall be engaged according to Article 29 of the CSDDD, meaning that it will be held liable for the damage caused to natural or legal persons (who will have the right to full compensation for the damage – and not to overcompensation), if:

(a) the company intentionally or negligently failed to comply with the obligations laid down in Articles 10 – *Preventing potential adverse impacts* and 11 – *Bringing actual adverse impacts to an end*, when the right, prohibition or obligation listed in the Annex to the directive is aimed at protecting the natural or legal person; and
(b) as a result of the failure referred to in point (a), damage to the natural or legal person's legal interests that are protected under national law was caused.

Please be informed that a company cannot be held liable if the respective damage is caused only by its business partners in its chain of activities.

Specific procedural rules shall be laid down and ensured by each Member State, pursuant to its national law and to Article 29, paragraph (3) of the CSDDD.

Therefore companies shall have to ensure compliance with the CSDDD, especially that, in accordance with Article 31, "*voluntary implementation, qualifies as an environmental or social aspect that contracting authorities may (...) take into account as part of the award criteria for public and concession contracts, and as an environmental or social condition that contracting authorities may (...) lay down in relation to the performance of public and concession contracts.*".

3.5. Transition Plan for Climate Change Mitigation?

The CSDDD also sets up an obligation for companies to "*adopt and put into effect a transition plan for climate change mitigation which aims to ensure, through best efforts, that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1,5°C in line with the Paris Agreement and the objective of achieving climate neutrality as established in Regulation (EU) 2021/1119, including its intermediate and 2050 climate neutrality targets, and where relevant, the exposure of the company to coal-, oil-, and gas-related activities*"[86]. This transition plan shall be updated every 12 months and shall contain a description of the progress the company has made towards achieving the targets imposed.

Companies are required to include in this transition plan the following:

(a) "*time-bound targets related to climate change for 2030 and in five-year steps up to 2050 based on conclusive scientific evidence and, where appropriate, absolute emission reduction targets for greenhouse gas;*

(b) *a description of decarbonisation levers identified and key actions planned to reach the targets referred, where appropriate, changes in the product and service portfolio of the company and the adoption of new technologies;*

(c) *an explanation and quantification of the investments and funding supporting the implementation of the transition plan for climate change mitigation; and*

(d) *a description of the role of the administrative, management and supervisory bodies with regard to the transition plan for climate change mitigation*"[87].

4. Where Are the CSRD and the CSDDD Similar?

The Directives should be seen as working hand in hand in order to promote at the EU level transparency, responsible conduct, protection of the environment and of human rights.

The Directives are largely based on two international due diligence guidelines based on voluntary action:

i. the **OECD Guidelines for Multinational Entreprises on Responsible Business Conduct**[88]: recommendations jointly addressed by governments to multinational enterprises (i.e. principles and standards of good practice), in order to enhance positive contributions to economic, environment and social progress, and to minimise adverse impacts on matters covered by

86 | According to Article 22, paragraph (1), first thesis of the CSDDD.
87 | According to Article 22, paragraph (1), final thesis of the CSDDD.
88 | Please see OECD 2025, They were introduced in 1976, but have been continuously improved in order to be adapted to the new realities of the society. The 2023 key updates include recommendations for climate change and bio diversity, due diligence to all forms of corruption.

the Guidelines. "*The Guidelines cover all key areas of business responsibility, including human rights, labour rights, environment, bribery and corruption, consumer interests, disclosure, science and technology, competition, and taxation. The 2023 edition of the Guidelines provides updated recommendations for responsible business conduct across key areas, such as climate change, biodiversity, technology, business integrity and supply chain due diligence, as well as updated implementation procedures for the National Contact Points for Responsible Business Conduct.*"[89]. Please note that the observance of these guidelines is voluntary, and not legally enforceable, therefore they do not create new international law obligationss.

ii. the **UN Guiding Principles on Business and Human Rights: Implementing the United Nations `Protect, Respect and Remedy` Framework**[90]: principles applicable to all States and to all business enterprises (transnational and others). Please note that the observance of these principles is voluntary, and not legally enforceable, therefore they do not create new international law obligations.

Therefore, companies that adhered already voluntarily to these guidelines, they should be already on the correct track to compliance.

But this voluntary regime existing at the EU level could not be considered enough, reason for which these Directives were adopted in order to impose a mandatory legal regime, for better results than the ones registered with the voluntary standards regarding the necessary dilligence.

Both Directives have a very similar purpose: to ensure companies' transparency throughout all the supply chain.

5. What Is the Difference Between the CSRD and the CSDDD?

Firstly, on one hand, the CSDDD sets up required due diligence steps that companies must take in order to be compliant. From this perspective, companies that are covered by the CSDDD have to investigate and address how their own operations and supply chains impact human rights and the environment. On the other hand, the CSRD establishes reporting guidelines on how companies should communicate information on their sustainability effort and practices (i.e. the European Sustainability Reporting Standards – ESRS[91]), being considered to revolutionize EU sustainability reporting.

