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THE CONDITIONS OF POSSIBILITY FOR NOMOSTASIS: A CONTRIBUTION TO THE THEORY OF LEGAL SURVIVALS

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All views presented in this paper are entirely personal and do not present the position of any institution.

Abstract: *The purpose of this paper is to provide for a theoretical reflection concerning the continued use of certain legal institutions, concepts, rules or principles outside the socio-economic or political context in which such legal morphemes (known as "legal survivals"), were created. In order to refer to the phenomenon of endurance of legal survivals following a transformation, transition or revolution, the paper will use the term "nomostasis," coined from the Greek words denoting "law" (nomos) and "resistance to change" or "stability" (stasis). The goal of the present paper is to formulate a number of hypotheses concerning the conditions of possibility of nomostasis with view to creating a theoretical scaffolding to be later filled with empirical, sociohistorical case-studies. For this purpose, the paper isolates and groups two types of factors enabling or favouring nomostasis: (1) endogenous ones, i.e., those pertaining to the juristic community as such and (2) exogenous ones, i.e., those pertaining to the environment within which that community functions, most notably the political and ideological climate. By contrast, the present paper does not address the question of intrinsic features of legal morphemes that may or may not favour nomostasis. The main theoretical hypothesis advanced in the paper is that for nomostasis to occur, one can typically expect there to be a need for a favourable combination of endogenous and exogenous factors. The paper is intended to provide elements of a theoretical framework for further empirical sociohistorical research on nomostasis within the broader framework of the historical sociology of law as a specific sub-discipline at the interstices of sociology of law and legal history.*

Key words: *Nomostatis; Legal Survivals; Historical Sociology of Law; Theoretical Sociology of Law; Social Theory*

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1. INTRODUCTION

The purpose of this paper is to provide for a theoretical reflection concerning the continued use of certain legal institutions, concepts, rules or principles outside the socio-economic or political context in which such legal morphemes[1] (known as "legal

[1] The term "morpheme" borrowed from linguistics (cf. Wierzchowski, 1981; Kowalik, 2024, p. 253), is used here—as legal morpheme—to denote any self-contained unit of legal form that can survive, or be transplanted, or revived, such as in particular a legal institution, principle, concept, doctrine or a legal rule (cf. Mańko, 2024b, p. 94 n. 1). In contrast to the concept of a legal formant, developed by Rodolfo Sacco (1991, pp. 343-384), and in contrast to the linguistic concept of a morpheme as the smallest unit of language (Kowalik, 2024, p. 253), a legal morpheme—as understood here—does not necessarily have to be the smallest unit of legal form (e.g., a legal institution is a complex of functionally interconnected legal rules governed by a number of common

survivals"),[2] were created. In order to refer to the phenomenon of endurance of legal survivals following a transformation, transition or a revolution , this paper will use the term *nomostasis*, coined from the Greek words denoting "law" (*nomos*) and "resistance to change" or "stability" (*stasis*).[3] Thus, under conditions of nomostasis, legal morphemes are taken out of their original context (Watson, 2000), and oftentimes, as a result, they come to fulfil new, previously unknown, social functions (Renner, 1976, pp. 293, 252; Mańko, 2016a, pp. 22-30). In fact, nomostasis is apparently a ubiquitous phenomenon in the history of legal development (Watson, 2001, pp. xviii, 5, 8; Mańko 2024b, p. 95). Therefore, it certainly requires further study, both theoretically and methodologically rigorous.

To briefly illustrate the phenomenon, let me turn to the Central European context.[4] Here, nomostasis, that is, the presence of legal survivals, was noted both after the creation of independent Central European states, such as Poland, Czechoslovakia or Yugoslavia, which continued to apply earlier imperial laws, typically until World War II. Following the latter war and the introduction of state socialism (communism) in the region, pre-War legal forms often persisted despite the changed political and economic regime. One can mention here the Polish Code of Obligations,[5] which remained in force until 1964, or the Austrian Civil Code (ABGB) of 1811,[6] which remained in force in the Czech part of Czechoslovakia until 1964. Following the third grand transformation—the fall of communism in 1989—much of the socialist-type legislation remained in place too. Suffice it to mention that Hungary had used its socialist Civil Code of 1959[7] right up to

principles). The emphasis is rather on its self-contained nature, and the possibility of it to become integrated as a building bloc of a legal system. Therefore, it is possible to speak of simple legal morphemes (legal rules, legal principles, legal concepts) and complex legal morphemes (legal institutions, legal doctrines).

[2] The phenomenon of legal survivals was discovered independently within the Common Law tradition by Oliver Wendell Holmes (2009 [1881], 7) and within the Civil Law tradition by Karl Renner (1976 [1929]). The term "survival" has been popularised by Jean Gaudemet (1955) and Hugh Collins (1982). The concept of legal survivals has been developed in more recent literature in theoretical sociology of law (see, e.g., Mańko, 2015a; 2015b; 2016a; 2024b; 2024c; 2025a). See also Eckhardt and Mańko (2025); Mańko and Eckhardt (2025).

[3] More specifically, the proposed term "nomostasis" [νομόστασις] is a neologism formed from the Classic Greek nouns 'νόμος' (nómos), denoting "law," and 'στάσις' (stásis), denoting "stability" and "resistance to change." It is also a conscious reference to the concept of homeostasis used in systems theory to describe how a system maintains its internal coherence despite external disturbances (see, e.g., Billman, 2020, 2), a concept that has been also applied to law (see, e.g., Kozak, 2003). However, it must be emphasised that nomostasis (the endurance of legal institutions despite social change) is only one aspect of law's homeostasis, which is a much broader concept.

[4] On the specificity of the Central European context when it comes to transformations and nomostasis, see, e.g., Giaro (2007; 2011a; 2013; 2024); Mańko (2019a; 2020); Mańko, Cercel and Tacik (2024).

[5] Rozporządzenie Prezydenta Rzeczypospolitej z dnia 27.10.1933 – Kodeks zobowiązań [Decree of the President of the Republic of 27 October 1933 – Code of Obligations] (Dz.U. nr 82, poz. 598). Original text available at: https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19330820598/O/D19330598.pdf (accessed on 16.12.2025).

[6] Allgemeines bürgerliches Gesetzbuch für die gesammten deutschen Erbländer der österreichischen Monarchie [General Civil Code for all German Hereditary Lands of the Austrian Monarchy] (JGS Nr. 946/1811). Original text available at: https://alex.onb.ac.at/cgi-content/alex?aid=jgs&datum=10120003&seite=00000275 (accessed on 16.12.2025)

[7] 1959. évi IV. Törvény a Magyar Népköztársaság Polgári Törvénykönyvéről [Act IV of 1959 on the Civil Code of the Hungarian People's Republic] (MK 1959/82). Original text of 1959 available at: https://iura.uj.edu.pl/Content/4390/SKAN/Civil%20Code_HUN.pdf (accessed on 16.12.2025).

2013,[8] Czechia replaced the socialist Czechoslovak Civil Code[9] only in 2012,[10] and Slovakia is still using that Code, although preparing to replace it with a new one.

On the other hand, even within the same legal system, nomostasis is not an evenly distributed phenomenon. Some legal morphemes endure following societal change to become legal survivals, whilst others disappear, either because of a conscious decision of the legislator (*abrogatio*), or simply fall into disuse and remain legal forms exclusively on paper (*desuetudo*). For instance, in Poland, the rules on socialist rights to land (*perpetual usufruct*) and to apartments (cooperative member's right to an apartment) survived long after the transformation (Mańko, 2015c; 2017b), but rules on contracts between state-owned enterprises[11] or about the special legal capacity of legal persons[12] were removed already in 1990.[13]

The phenomenon of nomostasis certainly requires further study, especially in the guise of granular, empirical[14] case studies of concrete legal institutions and their changing social functions, despite the endurance of their original form.[15] Such studies could be framed as contributions to the *historical sociology of law*—i.e., the analysis of law's historical development with an eye to its social conditions (Bucholc, 2022). Especially in the context of Central and Eastern Europe, the study of the exact role of law in the post-socialist transformation is one of the emerging topics of sociohistorical research (Bucholc, 2022, pp. 670-671; cf. Mańko, 2017d). Due to neoinstitutional conceptual framings, transformation studies have hitherto displayed a tendency to neglect the self-standing importance of law as a factor in the transition from socialism to capitalism (Bucholc, 2022, p. 671). The study of nomostasis can contribute to strengthening what Marta Bucholc (2022, p. 671) describes as the "cultural turn" in historical sociology and thereby turn focus to a more granular analysis of legal-cultural aspects of socio-economic and political transformations. At the same time, besides the

[8] 2013. évi V. törvény a Polgári Törvénykönyvről [Act V of 2013 on the Civil Code]. Available at: https://njt.hu/jogszabaly/2013-5-00-00 (accessed on 16.12.2025). English translation available at: https://jogkodex.hu/doc/8089567 (accessed on 16.12.2025).

[9] Zákon č. 40/1964 Zb., Občiansky zákonník [Act no. 40/1964, Civil Code]. Original text available at: https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/1964/40/?ucinnost=01.04.1964 (accessed on 16.12.2025).

[10] Zákon č. 89/2012 Sb., občanský zákoník [Act no. 89/2012, Civil Code]. English translation available at: http://obcanskyzakonik.justice.cz/images/pdf/Civil-Code.pdf (accessed on 16.12.2025).

[11] Articles 397-494 of the Polish Civil Code of 1964, within Book III ('Obligations'), Title IV ('Duty of Concluding Contracts Between Units of the Socialised Economy'). See ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny [Act of 23 April 1964 – Civil Code] (Dz.U. nr 16, poz. 93). Original text available at: https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19640160093/O/D19640093.pdf (accessed on 16.12.2025).

[12] Article 36 of the Polish Civil Code of 1964 (original wording): "*The legal capacity of a legal person shall not include the rights and duties excluded by statutory law or by-laws based on it. Neither shall it include the rights and duties that are not linked with the scope of tasks of a legal person; this shall not, however, impact the validity of a juridical transactions, unless the other party knew that the transaction was concerned with such rights or duties.*"

[13] Ustawa z dnia 28 lipca 1990 o zmianie ustawy – Kodeks cywilny [Act of 28 July 1990 amending the Act – Civil Code] (Dz.U. nr 55, poz. 321), known as the "July Novella." Full text available at: https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19900550321/O/D19900321.pdf (accessed on 16.12.2025).

[14] Nomostasis lends itself primarily towards qualitative analysis. Thus, the empirical material could include, in particular, court archives (to analyse case-law of ordinary courts, not just published case-law of supreme courts), and—for more recent developments—interviews with practitioners, legislators and judges. Moreover, discourse analysis could penetrate the continued usage of certain phrases coined in older case-law and doctrinal writings as a manifestation of nomostasis in its own right.

[15] Some initial research has been done already, see, e.g., Mańko (2016c; 2017b); Kuźmicka-Sulikowska (2019); Stetsyk (2019); Ernst, Sadowski and Sadowski (2024); Preshova and Markovikj (2024); Somby (2025).

empirical studies postulated above, the *theory* of nomostasis also needs to be developed,[16] understood as a contribution to the theoretical sociology of law, and thereby as the basis for the conceptualisation of case studies analysed within historical sociology of law.

Against this background, the present study is intended to move precisely in the latter direction by offering a theoretical analysis of the *conditions of possibility of nomostasis*, understood as the necessary prerequisites (premises) enabling the phenomenon of nomostasis to take place. After all, there is always the possibility of changing the law each time the social context changes and abrogating the old law altogether. Nomostasis is not, therefore, a necessary phenomenon but—in the light of its empirically proven presence—it is certainly a *possible* one, and, as mentioned above, a rather common one, at least in some areas of the law and in some jurisdictions. The theoretical approach of the present contribution means that, although aiming to provide conceptual tools of particular relevance to the sociohistorical study of Central and Eastern European legal cultures, it will nonetheless operate on a sufficiently high level of abstraction, making its findings potentially relevant also outside the region. Situations where, following a profound socio-economic or political transformation, the old law persists, are not only a specific feature of Central and Eastern Europe, but are also highly relevant in the post-colonial legal context (Bucholc, 2022, p. 672; Somby 2025; cf. Xavier et al., 2021). This is because "*the relics of the past continue to remain within the law and the legal architecture created since the legal process of decolonization*" (Xavier and Hewitt 2021, p. 1). Old legal forms, brought with the colonial settlers, still rule modern day Global South countries from the grave of colonisation.[17] Vestiges of Roman-Dutch law in South Africa (Kleyn and Van Niekerk, 2014; Mańko, 2003; Mańko, 2004), Dutch law in Indonesia (Gautama and Hornick, 1972), French law in Francophone Africa (Gasparini, 2022), or English law in Anglophone Africa (Iheme, 2025) require a proper theoretical framework for their in-depth sociohistorical investigation. How is this possible, and how can law be that flexible to be used in such disparate contexts—the metropolis, the colony, and then the independent post-colonial state? This is one of the pressing questions that research on nomostasis seeks to answer.

In this vein, the goal of the present study is to formulate a number of hypotheses concerning the conditions of possibility of nomostasis with a view to creating a theoretical scaffolding to be later filled with empirical, sociohistorical case studies. For this purpose, the paper isolates and groups three types of factors enabling or favouring nomostasis: (i) *endogenous* ones, i.e., those pertaining to the juristic community as such (examined in section 2); and (ii) *exogenous* ones, i.e., those pertaining to the environment within which that community functions, most notably the political and ideological climate (examined in section 3). By contrast, the present paper does not address the question of intrinsic features of legal morphemes that may or may not favour nomostasis.[18]

The main theoretical hypothesis advanced in the paper is that for nomostasis to occur, one can typically expect there to be a need for a favourable combination of

[16] See, e.g., the semiotic theory of legal survivals proposed recently by Ánde Somby (2025).

[17] Moreover, as Sámi legal philosopher Ánde Somby has convincingly shown, post-colonial legal survivals are also of great practical relevance in non-Global South post-colonial jurisdictions, such as Australia, Canada or Norway, where they directly affect the property rights of Indigenous people – the victims of Western European colonialism and imperialism (Somby 2025).

[18] For instance, it has been claimed that legal concepts are particularly prone to survival, more than entire legal institutions or norms (Giaro, 2008, p. 77). Karl Renner (1976 [1929]), in turn, analysed the survival of legal institutions drawing attention to the change of their social function. However, these issues remain outside the scope of the present enquiry.

endogenous and exogenous factors. It further puts forward a more detailed hypothesis that endogenous factors are, in fact, decisive (*sine qua non*), whereas exogenous factors must at least not block nomostasis. Nonetheless, the ultimate *locus* of nomostasis is in the collective consciousness and the imaginary of the juristic community, and its capacity to think creatively about old legal morphemes. This kind of reflective approach, which allows to adapt the social functions of legal institutions whilst maintaining their normative continuity does not, of course, exclude an entirely unreflective approach, in which the juristic community upholds old law despite its dysfunctionality under changed conditions. Although the focus of this paper is on the first scenario (reflective nomostasis), some of its findings may be also relevant for the second one (unreflective nomostasis).

Given the status of the claims put forward in this paper as *generalised research hypotheses*, they are intended to be verified or falsified in future sociohistorical legal research, based on the detailed analysis of specific case studies of legal survivals. The broad historical examples cited in the paper are indicated purely illustratively and are intended to give some initial foundations to the hypotheses put forward in the paper. However, such a preliminary overview cannot replace proper research on case studies which will be capable of verifying or falsifying the claims made in this paper. Moreover, different contexts (e.g., post-socialist Central and Eastern Europe vs. post-colonial Global South) may give rise to different findings that will enrich the theory and make it more sophisticated.

2. ENDOGENOUS CONDITIONS OF NOMOSTASIS

2.1 Epistemological Conditions – Morphonomism as Approach to Law

If law is to persist as form, but to change its content (social function) at the same time, it must be conceived of and perceived (by lawyers at least) *as form*. The concept or term of "form" does not have to be necessarily used, but there must be a consensus within the juristic community that law *is not identical to its content* (its social function, or effects) but that its essence is constituted by a certain formal framework that can be filled with various (and varying) content, as the need may be.[19]

In order for this to be possible, lawyers need to operate—at least unconsciously—within the hylomorphic distinction of form vs. content (or its variations: form vs. matter, form vs. substance) and apply that distinction to the juridical phenomenon to the effect that law is considered as form (cf. Mańko, 2017a). I propose to refer to this "law-as-form approach" (Mańko, 2025a, pp. 70-72) with the shorthand reference of "morphonomism."[20] It must be emphasised that morphonomism, as a *practical* understanding of the nature of law by lawyers is much older than any *scientific theory* of legal form.[21] By contrast, the *scientific theory of legal form*—which could be referred to as "morphonomics"[22]—appeared

[19] This is not relevant for unreflective nomostasis, where old legal morphemes persist without being adapted in any way despite their dysfunctionality.

[20] Derived from the Greek 'μορφονομισμός' [morphonomismós], coined from μορφή [morphḗ] – "form" and νόμος [nómos] – "law," with the suffix -ισμός [-ismós] used to denote a system or doctrine.

[21] Thus, to put it in Thomas C. Grey's (2003, p. 478) terms, morphonomism belongs to the sphere of "working legal thought," whereas morphonomics—to the sphere of "jurisprudential legal theory".

[22] Derived from the Greek 'μορφονομική' [morphonomikḗ], coined from the same two nouns as nomomorphism, but with the suffix -ική [-ikḗ] used for naming disciplines of knowledge (e.g., economics, physics, etc.).

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only in the 20th century in the writings of Evgeny Pashukanis (Pashukanis, 2002[1924]),[23] and is only gradually being further developed today (see, e.g., Cercel, Fusco and Tacik, 2025a; 2025b; Mańko, 2024e; Wilén, 2025). To sum up: morphonomics (the science of legal form) is one thing, and morphonomism (the approach to law as being a form), is another—just like the existence of any given phenomenon needs to be distinguished from its conceptualisation by legal science (Mańko 2024b, p. 95). We must remember that a given juristic community may well be morphonomist (i.e., intuitively treating law as form) without having any clue about morphonomics (scil. the theory of legal form).

As Aldo Schiavone (2012, pp. 202-203) has pointed out, morphonomism as an approach to juridicity can be traced back to Roman law, where legal form emerged from the sphere of the sacred and magical (Schiavone, 2012, p. 75). In the words of Friedrich Karl von Savigny, the forms of law (i.e., legal morphemes) were treated by the Roman jurists as "actual beings" (Savigny, 1831, p. 45), as "*real entities endowed with life of their own and an inescapable objectivity, which legal knowledge limited itself to mirroring*" (Schiavone, 2012, p. 202). The ontological consequences of this approach, which persists until today, have been well captured by Artur Kozak who observed that the lawyers "represent the social existence of law through the construction of a specific institutional world, the structure of objects whose reality is obvious and available only to subjects shaped in a specific regime of legal education" (Kozak 2002, p. 140).

If we agree with Thanos Zartaloudis (2018, p. xxxviii) that the birth of law occurred at the precise moment when the legal form became distinguishable from the life it seeks to express and regulate, we can point out that this distinction between abstract legal form on one hand, and the real-life circumstances to which that legal form is then applied, constitutes the foundation of nomomorphism and, as a result, a necessary condition of nomostasis.

2.2 Nomogenetic Autonomy and Interpretive Authority

In order to develop old (existing) legal morphemes through their creative reinterpretation, the juristic community must enjoy sufficient nomogenetic (law-making) autonomy. In other words, lawyers (especially judges) must feel empowered to make and change law through interpretation, i.e., perform acts of nomogenesis, doing so on their own authority. Nomogenetic autonomy has two sides: an internal (endogenous one), focusing on the juristic community's self-perception, and an external (exogenous one), pertaining to the political legitimacy of juristic law-making. That external aspect will be discussed below in section 3.

