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Interim Protection in the European Union Courts and Lithuanian Administrative Courts

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Interim Protection in the European Union Courts and Lithuanian Administrative Courts

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This paper compares the institution of interim protection in the European Union (EU) law and the administrative procedure law of the Republic of Lithuania with the objective to assess whether the Lithuanian legislation in this area complies with the EU law. The analysis finds that Lithuania's legal framework is largely aligned with the EU law, with a few potential exceptions. Specifically, the Lithuanian law imposes greater restrictions on the types of interim measures available, as it does not permit positive interim measures or those against certain administrative acts related to financial stability and the soundness of banks. Additionally, while there exist further differences between the EU and Lithuanian law on interim protection, these do not necessarily indicate non-compliance but could serve as an inspiration for future legislative or judicial developments.
Keywords: interim protection, interim measures, provisional measures, interim relief, effective judicial protection.

Laikinoji apsauga Europos Sąjungos teismuose ir Lietuvos administraciniuose teismuose

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Šiame straipsnyje lyginamas laikinosios apsaugos institutas Europos Sąjungos (ES) teisėje ir Lietuvos Respublikos administracinio proceso teisėje, siekiama įvertinti, ar Lietuvos teisės aktai šioje srityje atitinka ES teisę. Atlikus analizę nustatyta, kad Lietuvos teisinis reguliavimas iš esmės atitinka ES teisę, išskyrus kelias potencialias išimtis. Konkrečiai, Lietuvos teisėje labiau ribojamos galimų laikinųjų apsaugos priemonių rūšys, nes neleidžiama taikyti pozityvių laikinųjų apsaugos priemonių arba priemonių dėl tam tikrų administracinių aktų, susijusių su bankų finansiniu stabilumu ir patikimumu. Be to, nors tarp ES ir Lietuvos teisės aktų dėl laikinosios apsaugos esama ir daugiau skirtumų, jie nebūtinai rodo neatitiktį, bet gali įkvėpti būsimus teisėkūros ar teisminius pokyčius.
Pagrindiniai žodžiai: laikinoji apsauga, laikinosios apsaugos priemonės, reikalavimo užtikrinimo priemonės, teisė į veiksmingą teisminę gynybą.

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Introduction

This study compares the legal regulation of interim protection applied by EU courts and Lithuanian administrative courts. This will help to verify whether the Lithuanian legal framework is in line with the EU legal framework. From the EU law perspective, this compliance of Lithuanian laws is mandatory in cases where questions of the EU law arise before the national courts, they act as courts of the EU and, consequently, must consider the EU rules of interim protection. This is not only a theoretical issue but can also become of relevance in practice. For example, according to the case law of the EU courts, if national law prevents a national court from granting an interim measure in a case involving the EU law, while the measure should be allowed according to the EU law, the national court would have to refuse to apply the national rule, and instead directly apply the EU law, allowing to grant interim protection for a litigant. In such a case, if the national court does not prioritise the EU law over the national law, the Member State could be in breach of the EU law. Given that the article aims to check the compliance of the Lithuanian law with EU law, it will not discuss every aspect (rule) of interim measures of the relevant legal system and will concentrate on those which have potential for incompliance, especially substantive requirements for granting interim measures and most important procedural aspects.

In addition, this comparative analysis can be a source of inspiration to the national legislator and courts for enhancing the system of interim protection applied in domestic situations. However, this is not the main aim of this article, and therefore, the author will not provide a comprehensive list of 'suggestions' to the Lithuanian legislator and administrative courts on how to improve the institution of interim protection, unless these suggestions are necessary to ensure the compliance with the EU law.

The national legislative framework of the administrative procedure and Lithuanian administrative courts have been chosen for comparison instead of the civil procedure and the civil courts because the administrative courts face the EU law issues more frequently.

Only one academic article and a small section of one dissertation have been dedicated to the relationship between the EU law and interim protection in Lithuanian national courts (Samuilytė-Mamontovė, 2014; Valutytė, 2010, p. 104–108). However, in terms of the thematic area, these pieces overlap with this article only to a small extent. The compatibility of the legal design of interim protection before Lithuanian *administrative* courts with the EU law has never been examined, yet this is the main goal of this article. In contrast, other jurisdictions and the EU legal system in general have received much more attention in this regard (Eliantonio, 2009, p. 223–284; Sinaniotis, 2005; de la Sierra, 2003; Lenaerts *et al*., 2023, p. 166–172; Stehlík, 2012). In addition, in Lithuania, other authors have written more about the institute of interim measures (the so-called 'measures securing the claim') from the domestic perspective (Poška, 2007, p. 102–111) (Raižys, 2008, p. 66–70; Raižys, 2010; Arasimavičius, 2012; Heermann *et al*., 2013; Murauskas, 2015, p. 235–248). However, contrary to this article, these authors did not examine its relationship with the relevant EU rules.