89 | Please see OECD 2025
90 | Please see United Nations 2011
91 | Please see Worldfavor 2024

Secondly, on one hand, the CSDDD envisages a global application, because it does not stop at the EU borders, and it applies to both EU and non-EU companies, covering their actions in Europe and wherever they operate and source globally. On the other hand, the CSRD is EU-centric, designed only for companies within the EU.

Thirdly, on one hand, the main goal of the CSDDD is reducing negative effects of EU businesses, making sure that the companies take real actions to reduce or to stop any harmful effects their activities might have both on human rights, and on environment. On the other hand, the main goal of the CSRD is to ensure consistent and comparable reporting of (enhanced) ESG performance, giving to the stakeholders[92] a relevant view of the corporate sustainability performance, by driving corporate change.

6. Current Discussions in the European Commission Related to the CSRD and to the CSDDD

Unfortunately, taking into the consideration that the CSRD and the CSDDD are currently implemented in a very difficult context due to Russia's war of aggression against Ukraine, the European Commission is now discussing within the Simplification Omnibus package[93] a Proposal for a Directive of the European Parliament and of the Council amending Directives (EU) 2022/2464 and (EU) 2024/1760 as regards the dates from which Member States are to apply certain corporate sustainability reporting and due diligence requirements[94] (hereinafter "***the Proposal***").

According to the Explanatory Memorandum of the Proposal, this Proposal's main aims are:

i. to postpone the entry into application of the CSDDD and of certain provisions of the CSRD;
ii. to reduce the reporting burden and to limit the trickle down of obligations on smaller companies, being expected that the number of companies subject to mandatory sustainability reporting requirements to be reduced by 80% (i.e. large companies with up to 1,000 employees and listed SMEs);

92 | According to Article 3, paragraph (1), letter (n) of the CSDDD, 'stakeholders' means "*the company's employees, the employees of its subsidiaries, trade unions and workers' representatives, consumers and other individuals, groupings, communities or entities whose rights or interests are or could be affected by the products, services and operations of the company, its subsidiaries and its business partners, including the employees of the company's business partners and their trade unions and workers' representatives, national human rights and environmental institutions, civil society organisations whose purposes include the protection of the environment, and the legitimate representatives of those individuals, groupings, communities or entities.*"

93 | European Commission 2025b

94 | Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directives (EU) 2022/2464 and (EU) 2024/1760 as regards the dates from which Member States are to apply certain corporate sustainability reporting and due diligence requirements, COM(2025) 80 final, 2025/0044 (COD).

iii. to introduce a proportionate standard for voluntary use, based on the VSME standard developed by EFRAG, applicable for companies not subject to mandatory sustainability reporting requirements;
iv. to extend and strengthen the value-chain cap;
v. for the Commission to issue targeted assurance guidelines by 2026 (instead of the obligation to adopt standards for sustainability assurance by 2026);
vi. to introduce an "opt-in" regime "*where large undertakings with more than 1000 employees on average (i.e. undertakings that have more than 1000 employees and either a turnover above EUR 50 million or a balance sheet above EUR 25 million) and a net turnover not exceeding EUR 450 million which claim that their activities are aligned or partially aligned with the EU Taxonomy shall disclose their turnover and CapEx KPIs and may choose to disclose their OpEx KPI. This "opt-in" approach will eliminate entirely the cost of compliance with the Taxonomy reporting rules for large undertakings with more than 1000 employees on average (i.e. undertakings that have more than 1000 employees and either a turnover above EUR 50 million or a balance sheet above EUR 25 million) and a net turnover not exceeding EUR 450 million which do not claim that their activities are associated with economic activities that qualify as environmentally sustainable under the Taxonomy Regulation. In addition, this proposal provides more flexibility by allowing these undertakings to report on activities that meet certain Taxonomy technical screening criteria without meeting all of them. Such reporting on partial alignment can foster a gradual environmental transition of activities overtime, in line with the aim to scale up transition finance.*"[95];
vii. to adopt a delegated act to revise the first set of ESRS in order to simplify and to clarify;
viii. to postpone by two years the entry into application of the reporting requirements for the second wave and of the third wave of the CSDDD regulated companies.

Taking in view the EU procedure to adopt legislative acts and that Member States should transpose the CSDDD by 26 July 2026 (therefore it has not yet been transposed or applied by companies), the European Commission is inviting the "co-legislators to reach rapid agreement on the proposed postponement".

Considering the purpose of this present study, we shall not insist any more on this Proposal and we shall address the intentions of the Commission and the text of this Proposal in a future study, depending on the evolution of the negotiations at the EU level.