Within legal cultures based on jurisprudential law, as was the case with Classical Roman law, or based on judge-made case law, as is the case with contemporary Common Law, this condition is most visibly fulfilled. For instance, Roman jurists, creatively elaborating the old legal morpheme of *mancipatio* to produce out of it such new legal institutions as *emancipatio* (the liberation of the child from the father's authority) or *testamentum per aes et libram* (a type of testament) (Watson, 1995, pp. 188-191) enjoyed sufficient autonomy to make the law. Formally, they were only reinterpreting old legal morphemes and putting them to new uses. Substantially, however, they were indeed *making* the law, i.e., engaging in a nomogenetic activity. However, examples of entirely new legal norms being created (i.e., acts of proper nomoneogenesis) were reserved—besides the obvious case of legislation—to the Praetor, who could establish

[23] Evgeny Pashukanis is commonly considered the father of the theory of legal form (see, e.g., Bowring, 2025; Lukina, 2025).

new actions in his Edict, thereby acting *iuris civilis adiuvandi, supplendi, corrigendi gratia*[24] (with the goal of supporting, supplementing and correcting the civil law). In this context, the disputed border between faithful vs. creative interpretation becomes particularly important. In fact, certain theories of interpretation, such as hermeneutic universalism, claim that any text needs to be interpreted, and that the line dividing creative and reproductive interpretation cannot be drawn (see, e.g., Łakomy, 2019a; 2019b; 2020). However, if we think about the passage from simple *mancipatio* as a direct act of sale, to *emancipatio* as the act of terminating paternal authority (*patria potestas*), there can be no doubt that the interpretation of the old legal morpheme was highly creative. These kinds of reinterpretations have been referred to as instances of what Watson describes as a "pragmatic use" (Watson, 1995, p. 190), Johnston as a "juristic invention" (Johnston, 1999, p. 32), and Lewis as a "jurists' scheme" (Lewis, 2015, p. 159).

Clearly, the autonomy of the juristic community must also encompass sufficient interpretive authority, i.e., the capacity of jurists to engage in interpretive activity which leads to the generation of normative novelty (innovativeness). Thus, in terms of Luhmann's and Teubner's systems theory, the legal system must achieve the level of *autopoiesis*, and be capable of being reproduced within a hyperloop, for this to be possible. In other words, the legal system must have at its disposal the necessary means to reproduce and modify itself, and in this way to react to external changes on its own terms, thus modulating the effects of challenges emanating from its changing environment. Being capable to do so, the legal system may then opt for nomostasis, rather than for outright change of legal form, as the method for coping with external pressures due to socio-economic, political, ideological or cultural changes. From the legal system's internal perspective, the choice between nomostasis and statutory reform is, in fact, a question of *alternative means to the same goal*: whether to modify the law at the level of application or, if necessary, judicial interpretation (nomostasis) or whether to modify the legal provisions (statutory reform). In systems theory terms, in both cases the adaptation will be autopoietic—either the new rules are enacted in line with legislative procedures (statutory reform), or the case-law will take into account the changes without a modification of the statutory rules (nomostasis). The difference is a question of level (depth) of the normative system that is to be affected by the change in law's environment.

Whereas in Classical Roman Law or in contemporary Common Law the juristic interpretive authority is recognised, in the Civil Law tradition, especially in its Central European version, which is often described as being ultra-formalist and hyperpositivist,[25] the necessary scope of authority may be problematic. However, this does not block the jurists from continuing to apply existing legal morphemes, as long as their necessary adaptation occurs through the input of facticity—as is, most notably, the case with general clauses.

[24] Dig. 1, 1, 7, 1.

[25] The degree to which Central European legal cultures are excessively formalist is an object of debate. Much depends on the *tertium comparationis*, whether it is the pragmatist American version of the Common Law, or the more rigid version of English Common Law, or is it one or another Western version of the Civil Law, e.g., the more pragmatic Dutch one, or the more formalist French one, and so forth. For a classic account, see Kühn (2011). For national perspectives, see Uzelac (2010) on Croatia, Łętowska (1997), Matczak (2007) and Kusik (2025a; 2025, pp. 262-264) on Poland. For a cultural studies approach, drawing on Lacanian psychoanalysis, see Mańko (2013), and for a sceptical approach to the entire narrative about CEE exceptional formalism, see above all Cserne (2020; 2024).

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2.3 Axiological Conditions – Legal Tradition as an Intrinsic Value

For the juristic community to desire preserving old legal morphemes and filling them with new content as society changes, it is also necessary that it actually values (or at least tolerates) legal tradition as such, as opposed to sheer innovation. Here, we speak of an axiological condition—pertaining to the values of the juristic community. It can also be described in terms of juristic ideology, i.e., the professional guild ideology of lawyers (Mańko, 2025b, pp. 66-75). Why such an ideology or axiology is adopted is an entirely distinct question. It may well be part of a strategy for strengthening the juristic community's legitimacy in society, or it may be a consequence of a generally traditionalist mindset prevalent in a given time and space. Whatever its root cause, the juristic community's preference for an incremental or even organic development of the legal system through its gradual, at times creative, reinterpretation, appears to be a necessary condition of nomostasis.

From the point of view of law's consistency over time, statutory reform vs. nomostasis is a choice with high stakes. In fact, the longevity of the old *Ius Commune*, last modernised by the Pandectists in the 19th century, and of the Common Law, still applied in the Anglo-American legal world, is based on the preservation of old legal forms and the progressive change of their content. Under the *Ius Commune*, this continuity was textual: the text of the *Corpus Iuris Civilis* remained as a sign of unity and tradition. Under the Common Law, this continuity is also textual (with reference to the text of precedents),[26] but is based on the concept of working in a "chain"[27] of interpretation: every new judicial decision adds to earlier decisions, it is conditioned by them, but also conditions *ex post* their interpretation.

3. EXOGENOUS CONDITIONS OF NOMOSTASIS

3.1 Political Legitimacy to Reinterpret the Law

Besides autonomy, i.e., the capacity to create and modify the law, the juristic community must also enjoy sufficient political legitimacy for its nomostatic interventions to enjoy authority. This is because law-making authority, at least in its statutory form (legislation) is typically reserved, by the legal system itself, to the political authorities (today, typically, the parliament). This is considered the core of a system based on the division of powers, even if material law-making is an inevitable element of adjudication.

Once again, in a system based on jurisprudential law (as Rome was) or on judge-made law (as Common Law countries are) this element is fully recognised. In today's United Kingdom or United States, although Parliament or Congress are considered to be the legislative power, the legitimacy of judicial law-making is not questioned. More specifically, judges are entitled to reinterpret old legal morphemes and give them new meaning. This happens on a daily basis and constitutes the fundamental mechanism of legal development. Legislative intervention in the form of acts of Parliament or Congress is present, but the day-to-day management of legal adaptation is left in the hands of judges.

On the Continent, the Civil Law tradition has embraced, especially from the times of the French Revolution, a different understanding of the division of tasks between lawyers and legislators. It has been traditionally understood that only legislators make the law, whereas judges interpret it and apply it. However, despite this limitation (when

[26] On the doctrine of precedent in English law see, e.g., Samuel (2013, pp. 79-88).
[27] On the metaphor of the "chain" see Fish (1982).

compared to Classical Roman Law or Common Law), the concept of "dynamic interpretation" (Konca, 2025) has provided a helpful tool allowing for the proliferation of nomostasis. Moreover, the analytical distinction between interpretation and application (as two different actions undertaken by judges), coupled with the law vs. fact distinction,[28] also allows for greater flexibility. The change of social function of a legal institution can be conceived of as being a consequence of applying the same legal rules to different facts.[29] Thus, for instance, the concept of principles of social coexistence (the main general clause in the Polish Civil Code) can be considered as remaining the same as regards legal form, but assumes new content due to the changed circumstances to which it is applied (cf. Leszczyński, 2021, pp. 192-195). In this perspective, judges are not perceived as changing the law, but rather as applying the same law in new circumstances. It is the context, under this optic, which changes the legal outcome, without any change in the law, along the formula *societas mutatur, ius manet* (society changes, but the law remains the same). This relieves judges from the politically unacceptable burden of law-making and presents changed outputs of the legal process as an obvious consequence of changed inputs, rather than the effect of (arbitrary) judicial decision-making. It also allows to escape the question of legitimacy of judicial law-making.

If the judges working with legal survivals lack the courage or capacity to reinterpret them to suit new conditions, nomostasis can lead to a dysfunctionality of the legal system. For instance, as Iheme argues, African judges in former British colonies, due to an "*intellectual overdependence on English law*" are displaying "*the frequent inability (…) to effectively interpret or adapt English-originated contract concepts to suit local (African) experience*" (Iheme, 2025, p. 67).

3.2 Role of Politico-Ideological Climate and Culture

Besides enjoying sufficient autonomy (comprising autopoiesis), authority and political legitimacy, the juristic community—in order to favour nomostasis—must also operate in a political and ideological environment that will at least tolerate, and ideally promote, the continuity of legal form despite deep societal change. This does not always need to be the case. In what follows, I will consider both examples in which nomostasis was favoured by the political and ideological climate (3.2.1), those, where it was not (3.2.2), as well as ambiguous situations (3.2.3).

3.2.1 Nomostasis Favoured by Politico-Ideological Climate

Characteristic examples of a politico-ideological climate favourable to nomostasis include: classical Roman law; early modern *Ius Commune*; and the Common Law. Within Roman law, it was typical to show veneration to the legal traditions, especially the Law of Twelve Tables. Legal innovation was always cloaked in old forms, which were

[28] As Tomasz Giaro points out, the law vs. fact distinction became engrained in the Civil Law tradition due to the division of the civil procedure into a law-focused phase *in iure* (before the Praetor) and the fact-focused phase *apud iudicem* (before the private judge) (Giaro, 2008, p. 70; 2011b, pp. 217-218).

[29] In Renner's terms, one would speak of a different "substratum" of the legal norm leading to different outcomes in terms of its social function: "*…in spite of the norm, the substratum changes, yet this change of the substratum takes place within the forms of the law; the legal institutions automatically change their functions which turn into their very opposite, yet this change is scarcely noticed and is not understood. (…) [T]he economic substratum dictates the functions of the norm, (…) it reverses them; but the norm itself remains indestructible*" (Renner, 1976 [1929], pp. 293, 299).

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ostensibly developed in an incremental manner. The authority for legal change was usually to be found in some cues taken from existing law, rather than forged anew. The Romans did not have a taste for formal novelty, did not use legislation much (at least in private law), and their attachment to tradition also meant that old legislation (*leges*) was not formally repealed, rather continued to be formally in force, even if superseded by new *leges*.

Medieval *Ius Commune* emerged on the basis of the revival of Roman law, as enshrined within the *Corpus Iuris Civilis* comprising of four books: the Institutions, the Digest, the Code, and the Novellae.[30] Medieval and early modern jurists developed the *substance* of the law by creatively interpreting the *form* of Roman law, as found in the *Corpus*. A similar task was undertaken, in parallel, by Canonists, who subjected the *Corpus Iuris Canonici*, comprising church laws, to the same interpretive operations. Thanks to a dialectical model of interpretation, inspired by Greek philosophy, the content of interpreted norms could be innovative and could correspond to the needs of time. However, the form was bound within the venerated, ancient texts, which provided the entire enterprise with both intellectual and politico-juridical authority.

The Common Law system emerged in England, and until today it is split (in England) into two normative sub-systems: Common Law *sensu stricto* and Equity. Common Law *sensu stricto* was developed by the royal courts (King's Bench and Court of Common Pleas) ostensibly as a unification of customary law. Equity was developed by the Chancellor, and later by the court of Chancery, ostensibly as the application of the rules of conscience to legal cases, and thereby to mitigate the harshness of the formalist and rigid Common Law. The distinction between Law and Equity is still present in the internal organisation of the legal system, even if, in the US and increasingly in England, the distinction between courts applying the two sub-systems has become blurred or even outright abolished.

The method adopted by the Common Lawyers in the development of law can be rightly described as casuistry, and as such it owes much to the method developed by Canon lawyers and moral theologians (Douzinas and Gearey, 2005, p. 170). The casuistic method is based on proceeding *a casu ad casum* and treating the law as a thread of cases. More recently, American philosopher of law Stanley Fish (1982) called this "working on the chain gang". Rules are not formulated abstractly, but arise in cases, and become binding for the future as precedent (principle of *stare decisis*, i.e., "standing by [past] decisions"). The very structure of *stare decisis*, which is applicable both at Law and in Equity, is decidedly favourable towards nomostasis, because any legal innovation must stem from existing case-law, and may be induced principally by distinguishing and creatively filling the gaps within the intellectual structures laid down by existing case-law. A judge does not "make the law" outright, but is considered as working within an existing framework of case law, which at the same time constrains him (principle of *stare decisis*) but at the same time empowers him to make minute, incremental modifications (thanks to the possibility of distinguishing, which is a logical consequence of the strong systemic link between the legal aspects of a case—its "holding"—and the facts against the background of which the holding was made) (cf. Kennedy, 1986). Certainly, a precedent-based legal system, in which judges are expected to frame their argument within existing case-law, is strongly favourable towards nomostasis.

In this context it comes as no surprise that in modern English law the legal form feudal system of land ownership has been retained (Rahmatian, 2022). Even though feudal property became transformed into capitalist property along the same lines, both

[30] For a comprehensive discussion, see, e.g., Berman (1983).

in England, on the one hand, and in France and Germany, on the other hand, the latter two Continental legal systems returned to the Roman legal form of unitary property (*Eigentumsrecht*, *droit de propriété*), whereas the English legal system has retained the feudal forms: the *dominium emergens* remains with the King as sole proprietor of land in England, whereas other people can only enjoy *dominium utile*—known as "fee simple absolute in possession" (Rahmatian, 2022, p. 287). Moreover, in some cases there are still intermediary owners (the "mesne lords") (Rahmatian, 2022, pp. 285-286), although most landowners today hold their estates directly of the Crown, not of mesne lords. The fact that England has retained the legal forms of feudal land law, whereas France and the German states have abolished it in the 19th century, Scotland in the 2004[31] (Rahmatian, 2022, p. 295) and Ireland in 2009,[32] is surely an example of the role of the politico-ideological climate. Given that feudalism is a fusion of private and public law,[33] King Charles' title to ruling the country still remains directly based on Norman the Conqueror's conquest and his *debellatio* of England in 1066. As Andreas Rahmatian points out: "*The English feudal property system is in fact still a constitutional pillar for the whole of Great Britain, which is why it will probably continue to exist for some time as an example of living legal history, even though the actual core of feudal law has almost disappeared*" (Rahmatian, 2022, p. 301).

The case study of English legal survivals is certainly an extreme example, perhaps even the most extreme one among modern legal cultures. However, it certainly allows—precisely through its liminal character—to develop the necessary conceptual tools for studying the phenomenon of nomostasis also in less extreme cases, such as Central and Eastern Europe or the Global South.

3.2.2 Nomostasis Despite Unfavourable Politico-Ideological Climate

As regards the phenomenon of nomostasis occurring despite an unfavourable politico-ideological climate, let us consider three examples. Firstly, the example of post-revolutionary law in France (after 1789) and Russia (after 1917). In both instances, the general political climate was against continuity of legal form, and in favour of a revolutionary breakthrough. Indeed, many legal institutions were destroyed, never to be introduced again. For instance, France abolished feudalism, including serfdom, and introduced secular marriage, formal equality of all citizens, as well as formal freedom of contract; Russia abolished the private ownership of land (Bílková, 2017, pp. 147-148),[34] inheritance (Gsovski, 1947, pp. 295-297)[35] and religious marriage (secular marriage exists until today). Thus, important and politically significant legal institutions were subject to change—the legal system gave in to political pressure. However, despite that, large tracts of the lawscape remained the same, even if they had to be externally presented as being new. Thus, the *Code civil*, whilst encompassing the aforementioned revolutionary

[31] Abolition of Feudal Tenure (Scotland) Act 2000 (in force since 2004). Available at: https://www.legislation.gov.uk/asp/2000/5/contents (accessed on 16.12.2025).
[32] Land And Conveyancing Law Reform Act 2009, section 9(2): "In so far as it survives, feudal tenure is abolished." Available at: https://www.irishstatutebook.ie/eli/2009/act/27/enacted/en/html (accessed on 16.12.2025).
[33] Which of the two prevails has been an object of long-standing debate: whether title to political power stems from ownership of land, or ownership of land—from political power. In conceptual legal terms it seems, however, to be a "hen or egg" debate: Charles' title to rule England stems from his right of property just as his right of property stems from his status as king. Cf. Rahmatian (2022, pp. 297-300).
[34] Obviously, after the fall of state socialism, the institution of private property was fully revived in Russia (Sukhanov, 2001).
[35] However, inheritance was reintroduced already in 1923 (Gsovski, 1947, p. 298).

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novelties, nonetheless in all other aspects presented a compromise between the pre-revolutionary Romanic laws of southern France (the *pays du droit écrit*, influenced directly by Roman law) and the Germanic laws of northern France (the *pays du droit coutoumier*, in principle Germanic, but indirectly influenced by Roman law) (Sójka-Zielińska, 2009, p. 199). As for Russia, the Civil Code of 1922, which was officially presented as being new, was in fact nothing else than a digest of the pre-revolutionary draft of Digest of Civil Law, completed in 1914, but never enacted (Kuznetsov, 2022). Most notably, despite ideological visions of "withering away" of the law, the legal system in the Soviet Union was never dismantled, and instead of disappearing altogether, a socialist legal system was constructed (cf. Borisova, 2012; 2017; Cercel, 2018, pp. 97-120; Lukina, 2022).

Thirdly, the survival of colonial law in the Global South is another typical example of nomostasis under an unfavourable politico-ideological climate. Despite being the law of the oppressor, the colonial power, the legal system brought by the Dutch, French, or English colonisers has generally been retained and subject to reforms, rather than abolished outright. As Iheme points out, within former British colonies in Africa "*many [members of the] African intelligentsia recognised the sociological abnormality of legal transplants from England, viewing them as aberrations and remnants of colonial oppression rather than tools of justice*" (Iheme, 2025, p. 69). Despite that, the Common Law—despite the "*mismatch between English legal principles and local African customs, values and social structures*" (Iheme, 2025, p. 70)—remains in force and applicable.[36] Such a situation can certainly be described as a dysfunctionality of legal culture, because *"English legal concepts are rooted in English social norms, mindsets and traditional practices, and for that reason are inherently unable to resonate with African societies"* (Iheme, 2025, p. 70).

These examples show that, despite an official climate in favour of legal discontinuity, nomostasis proved to be stronger, although (in the French and Soviet cases) legal tradition had to be hidden behind a façade of innovativeness. Therefore, it can be concluded that an appropriate political and ideological climate can certainly favour nomostasis, but it is not a *condicio sine qua non* of the continuity of legal forms despite a deep societal transformation. Other factors, such as notably the lack of a ready-made new legal system to replace the old, are of equal importance.

3.2.3 Nomostasis under an Ambiguous Politico-Ideological Climate

Finally, in some situations one can speak of an ambiguous climate for nomostasis. This seems to be a characteristic feature of the Central European legal experience, where nomostasis occurred not because it was favoured by the political elites, but also not despite a strong hostility of those elites. Rather, they took an ambiguous stance of tolerating nomostasis for the time being, whereby this "time being" could have lasted 20 or more years.[37]

Let me focus, as examples, specifically on the Polish legal experience. Following World War I, when a sovereign and fully independent Polish state was established after 123 years of foreign domination, it was a political order of the day to get rid of foreign imperial law (German, Russian, French, and Austrian) and to replace it with Polish law (Gałędek, 2025). Already in 1919, the interim head of state, Józef Piłsudski, established a Codification Commission for this purpose. But the Commission's work progressed

[36] Moreover, legal survivals from the Common Law are followed by new legal transplants from the same legal family (e.g., United States) which are not adapted to local conditions (see, e.g., Iheme 2021). In this way, nomostasis generates path dependence (Kusik, 2024, p. 55).

[37] Further research could address, in a comparative fashion, the ambiguity of the Central and Eastern European political and legal elites with the situation in post-colonial Global South nations.

slowly, and after 10 years of work it could boast only the adoption of two acts on internal and external conflicts of law (private interregional law and private international law). Work accelerated somewhat in the second decade, when a Code of Civil Procedure was adopted in 1930, followed by a Criminal Code in 1932, a Code of Obligations in 1933, and a Commercial Code in 1934. But large areas of the law remained subject to foreign legislation of the former occupying powers, including property law, succession law and family law. The slow pace of work was due to the high quality of the drafting work: the professors and legal practitioners involved in it strived at finding the best solutions and formulating them with utmost precision and elegance. The outcome of their work still impresses with its drafting quality, but this quality came at a price—the price of time. This approach, where the politico-ideological will to unify the law swiftly gave way to the juristic tendency to high quality drafting, created—for a certain period—a climate favouring legal continuity, even if it was not desirable for symbolic and axiological reasons.