To achieve the objective, the article will discuss requirements for interim protection before national courts when the EU law is involved in the case (1); provide an overview of the legal regulation of interim protection before EU courts and Lithuanian administrative courts (2); compare the substantive requirements for granting interim measures (3); discuss a procedure for interim relief, and other special characteristics (4) in both legal systems; and give conclusions.

The EU courts' and Lithuanian administrative courts' case law were the main sources of the research. Furthermore, the primary references on the EU law were K. Lenaerts, K. Gutman and J. T. Nowak's book *EU Procedural Law* (Lenaerts *et al*., 2023), P. Lasok QC's *Lasok's European Court Practice and Procedure* (Lasok, 2022), the collective book *European Court Procedure* (Luszcz *et al*., 2020),

and Mariolina Eliantonio's book *Europeanisation of Administrative Justice?: The Influence of the ECJ's Case Law in Italy, Germany and England* (Eliantonio, 2009). The main source on the relevant Lithuanian law was *Summary of the Case-Law of the Supreme Administrative Court of Lithuania on the Application of the Provisions of the Law on Administrative Proceedings* (SACL's Legal Analysis and…) authored by the Legal Analysis and Information Department of the Supreme Administrative Court of Lithuania (SACL).

During the research, the main methods used by the author were the classic doctrinal method and the comparative method. The doctrinal method was used to understand and explain the legal norms forming the object of this article (the institution of interim protection). The author employed the comparative method to compare these legal rules in two different legal systems: Lithuania's and the EU's. Other methods were of lesser significance (for example, the empirical method was used to check which legal condition is the most common obstacle for applicants to achieve interim measures in Lithuanian administrative courts).

1. Requirements for Interim Protection before National Courts in EU Law Cases

Specific requirements for interim protection before national courts in cases involving EU law issues are not directly formulated in the EU law but stem from the jurisprudence of EU courts. The legal doctrine distinguishes two possible situations when the EU law becomes relevant in the context of interim protection before national courts. First, national courts can grant interim measures in cases when the national rule allegedly conflicts with the EU law. Second, it is manifested when the EU law is challenged itself (Lenaerts *et al*., 2023, p. 167).

In the *Factortame* case (*The Queen*…), the Court of Justice faced the first situation. Based on the principle of effectiveness of the Community law, the Court explained that if "a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule." In the *Unibet* case (*Unibet*…), the Court has reiterated this principle and added that, in the absence of Community law governing the situation where the compatibility of the national legislation with Community law is contested, "it is for the domestic legal system of each Member State to determine the conditions under which interim relief is to be granted for safeguarding an individual's right under Community law."; "[h]owever, those criteria cannot be less favourable than those applying to similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the interim judicial protection of rights conferred by Community law (principle of effectiveness)."

Zuckerfabrik (*Zuckerfabrik*…) and *Atlanta* (*Atlanta*…) cases concerned the second scenario, i.e., when compliance with higher norms of a particular EU law measure itself is in question. In the *Zuckerfabrik* case, the Court laid down the principle that national courts should be able to order the suspension of enforcement of a national administrative measure based on a Community regulation, the legality of which is contested. After that, the Court has set out uniform conditions under which the national court may suspend a national measure adopted based on the contested Community regulation. According to the Court, national "courts may grant such relief only on the conditions which must be satisfied for the Court of Justice to allow an application to it for interim measures." These conditions are as follows: (1) "serious doubts as to the validity of the Community measure"; (2) the national court must refer the question of the validity of the contested Community measure before the Court of Justice; (3) "there is urgency and threat of serious and irreparable damage to the applicant"; (4) "the national court takes due account of the Community's interests". In the *Atlanta* case, the Court has expanded the scope of

potential interim measures for instances when the validity of the EU act is contested. Notably, the national court is competent not only to suspend the national measure but also to issue *positive orders* that "settle or regulate the disputed legal positions or relationships".

2. Legal Framework for Interim Protection before EU Courts and Lithuanian Administrative Courts

In the EU law, interim protection is governed by several legal instruments. The most important provisions are in the Treaty on the *Functioning of the EU* (Treaty on the Functioning...) (TFEU) Art. 278 establishes the presumption of legality of the EU legislation and the possibility for the court to suspend its validity. Whereas, Art. 279 provides the competence to apply interim measures for the court. Arts. 280 and 299 are also relevant, as they deal with the enforcement of judgments of the EU courts and the possibility of applying interim measures in enforcement proceedings. These provisions are elaborated in Art. 39 of the Statute of the Court of Justice of the EU (the Statute of the Court…) (Statute). The Statute applies to proceedings before both the Court of Justice and the General Court. The Statute has the same legal force as the TFEU, being an annex to the TFEU. The institution of interim measures is further elaborated by subordinate legislation. Namely, it is defined in the Rules of Procedure of the Court of Justice (CJ Rules) (Arts. 160–166) and the Rules of Procedure of the General Court (GC Rules) (Arts. 156–161). Art. 47 of the Charter of Fundamental Rights of the EU (the Charter of Fundamental Rights…) (Charter) is also relevant because it enshrines the right of the individual to an effective remedy, which is the aim of, *inter alia*, the interim measures.