95 | Ibid 4–5.

7. Final Remarks

In the EU, the directives, and "*particularly the CSRD, demonstrate a holistic approach to ESG Reporting by encompassing all listed companies, including small and medium-sized enterprises*"[96], ensuring comprehensive coverage.

Even though in the legal doctrine, the ESG is sometimes considered to be the "result of a brainwave"[97] (in Romanian "*găselniță*"), "after the failure of CSR policies", we strongly believe that "*responsibility of companies regarding the negative effects that can arise in their value chains over human rights and environment are not a recent concern at the international level, being a consequence of the reflection over more than a decade associated with innovations in corporate structures, the development of technology and the expanding boundaries of where and how these companies can operate globally, and dedicated, as the literature shows, to identifying ways to bridge the gap between the scope and impact of economic actors, on the one hand, and the capacity of companies to companies their negative consequences, on the other hand.*"[98].

In a nutshell, both Directives are crucial for the EU's strategy for sustainable corporate governance: the CSDDD requires to EU and non-EU companies to be environmental and social responsible in their operations, while the CSRD ensures that EU companies are transparent about it. Certain companies falling under the material and personal scope of both Directives must apply them together.

We also propose to the company directors to "*think of the CSDDD as a toolkit for companies. It not only helps them fulfill their environmental and human rights duties, but also fits together with what CSRD asks for in sustainability reporting. This connection lets companies show the full picture of how they're being sustainable and responsible in their company.*"[99]. For instance, the CSRD is considered to be, by certain specialists, "*a game changer for sustainability reporting*"[100] or "*the biggest and the boldest sustainability reporting directive ever adopted*"[101].

Member States[102], international organizations together with the companies covered by the Directives should take additional steps to protect ESG, especially to combat the climate change and the environmental degradation. Special attention should be given to the use of artificial intelligence in implementing the principles of ESG regarding social sphere.

96 | Behl & Korwani 2024.
97 | Please see Rizoiu 2023, 139.
98 | Please see Nemes & Fierbinteanu 2023, 106.
99 | Please see Wordfavor 2025.
100 | Please see Ernst & Young 2025
101 | Please see Wordfavor 2023
102 | Regarding the EU Member States responsibility for the inadequate application of EU legislation, please see Dimitriu 2023 145–171.

In the European Union the clock is ticking having in mind that the European Green Deal challenges the Member States together to strive to be the first climate-neutral continent, and we can hardly wait to see the results in practice: on one hand, for companies to kickstart their CSRD and/or CSDDD compliance, and on the other hand, for the European authorities to unmask the wrongdoers and to make they pay the heavy fines! Based on the general duty of care due by each company director, the director must take into consideration the consequences of his/her decisions on a short, medium and long-term regarding human rights, and environment.

The intervention of the European legislator is beneficial, in our view, because, on the one hand, it ensures harmonisation and legal certainty among the players, and, on the other hand, it mitigates the unfair competitive advantages of any companies registered in third countries resulting from lower protection standards (i.e. social and environmental dumping in international trade).

We totally agree that, "*de lege ferenda,* article 22 CSDDD (i.e. Combating climate change) provides for climate-specific due diligence obligations for certain companies, which the management will then also be bound to comply with by virtue of their duty of legality."[103]. But things must be done properly, company law must be reformed accordingly, and finally, no more tolerance for the ESG violations, especially that nowadays there is an exponential growth in ESG investments[104]!

103 | Please see Weller, Hößl & Seemann 2025

104 | For instance, please note that in 2020 there were about $40.5 trillion of global assets under management s(AUM) in ESG funds – please see Popa Tache 2022.

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REVIEW

Gerhard DANNECKER[1] – Judit JACSÓ[2]

Report on the International Conference Titled 'Green Criminology and Green Deal'[3]

On 4-5 March 2024, an international conference on 'Green Criminology and Green Deal: Environment and climate protection – an unshiftable task for criminal law' was held in Miskolc, Hungary, as part of the Alexander von Humboldt Foundation-funded partnership project "On the systematization of criminal responsibility of and in companies"[4] between the Universities of Heidelberg and Miskolc. The aim of the institute partnership is to systematise practical experience and knowledge on the criminal liability of companies and to discuss criminal policy responses to technological and social changes, involving academics and practitioners (legal profession, public administration and judiciary), doctoral students and law students, to analyse comparative legal and to develop new solution concepts. This conference was the fourth and final event in this partnership project. Academic and practitioner speakers came from Germany and from Hungary, which can look back on an environmentally-oriented tradition of their universities, especially in Miskolc, from Austria, which has repeatedly followed a particular path in the implementation of Union law requirements in criminal law, and from Liechtenstein, an EEA state. The fourth conference aimed to provide a framework for a knowledge-based inter- and intradisciplinary discourse on green criminology and he European Union's Green Deal.