This climate of ambiguity surrounding nomostasis repeated itself in Poland also after World War II and after the 1989 transformation. When state socialism was introduced, the legal system of pre-1939 Poland was generally retained (Gałędek and Machnikowska, 2025, p. 161). A swift unification of private law was conducted over two years (1945-1946), with the result that no survivals of foreign imperial law (French, German, Austrian, and Russian) remained in place. However, the drafting was now done within the Ministry of Justice, and the drafters—who were much fewer in number and worked more hastily—heavily relied on advanced pre-war drafts (Gałędek and Machnikowska, 2025, pp. 162-163). This ensured a great deal of legal-cultural continuity with the pre-War period. The unified Polish private law was, therefore, very deeply anchored within the Western legal tradition, but—to the dismay of the political authorities—it was not in line with the requirements of state socialism. Piecemeal reforms of private law and civil procedure took place in 1950, alongside the enactment of a new Family Code (prepared jointly with Czechoslovakia), but it took until 1964 for the new Civil Code, Code of Civil Procedure as well as Family and Guardianship Code to be adopted. Nevertheless, despite the officially declared innovativeness, the gist of those codes remained very deeply rooted in Poland's post-war unified private law and, thereby, in the Western legal tradition. The socialist innovations were few and could easily be removed after 1989 (cf. Machnikowska, 2025). In this way, an ambiguous political climate—combining socialist ideology with a respect for legal culture and for Polish national legal tradition—allowed to preserve tangible elements of Polish legal culture and thereby favoured nomostasis even under conditions of a socialist transformation of the country.

Following the 1989 transformation, a similar climate of ambiguity *vis-à-vis* the legal survivals of the previous period has prevailed. On the one hand, the legal system of People's Poland has been entirely preserved (even the Constitution, as amended, remained in place until 1997). On the other hand, existing legislation, especially the codes, were gradually amended and replaced. The Civil Code of 1964 was most heavily amended twice – first in 1990, when most of the socialist "accretions" (Jodłowski et al., 2003, p. 33) were removed, and then in 1996. Following that, it has been amended quite frequently, although its core legal institutions, as laid down in 1964, have not been fundamentally altered. Deeper changes touched the Code of Civil Procedure, which was subjected to a first profound amendment in 1996. Since then, the system of appellate procedures has been virtually in constant flux. Nonetheless, numerous legal survivals have been retained or even revived: one can mention here the general legitimation of the prosecutor's office in all types of civil proceedings (Mańko, 2016c, pp. 80-84); the power of second-instance

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courts to submit preliminary references to the Supreme Court (Mańko, 2016c, pp. 84-85), a socialist legal innovation dating from 1950; and finally the extraordinary revision, i.e., the power of the Prosecutor General and certain other officials to challenge judgments after they have become *res judicata*, a power modelled on the Soviet *nadzornaya instantsiya*, imported to Poland in 1950, abolished in 1996 with effect from 1998, but then reintroduced *tout court* in 2017 as part of sweeping judicial reforms undertaken by the Law and Justice government (Ereciński and Weitz, 2019, pp. 8–9; Zembrzuski, 2019, pp. 35–37; Stasiak, 2020, p. 1; Mańko, 2025a, p. 77). In this climate of ambiguity towards nomostasis, numerous examples of legal survivals have managed to endure.

4. CONCLUSIONS AND OUTLOOK

The goal of this study was to pursue a theoretical enquiry into the conditions of possibility of nomostasis, i.e., the phenomenon of the endurance of old legal forms (morphemes) despite profound societal changes, such as, notably, transformations, transitions, revolutions, the breakup of empires, decolonisations, and the like. The goal of the paper was to prepare a theoretical research framework, composed of a number of hypotheses, designed to guide future empirical, sociohistorical research on nomostasis. In particular, it drew attention to the need for distinguishing between endogenic and exogenic factors of nomostasis and assessing their relative weight. It did not address the question of intrinsic features of legal form as a factor favouring or precluding nomostasis, which requires further theoretical and empirical research.

Even if, as observed at the beginning of the paper, the phenomenon of nomostasis can be described as ubiquitous (just like the phenomenon of legal transplants),[38] a claim can be made that post-socialist and post-imperial legal survivals play an important role in the legal culture of contemporary Central and Eastern European countries (Mańko, 2020, p. 34; Mańko and Sulikowski, 2024, pp. 258-259). This is because the region was, at least for the last two centuries, a recipient, rather than a donor, of legal transplants originating from former Empires and the Soviet Union (Mańko, 2019, pp. 72-3). In fact, in more recent history, the condition of *receptio necessaria* of foreign legal models – i.e. of "externally dictated" legal transplants (Kusik, 2024, p. 55; Kusik, 2025, pp. 169-170) – has not essentially changed, or has even intensified (Micklitz, 2015, p. 5; Mańko, 2019, p. 73; Tacik, 2019, p. 35; Mańko, 2020, p. 19; Kusik, 2025, p. 291). In this context, Central and Eastern Europe can be said to constitute a "laboratory of nomostasis"—especially with regard to remnants of the law of former empires, as well as of former socialist law. The same claim can be made with regard to the post-colonial states of the Global South which still cope with the relics of colonial legal form (cf. Iheme, 2025).[39]

Deeper research into such legal survivals should ideally focus on concrete legal institutions, analysed in a multidimensional way—combining "*historical, dogmatic, and sociological research*" (Eckhardt and Mańko, 2025, p. 178). As Swedish sociologist of law Håkan Hydén has rightly pointed out, the sociology of law "*uses inductive methodology aimed at relating empirical findings to theory. (....) The more empirical findings that can be added, the richer its contours become*" (Hydén, 2023, p. 2). At this stage, whereas the foundational conceptual framework for studying nomostasis has already been laid down,

[38] On legal transplants, see e.g.: Watson (1993 [1974]); Trikoz and Gulyayeva (2003); Kusik (2025b, pp. 45-220).

[39] Sulikowski and Wojtanowski (2018, pp. 79-80) have made the claim that there are certain analogies between the situation of CEE countries and the Global South that might justify the use of postcolonial legal theory also to the CEE region.

more research focused on concrete case studies will enable to test the hypotheses put forward in this paper and provide a deeper understanding of this theoretically capturing and practically relevant socio-legal phenomenon. In this way, a more nomocentric approach will enable scholars of historical sociology of law to gain a better understanding of the autonomous role of law as a factor involved in socio-economic and political transformations. Undoubtedly, such research will have to be programmatically multidisciplinary, combining not only the methods and sources used, on the one hand, by sociology of law, and, on the other hand, by legal history, but also any other relevant approaches, such as, notably, those of economics, political science and anthropology. Moreover, dogmatic (doctrinal) and comparative legal research will also be necessary. Nomostasis, as a complex phenomenon at the interstices of the legal and the social demands, requires adequately complex research methods.

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ON THE REGULATION OF SELECTED EXTERNALITIES IN THE MODERN URBAN ENVIRONMENT IN SLOVAKIA: SHARED MICROMOBILITY, SHORT-TERM ACCOMMODATION AND OUTDOOR ADVERTISING

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Abstract: *This paper analyses local authorities' ability in Slovakia to regulate negative externalities of selected urban services, specifically shared micromobility, short-term tourist rentals, and outdoor advertising. The authors explore the current legal framework and identify significant regulatory gaps at the local level. Drawing from international experiences, they propose measures such as operator registration, mandatory data sharing, geofencing implementation, and empowering municipalities to establish binding rules. The study emphasises that effective regulation requires legislative changes at the national level combined with enhanced local competencies, aiming to minimise adverse impacts while preserving the benefits of these services.*

Key words: *Negative Externalities; Regulation; Local Government; Micromobility; Short-Term Rentals; Outdoor Advertising*

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1. INTRODUCTION

Many contemporary innovations allow users to use infrastructure or resources more efficiently, but when overused, they can lead to negative impacts on third parties – negative externalities.[1] In this study, we deal with three such services specially established in larger cities, micromobility, short-term accommodation outside classic hotel facilities and outdoor advertising, and the powers of primarily Slovak municipalities to moderate these services in their territory in order to reduce their negative impacts

[1] We use negative externalities to mean unpriced harms borne by third parties within a municipality (e.g., sidewalk obstruction, noise), and spillovers to mean effects that cross municipal borders (e.g., tourism displacement across city lines). See for instance: Helbling (2010, pp. 48–49).

without limiting the positive ones. Although outdoor advertising has been present in Slovak cities at least since the transition to a market economy, abroad for decades longer, the other two services have been around in Slovakia for about 10 years.

The ambition of the study is to verify whether local governments (or other public authorities) in Slovakia have such tools at their disposal that will enable the sustainable functioning of these services in the urban environment. In particular, the research question guiding this study is the following: do Slovak municipalities possess adequate, modern regulatory tools to mitigate local externalities from platform-mediated urban services while preserving their benefits? We test whether Slovak municipalities currently have adequate, modern regulatory tools and identify concrete statutory gaps and enforcement bottlenecks where they do not. The research is based on a hypothesis that Slovak municipalities lack these appropriate tools.

The motivation underlying this research is the growing dissatisfaction with some manifestations of these services in several cities. In the case of micromobility, these are problematic collisions and accidents when interacting with pedestrians. Short-term accommodation (outside standard hotel facilities) often brings with it an increase in the unavailability of housing, as part of the housing market is reoriented in popular tourist destinations to short-term accommodation for tourists, which also brings with it problematic interactions between tourists and residents. Finally, outdoor advertising can reduce the aesthetic quality of cities or take away the attention of drivers.

These phenomena have a rather localised impact on the territory of a particular municipality (or a city), it is the municipalities that have the most accurate information about the need for possible regulatory intervention, and we assume that they also have adequate knowledge of the context for the adequacy of regulatory intervention. They may also be politically motivated to correct the negative effects. We verify these assumptions by analysing the existing legal framework governing the services. If we identify gaps in legal regulation (so-called policy gaps), we also offer *de lege ferenda* proposals to improve the regulatory framework.

The three cases studied are best understood as platform-mediated urban services or platform-gated activities with two-sided market dynamics and information asymmetries. Economic theory motivates the choice of instruments: where Pigouvian logic supports fees and fines aligned with marginal damage where measurement is feasible; limits to Coasean bargaining justify public rules when victims are diffuse and transaction costs high, and Oates' decentralisation suggests assigning instruments to the lowest level capable of internalising purely local externalities while reserving spillover-heavy or economy-wide levers to higher tiers (EU/national). We apply this lens throughout and pair each proposed instrument with a mechanism and a measurable outcome.

The explanation begins with an overview of the regulation of shared micromobility, then we focus on short-term accommodation services and outdoor advertising. In conclusion, we summarise the main findings and discuss the further application of this regulatory approach.

2. SHARED MICROMOBILITY

Shared micromobility refers to the shared use of low-speed means of transport (especially bicycles, e-scooters, etc.) that allow users to have short-term access to a

given means of transport according to (their) needs (Shaheen and Cohen 2019).[2] The advantage of shared micromobility is that it can flexibly expand the catchment area of public transport, or expand public transport services, especially the so-called last-mile mobility, i.e. the last section of transport (European Commission, 2020). It has the potential to make a significant contribution to reducing CO2 and other emissions, especially from passenger cars, especially if it uses sustainable energy sources for charging (Comi and Polimeni, 2024). Moreover, shared mobility also provides new solutions in the areas of courier services, goods transport or food and beverage delivery, as well as last-mile logistics (Kmeť, 2021).

Despite the undeniable advantages of micromobility for flexible urban mobility, it also brings with it the negatives in the form of an increased accident rate (Tark, 2023).[3] In addition to the lack of a separate infrastructure for this type of mobility, the source of the problem seems to be primarily modern ways of enforcing the rules applicable to electromobility and, secondarily, the rules for operators of these services. As an example, riding electric scooters on the pavement, which leads to unwanted collisions. Riding on the pavement is usually the result of the absence of a safe, separate cycling infrastructure that would also serve users of micromobility services. In many cases, these means of transport also obstruct pedestrians or cyclists due to the absence of reserved parking spaces. Currently, there is no legal regulation that would determine how to approach specifically driving or parking micromobility vehicles. Act No. 8/2009 Coll. on Road Traffic and on the Amendment of Certain Acts, as amended (hereinafter referred to as the "**Road Traffic Act**") only narrowly regulates the ride of a scooter with an auxiliary motor, but does not set clear rules for micromobility, nor does it give this possibility to determine the rules to a public administration body.[4]

2.1 Regulatory Approaches to Micromobility

A study by Sobrino et al. (Sobrino et al., 2023) looks at the regulation of shared electric scooters in urban areas and identifies the key factors influencing the effective implementation of these services: market access, technical requirements, transport safety and supervision of services. A fundamental problem identified by the study is the inconsistency of regulations within metropolitan areas. Different rules in neighbouring cities create legal uncertainty for both operators and users, complicating effective mobility management. Harmonisation of rules within the agglomeration would therefore allow for better coordination and predictability of regulations.

The study furthermore recommends that fixed parking spaces be created in city centres, while more flexibility can be maintained in less densely populated areas. In this way, uncontrolled overloading of public spaces with scooters is avoided while maintaining the availability of the service. The integration of shared electric scooters into the existing transport infrastructure is also an important aspect; in order to create synergies between various modes of sustainable mobility, scooters should be connected to public transport, for example through shared tickets or single booking and payment platforms.

[2] Note: There is also shared mobility in the broad sense of the word, which includes, for example, services such as Uber or Bolt, or short-term car rentals. However, we do not deal with these in the following explanation; The scope of the post is focused on shared micromobility (bicycles, scooters, etc.).
[3] Department of Transportation (2023). For the Slovak context, see anecdotally also: STVR (2024).
[4] See Section 55a of the ZoCP.

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From a safety point of view, it is necessary for regulations to include clear rules on the speed limit, the obligation to use safety features and minimum technical standards for vehicles. Many of these regulatory elements can be programmed directly into the means of micro-mobility, thus eliminating the possibility of committing an offence at all (see below). Supervision of compliance with the rules also plays an important role, and operators should be obliged to share data on the movement and use of scooters with cities, which would ensure more effective control and management of mobility.

The study highlights that effective regulation of shared electric scooters requires collaboration between the public and private sectors. Cities should have more supervisory and regulatory powers, with the aim of creating a balanced model that promotes sustainable mobility without unduly disrupting public space (Sobrino et al. 2023). However, comparatively, there is also a model of greater limitation of these services, such as Paris completely banning shared e-scooters.[5]

According to a McKinsey report of e-scooter sharing regulations in the world's 100 largest cities, the number of rides on these means of transport has risen to 350 million in 2022 since 2017, prompting increased yet differentiated interest from regulators (Heineke et al., 2023). Some cities, such as Barcelona, Philadelphia, Sydney, and Toronto, have banned shared e-scooters entirely, with private use remaining allowed. Other cities, such as Washington, D.C., Los Angeles and Madrid, allow them to operate, but limit the number of operators and vehicles through tenders. Some cities, such as Tokyo, São Paulo, Monterrey and Berlin, have introduced regulated rules with no limit on the number of operators. By contrast, there are no specific regulations in locations such as Mumbai, New Delhi, Dhaka and Cairo.

Geofencing is also one of the current trends in the regulation of shared mobility. This technology creates virtual boundaries in the urban environment, which make it possible to precisely define zones with specific rules for e-scooters and e-bikes, such as automatically reducing the maximum speed near schools or in pedestrian zones, increasing safety for pedestrians and other road users. It can also prevent parking in inappropriate areas by restricting the possibility of ending your drive outside of designated parking spaces. The implementation of geofencing thus provides municipalities with a tool for more efficient control and integration of shared micromobility services into the existing transport infrastructure, which contributes to a safer and more sustainable urban environment. The report on its use in Munich for shared mobility services shows positive changes after its introduction and a significant increase in the "discipline" of its users (Müller et al. 2024).

2.2 Modification of Micromobility in Slovakia

To evaluate the adequacy of the current regulation of micromobility in Slovakia, we propose to consider at least the following aspects (we apply the assumption that the means of micromobility are mainly scooters, bicycles, unicycles/unicycles and their electric variants):

1. Is there regulation of the concept of micromobility in the form of a special law or part of a law?
2. Is there regulation of operators of micromobility services (authorisation or registration as a prerequisite for the provision of services, mandatory provision of data, mandatory insurance, geofencing, etc.)?

[5] See, for example: Schofield (2023).

3. Is there a regulation specifically regulating driving in any of the means of micromobility (including insurance)?
4. Is there a regulation specifically regulating the parking of any of the means of micromobility on the pavement?
5. Is there a power for a public authority to determine binding micromobility rules at subordinate level?
6. What role do municipalities (cities) play in this context?

The Slovak legal system does not explicitly recognise the term micromobility, nor does it contain other interchangeable terms or concepts.[6] In answer to question No. 1, we can therefore state that in Slovakia we do not have a straightforward legal regulation of the concept of micromobility.

In answering the second question, we focused on verifying whether the transportation regulation does contain a regulation of the person of the "operator" of micromobility services and, consequently, the regulation of the obligations of these operators. Unsurprisingly, the Slovak legal system does not recognise the person of the operator of micromobility services and thus does not directly assign any obligations to him. However, it is necessary to deal with the question of whether the operation of micromobility services does not constitute a business with special requirements within the meaning of the Trade Licensing Act.[7] If we define the rental of mobility vehicles (i.e. the rental of movable property – means of transport) as a key part of micromobility services, we do not find this service in the list of reserved activities, professions or objects of business in Section 3 of the Trade Licensing Act. On the contrary, it is included in the list of free trades in point 58 of Annex No. 4a to the Act. Apart from the general requirements for business (trade, tax registration, etc.), operators of micromobility services do not need to obtain any special permit for their activities.

Questions 3 and 4 are directed to the regulation of the actual driving and parking of micromobility vehicles. In this respect, the Slovak legal system contains certain rules that can also be applied to means of micromobility. First, the driving of micromobility vehicles is subject to the specific rules set out in Section 55a of the Road Traffic Act. The rules for their operation, as well as the obligation to have mandatory contractual insurance, vary depending on the design speed, weight or power of the electric motor. The law also determines the rules for driving micromobility vehicles on roads and sidewalks.

Currently, there is no specific legal regulation that would determine how to approach the parking of micromobility vehicles. The parking of micromobility vehicles on the pavement is affected by the Road Traffic Act. The provision of Section 52 (2) of the Act stipulates that stopping or standing of a micromobility vehicle is possible under certain spatial conditions. Although, the Section 20 of the Road Act prohibits the

[6] The key legal regulations include Act No. 8/2009 Coll. on Road Traffic and on the Amendment of Certain Acts, as amended (hereinafter referred to as the "**Road Traffic Act**"), Act No. 135/1961 Coll. on Roads (Road Act), as amended (hereinafter referred to as the "**Road Act**"), Act No. 381/2001 Coll. on Compulsory Contractual Liability Insurance for Damage Caused by the Operation of a Motor Vehicle and on the Amendment of Certain Acts, as amended (hereinafter referred to as the "**Act No. 381/2001**"), Act No. 381/2001 Coll. on Compulsory Contractual Liability Insurance for Damage Caused by the Operation of a Motor Vehicle and on the Amendment of Certain Acts, as amended (hereinafter referred to as the "**Act No. 381/2001**"). Decree No. 106/2018 Coll. on the Operation of Vehicles in Road Traffic and on Amendments to Certain Acts, as amended (hereinafter referred to as "**Decree No. 106/2018 Coll.**"), Decree of the Ministry of Transport and Construction of the Slovak Republic No. 134/2018 Coll., laying down details on the operation of vehicles in road traffic, as amended (hereinafter referred to as „**Decree No. 134/2018 Coll.**") and Decree No. 35/1984 Coll. of the Federal Ministry of Transport, which implements the Road Act (Road Act), as amended.

[7] Act No. 455/1991 Coll. on Trade Licensing (hereinafter referred to as the "**Trade Licensing Act**").

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placement of objects that constitute a fixed obstacle, these vehicles cannot be subsumed under a fixed obstacle, as it requires a solid connection to the ground to form a solid obstacle.[8]

However, these vehicles could be subsumed under an obstacle (of road traffic) within the meaning of Section 43 of the Act. It is true that the person who caused the obstacle to road traffic is obliged to remove it immediately. If they fail to do so, the road administrator is obliged to remove it immediately at the person's expense.[9] Defects in the passability of local roads intended for pedestrians or in the passability of sidewalks are obliged to be removed without delay by local road administrators.[10] For these reasons, the regulation of parking of micromobility vehicles remains a challenge.