In Lithuania, the analogue of the interim measures in the EU law is regulated by Art. 70 of the *Law on Administrative Proceedings* (the Law on Administrative Proceedings…) (LAP), which are called "measures securing the claim". However, the present article will use a more conventional term, specifically, "interim measures". Art. 30 of the Constitution of the Republic of Lithuania (the Constitution of the Republic…) (Constitution), which provides for the principle of judicial protection, is also relevant. In Lithuania, administrative acts do not have an automatic suspensory effect, unless there is a specific exception in the regulation (Order of the SACL of 17 January 2024).

3. Substantive Requirements

The EU law emphasises three substantive requirements for the application of interim measures: (1) the application must establish a *prima facie* case, *i.e.*, the application in the main proceedings must, at first sight, have a reasonable chance of succeeding (*fumus boni juris*); (2) the application must be urgent; and (3) the applicant's interest in the imposition of interim measures must outweigh the other interests at stake in the proceedings (also referred to as the proportionality test) (Lenaerts *et al.*, 2023, p. 550). The first two requirements are laid down in Art. 160(3) of the CJ Rules and Art. 156(3) of the GC Rules, respectively. The third one stems from case law but is not applicable in all cases (Lasok, 2022, p. 710).

In making an overall assessment of these three essential requirements, the interim relief judge has a wide discretion and is free to decide how and in what order these requirements are to be examined in the light of the specific circumstances of the case, as the EU law does not provide for a prior scheme for the assessment. The three essential requirements are cumulative, and a failure to satisfy any one of them will lead to the rejection of the request. In practice, the determination of the urgency is often decisive, while the other requirements do not need to be examined or are examined only subsidiarily.

Moreover, in certain categories of cases (public procurement, restrictive measures, and confidential information), the condition of harm/urgency is less stringent, as it is too difficult, if not outright impossible, to prove this requirement for systemic reasons. According to the case law of EU courts, there is a certain relationship between all three conditions, such as the impact of the *prima facie* validity of the complaint on the urgency test or the fact that one of the elements of urgency – damage – is also the first comparative element in the balance of the interests test. In any event, in order to satisfy the interim relief request, the applicant must prove all three criteria (Lenaerts *et al.*, 2023, p. 550–552).

In Lithuania, the conditions for the application of interim relief are essentially similar to those applied in EU courts: (1) the party to the proceedings provides a *prima facie* justification of the claim; (2) the failure to take interim measures is likely to cause irreparable damage or damage which is difficult to repair; (3) the proportionality test, in the course of which the court assesses whether the interim measures would not infringe the principles of proportionality and the balance of the interests of the parties to the proceedings, as well as public interest. As in the EU law, the first two conditions are enshrined in the legal framework (Art. 70(1) LAP), while the third condition is derived from case law. However, the third condition is not considered a separate prerequisite to apply interim measures, but it is rather linked to the second criterion – damage (SACL's Order of 27 September 2023).

As in the case law of EU courts, according to the SACL case law, a single established algorithm for assessing these criteria does not exist. They are cumulative, i.e., the interim relief is applied only if all are established (SACL's Order of 21 February 2024). There is no need to analyse the application concerning all three criteria if one, such as the condition of harm (urgency), is not established (SACL's Order of 14 February 2024). Mostly, courts reject applications for interim relief due to the absence of urgency.

In summary, substantive conditions for granting interim measures in the EU and Lithuania largely coincide. Next, the article will discuss each of the substantive requirements and compare them in greater detail below.

***Prima facie* claim (*fumus boni iuris*)**. According to the case law of EU courts, this requirement is satisfied if at least one of the claims raised in the main action is not *prima facie* unfounded. This is the case, *inter alia*, where the claim and the arguments in support of it disclose the existence of complex legal issues, the resolution of which is not immediately apparent and therefore requires an in-depth examination which cannot be carried out by the interim relief judge, and which must be dealt with in the main proceedings, or where the parties' discussion of the issues discloses the existence of a serious legal controversy the resolution of which is not immediately apparent. The doctrine emphasises that, since the interim relief judge is not in a position to resolve the issues in the main proceedings in advance, his/her assessment in this respect is essentially limited to whether the arguments put forward by the applicant in the main proceedings are *prima facie* meritorious or manifestly doomed to failure (Lenaerts *et al*., 2023, p. 553–554).