1 | Prof. Dr. Dr. h.c. Gerhard Dannecker is a senior professor at the Faculty of Law of the University of Heidelberg.
2 | Prof. Dr. Judit Jacsó is professor at the Faculty of Law of the University of Miskolc and at the University of Economics and Business of Vienna.
3 | This report is originally published in *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)*, 2024/24,1153-1158. This report is translated by Dr. Roland Lindt, assistant lecturer at the Faculty of Law of the University of Miskolc.
4 | The papers presented at the first and the second Humboldt meeting are published in European Integration Studies Vol. 17. No. 1. (2021) and Vol. 19. No. 2. (2023) (https://ojs.uni-miskolc.hu/index.php/eis/issue/view/33 and 169).

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1. Contributions on environment and climate protection

The conference was opened by Prof. Dr. Péter Szűcs, Vice Rector of the University of Miskolc, and Prof. Dr. Csilla Csák, Dean of the Faculty of Law of the University of Miskolc. In his opening speech, Prof. Dr. Jan C. Schuhr, Dean of the Faculty of Law at the University of Heidelberg, highlighted the specific relationship between environmental protection and criminal law and emphasised that criminal law has a special place in the legal system. Therefore, the autonomy of criminal law must always be respected. Moreover, administrative law plays a central role in climate and environmental protection, and therefore the issues of administrative accessoriness of environmental criminal law and the treatment of offences that circumvent it require comprehensive and in-depth discussion and consideration.

The project leader, Prof. Dr. Dr. h.c. Gerhard Dannecker, Senior Professor at the University of Heidelberg, presented the concept of the meeting. He emphasised that, in addition to a discourse between different legal disciplines, an interdisciplinary approach is essential to make knowledge-based decisions. We need to go beyond the mere juxtaposition of scientific perspectives if a fruitful gain in knowledge is to be achieved. The aim of this last conference within the framework of the institute partnership was to address the current problems of environmental and climate protection and to develop research perspectives and approaches for solutions to improve the protection of the foundations of life, including enforcement by the member states of the European Union (see point 4). The European Union has shown that a union can be brought about through law. This requires the pursuit of a utopia, for which criminal law is particularly well suited because of its strong value orientation.

2. Presentations

2.1. Environment and climate protection an interdisciplinary perspective

The first section of the event, entitled 'Climate protection in interdisciplinary discourse', chaired by Prof. Dr. Dr. h.c. Gerhard Dannecker, was opened by Prof. Dr. Péter Polt, Prosecutor General of Hungary, who presented the current situation in the fight against environmental crime in Hungary, thus providing a comprehensive insight into the practice and experience of the Hungarian prosecutors. Environmental criminal law is characterised by the fact that it is often a form of organised, cross-border crime, requiring international cooperation by law enforcement authorities to gain access to documents and information, especially registers, and to acquire expertise in the field. In addition, Hungarian experience shows that environmental crime is often linked to serious crimes such as human

trafficking, terrorist financing and cybercrime. Criminal organisations play a significant role in this. In order to combat this effectively, there is a need for a well-functioning exchange of information within the European Union, especially at the level of administrative authorities, and for coordinated prosecutions in the countries concerned. In the light of such findings, there is no doubt that even the Member States of the European Union, which generally follow national paths in pursuit of Union law objectives, are committed to the common goal of protecting fundamental sources of life, particularly in the field of climate and environmental criminal law.

Dr. Kinga Szabó-Tóth, Head of the Institute of Applied Social Sciences of the University of Miskolc, then discussed the sociological aspects of climate protection, especially the interventions in nature and their perception, as well as the communication about the sociological aspects of climate protection, in particular social interventions in nature and their perception as well as communication about the consequences of these interventions in society.. She highlighted the need for sustainability and resilience from a social perspective, which must be taken into account in addition to economic considerations. Sociological aspects shall also be included, for example, on cooperative decision-making processes between the state, the private sector and civil society actors regarding inequalities in access to of resources and their distribution. These are interdisciplinary issues which, due to the dynamics of the environment and sustainability, can no longer be dealt with by sociology alone or only at a national level. Socio-economic systems need to be adjusted to the changed context, moreover, environmental and risk sociological expertise needs to be broadened: changed conditions require a changed approach. However, changing the status quo is not an easy undertaking because abandoning learned and well-established behaviours requires a new attitude that is no longer unilaterally oriented towards profit maximisation, but rather focuses on social goals such as social inclusion, job creation, sustainability, etc. However, a significant part of the population in Hungary denies climate change, so social acceptance of new approaches is low.