At the heart of the problem of operational issues (driving and parking) of micromobility vehicles is the topic of responsibility. When driving, the responsibility for driving is relatively directly linked to the driver (user of the micromobility service), but a clear software or hardware speed limit in a specific area (geofencing) can only be achieved by the means of the operator of the service itself. Today, however, there is no legal regulation allowing public authorities to oblige the operators to introduce geofencing in selected areas of the city (however, we believe that most operators voluntarily introduce geofencing in accordance with instructions from the municipality). Geofencing is also only preventive (although restrictive) in nature. Without geofencing, it is also difficult to operationalise sharing information about offences, accidents, and their perpetrators (service users). In situations where the offender would flee the scene of the accident or offence, it is only possible to invoke the general obligation of cooperation. A more complex issue is the responsibility for parking, where geofencing (preventing parking in a certain area) can again be used in terms of prevention. However, this is often difficult to use in the detailed scale of the position on the pavement, hitting the technological limits. It is possible to request information from the operator about the offender of the offence, or through the institute of strict liability, transfer the fine to the operator, who can apply it to the offender – user of his service. However, the situation is legally unclear today.

Clearly, there is also no clear enabling provision in the law for public authorities (especially municipalities) to determine binding rules for micromobility services in a certain territory. Such rules could be determined specifically for a specific area, especially a denser urban area, ideally adopted in the form of a generally binding regulation (hereinafter referred to as the "**GBR**") of the municipality.

2.3 Possible Elements of Micromobility Regulation

To solve these issues of micromobility services, we propose to expand the powers of municipalities in the regulation of shared micromobility, because Slovak municipalities have the primary responsibility for mobility, or transportation policy, in their territory and due to the better knowledge of local conditions. We acknowledge that this makes sense primarily in more densely populated larger cities, specifically in city centres, where collision situations are currently occurring more frequently.

The obligation to obtain an authorisation to operate micromobility services does not appear to be entirely necessary, considering the principle of proportionality. An adequate response of the legislator could be the registration obligation of operators of

[8] See Section 21(1) of Decree No 35/1984 Coll. of the Federal Ministry of Transport implementing the Road Act (Road Act), as amended.
[9] See Section 43 (1) of the Act.
[10] See Section 9 (2) of the Road Traffic Act.

micromobility services in the city (municipality) to provide the city with basic information about the service operator and establishing contact. An important part of the regulation should also be the obligation for shared mobility providers to share relevant data with municipalities (for more efficient infrastructure planning and monitoring of the use of these services).

An effective measure would be the introduction of mandatory docking points, which would serve as reserved zones for parking these devices, preventing their uncontrolled deployment and disruption of public space. Equally important is the pre-programmed speed limit in defined parts of the city (geofencing), which is already a standard for self-regulation of micromobility service operators.

Municipalities currently have the possibility to conclude contracts with operators of these services, in which they can set specific conditions of operation, and such contractual mechanisms could serve as a tool for more precise regulation and adaptation to local needs. For example, the City of Bratislava has developed draft rules for shared mobility operators within the city of Bratislava (The Capital of the Slovak Republic is Bratislava, 2024).

The draft rules constitute a recommendation for shared mobility operators as regards the speed and parking of those means; they are not directly binding, but operators can voluntarily adopt them (self-regulation based on the recommendation of the city). The City of Bratislava has proposed speed and parking restrictions for individual specific zones, such as pedestrian zones, parks, etc., in a map available to all operators on request. The city recommends a speed of 10 km per hour in the pedestrian zone, but a maximum of 15 km per hour. The city recommends places where means of transport should be parked, for example parallel to the sidewalk and at bicycle racks and outside of public transportation stops.

The city also recommends informing and educating users about improper parking, for example in the middle of narrow sidewalks where they block pedestrians, or in other places where they can act as an obstacle. If the operator does not meet the conditions of the city and repeatedly violates the rules and recommendations (e.g., inappropriate parking), these inappropriately located means of transport may be removed by the municipal police according to Section 9 (6) of the Road Act, which deals with the passability of roads. Vehicles may be collected after paying the costs of removal. The city may also include operators who meet the city's conditions in its marketing communications and communication channels (e.g., website, social media, printed materials) as part of a sustainable transport mix (Capital City of The Slovak Republic Bratislava, 2020, p. 2.).

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Table 1: A compact theory of change for micromobility governance [11, 12]

Lever	Mechanism	Targeted externality	Primary metrics (city-level)
Operator registration	Establishes accountable counterpart, enables enforceable permit terms, service caps, and response SLAs; assumption of strict liability.	Accountability & enforcement gaps	Response time to removal requests, share of verified operator contacts, violations per 10,000 trips.
Data sharing (MDS/GBFS)	Standardised trip/device feeds and policy APIs enable digital enforcement and evaluation.	Information asymmetry; weak monitoring	Trips, trip-minutes and device-hours; crashes per 10^5 trips, complaints per 10^4 trips, device distribution equity indices.
Designated docking/parking bays	Nudges end-of-ride to compliant locations, simplifies enforcement.	Sidewalk obstruction, visual clutter	Share of rides ending in designated bays; improperly parked devices per curb-km; mean clearance on footways. Evidence: Munich reported parking compliance rising from 19% to 88% after geofenced parking regimes and clearer rules.
Geofencing (slow/ no-ride/ no-park)	Enforces speed caps and spatial rules in sensitive areas.	Pedestrian safety & comfort	Fatalities/injuries; speed compliance rate in slow zones; conflicts/accidents per 10^5 trips, complaints per week in affected zones. Use national casualty stats as background risk context.

As for Enforcement pathways, municipal by-laws should pair operator registration with standardised data feeds (MDS/GBFS trip/device and policy APIs) for digital enforcement, service-level agreements (e.g., 2-hour removal of obstructing devices, graduated operator penalties for breach), geofenced compliance (slow/no-ride/no-park zones) codified in permits, and mis-parking liability with a layered design: primary user-level administrative fine where identification is feasible; operator strict liability as a fallback if the user cannot be identified via lawful request and the operator breached data/response duties. This structure aligns incentives without over-collecting personal data whereas operators retain identifiable data, municipalities receive event-level tokens and on-request identification under statutory basis, purpose limitation and retention caps. Success metrics include decrease in fatalities/injuries caused by shared micromobility (outcome indicator), speed compliance in slow zones (measurable due to data sharing), obstruction complaints per curb-km, and share of rides ending in designated bays (output indicators).

[11] Require registration and an MDS feed in operator permits; define slow/no-park zones and docking bays by municipal by-law or contract; publish a quarterly dashboard with the metrics above (normalised per trips, trip-minutes, or curb-km). Munich's experience shows that geofenced parking and clear placement rules can materially improve compliance; Bratislava's draft rules already outline speed and parking zones that can be evaluated this way. Available at: https://bratislava.blob.core.windows.net/media/Default/Dokumenty/Stránky/Chcem%20vybavit/Doprava/pravidla-zdielana-mobilita.pdf (accessed on 29.10.2025)

[12] Used sources: OPEN MOBILITY FOUNDATION. (n.d.); GOV.UK. (2023); Lindholmen (2024).

3. SERVICES PROVIDING SHORT-TERM TOURIST RENTALS

Like shared micromobility, short-term rentals are platform-mediated urban services with local harms (as housing availability, neighbourhood nuisance) and data asymmetries because key levers and information sit with gatekeeping platforms. Framing both cases as platform-governance problems allows a unified analysis: first secure registration and standardised data flows, then apply proportionate evidence-based local rules and evaluate them with clear metrics. The Airbnb or Boooking.com platforms allow ordinary people to offer their free accommodation capacities, thus becoming part of the sharing economy.[13] Despite the fact that these services provide a fairly simple tool for tourists in search of accommodation, or for property owners the opportunity to increase the yield on their property, several studies also show the negative aspects of these services, as evidenced by the bans on similar services in several world capitals.

In particular, Airbnb is a revolutionary accommodation placement model that can stimulate tourism and contribute to the economic growth of cities thanks to lower prices and a wide range of options offered. Some studies estimated a significant job growth and increase in tourism-related sectors (Nera Economic Consulting, 2017). As Airbnb provides access to more affordable and diverse forms of accommodation, which not only attracts a wider range of travellers, it should also open up new opportunities for the local economy. In theory, hosts who provide accommodation through this platform can earn income, which in turn can directly support local businesses and services, although in recent years there has been a clear trend of commercialisation of accommodation by professional accommodation operators akin to hotel chains (Hall et al., 2022, pp. 3057-3067).

In addition, the growing share of Airbnb in some urban areas is associated with a slight increase in employment in the hospitality sector, such as restaurants, demonstrating that the expansion of this service can have a positive impact on local jobs. Another benefit is the competitive environment that Airbnb creates, so traditional hotels have to face an alternative that often brings better affordability and flexibility. This pressure on the market can lead to an improvement in the quality of service across the accommodation sector (Economic Policy Institute, n.d.).

On the other hand, Airbnb has a significant impact on local communities, the real estate market, and the safety of residents, with its expansion causing multiple negative consequences. The growth of short-term rentals is reducing hotel revenues, with the biggest impact on low-cost accommodations, which are coming into direct competition with Airbnb (Yang et al., 2022). At the same time, short-term rentals contribute to rising rental and property prices, thus displacing long-term residents from their homes (Ding et al., 2023). This process leads to situations where originally residential areas are turned into tourist zones without a stable community, which deepens the tension between locals and tourists (Ho, Chaang-Iuan Chen et al., 2023).

Another problem is the negative impact on safety and quality of life in cities. Short-term tenants often cause noise, vandalism, and worsen the overall level of safety in neighbourhoods. Unlike traditional hotels, there are no uniform safety standards for Airbnb, such as firefighting measures or guest identity checks, which increases the risk of unforeseen incidents. Regulatory uncertainty is also a serious problem for Airbnb. Another problem is the situation where many properties are rented out by commercial operators who avoid tax obligations and regulations on short-term rentals. This leads to

[13] AIRBNB, INC. (2024).

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market distortions, as traditional hotels have to meet stricter standards, while Airbnb can benefit from regulatory loopholes (Ding et al., 2023). In addition to weakening the hotel sector, municipalities are losing significant revenues from tourist taxes, which could be used to develop public services and infrastructure.

3.1 Regulatory Approaches to Short-Term Accommodation

The Council of the European Union adopted Regulation (EU) 2024/1028 of the European Parliament and of the Council of 11 April 2024 on the collection and provision of data relating to short-term accommodation rental services and amending Regulation (EU) 2018/1724.[14] This Regulation addresses one of the main challenges, namely the lack of reliable information on services, such as the identity of the host, the place where these services are offered and their duration. The lack of such information makes it difficult for authorities to assess the real impact of short-term accommodation rental services and to prepare and enforce appropriate and proportionate policy responses.[15]

This Regulation lays down rules for the collection of data by competent authorities and providers of online short-term rental platforms and for the provision of data from online short-term rental platforms to competent authorities in relation to the provision of short-term accommodation rental services offered by hosts through online short-term rental platforms.[16]

The Regulation is expected to increase transparency of short-term accommodation rentals and help public authorities to regulate this increasingly important component of the tourism sector. The collection and exchange of data will make it possible to put in place effective and proportionate local policies to address the challenges and opportunities associated with the short-term rental sector. The Regulation balances the promotion of innovation and the protection of communities. It allows for fair competition in the sector while guaranteeing quality for consumers. Ultimately, the Regulation may contribute to a more sustainable tourism ecosystem and support its digital transformation (Council of the European Union, 2024).

The Regulation introduces harmonised registration requirements for hosts[17] and short-term rental properties, which include the assignment of a unique registration number to be displayed on the property's website and online platforms. Hosts will receive this registration number needed to provide short-term accommodation rental services by providing simple information. Online platforms will have to regularly provide the Digital One-Stop Shop in the Member States with information on the rental activities of their hosts. This will help competent authorities to produce reliable statistics and take sound regulatory action (Council of the European Union, 2024).

[14] EUROPEAN UNION. EUR-Lex: Access to European Union law [online]. Available on the Internet: https://eur-lex.europa.eu/legal-content/sk/TXT/?uri=CELEX%3A32024R1028 (accessed on 30.12.2024).

[15] See paragraph 1 of Regulation (EU) 2024/1028 of the European Parliament and of the Council of 11 April 2024 on the collection and provision of data relating to short-term accommodation rental services and amending Regulation (EU) 2018/1724.

[16] See Article 1 of Regulation (EU) 2024/1028 of the European Parliament and of the Council of 11 April 2024 on the collection and provision of data relating to short-term accommodation rental services and amending Regulation (EU) 2018/1724.

[17] A Host is a natural or legal person who provides, or intends to provide, on a regular or temporary basis, short-term accommodation rental services for remuneration, on a professional or non-professional basis, through an online short-term rental platform. See Art. Article 3(2) of Regulation (EU) 2024/1028 of the European Parliament and of the Council of 11 April 2024 on the collection and provision of data relating to short-term accommodation rental services and amending Regulation (EU) 2018/1724.

We consider the main regulatory problems for short-term accommodation to be threefold. First, the availability of housing for city residents or long-term tenants – the transformation of apartments from the function of housing to the function of short-term accommodation services may lead to a decrease in housing availability. This can circumvent the regulation of permanent housing leading to unequal conditions are created on the market. The spatial planning authority monitors the land use policy (e.g., housing policy) by determining the relevant regulations (e.g., the function and intensity of development). By transforming permanent housing into short-term housing, the goals of these policies are circumvented, and the housing supply is reduced. Second, the inappropriateness of the location of the short-term accommodation service in residential buildings – potential conflicts, hustle and bustle associated with it, etc. It is advisable to place a homogeneous function (e.g., housing) in one apartment building or entrance to minimise conflicts of often incompatible operations (nightlife, night arrivals of guests, demanding cleaning cycles, increased movement of unknown persons increasing the risks for residents). Finally, the tax loopholes and tax evasion – the transfer of short-term accommodation services from professionally managed hotel facilities to potentially hundreds of natural persons can lead to tax loopholes and evasion, both in accommodation tax (currently local tax) and in income tax (income of municipalities or the state – FO/PO) and value added tax (state). This problem is also a key factor for the protection of competition in the short-term accommodation segment.

The trend abroad, especially in popular tourist destinations, which become literally overwhelmed with tourists during the season, is to regulate short-term accommodation services. There are several approaches, from a blanket ban on the provision of short-term accommodation services in residential areas, through time restrictions on the possibility of providing the services (e.g., 60 days during the year), or mandatory tax registration, to deviating adjustments to tax liability.

There are several options for regulating services such as Airbnb. The regulation of short-term rentals through platforms such as Airbnb evolves differently from city to city, depending on local needs and the challenges that this phenomenon brings. One of the most common approaches is to introduce tax obligations for landlords, whereby in some cases, such as in Vienna, hosts pay the relevant taxes themselves, while in cities such as Amsterdam or San Francisco, this obligation is taken over by the platform itself and transferred the collected taxes to the local government, thus facilitating tax administration. These measures aim to ensure that short-term rentals do not provide a competitive advantage over traditional hotel facilities, which are subject to tax and regulatory obligations (Von Briel and Dolničar, 2020).

Another important regulatory tool is the introduction of a mandatory registration or licensing system. Many municipalities, such as in Barcelona and Berlin, require every landlord to obtain an official registration or license, creating a control mechanism to monitor and regulate the industry (Bei and Celata, 2023). In addition, time limits on leases are increasingly used, which set the maximum number of days during which a property can be rented out without a special permit.[18]

In addition to time limits, some cities have also implemented territorial restrictions that divide areas according to the level of regulation. Barcelona and Amsterdam have thus introduced so-called growth and decline zones, where the granting of new licenses is strictly limited or completely prohibited in the most affected parts of

[18] Paris, for example, has limited this period to 120 days per year, trying to prevent abuse of the system by professional landlords who are effectively operating as business entities and circumventing traditional real estate market regulations. *Ibid.*

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the city. This model has the ambition to mitigate the excessive concentration of tourist accommodation in historic centres and redirect it to less congested neighbourhoods.[19]

From the point of view of regulation, control of the scope of business of individual landlords also plays an important role. Some municipalities have taken measures to limit the number of properties that can be managed by a single person or entity, trying to eliminate large commercial players who operate large hotel chains through platforms such as Airbnb without being subject to traditional hotel regulations (Bei, 2025). Successful regulation also requires an effective control and enforcement mechanism. Many cities, such as Barcelona and Paris, have established cooperation with platforms that are obliged to block illegal offers and provide data on registered landlords. Such measures allow authorities to better monitor the market and intervene more effectively against illegal practices.[20]

Looking at the short-term rental from the fiscal perspective, taxation and fees for short-term rentals have a significant impact on market regulation and local government revenues. Cities such as Amsterdam and San Francisco have made it mandatory for platforms such as Airbnb to collect tourist taxes directly, making it easier to control and collect them. Elsewhere, such as in Vienna, hosts are required to pay taxes, but this makes it difficult to enforce them effectively. Some jurisdictions impose additional registration or license fees for short-term rentals, limiting uncontrolled supply growth. At the same time, these measures level the playing field between hotels and short-term rentals, as hotels are already subject to similar tax obligations. Mandatory registrations and licensing systems reduce the number of illegal rentals and increase control over the market, while cities such as Berlin and Paris have seen a decline in advertised apartments.

Time limits, such as the 120-day limit in Paris, have mixed results, as they often lead to circumvention of the rules through multiple accounts. Zonal regulations, introduced in Barcelona and Amsterdam, help alleviate tourist pressure in the centres, but may shift the problem to the outskirts. Limits on the number of properties per host limit the professionalisation of the market, bringing short-term rentals closer to the original idea of a sharing economy.

The regulation of Airbnb can also theoretically have a constitutional framework, as American studies show, for example (Jefferson-Jones, 2015, pp. 557–576). However, current judicial practice in European countries proves the opposite. We can cite two cases where there was a restriction on Airbnb and the courts approved this restriction. The first situation concerns Spain, where the Spanish Supreme Court approved the possibility for property owners' associations to limit or even prohibit the provision of Airbnb services in their properties by a majority vote (Short Term Rentalz, 2023). The second case concerns the city of Berlin, Berlin's regulation of short-term rentals, known as the Prohibition of Misuse of Residential Space, was adopted in 2014 to limit the negative impacts of commercial rentals on housing affordability.[21] The city courts initially allowed the original

[19] *Ibid.*

[20] In Barcelona, for example, special inspection teams have been set up to actively search for illegal offers and impose sanctions in the event of violations, which has significantly reduced the number of illegal rentals. *Ibid.*

[21] A key element of this legislation is the obligation to obtain a permit to rent out entire apartments for short stays, while a transitional period was in force for existing offers until May 2016. In 2018, the regulation underwent an amendment that introduced mandatory registration of rented properties. Owners can rent out their primary apartment under certain conditions, for example during their absence, while when renting a part of the apartment to the extent of less than half of the total area, a permit is not required, however, registration is still required. Secondary apartments can be used for short-term rentals for a maximum of 90 days per year,

ban on Airbnb in the city, arguing that there was a critical shortage of rental housing in Berlin and the ban was in line with the German Constitution. Thanks to the new decision of the Higher Administrative Court, these restrictions are even retroactive (DW.COM, 2023).

3.2 Short-Term Accommodation in Slovakia

A study from 2020 (Gregorová, 2020) analysed the spatial expansion of the Airbnb service in Slovakia and its impact on the tourism market (Gregorová, 2020). The offer of short-term rentals of 7,756 beds in 987 accommodation facilities in 2019 was concentrated in four main types of locations: large cities (Bratislava, Košice), mountain recreational areas (Tatras, Low Tatras), spa and summer recreation centres (Piešťany, Podhájska) and peripheral rural areas (e.g., Detvianske lazy, Krupinské lazy).

At the same time, the author points to the growing concentration of tourist accommodation in some areas, which leads to the phenomenon of so-called "tourist ghettos", like those in Western European capitals. According to the study, this phenomenon is manifested not only in the historical centres of foreign cities, but also in Bratislava and the High Tatras. The study also draws attention to the dynamic growth of the use of the Airbnb service in Slovakia compared to other V4 countries. Overall, the study evaluates the growth of the Airbnb service in Slovakia as significant, with its greatest impact being reflected in tourist-attractive locations. At the same time, the author points out the risks associated with the deregulation of the accommodation market and the development of informal business in the field of short-term rentals, which can have long-term consequences on housing affordability and the dynamics of local communities (Gregorová, 2020).