As mentioned above, the more or less serious nature of the *prima facie* case may be relevant to the assessment of the other two criteria – urgency and balance of interests. For example, the urgency relied on by the applicant must be considered by the court hearing the application for interim relief, all the more so if the *prima facie* claim appears to be particularly serious (Luszcz *et al*., 2020, p. 586).

When the SACL applies the *prima facie* case requirement, this condition is met when the applicant's claim is objectively plausible to succeed. The court could refuse to apply interim measures only in cases where the claim is manifestly unfounded (SACL's Order of 27 March 2024).

Thus, the content of the *prima facie* requirement is similar in the case law of EU courts and the case law of Lithuanian courts – this condition is satisfied if the complaint is not manifestly unfounded. How-

ever, the scope of the analysis of the requirement differs. In Lithuania, the analysis is very limited – the courts in almost all cases generally limit themselves to the standard phrases that "the form and content of the complaint comply with the requirements laid down in the Law on Administrative Procedure" and "the applicant's claim is based on the facts set out in the complaint and is, therefore, to be recognised as provisionally substantiated". By contrast, the rulings of EU courts place much more emphasis on demonstrating that the claim is *prima facie* well-founded, e.g., by the General Court devoting five pages (43 paragraphs) (*Mazepin v. the Commission*...) or five pages (45 paragraphs) (*Commission v. Amazon Services*...) to the *prima facie* case analysis. In addition, the result of this analysis plays a greater role in the overall assessment. For example, in the case of *Mazepin v Commission* (*Mazepin v. Commission*…), where Mr Mazepin challenged restrictive measures taken against him by the Commission, the President of the General Court applied for interim relief in the light of, *inter alia*, the gaps in the Council's evidence, which was a basis to include Mr Mazepin in the list of restrictive measures.

The more in-depth analysis of the *prima facie* case by EU courts can be explained by the fact that the EU judges have much more time to deal with applications for interim relief. A decision by the General Court judge can take, e.g., three months (*Commission v Amazon Services*...). In Lithuania, however, the judge may have only 3–10 working days to examine an application (Art. 70(4) of the LAP). What is more, the author has not been able to find that the degree of *prima facie* validity of the complaint has any influence (at least explicitly) on the Lithuanian courts' assessment of the urgency criterion. As the article will explain below, this reluctance may stem from the fact that the judge deciding the applications for interim relief is the same judge who presides over the main case and wants to avoid showing prejudice during the proceedings on interim measures.

Urgency (*periculum in mora*). According to the EU law doctrine, an application for interim relief is urgent when the failure to comply with the judgment in the main proceedings threatens the person requesting the measures with serious and irreparable harm. Thus, the courts determine the urgency by the nature of the damage (serious and irreparable) likely to be caused by the duration of the main proceedings. This dual criterion of serious and irreparable harm is intended to limit the application of interim relief to cases where, without them, no legal remedy would be available from the judgment in the main proceedings. In case law, the seriousness and irreparability of the alleged damage are often, but not always, assessed separately. Although the harm must be both serious and irreparable, if one of the two criteria is absent, the judge may refrain from examining the other criterion. The burden of proving that the damage is serious and irreparable is on the applicant (Lenaerts *et al*., 2023, p. 554–555).

The damage is irreparable if it is not remedied by a decision in favour of the applicant in the main proceedings. For example, financial damage is not generally considered irreparable, but the threat to the applicant's existence or the danger of incalculable financial damage may be (Lenaerts *et al*., 2023, p. 555–556).

The harm must also be serious, which is an open criterion to assess urgency. For example, serious harm can be a threat to the applicant's existence, or where the individual would not have sufficient resources to meet his/her own and/or his/her family's basic needs in the absence of the application of the interim measures (Lenaerts *et al*., 2023, p. 556–557).

In deciding on the urgency, EU courts also examine the requirement of imminence of damage. For example, courts reject the interim relief request if the contested act has been fully implemented and has caused all the consequences (damage) that can no longer be avoided by the measures. However, where the act has been implemented but is still causing some continuing harm, interim measures are possible. The threat of harm must be real (sufficiently probable), but not necessarily absolutely imminent. However, hypothetical or uncertain harm is not sufficient (Lenaerts *et al*., 2023, p. 558–559).

Turning to Lithuania, according to the SACL case law, the interim protection institute aims to prevent irreparable violation of a person's rights and legitimate interests (SACL's Order of 15 January 2019). Persons requesting interim relief bear the burden of proof for showing the irreparable injury if interim relief is denied (SACL's Order of 5 October 2022). When deciding on the existence of this condition, the court must take into account the nature of the claims sought to be secured, the factual basis of the claims, the rights and obligations conferred by the contested act and the actual realisation thereof, whether the application of the measures would be adequate, in the light of the circumstances established, to the objective pursued, would not infringe the principle of proportionality, the balance of interests of the parties to the proceedings, and the public interest (SACL's Order of 5 April 2017). The grounds must be realistic and not based on assumptions about possible negative consequences in the future, and the assumption that the applicant may suffer certain negative consequences is not in itself a ground for the application of the interim measures, all the more so if the person does not prove that the removal of such negative consequences would be impossible or difficult (SACL's Order of 26 July 2017). The interim relief will not normally be granted if the circumstances giving rise to the application have already occurred. Otherwise, it would be contrary to the purpose of interim measures, since, by its very nature, measures are only applicable where there is a risk that the relevant circumstances will arise in the future (Order of the SACL of 20 December 2023).