Dr. Tekla Szép, Deputy Head of the Institute of World and Regional Economics of the University of Miskolc, subsequently analysed the economic perspectives of climate protection. She emphasised that the current way of doing business is destroying or at least endangering the natural basis of economic activity, and that a green economy in harmony with nature and the environment is needed: a model that takes account of social impacts and no longer focuses solely on criteria of growth and profit, to the detriment of future generations and social impacts. The aim must be economic development for social well-being, in which environmental protection and economic development are not seen as opposites, but rather as mutually interdependent. In this regard, the need for interdisciplinary discourse with engineering and materials sciences became particularly clear here, for example in terms of the need to increase energy and material efficiency

and with regard to the pressure to increase the use and further development of environmental and efficiency technologies, which are important for international competitiveness. Furthermore, economic opportunities in future green markets depended on sustainable water management, mobility, environmentally sound waste management and recycling. The speaker rightly stressed that a positive overall balance is crucial, rather than a narrow economic balance. However, very little progress has been made until now in the field of climate and environmental protection in Hungary.

Dr. Lajos Szalontai, an engineering scientist at the Earth and Environmental Protection Faculty of the University of Miskolc, then addressed the requirements of engineering sciences for the preservation and development of human living and production spaces. On the one hand, this involves responses to fundamental and structural ecological problems, leading to large reductions in energy and resource consumption, and the environmentally friendly use of resources as a response to climate change and ecosystem disruption. On the other hand, there are technical problems that require the development of specific engineering solutions. Specific tasks were presented to illustrate the challenges of developing scientifically and technically sound solutions for efficient and sustainable resource management. Based on several projects led by the research group to which the speaker belongs, and which has been awarded seven Horizon projects, successful initiatives such as the development through international cooperation of a 'Robominer' for the extraction of minerals from former mines, and a monitoring system for the monitoring of water-soluble rocks leached by surface and groundwater were presented. At the same time, it became clear that the ecological planning and implementation of infrastructure, technical installations and buildings clearly depends on a clear social and legal framework.

Under the chairmanship of Prof. Dr. Ákos Farkas, full professor of the Department of Criminal Procedure and Correctional Law of the University of Miskolc, the focus was placed on climate change.

Ethicist and psychologist Prof. Dr. Monika Bobbert, Director of the Seminar on Moral Theology of the University of Münster, highlighted the open questions and possible debates in the application of the precautionary principle in the field of climate change. Firstly, she underlined that the precautionary principle in politics and law aims at risk avoidance; however, it should be distinguished from the areas of aftercare and risk prevention. Overall, the precautionary principle requires new forms of scientific cooperation between the disciplines concerned. New procedures must be developed for constructive discussion of scientifically controversial issues relating to risks and effective measures, to ensure that the open questions and uncertainties in risk analyses and precautionary measures can be reliably identified, so that decisions can be taken that are neither biased by vested interests nor require excessive precaution. In most cases, however, there are no clear-cut right solutions, only potentially better and worse ones.

The debate has made clear that the precautionary principle is firmly anchored in environmental policy and environmental law, and, despite its flexibility, it confers responsibility on different actors – individuals, companies, states and communities of states. This principle precludes any reduction of liability only in the case of particularly serious damage and thus constitutes a clear point of reference in both political discourse and environmental law. Complex causal chains often make it difficult to foresee and assess the future consequences of current actions. Therefore, public interventions are needed that lead to a democratically legitimised, proportionate restriction of freedom and are aimed at a fair distribution of burdens.

Dr. Mária Lubinszky, Associate Professor and Head of Department, Teacher Training Institute, Department of Psychology, University of Miskolc, psychologist, and Péter Fülöp, psychologist and Head of Research at Ipsos, then discussed the vulnerability of people and climate anxiety among the younger generation and gave an overview of the effects of climate change on the human psyche. They highlighted that children and young people in Hungary are particularly affected by the psychological impact of the climate crisis because they are intensely concerned about their own future. Children and young people are also a particularly vulnerable group because they are at a sensitive stage of development and their coping mechanisms are less developed than those of adults. It is also stressful when adolescents and young adults experience that the security they had hoped for is not guaranteed. This group often reacts particularly emotionally with fear, anger, frustration or helplessness. In addition, knowledge of the climate crisis can lead to exposure to environmental stress factors and cause both acute and secondary stress disorders. These empirical findings from Hungary, which are also emerging internationally, underline the need for environmental protection and the approach of the constitutional courts in the European Union, which attach central importance to the protection of freedoms and fundamental rights in the context of climate protection.