There is certainly a risk of unequal market conditions between regular providers of tourist accommodation (hotels, B&B, hostels) and short-term accommodation providers intermediated via platforms, such as Airbnb or Booking.com. The main arguments consist of (i) regulatory requirements imposed on hotels and other formal types of establishments and lack of enforcement or inability of enforcement of these requirements in relation to informal establishments; this naturally has a real economic impact on the costs structure of respective providers and their competitiveness; (ii) tax treatment and the risk of tax evasion, which strikes competitiveness as well; (iii) other types of anti-competitive behaviour of the platforms based on their market power in intermediation services. These arguments are not only logically constructed but also have been anecdotally raised by associations of hotels in Slovakia.[22]

In order to evaluate whether there are adequate regulatory tools in relation to services related to short-term accommodation outside standard hotel facilities, we will address the following questions:

1. Is there regulation of the concept of short-term accommodation outside standard hotel facilities, both in relation to the operators of the accommodation itself and in relation to the platforms facilitating this accommodation?

which is an additional restriction on the commercial use of real estate. Berlin has also introduced severe sanctions for violating the rules, with a maximum fine of up to 500,000 euros. The effectiveness of regulation is strengthened by the creation of a special control group with 30 employees who monitor compliance in practice. See: Hübscher and Kallert (2022).

[22] See for instance the most recent manifestation of this: AHRS (n.d.).

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2. Is there a regulation regulating the standard of this short-term accommodation?
3. Is there a regulation governing the mediation of this short-term accommodation?
4. Is there a power for the public authority to lay down binding rules for the provision of these services (accommodation and mediation) at sub-statutory level?
5. What role do municipalities (cities) play in this context?

In Slovakia, there is no explicit prohibition or specific legal framework for the provision of short-term accommodation placement services. However, this intermediation is carried out through platform operators, such as Airbnb or Booking.com, which, unlike operators of micromobility services, do not even have to have any physical element of presence in the territory of the Slovak Republic. They usually provide their services in Slovakia based on the free provision of services within the European single market. For this reason, the issue of their regulation and its enforcement is also significantly more difficult.

Although there is no explicit legal framework in Slovakia prohibiting the mediation of short-term accommodation through platforms such as Airbnb or Booking.com, their activities are already subject to a specific legal framework at the EU level. These platforms, even if they operate without a physical presence (or the presence of a legal entity) in Slovakia, are regulated through EU Regulation 2024/1028 and the Digital Services Act. At the level of European law, we cannot forget the directive known as DAC7 (EU Council Directive 2021/514). The directive regulated tax transparency in the digital economy, according to which platform operators are obliged to carry out due diligence procedures and annually collect, verify, report to the tax authorities detailed information about hosts (data such as address, first name and surname, etc.). This directive has also been transposed into our legal order.

At the level of national legislation, an amendment to Bill No. 470/2021 Coll. was approved, in which the legislator introduced special obligations for platforms such as Airbnb. This amendment introduced a new institute of a "representative of the taxpayer" in accordance with Section 38 (3) of Act No. 582/2004 Coll. This representative can be a digital platform mediating accommodation. Pursuant to Section 41c of Act No. 582/2004 Coll., the municipality may then conclude an agreement with such a platform (as a representative of the payer) on the conditions for collecting and paying local tax for accommodation. In such a case, the platform would collect the tax directly from the guest (taxpayer) as part of the reservation payment in accordance with Section 41c and pay it directly to the municipality (tax administrator). For the accommodation provider itself (which is primarily a taxpayer under Section 38 (2) of Act No. 582/2004 Coll.), this would mean a simplification of the administration associated with the payment of tax for reservations mediated through the platform, although the provider would still be obliged to keep records of accommodated persons in accordance with Section 41a (3) of Act.

However, the provision of short-term accommodation services mediated by one of the platforms may be subject to regulation separately, apart from the regulation of the intermediation itself. Operators of short-term accommodation services are primarily obliged to obtain a free trade in accordance with the Trade Licensing Act, depending on the services related to the rental.[23] Income derived from short-term rental undoubtedly falls under income classified under the Income Tax Act.[24] The short-term rental itself can

[23] § 4 (1) and point 50 of Annex No. 4a to the Trade Licensing Act.
[24] E.g., Section 3 (1) (b) of Act No. 595/2003 Coll. on Income Tax.

be considered accommodation within the meaning of the Local Taxes Act and is thus subject to accommodation tax, which represents income for municipalities and cities.[25] However, there is no specific regulation of this type of non-professional or semi-professional type of accommodation in Slovakia, which results in its fragmentation potentially causing confusion among the landlords themselves.

Special regulations apply to accommodation, similarly to hotels and other establishments, but their practical enforceability is limited.[26] If the service provider provides Airbnb accommodation in an apartment building, the apartment building must meet the requirements of utility, hygiene, fire safety and civil protection.[27]

Regarding the regulation of intermediation itself, we can refer to Regulation (EU) 2024/1028 of the European Parliament and of the Council of 11 April 2024 on the collection and provision of data relating to short-term accommodation rental services. This regulation introduces harmonised rules for data collection and sharing across the EU, regulates the registration obligations of hosts and the synergies of platforms, with the main objective of providing designated public authorities with better market monitoring data. The collected data should then allow them to regulate the housing market more effectively, take measures against illegal rentals and protect consumers. However, it is important to underline that the regulation itself does not directly give any new strong regulatory powers to the states or municipalities in which accommodation is placed but rather acts as a tool to gather information for the development and enforcement of existing or future national or local regulations. In addition, the Slovak legal system today does not give public authorities, including local governments, any special authorisations against operators and intermediaries of short-term accommodation.

3.3 Possible Elements of Regulation of Short-Term Accommodation

Currently, with regard to the principle of proportionality, in our opinion, it is not legally justified to limit or prohibit the provision of short-term rentals, primarily due to the absence of studies that directly name Airbnb as part of the problem of housing shortages in Slovakia.[28] Therefore, the argumentation for a ban or restriction in this case can hardly lie in the fact that there is a long-term housing problem in Slovakia directly related to

[25] Section 37 et seq. of Act No. 582/2004 Coll. on Local Taxes and Local Fee for Municipal Waste and Small Construction Waste.

[26] General technical requirements for construction, which are requirements for the zoning and technical design of construction, requirements for the construction and technical design of the building and requirements for the purposeful design of the building, for types of buildings are regulated by Decree No. 532/2002 Coll. of the Ministry of the Environment of the Slovak Republic, laying down details on general technical requirements for construction and general technical requirements for buildings used by persons with reduced mobility and orientation, as amended (hereinafter referred to as "**Decree No. 532/2002 Coll.**").

[27] See Section 43 (1) of Decree No. 532/2002 Coll. According to Section 43 (4) of the Decree, the living room must meet the requirements of the Slovak technical standard STN 73 4301. If the service is provided in a family house, it is subject to Section 45 of Decree No. 532/2002 Coll. Apart from the provision of Airbnb, it can be stated that the hotel, motel and guesthouse must meet the requirements for a short-term stay with their construction and technical arrangement and equipment, while the requirements are specified in Section 46 of Decree No. 532/2002 Coll.

[28] International evidence increasingly finds that Airbnb is associated with higher rents and house prices, and with lower hotel revenues, though magnitudes vary by city and identification strategy. For Slovakia, however, causal evidence is thin: existing work is largely descriptive and spatial (e.g., the concentration of listings and tourist "ghettos"), without quasi-experimental designs. Identification is challenging due to endogenous supply (hosts enter where rents are rising), time-varying tourism shocks, and the professionalisation of hosts. Accordingly, we use cautious phrasing ("is associated with", "may contribute to") and separate distributional effects (who gains/loses) from externality arguments (noise, crowding, housing availability). Also, there is a fact, that there is no database of bed occupancy of online platforms in Slovakia.

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short-term accommodation mediation services. Nevertheless, it seems expedient to give local governments certain competences in relation to the operational and tax obligations of operators and intermediaries of short-term accommodation services.

Timely regulatory intervention can also be justified through the prism of a precautionary principle (Meinhard, 2014). Despite there being absence of evidence in particular case of Slovakia, as evidenced above, there is multiple evidence of serious harm done in other countries and cities, justifying a precautionary measure with proportionality in mind.

In the Czech Republic, there is currently a discussion about the upcoming legislation that will allow municipalities to better regulate services providing short-term rentals. The Czech Republic plans to create a similar system to gather data on tourism and allow for better and addressed regulation (eTurist), similar to the Croatian eVisitor system. The upcoming law should regulate short-term rentals, giving municipalities more control over what happens in apartment buildings on their territory. Municipalities will be able to determine the maximum number of people in an apartment based on the minimum area, limit the number of days during which short-term accommodation can be offered, and even set periods when it will be completely banned, for example during the busiest tourist seasons. Each rental offer will have to be registered and have a unique number, which will ensure better control and supervision. Municipalities will also be given the power to impose sanctions for violating the rules.

In order to examine the impact of short-term accommodation services on local conditions and the economy, the cities and municipalities most affected, as well as the state, could carry out a thorough analysis of the current situation. If the conclusion is that there is a shortage of housing (especially in Bratislava or Košice, in accordance with the findings from Gregorová above), while Airbnb and similar services contribute significantly to this, or other problematic phenomena occur, it would be desirable to adopt a legal regulation of the functioning of these services.

The regulation could include several elements, including key options to limit the provision of these services in selected areas of the municipality and to limit the length of short-term rentals. These measures are active in many cities, as we described above. The provision of short-term accommodation services, i.e. the de facto performance of business activities, in residential buildings intended for long-term housing, may lead to several conflict situations and may also conflict with zoning regulations, including conflict with the zoning plan of the municipality.

According to the applicable legislation, namely Act No. 25/2025 Coll. on the Construction Act and on the Amendment of Certain Acts (the Construction Act), as amended (hereinafter referred to as the "**New Construction Act**") and Act No. 200/2022 Coll. on Spatial Planning, as amended (hereinafter referred to as the "**Spatial Planning Act**"), it is crucial that in accordance with Section 68 (1) of the New Construction Act, the building can only be used for the purpose specified in the occupancy certificate. This permitted purpose must be in accordance with the binding part of the zoning documentation, which is verified already at the stage of permitting the construction by means of a binding opinion of the spatial planning authority within the meaning of Sections 24 and 24a of the Spatial Planning Act, while non-compliance is a reason for rejecting the application under Section 59 (1) (a) of the New Construction Act. The enforcement of compliance with the zoning plan is therefore carried out both preventively when permitting the construction and its changes, and subsequently through the control of compliance with the purpose set out in the occupancy certificate within the meaning of Section 72 (2) (a) of the New Construction Act.

Pursuant to Section 68 (1) and (2) of the New Construction Act, any change in the prevailing manner of use of the building, or a change affecting the surroundings or safety, requires a new decision of the building authority on the change in the use of the building. Although the law admits that a change in the use of individual premises does not have to be considered a change in the use of the entire building (and therefore does not require a decision), but only under the strict condition that, in accordance with Section 68 (1) of the New Construction Act, the original function of the building as a whole is preserved. It is therefore not a general possibility to change the purpose without consent in the case of "non-complex" changes. In addition, even if such a partial change was contrary to the zoning plan, it would not be admissible, as any proposed change of the purpose of use, which is contrary to the binding part of the zoning documentation, will be rejected by the building authority (Section 68 (5) of the New Construction Act). The use of a building for a purpose other than that specified in the occupancy certificate, or the implementation of a change of purpose without the necessary decision of the Building Authority, is punishable as an offence.[29] However, it is questionable to what extent such a situation is practically applicable, although in our opinion it is possible.

As can be seen, municipalities that carry out spatial planning as their original authority already have the power to decide on the use of the territory and thus real estate. However, this power is used in practice, especially in the case of authorisation, when using the building only sporadically and in cooperation with the building authority. For this reason, municipalities could have the possibility to determine additional rules for the use of apartments or non-residential premises for short-term accommodation services, for example, to determine the time and intensity of the provision of the service, or deviations for different parts of the municipality regarding local conditions and territorial policy of the municipality. It would therefore be a matter of regulating the provision of short-term accommodation itself, which could ultimately bring legal certainty to the operators of these services themselves. These regulatory tools can also give municipalities the opportunity to address problematic phenomena associated with this type of tourism, such as noise, vandalism, etc.

To operationalise such a power of municipalities, operators of the accommodation services themselves should be obliged to register and share data with the regulatory authority. The authorisation of the activity does not appear to be justified and proportionate. The registration obligation would minimise tax evasion, both in income tax and local taxes. In relation to the intermediaries of these services, it would be necessary to find a pan-European solution so that they primarily share data with the regulatory authority and, of course, provide their platform only to registered entities.

However, these measures should be taken at the level of municipalities that have appropriate knowledge of local conditions. Formally, municipalities would be able to regulate this area through GBRs, while providing the most flexible options possible (for example, restriction during certain periods). Appropriate information and registration obligations and the sharing of data on (informal) tourism in one register will help to better inform local governments about the state of tourism in their territory, which can not only regulate regulatory obligations, but also the accommodation tax, among other things.

[29] For natural persons under Section 79 (2) (d), (3) (c) and (4) (b) of the New Construction Act, or for legal entities and entrepreneurs under Section 80 (4) (c) of the New Construction Act. According to Sections 79 (6) and 80 (4) of the New Construction Act, these violations are subject to appropriate fines, which can range from EUR 30 to EUR 150,000, while in the case of repeated violations, a fine of up to twice the original amount may be imposed in accordance with Sections 79 (7) and 80 (11) of the New Construction Act.

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Both cases in this paper concern platform-mediated urban services organised as two-sided markets. In both, local externalities (street obstruction and pedestrian safety for micromobility; housing availability, neighbourhood nuisance for short-term rentals) are significant, while governance frictions arise because critical data and enforcement levers sit with gatekeeping platforms. Recognising this shared architecture motivates similar regulatory logic: require registration and standardised data sharing (e.g., MDS for micromobility; EU Regulation 2024/1028 for short-term rentals), then target externalities with proportionate, evidence-based rules (Rochet and Tirole, 2003).

Table 2: Theory of change for short-term rentals[30]

Lever	Mechanism	Targeted phenomenon	Primary metrics (city-level)
Host/property registration and unique number display	Formalises market, enables listing-level filtering/ takedown by platforms, auditable enforcement	Information asymmetry, enforcement gaps	Share of active listings with valid registration ID, takedown rate for non-compliant listings, audit pass rate
Platform data flows	Periodic platform – authority reports unlock monitoring, tax reconciliation and evidence building	Information asymmetry	Timeliness/coverage of platform reports, reconciliation gap vs. tourist-tax receipts
Day caps/zoning overlays	Shift host payoff towards long term rental/medium in tight markets, reduces short term rentals density in hotspots	Housing availability as externality	Short term rentals nights per 1,000 dwellings, short term rentals density tract, long term rentals rent/vacancy index
Platform collected tourist/accom modation tax	Levels playing field, reduces leakage, funds mitigation	Fiscal fairness, administrative efficiency	Effective tax coverage, receipts vs. hotel baseline, variance to platform reports
Use & nuisance rules (quiet hours, occupancy, building rules)	Deters problematic use, protects common areas in multi-unit buildings	Neighbourhood nuisance as externality	Noise/incident complaints per 1,000 short term rental nights, building-level incident rate
Platform cooperation & blocking of non-compliant listings	Programmable enforcement at the gatekeeper level, reduces illegal supply	Enforcement gaps	Share of blocked listings, time-to-block after notice, repeat-offender rate

4. OUTDOOR ADVERTISING

While freedom of expression closely linked to commercial activity cannot be questioned, the topic of outdoor advertising raises several regulatory challenges. First of all, it is the aspect of traffic safety, where advertising perceived by drivers becomes an attractor potentially depriving drivers of attention (Madlenák et al., 2023). The second challenge is to a large extent subjective evaluation of the aesthetics of outdoor advertising carriers and their placement in the city (Azumah et al. 2021; Chmielewski et al., 2015). This is related not only to aspects of the context (where these advertising devices are placed), the quality of the advertising devices themselves, but also the

[30] Used sources: Hübscher and Kallert (2022); Von Briel and Dolničar (2020); Bei and Celeta (2023).

intensity of their occurrence (how many advertising devices are located in a given place and how often are they repeated?). The third issue is the content of the ad itself, which is largely a universal issue of all types of ads and therefore we will not deal with it further.[31]

4.1 Regulatory Approaches to Outdoor Advertising

Outdoor advertising undoubtedly belongs to the visual of cities and can have both a positive and a negative side. There are extensive studies examining various aspects of this advertising. According to a study from Warsaw, outdoor advertising in an urban environment generates significant externalities that can be perceived both positively and negatively. On the one hand, it provides information to residents and visitors and can increase the availability of products and services. On the other hand, however, it represents visual pollution that disrupts the aesthetics of public space and can reduce the quality of life. Research shows that limiting outdoor advertising in the form of billboards or advertisements on buildings can be perceived favourably by the public, while the willingness to pay for these regulations indicates the high social value of a cleaner urban environment (Czajkowski et al., 2022).

The legal regulation of outdoor advertising can be divided into two levels, regulation at the level of spatial planning and construction law and legislation at the level of taxes. From a comparative point of view, taxes on outdoor advertising devices are popular in Europe, such countries include Italy, Hungary, France, Lithuania. In most countries, this is the income of local government, which is based on the fact that these facilities primarily affect local governments as such. Such a tax is currently not regulated in Slovakia, so municipalities have the only option to regulate outdoor advertising, through a zoning plan. Therefore, most countries and cities resort to adjusting advertising from the position of spatial planning.

The regulation of outdoor advertising in Europe relies primarily on urban planning and zoning tools, which make it possible to adapt the rules to the specificities of individual cities and municipalities. In the Netherlands, the *omgevingsplan*, which, in combination with municipal ordinances, lays down the conditions for the installation of advertising devices, plays a key role. In France, local authorities have the explicit power to limit the size and number of billboards, as evidenced by the approach of cities such as Paris, Lyon and Nantes, where measures are being introduced to minimise visual congestion and protect cultural heritage. A similar trend is observed in Germany, the United Kingdom and Finland, where local planning authorities and zoning regulations ensure that the placement of advertisements meets the aesthetic and safety criteria of public spaces.

In general, Slovakia, in addition to specific regulation at the local level in the form of bylaws, joins most examples of countries that work with a zoning plan. Again, we can call these regulatory challenges of outdoor advertising negative externalities, and their cost can even be estimated (Czajkowski et al., 2022). The spatial-aesthetic aspects of outdoor advertising are commonly appreciated abroad, which has led to restrictions or bans in some cities. One of the first regulations of outdoor advertising was the U.S. federal Highway Beautification Act of 1965, which aimed to explicitly increase the

[31] We can only refer to Act No. 147/2001 Coll. on Advertising and on the Amendment of Certain Acts, as amended (especially Section 3) and the Advertising Council. Pursuant to Section 3 of the Advertising Act, advertising, including outdoor advertising placed on an advertising structure, must not contain anything that disparages human dignity, offends national feelings or religious feelings, as well as any discrimination on the basis of gender, race and social origin, promotes violence, vandalism or vulgarity and incites or expresses consent to illegal actions, presents the nakedness of the human body in an offensive manner, etc. For an overview, see, e.g., Chung et al. (2022).

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aesthetic quality of views from American highways (Weingroff, 2017). Lowery's study, on the other hand, dealt with the complex economic, legal, and political correlations of outdoor advertising regulation in Los Angeles over its nearly 140-year history (Lowery, 2016, pp. 191–209). In the UK, we can see a trend of regulation of outdoor advertising motivated by civil society in cities and local governments themselves (Greenhalgh, 2021, pp. 384–409). A complete ban on outdoor advertising has been introduced, for example, in São Paulo in Brazil (Mahdawi, 2015). In our context, we can cite a Polish-Slovak study from 2019, which stated the inadequacy of the regulation of outdoor advertising with regard to the protection of the visual identity of the most important parts of the country (Szczepańska et al., 2019, pp. 133-149).

4.2 Outdoor Advertising in Slovakia

To evaluating the adequacy of the current regulation of outdoor advertising placement (i.e. placement of advertising devices or advertising structures) in Slovakia, we propose to consider at least the following aspects:

1. Is there a regulation of the concept of outdoor advertising in the form of a special law or part of a law?
2. Is there regulation of operators of outdoor advertising services?
3. Is there a regulation specifically regulating the placement of outdoor advertising devices (or a narrower category of advertising construction)?
4. Is there a power for a public authority to determine binding rules on outdoor advertising at subordinate level?
5. What role do municipalities (cities) play in this context?

In Slovakia, there is no special legal regulation of outdoor advertising that would address the phenomenon comprehensively from a procedural, spatial or content point of view. Thus, the legislation can be found fragmented across several regulations, but there is no specific regulation of operators of outdoor advertising services. Again, as in the case of operators of micromobility and short-term accommodation services, this is also a free trade within the meaning of the Trade Licensing Act.[32] We believe that there are no grounds for special (stricter) regulation of the operators themselves.