When assessing the specific consequences referred to by the applicants, the SACL has clarified that, for example, a person's desire to avoid possible legal disputes in the future is not usually decisive for the application of interim measures (SACL's Order of 5 June 2018); the possible negative impact of a contested act on the applicant's financial situation alone is not normally considered to be an extraordinary circumstance constituting a ground for the application of interim relief (SACL's Order of 29 November 2023). The SACL emphasises that if the court adopts a decision in favour of the applicant in an administrative case, the applicant can recover the financial losses incurred from the State by claiming for damages from the State (SACL's Order of 27 November 2018).

A comparison of the urgency criterion in the case law of EU courts and Lithuanian courts shows that its main principles are the same, and only details differ. For example, the EU legal doctrine provides that, in recent years, EU courts have increasingly considered financial damage as a ground for establishing the condition in certain cases (Lenaerts and Radley, 2016; Lefèvre and Nõmm, 2023), whereas, in Lithuania, such tendencies are not observed. Also, the practice of applying this criterion is more developed (detailed) in EU courts, for the understandable reason that these courts have had significantly more time to develop this practice.

Balance of interests (proportionality test). According to the case law of EU courts, when the applicant seeks to suspend the operation of the contested measure, the judge must first determine, in the light of the balance of interests, whether the applicant's interest in obtaining the measure sought outweighs the interest in the immediate application of the contested measure. In that context, the courts must determine whether the possible annulment of that act by the EU court giving judgment in the main action would make it possible to reverse the situation that would be brought about by its immediate implementation and, conversely, whether the suspension of operation of that act would be such as to prevent its being fully effective in the event of the main application being dismissed. Therefore, even where the judge has found that the action in the main proceedings is not *prima facie* unfounded and that the request is urgent, he/she is still not obliged to order the application of those measures unless the applicant's interest is outweighed by the possible effect of the interim measures on the opposing party, on third parties, on the public interest of the EU, or on the public interest of the EU as a whole (Lenaerts *et al*., 2023, p. 560–561).

In the SACL case law, the test of balance of interests is called the principle of proportionality and is related to the second criterion of serious damage (urgency). More specifically, when deciding on this condition, the court has to take into account whether the application of the interim measures would be adequate to the objective pursued, would not violate the principle of proportionality, the balance of interests of the parties to the proceedings, and the public interest, in the light of the established circumstances (SACL's Order of 5 April 2017). The principle of proportionality requires an assessment of the negative consequences that may actually occur to the applicant if the measures are not applied and the court upholds the applicant's complaint, and of the consequences that may occur to the defendant and the third parties in the case, as well as to the general public, if the measures are applied and the court rejects the applicant's complaint. In such cases, the public interest must also be considered, i.e., the suspension of the contested act in terms of the negative consequences for the public interest must be assessed (SACL's Order of 21 February 2024).

In essence, the EU and Lithuanian courts apply the balance of interests (proportionality) test similarly. The only significant difference is that, in Lithuania, it is not considered as a separate condition of the interim measures and is linked to the second criterion of serious harm (urgency).

In summary, the Lithuanian regulation of substantive conditions for granting interim measures is largely compliant with the EU law. Three main conditions (*fumus boni iuris*, *periculum in mora*, and balance of interests/proportionality) coincide, although their application slightly differs. First, EU courts put more emphasis on *fumus boni iuris* than Lithuanian courts. Second, EU courts recognise interconnections between substantive conditions (for example, between *fumus boni iuris* and *periculum in mora*), while Lithuanian courts are much more reserved in this regard. However, these differences do not present a significant threat of Lithuania's law incompliance with the EU law. It may only be the case, for example, when the applicant's main claim *prima facie* is so strong that EU courts would relax the condition of urgency, while Lithuanian courts would not consider this strength of the application, and, therefore, relax the criterion of urgency. In such cases, it would not be just from the perspective of the principle of equal treatment because the applicant with a strong claim would have similar chances of getting interim measures in comparison with the applicant with a weak (although not manifestly unfounded) claim.

4. Procedure and Other Specific Characteristics

This section shall discuss and compare the most important procedural rules and other special characteristics of interim relief in EU courts and in Lithuanian administrative courts. Due to the limited extent of the article, it will not discuss them all, but rather focus on the main differences, where the greatest risk of incompliance exists.