Prof. Dr. Katharina Pabel, Deputy Head of the Institute for European and International Law at the Vienna University of Economics and Business, reviewed the case law of the constitutional courts of the European Union Member States – the German Federal Constitutional Court, the French Conseil d'Etat, the Dutch Hoge Raad, the Austrian Constitutional Court and the Swiss Federal Supreme Court – and commented on the pending applications before the ECtHR. On 9 April 2024, the Grand Chamber of the ECHR found a violation of the fundamental rights of the applicant Swiss 'KlimaSeniorinnen'. The climate targets set out in the Paris Agreement played a key role in these decisions. This is because it was only by reference to these targets that the courts were able to determine the minimum standards of protection required, non-compliance with which leads to a violation of fundamental rights. It has also become clear that climate activists rely heavily on the effectiveness of the courts to achieve their policy goals of promoting

climate protection and enhancing the efforts of states to protect the climate. However, this raises the legal-policy issue of the separation of powers and the limits of constitutional jurisdiction, which may be able to control environmental and climate protection measures, but which cannot replace majority voting in a democracy.

2.2 Environment and climate protection from an intradisciplinary perspective

In the second session, Prof. Dr. Erika Róth, Head of the Institute of Criminal Justice of the University of Miskolc, and Prof. Dr. Judit Jacsó, Head of the Department of Criminal Law and Criminology of the University of Miskolc and Holder of the Chair of Criminal Law of the Vienna University of Economics and Business, discussed the perspectives of different areas of law.

The first speaker, Prof. Dr. Claudia Seitz, Professor at the Private University of the Principality of Liechtenstein, addressed the question of what mechanisms are recognised in climate and environmental law at international and EU level to address the challenges of climate change. Immediately afterwards, Dr. Anikó Raisz, State Secretary for Environment and Circular Economy at the Ministry of Energy Policy in Hungary and Head of the Department of International and Comparative Law of the University of the University of Miskolc shed light on the different mechanisms of action from a Hungarian perspective. The starting point for both presentations was that climate change requires fundamental changes in order to make the transition to a low-emission economy. This requires a structural transformation of the economy and a fundamental change in consumer behaviour.

It was highlighted that European climate policy aims to mitigate the effects of climate change, adapt to climate change at EU level and reduce activities that are harmful to the environment and climate, and that this policy is significantly influenced by international climate policies such as the UN Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement. The 'Energy Union' strategy, developed in 2015 to address the EU's energy policy tasks, is based on the pillars of security of energy supply, an integrated internal energy market, energy efficiency, decarbonisation of the economy, and research and innovation. In order to achieve the 2030 climate and energy targets, a regulation was adopted in 2018 to standardise and restructure Member States' planning and reporting obligations on climate and energy issues. In addition, the EU Member States were obliged to develop long-term strategies for the period up to 2050, into which National Energy and Climate Plans (NECPs) can be integrated. In January 2020, the Hungarian government published an updated version of the National Energy Strategy and National Energy and Climate Plan (NECP), which includes Hungary's climate policy goals up to 2030, with an outlook to 2040.

Dr. Anikó Raisz emphasised the high level of acceptance of nature conservation in Hungary. This is a good precondition for taking and implementing effective climate and environmental measures. She mentioned climate-neutrality, the conservation of drinking water resources, the protection of biodiversity and the need for sustainable environmental protection in general, which are also followed by the European Union, as important goals, as well as the fight against plastic pollution as part of the chemical strategy and the responsibility of manufacturers and suppliers for the entire supply chain in Hungary, up to the disposal of products. There is already a high level of social consensus on this. For Hungary, however, it is important to find national solutions to achieve the targets set by the European Union that are as cost-neutral as possible in order to achieve a high level of competitiveness.

Prof. Dr. Dr. h.c. Gerhard Danneckerdiscussed the European Union's fundamental requirements for liability in environmental and climate criminal law, which set a binding policy objective for the European Union and a standard that Member States must meet. The presentation focused on the Green Deal, the EU Commission's initiative to strengthen the criminal law protection of the environment. The EU directive, which has recently entered into force, sets new requirements for Member States to transpose into national (criminal) law. These include the obligation to introduce new environmental offences, such as the prohibition of illegal timber trade, as well as setting minimum ceilings for criminal sanctions and a requirement to strengthen cooperation in cross-border criminal prosecution. EU Member States are also obliged to support persons reporting environmental offences. Dannecker identified the complementary nature of public administration as a potential obstacle to effective criminal sanctions and pointed to the need for measures in this respect, such as the circumvention clause. The EU Commission's call for more effective environmental criminal law is based on the central role of transnational organised environmental crime and the assumption that significant criminal profits are made in this area. It is therefore important to address the criminological side of environmental crime, i.e. green criminology.

In his presentation, Prof. Dr Robert Kert, Head of the Institute for Austrian and European Commercial Criminal Law at the Vienna University of Economics and Business, addressed the requirements of the European Union with regard to criminal, civil and administrative sanctions. His presentation focused on the proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law, replacing Directives 2008/99/EC and 2009/123/EC, which has since entered into force on 20 May 2024. He compared the sanctions provisions with those of Directive 2008/99/EC, and pointed out that the European Union is an important impulse generator for Member States' environmental criminal law. This applies in particular to a series of new criminal offences involving damage to the environment of other States only (e.g. unlawful

timber imports), the extension of penalties such as the minimum prison sentence for natural persons and the minimum fine for legal persons, and the effective enforcement required from Member States.