However, another issue is the placement or construction of the outdoor advertising itself in the public space. The placement itself will be subject to construction legislation with regard to the so-called advertising buildings, which represent the majority of outdoor advertising equipment within the meaning of Act No. 50/1976 Coll. on Spatial Planning and Construction Regulations (Construction Act) in the version effective until 31.03.2025 (hereinafter referred to as the "**Construction Act**") and information constructions under the New Construction Act. The construction of an advertising building is subject to notification to the building authority or a building permit in accordance with the Construction Act.[33]

It can be stated that the New Construction Act has replaced the term advertising construction with the term information construction, while the definition has also been changed in terms of content. The process of permitting information construction is different from the processes under the Construction Act. For the purposes of this paper,

[32] See paragraph 55 of Annex 4a to the Trade Licensing Act.
[33] On the definition of an advertising structure, see Section 43 (1) of the Commercial Code.

we focus only on the legal regulation of advertising constructions according to the Construction Act.[34]

The starting point for the regulation of the placement of advertising structures is specified in the provision of Section 126 of the Construction Act, which requires to take specific requirements into consideration. If the proceedings under the Construction Act affect the interests protected by the regulations, then it is necessary to account for a binding opinion issued by the concerned authorities (e.g., cultural heritage authority may issue specific regulations under the Act No. 49/2002 Coll. on the Protection of the Monument Fund). The owner of the advertising building (builder) is then subject to the conditions for the implementation of the advertising construction as specified in the building permit.[35]

4.3 Possible Elements of Outdoor Advertising Regulation

A particularly important regulation of the location of buildings in municipalities is spatial planning, which allows municipalities to determine the functional use and intensity of development in their territory. In Slovakia, at least two urban plans of cities have been adopted, which regulate the placement of advertising buildings in the territory of the Slovak Republic: the zoning plan of the capital of the Slovak Republic BA and the zoning plan of the city of Nitra. Municipalities can regulate the use of land in accordance with their original spatial planning power, as a result of which they can regulate the provision of this service in their territory. However, if we begin to assess the practical aspects of this regulation, especially the scale of the zoning plan of a larger city, the degree of detail and the possibilities of taking into account special situations in the area, as well as the time parameters of a possible change in the regulation, we argue that this instrument does not represent a completely adequate response to this type of negative externalities.

Allowing municipalities to regulate outdoor advertising through the means of regular GBRs provides municipalities with flexibility to react to changing conditions or even political contexts. In comparison, a change to the zoning plan (which takes form of a very procedurally regulated GBR in Slovakia) usually takes about two years, so the possibility of responding to changes in space and at a given time is reduced. The second problem related to the zoning plan is its scale (1:10,000), which we consider inappropriate for the regulation of advertising constructions. For example, the Bratislava's zoning plan regulates the distance of advertising constructions, which subsequently leads to the difficulty of interpreting the regulations in the zoning plan and to the absence of discretion of administrative authorities. The zoning plan also leaves very limited room for discretion of administrative authorities. The zoning plan appears to be an inadequate tool for the regulation of advertising buildings.

This regulation could therefore include the following procedural and formal elements. First, the rules for the placement of outdoor advertising could be set out in a map with elements of regulation similarly to the zoning plan, but the adoption or modification of this GBR would not be as demanding from a procedural point of view as

[34] Although the text does not deal with the legislation effective from 1.4.2025, which concerns the information construction within the scope of the New Construction Act, it can be stated that the conclusions of the third chapter are also applicable to information constructions. Smaller advertising devices that do not meet the criteria of an advertising structure (e.g., bipods with an advertising area, objects that are not firmly connected to the ground in accordance with the Road Act) are regulated in Section 9 of the Road Act. Defects in the passability of local roads intended for pedestrians or in the passability of sidewalks are obliged to be removed without delay by local road administrators. See Section 9 (2) of the Road Act.

[35] Alternatively, in the notification or occupancy decision.

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amendments to the zoning plan. Second, the GBR could have a looser methodological structure that could respond more flexibly to various aspects and new forms of outdoor advertising, as opposed to relatively methodologically bound regulation in the form of a zoning plan. Third, compliance with such regulation would be communicated to the building authority directly in the digital map base issued by the municipality.[36] Finally, the regulation could include a new tax on advertising constructions with several variables (e.g., number of advertising spaces, size of advertising spaces, digital display/paper, location, etc.).

From a substantive point of view, such a regulation could contain rules for the placement of selected types of outdoor advertising, in particular zoning for individual size standards, frequency of occurrence, special rules for positioning outdoor advertising so that it does not interfere with movement, etc.[37]

Table 3: Theory of change for outdoor advertising

Lever	Mechanism	Targeted phenomenon	Primary metrics (city-level)
Advertising construction permitting (under Construction Act)	Requires building permit or notification (subject to country-wide legislation)	Uncontrolled proliferation; safety risks from unregulated structures	Number of permit violations; share of compliant advertising buildings; average permit processing time
Placement of ads constructions	Requires a compliance with a light "zoning" plan (subject to city-wide legislation)	Excessive, overwhelming ads; visual clutters; perception of urban landscape; heritage protection	Density of ads per km2; qualitative decisions
Outdoor ads tax	Imposes a new municipal tax source, differentiated by size, location, medium	Excessive ads; lack of funds to cultivate public space	Tax revenue; decrease in ads density
Ex post review	Content review (subject to country-wide legislation)	Unsuitable ads	Number of content violations

5. CONCLUSION

The three presented case studies show that the current regulatory regimes are inadequate due to the complications that these services often cause in cities and municipalities. Any regulatory intervention should be proportionate and sensitively considered in the light of the basic premise of a free market economy, but the capacity of the public sector to intervene in the pursuit of the public interest should also be adequate and given to the appropriate entity.

In two of the presented case studies (micromobility and short-term accommodation), it is possible to use the possibility of marginally regulating the activities of intermediaries, the so-called "intermediaries" (or *gatekeepers*), who have the possibility to transfer the regulation directly to the target entities of the regulation (users of micromobility services, short-term accommodation operators). This is done not only through their own rules of use, but also through a technological solution – the code of

[36] Alternatively, it is conceivable that in addition to the regulation of the placement of advertising structures in accordance with the construction legislation, the consent of the municipality would be required for the placement of advertising equipment in a public space, i.e. publicly accessible, visible parts of the municipality, in the form of a binding opinion of the municipality (similarly to a binding opinion verifying compliance with the zoning plan of the municipality). However, this solution is administratively quite demanding.
[37] See, for example: Šingerová et al. (2022).

the platform itself (e.g., geofencing). The regulatory intervention is thus relatively targeted and effective.

In the study, we also present the opinion that the entities with regulatory powers in these situations should be local governments. This is because they have key information about the impacts (negative externalities) of the services in question on their territory and are therefore best placed to adopt appropriate rules. It goes without saying that the basic mandates and limits for these regulatory interventions must be determined by the legislator (or European legislation), which will leave only a limited space for local governments.

The EU level of intervention seems appropriate when it comes to enforcing certain duties of platforms, which may be difficult to enforce if the platforms do not have any physical element in a member state. Consider the case of platforms intermediating short-term accommodation which typically provide their services from a single member state. As regulatory interventions of individual member states towards platforms themselves may fall short of enforcement, the EU intervention should include obligations of platforms to follow any national rules, guarantee equal access and conditions to their services for accommodation providers across the single market, protecting consumer rights in respect to platforms and provide required data. In case of micromobility services and outdoor advertising, the EU regulation appears excessive.

On the other hand, member states should focus on accommodation providers who necessarily have a physical element present in respective countries, such as safety requirements; similarly, in case of micromobility the national legislation could deal with overall traffic safety rules and in case of outdoor ads set parameters of their placing adjacent to roads. Finally, we hold that municipalities are best placed to recognise the local impact therefore can regulate the intensity and certain details of the services.

The principle of extending the regulatory effect of local governments to some aspects of new services can also be applied in other cases: for example, the regulation of mobility services (shared cars, taxi services), the regulation of urban logistics, or the placement of so-called parcel boxes in which shipments are stored. This principle is also in line with the already established trend in the field of spatial planning and construction regulation in cities with specific needs and context in Slovakia. For example, the capital city of Bratislava and the city of Košice may, in accordance with the new spatial planning legislation, establish special conditions for the spatial arrangement of the territory and the functional use of the territory and the zoning and technical requirements for construction, which consider the specifics of denser cities with developed public transport.[38]

We can discuss that the reason why cities in Slovakia are usually not given adequate tools to regulate selected types of business with undesirable effects is the lack of urban policy. Although there is a good understanding of regional problems, disparities and thus policies in Slovakia, urban politics is still underappreciated, as evidenced by its competence fragmentation.[39] Most likely, new challenges will be added in the urban space, so it is advisable to closely monitor these and provide municipalities with appropriate tools to address them.

[38] See Section 39(2) and (3) of Act No. 200/2022 Coll. on Spatial Planning.
[39] See, e.g., Šujan and Mazúr (2023, pp. 20–26).

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INTERDISCIPLINARY COOPERATION IN THE CZECH REPUBLIC AND COCHEM PRACTICE

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Abstract: *The following article aims to present the principles of interdisciplinary cooperation with a focus on the Cochem practice and to show the possibilities of its application in courts not only in the Czech Republic – attention will also be paid to the situation in Slovakia. In proceedings in family law matters, in which the arrangements between parents and minor children are regulated, it involves a relatively new and still not yet institutionalised approach. The basic characteristic of the Cocham practice is the attempt to minimise parental conflict and to make parents find an amicable solution together. The process involves professionals from different sectors to help parents in the divorce period to find a joint solution to their conflict, one that works best for their child (Rogalewiczová, 2019, p. 236) In this article, I mainly point out how this method of interdisciplinary cooperation is applied in practice in Czech courts, with a comparative overlap to the Slovak court environment.*

Key words: *Interdisciplinary Cooperation; Cochem Practice; Shared Custody; Parental Responsibility; Children; Civil Law; Family Law*

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1. INTRODUCTION

Parental responsibility in the Czech Republic is currently regulated by Act No. 89/2012 Coll., the Civil Code, which entered into force on 1 January 2014. Parental responsibility is conceived as a set of rights, privileges and obligations. In particular, it refers to the duties and rights to "[...] *take care of the child, protect the child, maintain personal contact with the child, ensure the upbringing and education of the child, determine the place of residence of the child, represent the child and take care of the child's property.*" (Zuklínová et al., 2016, p. 114). Parental responsibility is vested in both parents: "*Both parents have parental responsibility equally. Every parent has parental responsibility, unless he has been relieved of it.*" [1]

2. FORMS OF CHILDCARE

If the court decides on the dissolution of a marriage, the decision on the dissolution must be preceded by a decision on the post-divorce arrangements for the child: "*If spouses have a minor child who has not yet acquired full legal capacity, the court shall not divorce the marriage until it decides on the situation of the child at the period after the divorce.*"[2] If the spouses have multiple children, the court issues a separate decision for each of them (Zuklínová, 2016, pp. 111-122). The court may also decide to approve the parents' agreement provided that its terms are not contrary to the best interests of

[1] Section 865(1) of the Civil Code.
[2] Section 753(3) of the Civil Code.

the child. The main criterion for the court's decision is therefore the child's best interests. In its assessment, the court takes into account not only the child's relationship with each parent, but also with siblings and grandparents (Zuklínová et al, 2014, pp. 543-545).

A different situation arises when the child's parents are not married. In such cases, the parents may independently agree on childcare arrangements. However, if they fail to reach an agreement, they may petition the court for an authoritative decision. However, from this point onward, any further modification of child custody arrangement must always be regulated by the court (Šmíd et al., 2017, p. 79).

Section 907(1) of the Civil Code enumerates the various forms of child custody: "*A court may entrust a child to the care of one of the parents or to shared or joint care; a court may also entrust a child to the care of a person other than a parent if it is necessary with regard to the interests of the child. If a child is to be entrusted to joint care, the consent of both parents is required.*" When determining the appropriate form of custody, the court considers "[...] *the child's personality, especially his talents and abilities in relation to the potential to develop and to the life situation of the parents, as well as the emotional inclination and family background of the child, upbringing skills of each parent, existing and expected stability of the upbringing environment in which the child is to live in the future, emotional ties of the child to his siblings, grandparents, or other relatives and unrelated persons. A court shall always take into account which of the parents has until that point properly cared for the child and properly provided for his emotional, intellectual, and moral upbringing, as well as which of the parents is better suited to provide the child with healthy and successful development*."[3] The legislator may not itself prescribe which of the above-mentioned forms of custody is the preferred and primarily applicable care. "*It is never certain which of the whole register of possible arrangements will best suit a particular child*." (Zuklínová, 2015, p. 101).

Below, I will focus on the importance of viewing the situation from the child's perspective rather than treating the child as a mere object of dispute. The necessity of an individualised approach to each case is confirmed by the Constitutional Court's judgement that shared custody is not an 'automatic' option following the separation of the child's parents. The decisive criterion remains the best interests of the child and shared custody further presupposes that both parents are interested in such an arrangement. Moreover, in the case at hand, the children expressed that they have a significantly more positive relationship with the intervener (aunt), whose upbringing environment suits them, and that they feel uncomfortable in the father's home due to their negative relationship with his partner. It can therefore be concluded that they do not want to be placed in shared custody themselves.[4]

It is generally recognised that the following forms of child custody: joint custody, shared custody, and custody entrusted to one parent are defined not only in Act No. 89/2012 Coll., the Civil Code – but also in Section 24 of Act No. 36/2005 Coll., the Family Act, and on the Amendment of Certain Acts. Nevertheless, I will briefly outline these forms here, as they are essential for understanding the later context of Cochem practice.

2.1 Joint Custody

This is often regarded as one of the best arrangements, where the child and parents still form a single family (Zuklínová, 2016, p. 122). However, this institution is not widely used and the court cannot decide on joint custody if one of the parents does not

[3] Section 907(2) of the Civil Code.
[4] Decision No. III. ÚS 2396/19, of 29th October 2019 of the Constitutional Court of the Czech Republic.

agree to it. The court itself cannot order such custody, so the only way to decide on such custody is to approve the parents' agreement. Joint custody is considered appropriate primarily in cases "*[...] where the child is almost an adult and no longer lives in the same household as the parents (the child is studying in another city or abroad or is already self-supporting, etc.). In addition, joint custody is an option if the parents plan to continue living in the same apartment or house after the divorce and are in agreement on matters relating to the child and its maintenance*." (Linhartová, 2018, p. 57). However, the best interests of the child must always remain the decisive criterion. Before approving an agreement on joint custody, the court should always ascertain whether any disagreements exist between the parents and whether they are capable of reaching consensus on matters concerning the child. One of the advantages of joint custody is the absence of authoritative court intervention. The upbringing and maintenance of the child are still handled solely by the parents (Tomešová, 2017). The Constitutional Court has also described this form of custody (alongside shared custody) as an ideal arrangement.[5]

2.2 Sole Custody

When a child is entrusted to the sole custody of one parent, it is often necessary to regulate the child's contact with the other parent (Frenclová, 2019). According to Section 888 of the Civil Code "*A child who is in the care of only one of the parents has the right to have contact with the other parent to the extent in which it is in the interests of the child, and that parent has the right to have contact with the child, unless such contact is limited or prohibited by a court; a court may also specify conditions of the contact, especially where it is to take place, as well as to identify persons who may or may not participate in the contact. A parent who has the care of the child is obliged to prepare the child for the contact with the other parent, duly facilitate the child's contact with the other parent and cooperate with the other parent in the exercise of his rights to contact to the necessary extent*." Both parents are required to refrain from making any negative comments about the other parent with the intention of undermining the child's relationship with that parent. Furthermore, the parents have a mutual duty to share relevant information, so they remain obliged to communicate with each other on some level and communication should be conducted through the child[6] (Zuklínová, 2016, pp. 123-124).

The parent who has sole custody of the child is required to fulfil three key obligations: to prepare the child properly for contact with the other parent, to facilitate such contact and to cooperate with the other parent. Proper preparation of the child includes both material and psychological aspects. Material preparation involves ensuring that the child has appropriate clothing, necessary medication and, where appropriate, personal items such as toys. Psychological preparation is more demanding: it should be carried out continuously. It requires, as noted above, refraining from negative comments and to actively promote a positive relationship between the child and the other parent. Another point is to allow the child to have contact with the parent. This builds on proper preparation and involves ensuring that the child is handed over to the other parent at an agreed place and time, and subsequently returned to the custodial parent at an agreed time and place. A child's illness should not in itself be an obstacle to the visit of the other parent, unless the illness is so serious that the child cannot be transported to the other parent. If the non-custodial parent is capable to care for the sick child, contact cannot be obstructed. The final obligation is cooperation between parents. They should strive to

[5] Decision No. III. ÚS 2298/15, of the 15th March 2016 of the Constitutional Court of the Czech Republic.
[6] Section 890 of the Civil Code.

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maintain functional communication, e.g., by handing over the child to a different place than usual because of an unexpected event, the caring parent should assist in learning to care for the child in situations involving illness, work to mitigate any negative reactions the child may have towards the other parent and encourage the child to develop a relationship with the other parent[7] (Šínová et al., 2016, pp. 138-140).

2.3 Shared Custody

In shared care, the child resides with one parent for a designated period of time and then, usually after one week or fourteen days, resides with the other parent (Kovářová, 2015). This arrangement may be viewed as a form of 'compromise' where parents share caregiving responsibilities. A notable advantage is that the child does not lose contact with either parent and the parents are forced to cooperate and communicate (Malá, 2019). On the other hand, a significant drawback is the potential instability of the child's social environment and the bonds (Vraštilová, 2022, p. 19).

In recent years, a new type of shared care, called "Bird's Nest", has emerged, where the child remains in a single household while the parents alternate residence. In practice, this means that the child does not change environments, instead the parents take turns staying with the child at certain intervals (Zuklínová, 2016, p. 122). However, this form is rejected by a substantial proportion of parents.

The effort to maintain the child's social bonds has also been reflected in recent years in case law. According to this case law, shared custody may be implemented if the arrangement allows the child to continue attending the same school, clubs and be close to his/her peers (Kovářová, 2015). However, courts do not always prioritise these social bonds. In connection with this issue, worth mentioning is the rejected judgement in case No. ÚS 1506/13 of the Constitutional Court, which dealt with the issue of shared custody between parents living at a considerable distance from one another (Česká Lípa - Olomouc) and the implications for the child's upcoming school attendance. The complainant disagreed with the decision of the Constitutional Court on several grounds, one of which was the issue of the aforementioned school attendance. According to the Regional Court's decision, the girl was to spend two weeks a month with her mother and two weeks a month with her father. The mother disagreed with this arrangement, arguing that the girl would have to alternate school facilities. The Constitutional Court reasoned that the upbringing environment was stable, as the girl had been used to this model since her parents' separation (approximately two years). The Constitutional Court therefore found no compelling reason to change the system in place and, in addition, stated in the next paragraph that there was no reason why such arrangement could not continue in the upcoming school year, given the current possibilities for individual education. However, this view was challenged in a dissenting opinion by Judge David. According to David, the current arrangement of moving between such distant residences is very challenging but manageable at present (since the child is pre-school age). However, unlike the Constitutional Court, he sees that real difficulties would arise in the upcoming schooling.[8] "*Unlike in kindergarten, where we cannot yet speak of a children's collective in the full sense of the word, in primary school such a collective is already beginning to form, with all the educational advantages and childhood vices that accompany it. Although today's children find very little surprising, a minor can cope with the fact of a permanent change of school environment [...] Can she cope, for example, with the different learning*

[7] Section 888 of the Civil Code.
[8] Decision No. I. ÚS 1506/13, of 30th May 2014 of the Constitutional Court of the Czech Republic.

demands that will undoubtedly make her teachers uncomfortable? How will she be able to really enjoy her extra-curricular activities if she has to move from place to place every fourteen days to do them?" (David, Dissenting opinion to judgement mentioned above) Psychologist Mertin expressed a similar view regarding compulsory schooling: "*Once a child is older, he needs not only parents but also social ties in place. The law does allow for the attendance of two kindergartens and possibly primary schools, but I find it almost inhumane. Why make it any harder for a child than it has to be.*" (Bulletin advokacie, 2014).

3. COCHEM PRACTICE

If a situation arises in which the court must regulate the arrangements for a minor child, it is always preferable for the parents to reach a mutual agreement on this matter (Mach and Šmolka, 2008, p. 136). The essence of the Cochem practice lies precisely in fostering such parental agreement. Within this arrangement, parents are encouraged to cooperate with the court, lawyers, psychologists and social workers to reach their own consensual agreement - an agreement that they both support.