Types of interim measures. The EU and Lithuanian laws foresee an inexhaustive list of possible measures. Specifically, the EU law foresees a suspension of the contested act (Art. 278 TFEU) and other interim measures (Art. 279 TFEU). Whereas, Lithuanian laws foresee a prohibition of actions, suspension of enforcement, suspension of the contested act, and other interim measures (Art. 70(3) LAP). However, the SACL has limited the scope of possible interim measures by providing in its case law that courts cannot grant positive interim measures (SACL's Order of 3 July 2018). In contrast, the Court of Justice has ruled that the EU law allows national courts to grant such measures (*Atlanta*…). This contradiction means that, when the EU law is at stake in a case in a Lithuanian court, and the court refuses to grant positive interim measures to temporarily safeguard the applicant's right stemming from the EU law, it might be non-compliant with the EU law.

Another issue in Lithuania is that interim measures against certain administrative acts are *a priori* exempted by the legislation. Namely, Art. 71(3) of LAP prohibits the courts from imposing interim measures against acts concerning sanctions and measures to strengthen the financial stability and soundness of banks, if such a possibility is provided for in other laws. The legislator introduced this exemption in 2011, after one failed major bank scandal, to *a priori* prevent courts' interference in similar future cases while a case is still pending in court. This provision was challenged before the Constitutional Court, and the Court found it to be compatible with the Constitution (Constitutional Court's Resolution of 5 July 2013). However, the appropriateness of such a decision is questionable, as it unreasonably legitimises the legislator's mistrust of the judiciary. This issue – the exceptionality of interim measures in cases related to the financial stability of banks – should be resolved not by legislative interventions, especially by such blanket prohibitions, but through case law of ordinary administrative courts. For example, courts can refuse such interim measures through the substantive criterion of balance of interests (proportionality) because, almost always, public interest in rescuing a potentially failing bank will be greater than the potential harm to the applicant if it turns out that the measures taken by the administration were unlawful. Therefore, if, one day, this prohibition prevents national courts from granting interim measures in cases involving the EU law, it is possible that this would conflict with the EU law, which probably does not allow such blanket prohibitions of interim measures, and national courts would have to set aside (ignore) this national rule.

Subjects eligible to apply for interim relief. According to the EU law, only the party challenging the contested act has the right to request its suspension (Art. 160(1) CJ Rules and Art. 156(1) GC Rules). Theoretically, the range of other entities that can request other interim measures is wider. According to the CJ Rules, any party to the proceedings can request them (Art. 160(2) CJ Rules). Under the GC Rules, it is the main parties to the proceedings (i.e., only the applicant and the defendant) (Art. 156(2)). There is no consensus in the doctrine as to whether, under the CJ Rules, interim relief may be requested by an intervener, i.e., a subject that may have a legal interest in the outcome of the proceedings but is not a main party (the applicant or the defendant) (Lasok, 2022, p. 811; Lenaerts *et al*., 2023, p. 542–543; Luszcz *et al*., 2020, p. 576). This question has not yet been addressed by the Court of Justice (Lasok, 2022, p. 811; Lenaerts *et al*., 2023, p. 542–543). In any event, an intervener before EU courts is entitled to join the application for interim relief of the main party, provided that it establishes a sufficient interest in the outcome of the proceedings (Lenaerts *et al*., 2023, p. 542). In practice, almost always, the applicant requests interim measures (Lasok, 2022, p. 811). In Lithuania, on the other hand, the circle of subjects entitled to apply for the measures is wider, and it includes all participants in an administrative case (Art. 70(1) LAP), for example, the applicant, the respondent, the third interested person, the public prosecutor, the public administration entity, etc. (Art. 46(3) LAP).

Defendant. In the EU law, the defendant in the interim relief proceedings is the opponent of the party applying for interim relief in the main case. The judge only has jurisdiction to hear an application for interim relief if the acts at issue in the main proceedings and the interim relief proceedings arise from the same body of the EU, and if this body is a party to the proceedings (Lenaerts *et al*., 2023, p. 543). In Lithuania, in interim relief proceedings, the defendant in the main action also remains the defendant, and the measures can only be applied to the defendant (SACL's Order of 19 September 2019).

Third parties. According to the Court of Justice, the effect of interim measures in certain cases can be directed at a third party (i.e., not necessarily the defendant or the applicant) (Luszcz *et al*., 2020, p. 574–575; Lenaerts *et al*., 2023, p. 544). However, in such a case, the court must comply with the procedural requirements, including the right to be heard by such a third party (*Aer Lingus Group*. ..). In Lithuania, on the contrary, the SACL has consistently taken the position that interim measures can only

be applied to the defendant (SACL's Order of 19 September 2019). Such a practice is questionable and may, in certain cases, prevent the applicant's right to an effective remedy. Furthermore, such practice may be contrary to Art. 70(6) of the LAP, according to which, *inter alia*, when the interim measures to be applied affect non-parties to the proceedings, they may apply to the court for a modification or lifting of the measures taken against them. In this provision, the legislator did not provide that the court should immediately revoke the measures affecting non-parties. Non-parties only have the right to challenge those measures, but they do not have an absolute right to have them annulled.