Prof. Dr. Anita Paulovics, Head of the Department of Constitutional Law of the University of Miskolc, and Dr. Szilvia Vetter PhD, Director of the Animal Protection Centre of the Veterinary University of Budapest, presented the specific requirements of sustainable animal welfare, which are of central importance in Hungary. In this respect, the primary focus shall not be on the protection of animals and their welfare and the avoidance of harm. It is not enough to interpret the concept of animal welfare internationally and in the European Union as meaning that no one shall cause pain, suffering or harm to an animal without a reasonable cause. Such a 'negative' approach, which only seeks to prevent harm and suffering, is inappropriate. A positive approach would be preferable, which approximates the status of animals on that of humans and aims for general non-violence. This can be justified on economic, psychological and criminological aspects, which argue in favour of a society that is comprehensively free from violence and suffering.

For the European Union, Art. 13 TFEU requires that in defining and implementing the Union's policies on agriculture, fisheries, transport, internal market, research, technological development and space, the Union and the Member States shall pay full regard to the welfare requirements of animals as sentient beings. This legal solution protects the welfare of individual animals, whereas species protection only protects animal or plant populations from extinction. This protects the welfare of the individual animal, whereas species protection only serves to protect animal or plant populations from extinction. However, animal welfare is not only an EU objective that the European Union should actively promote and support. On 7 December 2023, the EU Commission proposed new regulations for the welfare of animals in transport and presented standards for the welfare and traceability of dogs and cats, setting uniform standards for the breeding, housing and handling of dogs and cats in breeding farms, pet shops and shelters.[5] In addition, the traceability of these pets shall be improved through mandatory labelling and registration in national databases. The aim is to combat illegal trade and to better monitor the welfare conditions in establishments. Therefore, similar developments are emerging in this area at national level in Hungary, as well as in other Member States and at EU level, which give reason to expect the implementation of harmonised standards.

Prof. Dr. Csilla Csák, Dean of the Faculty of Law and Head of the Institute of Private Law of the University of Miskolc, then addressed the challenges of

5 | Proposal for a regulation of the European Parliament and of the Council on the protection of animals during transport and related operations, amending Council Regulation (EC) No 1255/97 and repealing Council Regulation (EC) No 1/2005, COM(2023) 770 final, Brussels, 7.12.2023.

agricultural policy in supplying the population. She underlined that the agricultural sector is facing a double challenge: on the one hand, it has to produce food, while at the same time it shall protect nature and biodiversity. The prudent use of natural resources in food production is also necessary. However, soil protection has a qualitative and a quantitative function: on the one hand, to maintain or improve soil quality, to counter soil erosion and to reduce ammonia and nitrate pollution; on the other hand, strives to preserve agricultural land, which is why only a small amount of land shall be taken out of cultivation. Moreover, the number of hectares under organic farming has almost doubled in recent years. In addition, the rapid growth of the world's population requires an increase food production. Furthermore, solutions must also be found for the use of expired foodstuffs. All this shows the need to balance nutritional, economic and environmental interests, as found in particular in the EU's organic regulations as a central element of the Common Agricultural Policy in the 2023 to 2027 funding period. At the same time, it is essential to maintain the level of progress achieved, including the specific legislation applicable in Hungary, e.g. on GMO-free agriculture.

Dr. Erika Csema-Váradi, Associate Professor of the Department of Criminal Law and Criminology of the University of Miskolc, gave an overview of green criminology, introducing the empirical side of criminal activity. It is surprising that the field of environmental crime has played only a subordinate role in European criminology, while in the Anglo-American area the field of green criminology has only developed in the last twenty years, yet it is covered in detail. Nevertheless, according to the speaker, there is no question that empirical knowledge is indispensable if a rational criminal policy is to be pursued. Therefore, an overview was displayed regarding the developments in the field of green criminology over the last two decades and the current challenges were outlined.

It became clear that both political and economic actors and ordinary people come into consideration and that the category of victims is too tight because not only people but also nature is affected by the consequences of environmental offenses. It has finally become clear that attempts to explain the relationship between the humanity and the environment, anthropocentrism, biocentrism and ecocentrism, lead to different answers as to how environmental crime is defined and regulated, depending on the underlying epistemological perspective. It is striking that, despite the reform agenda of Green Criminology, there is little interest in integrating the findings of environmental science, environmental economics and environmental ethics into criminological theory.