3.1 The Origin of the Cochem Practice

The Cochem practice began to take shape in the Cochem court district (Germany) in 1992. A conference was convened that brought together professionals from five disciplines, namely judges, lawyers, child welfare workers, staff of professional counselling centres and experts. The aim of the conference was to assess both the perception of their own profession and the perception of the other professions (Rudolph, 2010, p. 21).

The discussions revealed that the different professions were critical of each other and showed prejudice regarding the abilities and expertise of others. The greatest tensions arose between the child welfare department and attorneys, followed by the family law judges' criticism directed at the child welfare departments. The reports on the child's current family situation that were submitted to the court by this department tended to focus primarily on how the children's rooms were equipped and the cleanliness of the home. Based on these findings, the courts often awarded custody to the parent, who stayed in the residence on that basis alone. These meetings demonstrated the need for interdisciplinary cooperation.

In the subsequent conferences, the need for collaboration with psychologists also became evident (Rudolph, 2010, p. 21). Interactions between representatives of specific professions and gaining insight into each other's methods of work proved also beneficial in terms of efficiency. The lengthy formal processes of establishing contact are disappearing, so, for example, a simple telephone conversation is sufficient (Rogalewiczová, 2019, p. 229).

The most significant outcome of these negotiations was the idea that the child should retain meaningful relationships with both parents even after the divorce (Rudolph, 2010, p. 21). Children who maintain close contact with both parents have a better opinion of themselves. "*They know that dad is still actively involved in their lives, even though he no longer lives with mom.*" (Warshak, 1996, p. 165). They don't doubt themselves and don't explain away "*Dad's relative disinterest by blaming themselves.*" (Warshak, 1996, p. 165).

Moreover, in Germany, until 1998 (i.e. until the reform of the German Civil Code), parental custody was often not granted to both parents. If the child's parents were unmarried and did not live together, parental custody was, by court decision, always assigned to only one of them, and the other parent thus lost the right to participate in the

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child's upbringing, to maintain contact with the child, and to take part in the child's future life. In the case of unmarried couples, parental custody belonged exclusively to the mother, and the father could obtain it only in cases provided for by law.

Given this legal framework, the events before the court were frequently dramatic, and the relationship between the two parents tense. The judges based their decision almost exclusively on the expert's report. These recommended that the child be entrusted to the care of one parent and advised that the other parent should either have no contact with the child for a certain period of time or should resume contact only after a long break. The reason for such a measure was that, according to the expert, the child needed a break from parental conflict. In reality, however, these restrictions had rather negative consequences on the child's relationship with the non-residential parent and led to mutual alienation. Moreover, the parental conflict itself remained unresolved and, once the judgement was issued, no one monitored whether the court's decision was being respected (Rogalewiczová and Cirbusová, 2015, p. 5).

A series of negotiations in 1992 was followed the next year by the adoption of the Cochem Convention, which aimed to "*re-establish joint parental action even in highly disputed cases*" (Rudolph, 2010, p. 24), to bring the child's parents together for dialogue and to encourage them to view the situation through the child's eyes. "*The result - also of the court hearing - should be a judgment: the parents' decision*" (Rudolph, 2010, p. 24).

The reason for the parents' reluctance to resolve childcare arrangements through a joint agreement is that they are unable to detach themselves from their partner conflicts, so they cannot fully perceive the interests of their common child. The involvement of professionals is therefore intended to help parents overcome their partnership problems and to view the situation as objectively as possible, placing the child's interests at the forefront. Lawyers themselves often initiate the first meetings with the child welfare department and visits to counselling centres. Such a procedure can, in certain cases, resolve parental conflict amicably and avoid the need for court proceedings (Rudolph, 2010, pp. 24-25).

As noted above, the result of this conference was the adoption of the Cochem Convention. The basic purpose of the Cochem practice is "*to restore the ability of parents to act together in the affairs of the child. The means to achieve this goal*" (Rogalewiczová and Cirbusová, 2015, p. 8) lie in connecting all the professions together in an imaginary network. If one link falls out, the system can no longer function effectively. Under the Cochem Convention, each professional group commits to specific tasks, that it must fulfil throughout the proceedings (Rogalewiczová and Cirbusová, 2015, p. 8).

3.2 Roles of Individual Professions

First, it is useful to outline the principles on which Cochem practice is based, as these principles constitute the hypothetical theses for the different actors, whose roles will be discussed in the following pages. The key principles are as follows: "*Decisions are primarily in the hands of the parents, as is the responsibility for their child's life; all professions are equal, their contribution to the solution is equal; the performance of the different professions must be coordinated - active collaboration, regular meetings, fine-tuning of procedures, capacity of services, etc.; respect, communication, orientation to the child's perspective (important for all involved).*"[9]

[9] Manual for establishing interdisciplinary collaboration. *Cochem.cz*. [accessed on 10. 10. 2021] Available at: https://www.cochem.cz/wordpress/wp-content/uploads/MANUAL-final-cochem-bez-orez.pdf. (Cochem.cz is an association that fights for the Cochem practice to be enforced in the Czech legal system.)

We will then introduce the different professional groups and their role within the Cochem practice. In the first place, it would be appropriate to highlight those who set the whole procedure in motion, which is not any member representing the professions, but the parents themselves. The parents must be willing to work on themselves throughout the proceedings, to learn to communicate with each other again, and to cooperate with the professionals, which we will mention further (Rogalewiczová, 2015, p. 20).

Sooner or later, both parents are represented by attorneys in a heated parental conflict. The first disagreements arise immediately after the filing of a suit. Once a parent receives a copy of the pleading, he or she might feel devaluated as a parent in the light of the harsh tone of legal language. As a result, the parent immediately turns to the attorney and asks to be portrayed in the best light before the court. In Cochem practice, attorneys are instructed not to act solely as advocates for their client, but also to emphasise the fact that both parties remain, first and foremost, parents who must continue to cooperate. Written communication between parents should also be completely minimised and replaced by verbal communication. Even these initial steps can significantly contribute to reconciliation. The aim is therefore not for one party to "win", but for both parties to reach a mutual agreement.

Another undoubtedly very important institution is the family law court (in German *Famieliengericht* - family court). The court must set a hearing within two weeks from the date the petition is served to the court -this priority supersedes other court proceedings. It is the speed with which the whole situation is resolved that has a significant impact on how the child is affected by the separation of the parents. Delaying proceedings for several months, can irreparably damage the child's relationship with the parent with whom he or she does not live. This is confirmed, among other things, by a judgement of the Constitutional Court of the Czech Republic: "[...] *cases concerning the care of children must necessarily be dealt with as a matter of urgency, delays in any of the stages of the proceedings may be tolerated provided that the overall duration of the proceedings is not excessive, since the passage of time may have irreversible consequences for the child's relationship with the parent with whom he or she does not live for that period and with whom he or she has either no or limited contact during that period.*"[10]

It is only at the first court hearing that the parents are able to present and elaborate on their ideas about the future arrangement of their "parenthood", as they usually do not have sufficient time to consult their attorney beforehand (as mentioned above, the proceedings are initiated very quickly). In most cases, this first hearing is accompanied by arguments, yet this is to the court's advantage, because in heated moments, the core issues tend to surface, which is a springboard for their subsequent resolution (Rudolph, 2010, pp. 26-27). The judge then has the task of communicating with all the professions involved (see above). The court guides the parents throughout the proceedings, but does not impose an authoritative decision, rather, assists them in reaching their own agreement (Rogalewiczová and Cirbusová, 2015, p. 20).

The Department of Child Welfare is expected to work with the family as a whole, and its representative must be present at all court hearings. When working with the family members, the representative is exempt from keeping written records, instead, the emphasis is placed on extensive communication and through this approach the Child Welfare Department is often already able to reach an agreement with the parents.

If the disputes between the parents cannot be resolved during the court hearings, the court stays the proceedings, and both parents are referred to the psychological

[10] Decision No. I. ÚS 1074/13, of 28th July 2014 of the Constitutional Court of the Czech Republic.

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counselling centre with the assistance of a child welfare worker to a psychologist, where they are again given an appointment for an interview within a maximum of fourteen days. Another court hearing must be held within six months at the latest, at which the parents are expected to present an agreement. If no agreement has been reached by that time, both parents continue attending the psychological counselling centre. Common reasons why parental conflict persists are disputes over property, and situations in which fathers fight for their paternal rights without fully considering the consequences for the child. The "desire" for revenge, aggression, or anxiety also plays a role (Matoušek et al., n. d., p. 19).

An alternative to attending a psychological counselling centre is the preparation of an expert report. The experts communicate with the parents and their attorneys during the preparation of the report. If an agreement can be reached before the expert report is completed, the obligation to submit it is lifted and the court approves the parents' agreement (Rudolph, 2010, pp. 25-28).

The child is at the centre of all cooperating professions. "*The best interests of the child are seen from the child's point of view, not from the point of view of adults who believe that they know what is best for the child from their position, age, and experience*." (Rogalewiczová, 2015, p. 10). The professionals involved aim to guide parents to set aside their partnership issues and to focus instead on the needs of their child from their perspective, with a successful solution being deemed to be a parental agreement (Rogalewiczová and Cirbusová, 2015, p. 10). *"Cochem practice seeks to achieve that divorcing or separating parents are able to take back their joint responsibility for their child together. To behave like parents again, realising that although their life together is in the past, they will always remain parents of a child together. And that their child needs them both."* (Rogalewiczová and Cirbusová, 2015, p. 10). By the end of the proceedings the parents should therefore be fully aware that they must treat each other with due respect and that they must continue to communicate with each other in a way that safeguards the welfare of their child. The child should still have both parents even after the judgement is given.

4. COCHEM PRACTICE AND ITS APPLICATION IN THE CZECH REPUBLIC

The spread of Cochem practice in the Czech Republic can be linked to the establishment of the Cochem.cz association in 2015.[11] Since then, this group, joined by other Czech courts and judges, has been working to implement the Cochem practice in Czech judicial practice.

The reasons for promoting the practice of Cochem in the Czech Republic are not exactly identical as the initial impulses that led to its development in Germany. This is because the Czech legal system, unlike the German system at that time, grants parental responsibility to both parents.[12] By contrast, in Germany, as mentioned above, both parents exercised parental responsibility only if they were married. After a divorce, the court decided which parent would retain parental responsibility and which would lose it. If the child was a child whose parents were not married, only the mother had parental responsibility, albeit with certain exceptions (Rogalewiczová, 2019, pp. 236-237).

In the Czech environment it is irrelevant whether the parents live together or whether they are married. Parental responsibility cannot be relinquished unilaterally by either parent, but in cases provided for by law, if *"there are reasons to believe that it is*

[11] About us. Cochem.cz Available at: https://www.cochem.cz/index.php/o-nas/ (accessed on 11.10. 2021).
[12] Section 865(1) of the Civil Code.

necessary in the best interests of the child a court may decide that the exercise of parental responsibility of the parent be suspended".[13]

The need to introduce the Cochem practice in the Czech Republic stems from the effort to change the way guardianship courts operate according to the principle that it is always preferable to lead parents toward an agreement so that they can continue to function as equal parents of their child rather than imposing a certain solution on them. "The essence of Cochem practice is the coordinated interdisciplinary cooperation of professionals who work with parents (through their influence on them) to resolve a conflictuous situation." (Macková-Jurásková and Nováková, 2019, p. 13).

The fact that it is important for proper upbringing to have parents who can communicate with each other has been confirmed by the Constitutional Court. In its judgement of 15 March 2016, the complainant, in this case the child's father, argued that the Regional Court's decision had restricted his contact with his daughter, who was in the custody of her mother. With regard to the father's conduct, the Constitutional Court stated the following: *"[...] the complainant, who apparently considers himself to be a better parent than the mother, should consider very carefully whether the confrontational way of conducting the proceedings before the general courts (and indeed before the Constitutional Court), involving personal attacks against the mother, is actually in the interests of his daughter. Experience has shown that the key prerequisite for the proper upbringing of a minor child is correct relations between the parents, or the ability to communicate with each other about the care of the child and issues of his upbringing, while such personal attacks can hardly contribute to the quality of the latter.*"[14]

If it is not evident that the parents have reached a joint agreement or engaged in any meaningful discussion about their future functioning in relation to the child, the judge may order a "other court proceedings".[15] During the other court proceedings, the judge may convene an informal conference outside the courtroom in his or her office to talk with the parents about their parental responsibilities. The judge inquires into their respective ideas about the future arrangement of parenting time and, in the process, seeks to eliminate any obstacles that are preventing them from reaching an agreement. Ultimately, responsibility for resolving the post-divorce situation rests mainly with the parents. "*If parents are unable to reach an agreement and rely solely on the court's decision to help them resolve the issue, they are deeply mistaken. Relying on the court and its decision is buck-passing because in order to resolve the broken relationship between the parents, it is necessary first of all to show their will to solve the problem*." (Rogalewiczová, 2015, p. 26).

4.1 Attorneys

The manner in which parents enter the courtroom often indicates the spirit in which the hearing will unfold. If the parties are able to communicate without difficulty and appear before the court with a jointly proposed solution, this is generally a positive sign that they are acting with their child's welfare in mind. However, when the parents arrive the courthouse accompanied by a group of relatives who unequivocally support "their" family member as the better parent and are already at that point divided into two hostile parties, it becomes evident that neither parent is interested in any mutual agreement at

[13] Section 869 et seq. of the Civil Code.
[14] Decision No. III. ÚS 2298/15, of 15th March 201 of the Constitutional Court of the Czech Republic.
[15] Type of proceedings in the Czech Republic, which means a less formal hearing, which can be held for example in the office of a judge.

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that point. In such situations, the parties' attorneys are not helping an already rather escalated situation. Seeking to secure a "victory" for their client, they portray their client's qualities in the best possible light, thereby simultaneously undermining the qualities of the other party (Rogalewiczová, 2015, pp. 26–27). The counterpart then searches for "faults" in the other parent and attempts to use these faults to prevail in the dispute, but this does not automatically translate into a good relationship with the child (Macková-Jurásková and Nováková, 2019, p. 14). However, this rule does not always apply universally; there is also a group of attorneys who do not seek visibility through court proceedings, but on the contrary seek to ensure constructive communication.

For the purposes of this paper, Mgr. Miroslava Káňová, judge of the District Court in Nový Jičín, shared her experiences regarding the involvement or rather non-involvement of attorneys in Cochem practice. In general, she does not consider the involvement of lawyers in the process to be particularly beneficial. When another court year is ordered, it occasionally occurs that the parents are accompanied by their lawyers, and are told that their participation at this stage of the proceedings is not required at all, and indeed, is not even appropriate. The judges' task is to establish the relevant facts together with the parents, and the lawyer cannot meaningfully contribute in any way. Furthermore, the participation of attorneys in the negotiations often obstructs the achievement of an agreement and parents are less willing to compromise (Káňová, 2021).

At the District Court in Nový Jičín, the judges sought a solution for integrating attorneys into the system. The proposal was to allow the public to choose an attorney who would sign a statement in advance stating that he or she would not use confrontational strategies in family law proceedings. The declaration would read as follows: "*I have familiarised myself with the principles of the proceedings and decision-making of the District Court in Nový Jičín in matters of custody of minors, and I undertake not to use conflict strategies in these proceedings. I will limit myself to the necessary description of the facts when drafting the petition for the initiation of proceedings*." (Kutlík, 2018, pp. 21–22). A list of such attorneys would be published on the court's website. However, the Bar Association advised attorneys not to sign such a statement under the threat of disciplinary action. The court's proposal, it said, contravened section 16(1) and (2) of the Advocacy Act[16], which states that an advocate is to promote the rights and protect the legitimate interests of his client, and to do so he is to use all legal means and, within those means, to apply everything he considers beneficial to his client (Kutlík, 2018, pp. 21–22).

4.2 The Department of Child Welfare

An important and irreplaceable role in the proceedings is undoubtedly played by the Department of Child Welfare which acts as a representative, guardian of the child (Rogalewiczová and Cirbusová, 2015, pp. 26-27). A minor child is, in principle, represented by his or her parents: the duty and right to represent the child is part of parental responsibility.[17] However, in proceedings concerning the court's care of a minor, a conflict of interest (or even the threat of such a conflict) may arise between the parents, as representatives of the child, and the child. In such cases, it is therefore necessary to appoint guardian ad litem for the child, which is usually the Department of Child Welfare[18] (Šínová et al., 2016, pp. 265-266). A social worker of the Department of Child Welfare also

[16] Act No 85/1996 Coll., Advocacy Act.
[17] Section 892 of the Civil Code.
[18] Section 469(1) of the Act No 292/2019 Coll., on Special Judicial Proceedings.

meets with the parents prior to the court proceedings and may help them reach an agreement that the court subsequently approves (Rogalewiczová and Cirbusová, 2015, p. 27). Within the Cochem practice, the Department of Child Welfare is expected to act as an independent third party, informing the parents before the court hearing about what to expect. Its role is to represent the child's interests by helping the parents see the whole situation from the child's point of view and by appealing to them not to cause one of them to disappear from the child's life by their separation and conflicts (Rogalewiczová and Cirbusová, 2015, p. 20).

It is the loss of a parent that represents one of the greatest fears for a child in divorce proceedings, "*younger children fear that their parents may physically abandon them, older children may fear that they will not have parental love when they need it*." (Gradková, 2019, p. 44) Children therefore often find themselves in situations where they enter into imaginary coalitions with one parent, usually the parent who does not want the divorce, against the parent who is "leaving" the family. These are aspects that can aggravate parental cooperation. With the help and cooperation of professionals, parents may eventually be able to recognise when such behaviour is merely a "game" played by the child. This is why the role of the Department of Child Welfare worker is irreplaceable in the context of Cochem practice – Its worker helps parents understand the situation they are facing and works to stabilise the family environment. He or she also informs the child about the current circumstances and assists the parents in communicating with the child. The Department emphasises that the parent who is leaving or has already left the family household should also continue to maintain contact with the child, and it urges parents to refrain from making negative comments about each other in the child's presence (Gradková, 2019, pp. 44–45) This directly reflects the text of the law: "*When deciding on entrusting the child to the care of another person, a court must also consider the right of the child to be cared for by both parents and to maintain regular personal contact with them, and the right of the other parent to whose care the child will not be entrusted to get regular information about the child; the court shall also take into account the ability of a parent to agree on the child's upbringing with the other parent.*"[19]

If the disagreements between the parents persist and they are unable to resolve issues related to the future care of the child without professional assistance, the Department of Child Welfare may require the parents to participate in professional counselling.[20]

4.3 Mediator

The court may also order the parties to seek assistance from an expert. Under the Act on Special Judicial Proceedings, the court is required to guide the parents of a minor child towards reconciliation, and it may order them to meet with a mediator, undergo family therapy or use the services of a specialist in the field of pedopsychology.[21] Mediation, however, can be financially burdensome for parents, as under the Mediation Act, the parties to the proceedings pay the mediator's fee equally.[22]

In mediation, we encounter an element that is consistent with the principles of Cochem practice: it is the parties to a given dispute who make all the decisions and, more importantly, who bear responsibility for them afterwards. However, one undoubtedly

[19] Section 907 of the Civil Code.
[20] Section 12(1) (b) of the Act No 359/1999 Coll. On the Social and Legal Protection of Children.
[21] Section 474 of Act No 99/1963 Coll., Code of Civil Procedure.
[22] Section 10(3) of Act No. 202/2012 Coll., the Mediation Act.

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crucial participant is often overlooked in mediation: the child. In 2015, only 20% of mediators involved children in the mediation process. In most cases, mediation is only managed from the parents' perspective, and the child's perspective is scarcely represented (Rogalewiczová and Cirbusová, 2015, pp. 20–22). The Mediation Act contains general reference about taking the child's interests into account: "*The mediator shall [...] (b) respect the views of the parties to the conflict and create conditions for their mutual communication and for finding a solution which takes into account the interests of both parties and which, where the subject of the conflict directly concerns the rights of a minor child, takes into account in particular the interests of the child*."[23] Yet, the involvement of the child in the mediation process is undoubtedly beneficial. The mediator can act as the child's confidant in this process, just as the Department of Child Welfare does in the situations described above. It is often easier for a child to confide his/her feelings to a "stranger" than to his/her own parents, because he/she is not afraid of hurting his/her feelings. The mediator can also help shed light on a complex situation for the child, allowing the child to offer his/her own suggestions for dealing with the situation and interact with the parents to communicate their future functioning. "*Children want to be involved and are able to be involved if adults, including mediators, can adapt and, above all, if they can find the courage to ask and talk to them*." (Rogalewiczová and Cirbusová, 2015, p. 26).