Deciding judge (court). Under the EU law, the decision on the interim relief application before the General Court is taken by its President (Art. 158(1) GC Rules). Where the President is unable to take that decision, the matter is delegated to a specially designated judge (Arts. 157(4) and 11 to 12 BC Rules). At the Court of Justice, the decision is taken by the Vice-President (Art. 39(2) Statute; Judgment of the Court of Justice of 23 October 2012....). The latter may also refer the matter to a court of more than one judge (Art. 161(1) CJ Rules). Such a referral is usually motivated by the complexity or importance of the case (Lenaerts *et al*., 2023, p. 544–545). The composition of this court is not identical to that of the court hearing the case on the merits, although the composition of the two courts does not need to be made up of completely different judges (see, for example, *Commission v. Poland*...).

In Lithuania, the application for interim measures is decided by the judge hearing the case (Art. 70(1) LAP). Such a regulation is open to criticism, given that, when deciding on the application, the judge assesses the *prima facie* case of the complaint. It is difficult to see how a judge who decides that a complaint is *prima facie* unfounded could be considered impartial in a case. Such a regulation may contribute to the fact that the analysis of the *prima facie* requirement in Lithuanian courts is very formal and limited, as the judge avoids demonstrating any prejudice in the case. The legislator has obliged the judge of the main case to deal with applications for interim relief for efficiency. However, it is questionable that the legislator should prioritise efficiency rather than the judge's impartiality. This potential prejudice is one of the reasons why the EU decided to entrust the decision on the interim measures to a judge who does not sit in the main case (Vesterdorf, 2004, p. 451).

Procedure. The summary procedure is used to decide interim relief applications in EU courts (Art. 39 Statute). As a general rule, the application is served on the opposite party, and the judge sets a short time limit for the party to respond (Art. 160(5) CJ Rules and Art. 157(1) GC Rules). Exceptionally, the judge can apply the measures without hearing the opposing party (*ex parte* order) (Art. 160(7) CJ Rules and Art. 157(2) GC Rules). Depending on the case, an oral hearing is also possible (Art. 160(6) CJ Rules and Art. 157(3) GC Rules) (Lenaerts *et al*., 2023, p. 545–546).

In Lithuania, the interim relief procedure is not regulated in detail. As a general rule, contrary to the EU law, the court decides on the application without hearing the opposing party; the judge may seek its opinion before deciding only as an exception (Art. 70(4) LAP). The Court is not prohibited from organising an oral hearing but, usually, the whole procedure happens in writing.

Right to respond. In the EU law, the opposing party generally must be heard before the judge decides on the application of the interim measures, and only in exceptional cases may a judge decide otherwise. In Lithuania, the general rule is the opposite – the court decides on an application without hearing the opposing party unless it considers it necessary. The EU's regulation is more positive, as the right of a person to be heard before a decision is taken – which might affect it – is one of the fundamental rights of the individual in the EU (Art. 41 Charter) than in Lithuania (Constitutional Court's Resolution of 1 October 1997). Turning a fundamental right into an exception negates the importance of this right and disregards one of the fundamental principles of human rights, namely, that the limitation of such rights should be an exception but not a general rule. Moreover, often the hearing of the opposing party

would help the court to resolve the request for interim measures more efficiently and qualitatively, as the opposing party would present the evidence and arguments relevant to the decision, which would no longer be necessary for the court to think/search for on its own. The balance between the individual's right to an effective remedy in urgent cases would be ensured by retaining the exclusive right of the court to decide on an application for interim relief without hearing the opposing party.

Timing. In both the EU and Lithuania, a subject can request interim relief only when the main complaint has been lodged (Art.160(1)-(2) CJ Rules, Art.156(1)-(2) GC Rules, and Art.70(1) LAP). In principle, in both legal systems, this right remains until the merits of the case have been decided (Lenaerts *et al*., 2023, p. 543; Art. 70(1) LAP).

The EU law does not set a specific time limit for the judge to rule on the application. Accordingly, this decision may be taken days or months after the application has been made (Luszcz *et al*., 2020, p. 577). Whereas, in Lithuania, this time limit is regulated strictly. The time limit for the examination is only 3–10 working days without any exceptions (Art. 70(4) LAP). It is questionable whether such a mandatory regulation without any exceptions in all cases allows the court to assess and resolve the application for interim relief qualitatively. On the other hand, such a difference in time limits between the EU and Lithuanian courts is explained by the difference in court workloads.