3. Panel discussions and results: research perspectives and approaches for solutions to improve environmental and climate protection

The presentations were followed by two panel discussions. In the first one,[6] the topic of 'Criminal climate protection as a challenge from a national perspective' was discussed by scholars from Austria, Germany, Hungary, Liechtenstein and Turkey, while in the second,[7] 'National, European and International Research Perspectives' were considered.

The following highlights selected aspects of the discussions that require further research:

(i) The recognition by the constitutional courts and the European Court of Human Rights in Strasbourg of the subjective, enforceable rights of citizens with regard to climate protection measures also affects criminal law and raises the question of the extent to which the distinction between supra-individual and individual legal interests should be further developed in the field of climate and environmental protection.

(ii) With regard to the climate emergency, cross-border solidarity in the field of environment and climate protection is needed, which requires a new ethical and legal basis.

(iii) The issue of resilience, which is becoming increasingly important in the European Union, should also be integrated into environmental and climate protection considerations.

(iv) As far as climate protection is concerned, the need for criminal defense is much more difficult to communicate than environmental protection through administrative law instruments, so measures to promote acceptance are essential in the field of climate protection. In this respect, criminal law must be structured in a way that administrative law complements it and considers fundamental the principles of sustainability and precaution. In the corporate sector, reckless or negligent behaviour shall be punished alongside intentional conduct. Emphasis shall also be placed on the criminal liability of legal persons, with the threat of fines, confiscation of assets and reparation, the latter generally not in the form

6 | Moderated by Prof. Dr. Dr. h.c. Gerhard Dannecker with the participation of Prof. Dr. Csilla Csák, Prof. Dr. Robert Kert, Dr. Efser Erden Tütüncü (Istanbul Kültür University), Prof. Dr. Anita Paulovics, Prof. Dr. Claudia Seitz, Dr. Erika Csema-Váradi and Dr. Szilvia Vetter.

7 | Moderated by Prof. Dr. Claudia Seitz with the participation of Prof Dr. Wolfgang Brandstetter (Vienna University of Economics and Business), Prof. Dr. Ede János Szilágyi (University of Miskolc, Ferenc Mádl Institute of Comparative Law), Dr. Lajos Szalontai, Prof. Dr. Judit Barta (University of Miskolc, University of Public Service) and Prof. Dr. Judit Jacsó.

of restitution but of the application of the most environmentally friendly solution.

(v) Environmentally destructive practices that take place outside EU Member States (e.g. exploitation of rainforests) shall be criminalised in the Member States, so that natural and legal persons under their jurisdiction that commit offences in non-EU countries can be prosecuted in the European Union. It is not enough to extend national rules on the territorial scope of criminal law, since double criminality, domestic and foreign criminality, is often a precondition for the application of criminal law tools.

(vi) There are significant deficits in the field of green criminology, both in terms of quantitative and qualitative surveys. However, the lack of quantitative data is less significant than is often assumed, because for legal policy measures it may be sufficient if the existence of criminal behaviour can be demonstrated by qualitative studies, such as the expert surveys often carried out by EU institutions, even if the frequency of such behaviours remains latent or the modus operandi and other relevant circumstances of perpetration is often unclear, for example whether and to what extent organised crime is involved.

(vii) From the perspective of legal policy, it has proved particularly important that the protection of the foundations of life cannot be interpreted as a purely national problem, so that environmental law issues arise in the conflict zones between international law, EU law and domestic law.

(viii) The accessory nature of environmental criminal law requires administrative law provisions that eliminate gaps in enforcement. This requires specific rules on unlawfully obtained authorisations, on the registration of acts that circumvent the law, and on the cross-border effects of environmental law authorisations and their limits.

(ix) The issue of the protection of human rights beyond human beings should be pursued further and made fruitful for criminal law.

(x) Considerations regarding introduction of an international criminal law definition of ecocide should be continued and deepened.

(xi) The establishment of a due diligence obligation imposed on companies by the UN and the OECD should be used to promote environmental compliance and resilience.

(xii) The requirements of supply chain responsibility is strongly aligned with French legislation (*Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*), which was favoured by NGOs and therfore needs to be reviewed and complemented from a legal point perspective.

(xiii) Member States of the European Union, such as Poland and Hungary, which tend to follow their own paths in the European Union and rely on their own legal culture, do not question the need for common protection of the

foundations of life, especially in the field of water protection. This makes it easier to achieve a uniform and coordinated european approach than in other policy areas where the speed of 'Europeanisation' may vary. This opportunity shall be used to achieve a common and consistent approach in the field of climate and environment protection.

(xiv) The international dimension of the issue, which is particularly evident in the debates on the establishment of an international ecolcide crime, should be taken into account by making greater use of experience and expertise in the field of international negotiations to implement an international environmental and climate protection policy that goes beyond the European Union.

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