Content requirements for the application. The EU law regulates the content of a request for interim measures in detail. The application must be a separate document and comply with the general requirements for procedural documents laid down in other articles of the CJ and GC Rules, respectively (Art. 160(4) CJ Rules and Art. 156(4) GC Rules). The requests must specify the subject matter of the dispute, the circumstances justifying the urgency, and the factual and legal grounds that *prima facie* justify the requested measures (Art. 160(3) CJ Rules and Art. 156(4) GC Rules). Art. 156(4) of the GC Rules further specifies that the application must include all available evidence and offers of evidence to support the application. An application that does not comply with these requirements may not be accepted for the examination on the merits (Lenaerts *et al*., 2023, p. 549). In Lithuania, on the other hand, there are no requirements (at least directly) for the content of an application for interim measures. It should be considered whether they should be introduced to ensure a higher quality of applications and to allow the court to avoid spending time on applications that do not meet the basic requirements by leaving them inadmissible.

Security and other conditions for the application of interim measures. Before EU courts, the application for interim measures may be made subject to certain conditions, including security (Art. 162(2) CJ Rules; Art. 158(2) GC Rules; Lasok, 2022, p. 832–834; Lenaerts *et al*., 2023, p. 537; Luszcz *et al*., 2020, p. 598). The judge may require security in cases where the party from whom security is required is liable for the amount claimed and where there is a risk that that party may become insolvent and therefore unable to pay the amount (*Commission v Germany*...). The willingness of a party to accept a security may also influence the court's decision on the application for interim relief. A bank guarantee may also act as security. EU courts may also attach other conditions to the application. For example, a prohibition on the transfer of assets before a final judgment is given without the consent of the opposing party, a temporary partial payment, and the provision of information to the opposing party to enable it to monitor the developments (Lasok, 2022, p. 832–834).

In Lithuania, laws do not foresee security in cases of interim measures. However, according to the SACL, bank guarantee may be taken into account when deciding on the application (SACL's Order of 23 March 2012). The author has not been able to find any case law of the SACL which makes the application for interim relief subject to additional conditions. The possibility of additional conditions

would be viewed positively in the practice of Lithuanian administrative courts, as it would allow for a more appropriate adaptation of the measures to the individual case.

Appeal. The parties may appeal the General Court's order regarding interim relief as a matter of law (but not as a matter of fact) before the Court of Justice (Art. 57(2) CJ Rules). In cases of *ex parte* orders, the unheard party will normally first apply to the General Court based on Art. 157(2) GC Rules for the order to be modified or revoked (Luszcz *et al*., 2020, p. 601). The orders of the Court of Justice are not subject to appeal (Art. 162 CJ Rules). In Lithuania, orders of a court of first instance are also subject to appeal (Art. 70(7) LAP). The opposing party unheard before the decision on the application for interim measures could also apply for a review by the court of the first instance of the *ex parte*, given that this would better ensure that the party's rights to be heard and to an appeal.

In summary, EU rules on interim protection regarding procedures and other special characteristics seem more flexible than the Lithuanian ones. For example, the EU rules allow interim measures against third parties, impose fewer restrictions on potential measures, and usually dedicate the decision on the application for a judge who does not sit in the main case, and, therefore, who is free from the risk of prejudice, *ex parte* orders are the exception but not the rule, procedural deadlines are more flexible, and courts have more possibilities to allow interim measures under security or subject to other conditions.

Conclusions

1. Generally, the Lithuanian rules on interim protection before administrative courts comply with the EU law. However, a few isolated points might conflict with the EU law. Namely, contrarily to the EU law, first, the SACL case law prevents courts from granting positive interim measures, and, second, the Lithuanian law imposes a blanket prohibition to grant interim measures against acts imposing sanctions or measures to strengthen the financial stability and soundness of banks, if such a possibility is provided for in other laws. Thus, the Lithuanian law limits potential interim measures more than the EU law, restricting the right to effective judicial protection. It is doubtful that such restrictions are justified according to the EU law, especially with the right to an effective remedy (Art. 47 Charter).
2. There are more divergences in the institution of interim protection in the EU law and the Lithuanian law. However, these do not imply incompatibility of the Lithuanian law with the EU law but still may be a source of inspiration for further development of the institution through legislation or case law. Compared to the Lithuanian law, the EU law provides more flexibility in interim protection. It allows interim measures against third parties and imposes fewer restrictions on the types of measures available. The EU law also places greater emphasis on the *fumus boni iuris* criterion and recognizes stronger interconnections between substantive conditions for granting interim measures. Procedurally, the EU law ensures that decisions on interim measures are made by a judge who does not sit in the main case, thereby reducing the risk of prejudice. *Ex parte* orders are the exception rather than the rule, procedural time limits are more flexible, and courts have a more established option to grant interim relief under specific security or other conditions.

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