Mediator Míša Kopalová introduces a new initiative to her role as a mediator between the child and parent, which she refers to as a ritual. This occurs in situations where the parents have already developed a plan for their future functioning, but do not know how to communicate this arrangement to the child. As a mediator, she then explains to the child that it is entirely understandable if they do not fully understand the situation. She familiarises them with the parents' plan, for example, explaining who will take them to extracurricular activities and who will pick them up, and she is prepared to answer the children's questions.

During the mediation process, it is also advisable to involve a psychologist. He or she can work with the child individually, is able to better distinguish his or her needs and subsequently convey information about them to the parents. Parents can also benefit from psychological help. It is possible to interrupt the mediation for a period of time in order to allow one of the parents to undergo therapy, and then resume the mediation once the parent has become more at ease with the situation (Majetný and Kopalová, 2019, pp. 20–23).

4.4 The Opinion of the Child

The child is often the most overlooked and at the same time the most vulnerable party in a divorce (as well as a separation) situation. It is therefore essential to prepare and communicate with the child for this emotionally demanding process. Both parents should explain to the child what is happening at that time, why it has occurred and what the future arrangements will look like. It is also crucial to reassure the child that the situation is not their fault. Children frequently feel compelled to take on adult burdens, becoming imaginary partners and advisers to their parents. However, it is essential that they remain in their role as children and spend their time as they have been used to. They should maintain regular contact with their friends, extended family, and meet them and other acquaintances in places where they are not burdened by the tensions associated with their parents' divorce (Macková-Jurásková and Nováková, 2019, p. 16).

[23] Section 8 (1)(b) of the Mediation Act.

They should also be allowed to express their own views. The child's right to be heard is enshrined in the Convention on the Rights of the Child, specifically in Article 12: "*1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*" According to the UN Committee on the Rights of the Child, this right should not be limited by age. States Parties should not impose age limits.

If the court ascertains the child's opinion in the proceedings, "[...] *it must assess its relevance and give proper reasons for its conclusions in the decision*." (Šínová et al., 2016, p. 145). Approaches to "talking" with a child vary according to the child's age. In this respect, children can be divided into five age groups depending on their intellectual development. The first group consists of children from birth to the age of three: these children are unable to fully comprehend the events taking place around them, so it is necessary to maintain a relationship with both parents. Children aged three to six, i.e. pre-school children, are already capable of grasping the situation to a certain extent; therefore they need to be treated with increased sensitivity. At this age they are easily influenced, and they are also highly sensitive to changes in their environment, so they must be given sufficient space to understand and cope with these changes. As with the previous age group, the emphasis is on the relationship with both parents. In the third category, which includes children aged six to ten, children are already capable of expressing themselves fully. Their wishes should be taken into account and, to a certain extent, reflected in the judgement. It is also appropriate to communicate the judgment to the child in an age-appropriate manner after the proceedings have been concluded.

A significant shift occurs with children aged ten to fifteen, whose opinion is taken very seriously and should be duly reflected in the final judgment. Even though this is a period when the child is often very critical of their parents due to their development, their views should nonetheless be respected.

When the child reaches the age of fifteen, his or her opinion must be respected without reservation. As with the previous group, it is not appropriate to force contact with a parent; on the contrary, such pressure may be traumatic for the child and will certainly not strengthen relations (5th Family Law Symposium of the Judicial Academy on the Participation of Children in Guardianship Proceedings, held on 24 and 25 June 2021).

However, the child's wishes cannot be regarded as an absolute value in the assessment of a given case – although they carry significant weight, the judge must make a comprehensive assessment of the child's best interests together with them. "[...] *it is not possible for the child's wishes to be ascertained by inappropriate questions such as 'Who would you like to live with?'; the child's wishes must be ascertained comprehensively, i.e. in particular by indirect questions (especially for younger children), and ideally in an informal setting (i.e. not in the courtroom but, for example, in the judge's chambers or elsewhere). In this context, the Constitutional Court notes that the older the child is, the more weight his or her opinion carries*."[24]

According to Mgr. Káňová, talking to the child is a great benefit to the entire procedure. Allowing the child to express his or her opinion on the situation ensures that the child is not treated merely as an object of the proceedings and the parents' agreement

[24] Decision No. I. ÚS 2482/13, of 26th May 2014 of the Constitutional Court of the Czech Republic,

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is not formed without the child's knowledge, but the child is given the opportunity to become a full-fledged participant in the process.[25] In her experience, Mgr. Káňová states that children generally appreciate the opportunity to express their opinion on the situation. There are, however, cases where a child indicates that he or she does not wish to express an opinion, which must also be fully respected: as it is the child's right. It is advisable to make clear to the child that it may not always be possible for the court to decide entirely in line with his or her wishes, but that the court will seek to accommodate those wishes as far as possible. Children then feel that they themselves can meaningfully influence the situation and many value the opportunity to be informed of the contents of the judgment as soon as it is delivered. In most cases, the child's parents are informed of the outcome of the proceedings, but Mgr. Káňová encountered situations in which the child requested that the judge inform them of the decision by e-mail (Káňová, 2021).

4.5 Parents

When a relationship or marriage involving children breaks down, it is essential to minimise the impact of partner conflicts on the child. Parents should avoid involving the child in issues arising from their partnership, should not use the child as a mediator to resolve disputes, blame the child for maintaining affection for both parents equally, or impose their own views on the child. Instead, they should allow the child to develop a positive relationship with both parents, allow the child to form his or her own opinions about his parents, and support them as much as possible. At the same time, they should refrain from attempting to convince the representatives of the professions involved in the proceedings, which are conducted on the basis of the principles of Cochem practice, as to which of them is the "better" parent.

Seeking professional help at an early stage can help preserve relationships as well as maintain constructive communication. Parents should strive to find a future family arrangement in which the child does not lose either parent and thus does not lose contact with the wider family network.

After the petition is filed with the court, the parents are invited to meet with the Department of Child Welfare. During this meeting, they receive initial guidance and recommendations on how to proceed. One of the purposes of the Cochem practice is to shift the responsibility for deciding the child's future back to the parents themselves: they are presumed to know better than the court what arrangement is best for their child. The Department of Child Welfare may refer parents to additional professional support, such as mediation or family therapy. It is entirely left to the parents to decide whether or not to use such services, but if the conflict persists and communication deteriorates, the Department of Child Welfare has the authority to require the parents to seek professional counselling: to attend an initial meeting with a registered mediator or family therapy under the threat of a fine of up to CZK 20 000[26] (Brzobohatý, Cirbusová and Rogalewiczová et al., 2015, pp. 85-89).

In the context of cooperation between various professionals, the court, and the parents, it is essential to emphasise that parental conflict primarily harms the child. Parents often present the child's interests through their own subjective perspective, so it is the professionals' task to ascertain how the child genuinely perceives the situation and to communicate this perspective back to the parents. The participating professions aim to guide the parents toward resolving the situation amicably by reaching an agreement.

[25] Section 100(3) of the Code of Civil Procedure.
[26] Section 59d (1) (a) of Act No. 359/1999 Coll., on the Social and Legal Protection of Children.

They inform them about the ways in which this can be achieved and to whom parents can turn if they need help. Working with parents is a long-term and challenging process for the good of their child (Brzobohatý, Cirbusová and Rogalewiczová et al., 2015, pp. 4-5).

4.6 Parental Plan

A parental plan is a form of help for parents to establish a system for the future functioning of their parenting. It may be presented to them at the meeting with the Department of Child Welfare, specifically in a situation when they have already agreed on the future arrangement of their relationship. The court may also refer to the parental plan at the conclusion of the proceedings.

Within the parental plan, parents can set out the details for how they will handle individual situations that arise in the upbringing of their child. It can viewed as a notional agreement outlining their parental responsibilities: for example, addressing issues such as education, housing, upbringing, medical care, financial support, and much more. When drawing up a parental plan, parents should bear in mind that parental responsibility is shared equally between them, regardless of which parent currently has custody of the child. Parents should contribute equally and remain united in the upbringing of the child.

Parents may draw up the plan together if their communication is functioning well. If communication has already broken down, each parent may first prepare their own version. They can then present their versions to each other and jointly discuss the parts that are contentious. If they cannot resolve their disagreements, they can seek assistance from a professional (for example, a psychologist or the Department of Child Welfare) who can help them facilitate the creation of a parental plan.

If the parents already have an older child who is capable of understanding the situation at least to some extent, it is advisable to introduce the parental plan to them. They can also incorporate the child's wishes and complete the parental plan accordingly (MSK, n. d.).

4.7 Cochem Practice at the District Court in Nový Jičín

In 2019, the Cochem practice in the Czech Republic has already expanded to approximately thirty courts. Interdisciplinary teams were established within these courts and began to cooperate systematically. The first court to introduce the Cochem practice into its activities was the District Court in Nový Jičín in 2016. Experts from this region (including judges, Department of Child Welfare, mediators, staff of professional family counselling centres, and staff of the Moravian-Silesian Regional Office) met once a month to develop a suitable procedure for resolving parental disputes (MSK, n. d.). The participants of the meeting agreed that it was necessary to abandon the long-standing notion that legal relations concerning children in family law should be decided authoritatively by the courts, and that it should be the parents themselves who bear responsibility for the future of their child and for the decisions affecting them (Kutlík, 2018, p. 9). "*In the course of the cooperation, we managed to implement a project co-financed by the European Union called "Interdisciplinary cooperation* (the courts themselves often prefer the term interdisciplinary cooperation rather than cochem practice, which is why this term appears in many publications and professional articles) *in the judicial region of Nový Jičín", which enabled the realisation of activities that further supported and deepened the mutual cooperation of the professionals involved*." (MSK, n. d.). Activities aimed at educating parents were created, and the region was able to

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introduce the services of key professionals, without whom Cochem practice could not be implemented, such as mediators or family therapists. In addition, brochures for both parents and children were developed, as well as the parental plan mentioned above. The cooperation established in Nový Jičín under the leadership of Mgr. Vladimír Polák, became an inspiration for many other courts, which gradually followed its example (Polák, 2021). The following section is based on my experience at the Nový Jičín court.

For the system of interdisciplinary cooperation to function effectively, the participating institutions must act in a coordinated manner and follow four principles: "[the principle of] 1) *cross-section of the competencies of the individual institutions*, [further implemented by] 2) *comprehensive, goal-oriented and cooperative intervention by the participating institutions*, [whereby] 3) *the quality of the individual contributions of the participating institutions is considered equal*, [and using] 4) *preventive intervention in conflicts*." (Kutlík, 2018, p. 14). The judicial process within this model is conceptually divided into two parts: an informal and a formal stage. In the informal stage, the interconnected institutions seek to "*eliminate the parents' ignorance and reluctance in relation to the adjustment of the minor child's circumstances* [...]. *At this stage, the parents are approached informally on a partnership basis, with power elements being used only when necessary.*" (Kutlík, 2018, p.13). Once the first hearing is formally initiated, the next stage begins, in which the judge and the Department of Child Welfare assume an authoritative role, and with it comes the power approach. In most cases, after the first hearing, a judgment is handed down, with the optimal outcome being the approval of the parents' agreement.

The entire project implementation at the Nový Jičín District Court began with the application of the Cochem practice in several pending cases. Since 2017, the entire guardianship department has been involved in this approach. The results of the streamlining of the guardianship department became evident the following year, when it was possible to conclude that: "*1) the principles and processes of the Cochem practice can be implemented in Czech courts without the need for legislative changes, 2) the joint, coordinated and prompt action of the participating institutions, which is primarily aimed at eliminating the parents' ignorance and reluctance regarding the possibilities of arranging the relations with their minor child, 3) the joint meeting of the parents at the Department of Child Welfare prior to the first court hearing has proved to be successful*." (Kutlík, 2018, p. 23).

4.8 Explicit Experience with the Cochem Practice: An Interview with Mgr. Vladimír Polák

For the purposes of this article, an interview was conducted with Mgr. Vladimír Polák, Vice President of the Regional Court in Ústí nad Labem, who shared his experiences from his time as a judge in Nový Jičín District Court.

Mgr. Polák began considering the implementation of Cochem practice when he became the vice president responsible for the guardianship department in Nový Jičín, with the aim of improving its efficiency. As he explains, "*While drafting procedural maps, I thought about what could be done to make the system function better—if court processes are to be managed effectively, each case must be addressed efficiently.*" (Polák, 2021). This means that court proceedings should not be unnecessarily prolonged; for instance, it should not be necessary to schedule five hearings for a single case. It was also essential to improve the quality of information and reports received by the court—specifically from child welfare authorities (Department of Child Welfare) and psychologists from counselling centres. Enhancing the efficiency of the guardianship department would not

have been possible without simultaneously improving cooperation with Department of Child Welfare and providers of specialised assistance.

The Department of Child Welfare has made significant progress in its approach toward parents. It has moved away from the practice of drafting proposals on behalf of only one parent and instead now engages with both parents simultaneously, rather than individually. It has also begun to make greater use of counselling and preventive measures, including parental education. The Department of Child Welfare now acts as an guardian ad litem in cases of conflict, better fulfils children's participatory rights, and has significantly reduced its interventions in family life (particularly home investigations).

Awareness of the Cochem practice has also been successfully disseminated among parents living within the court's jurisdiction. As a result, they are often aware before proceedings begin that cooperation with associated institutions will be expected of them. Some parents have developed sufficient trust in professional assistance that they voluntarily seek such services again when facing later complex life situations.

Experience with parental plans in Nový Jičín has likewise been very positive. Only a small percentage of parents who are willing and able to create a parental plan subsequently file new petitions in the future.

The Cochem practice cannot be universally applied to all cases. This method of working with families is appropriate only when dealing with fully competent and capable parents – those who, due to a lack of information or their ongoing conflict, are unable or unwilling to reach an agreement. The goal is to address this lack of awareness and unwillingness to cooperate. Naturally, the Cochem practice is not fully applicable in cases involving at-risk children, as such situations require intervention (e.g., cases of domestic violence).

Criticism of the Cochem practice generally revolves around insufficient participation of children, with concerns that it reduces the child to a mere object of the parental agreement, as well as on the risk of exerting excessive pressure on parents to reach an agreement. It is unquestionably unacceptable to compel parents into an agreement simply because a judge considers a particular solution to be desirable. However, it is beneficial to apply pressure that encourages parents to learn how to reach agreements on their own. A shortcoming of the Cochem practice in the Czech Republic is the failure to systematically involve attorneys (see above for details).

In summary, the Cochem practice represents a trend that originated in Nový Jičín, later expanded to Most, and today is being pursued by at least one judge in nearly half of the district courts. This progress has been significantly supported by the initiative Cochem.cz, which successfully brought the concept to the attention of Members of Parliament and Senators, and continues to promote the practice further.

4.9 An Insight into the Functioning of the Cochem Practice: Analysis of Court Proceedings

This section presents how court proceedings are conducted under the Cochem practice and analyses their procedural structure of these proceedings as implemented by the District Court in Nový Jičín. The explanation is supplemented by a specific case, referred to as Case XY for the purposes of this article.

In Case XY, which serves as the basis for this analysis, the matter involved parental divorce. The father filed a petition requesting an adjustment of custody arrangements for the minor child following the divorce. He proposed that the child, in this case a son, be placed in the mother's custody, with him paying child support set at 4,000 CZK.

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As a general rule, proceedings commence on the day the petition is delivered to the court.[27] Within three days of receipt, the court must contact the Department of Child Welfare and notify it of its appointment as the child's guardian ad litem. The court then schedules either an additional court session or the first hearing, if a parental agreement has already been proposed, typically within three weeks to one month from the initiation of the proceedings. A senior court official notifies the other parent of the initiation of proceedings and subsequently informs both parents of the date of the court session, as well as the documents they are required to prepare. Parents are further instructed to promptly contact the Department of Child Welfare and arrange a meeting with its representative (MSK, n. d.). Importantly, the responsibility for scheduling the meeting lies with the parents themselves, rather than with the court facilitating it. This serves as an initial step in engaging parents in the process. At this stage, parents begin to take initiative in communicating with one another and start assuming responsibility for their overall approach to the case. An identical approach was followed in Case XY.

For the first meeting with Department of Child Welfare, the parents are required to bring their minor child. Prior to the visit, the parents are tasked with explaining the family situation to the child and informing them that they will participate in the meeting together. During the meeting, the Department of Child Welfare representative informs the child of their participatory rights. The meeting is always scheduled to take place before any subsequent court session or hearing. During the meeting, the entire process that lies ahead is explained to both parents and the child and the roles of the various institutions involved are clarified. The purpose is to present the situation to the child in a manner that fosters a sense of security while also ensuring that the child has an opportunity to express their perspective. The guardian ad litem then asks the child how they prefer to be informed about the outcome of the proceedings (the possible methods of communication were outlined above) and provides them with informational brochures.

The next step involves a discussion with the parents, during which they are informed about their rights and obligations. Together with the Department of Child Welfare representative, they establish an interim arrangement governing child custody and the amount of maintenance. The parents are introduced to the concept of a parental plan and provided with an informational leaflet. A record of the entire meeting is prepared and subsequently sent to the court (MSK, n. d.).

In Case XY, the joint meeting with the parents took place with the understanding that they had already agreed the child would remain in the mother's custody; however, they were unable to agree on the amount of maintenance.

At this point, it is relevant to mention the so-called fundamental questions posed to both parents, as these guide the entire process. These questions are asked by the Department of Child Welfare, the judge during other court proceedings, or a psychologist from a counselling centre. The purpose is to assess the progress the parents have made at each stage. The questions are as follows: "*Why are you here, and what problem are you addressing? What is your vision for resolving the family's breakdown? What role does the other parent play in your vision of the solution? What role, in general, should the other parent have in your child's life? Have you informed your child about the situation? What is their response, and what are their wishes?*" (MSK, n. d.).

The process then continues with the other court proceedings, typically held within three weeks of initiating the case. This session constitutes the informal part of the judicial process. The judge does not wear robes and may meet with the parents outside the courtroom, often in their office, and the judge's role is closer to that of a mediator.

[27] Section 82 (1) of the Civil Procedure Code.

The judge explains the principles and rules of the court process and assesses how the parents are currently managing their relationship with the child. The guardian ad litem provides the court with a report from the Department of Child Welfare, including the outcomes of their discussion with the child. The judge then outlines potential solutions, emphasising that the case may be resolved either by an agreement between the parents or by a judicial decision is possible, with the preferred outcome being an agreement: "*I trust that this will be your agreement.*" (Kutlík, 2018, p. 17). The eventual outcome depends on several factors, as illustrated in Case XY. Parents are questioned about how they have engaged in resolving the situation, their understanding of the child's wishes, and the child's perspective on the matter. Emphasis is placed on educating the parents about the potential consequences of their marital breakdown on the child's well-being, as stress of the situation may manifest in children through symptoms such as disrupted sleep, eczema, or bedwetting. The session also revisits the earlier-mentioned questions to evaluate whether the parents, through ongoing education, are beginning to approach the situation from the child's perspective. Efforts are made to reach a provisional agreement, with input from the guardian ad litem, before concluding the other court proceedings. As noted in the previous chapter, lawyer involvement is not necessary at this stage (Kutlík, 2018, pp. 29–30). In many cases, parents reach an agreement by the end of the other court proceedings, and if the court has all the necessary documents, it may schedule a formal hearing on the matter for the same day (Káňová, 2021).

In Case XY, the parents were unable to reach an agreement due to their disagreement on the amount of maintenance. Their relationship was also strained, resulting in ineffective communication. Consequently, they were advised to visit a psychological counselling centre for intervention to address and resolve these interpersonal difficulties. This approach is commonly applied in cases where parents struggle with communication. In similar situations, it is often possible to establish a so-called provisional agreement regarding at least the undisputed aspects of the case.

When parents are unable to reach an agreement, the judge schedules a hearing within approximately three weeks and, in the interim, advises the parents on what they should focus on before the next session, typically directing them to professional counselling. In most cases, parents attend three counselling sessions, during which they engage with a psychologist or social worker. During the first session, the professional assesses the current family situation and identifies the parents' visions for resolving the dispute. During the second and third sessions, the parents work with the professional to address contentious issues and are guided to find mutually acceptable solutions. Parents are also educated about their child's needs, including: "[…] *parental responsibility, the role of both parents in the child's life, the impact of family dissolution on children, explaining the "null hypothesis" principle, judicial decision-making practices and the principles of determining maintenance* […]." (MSK, n. d.). The counsellors further support the parents in drafting an agreement and completing a parental plan.

If the parents succeed in reaching an agreement or drafting a parental plan, they submit the relevant documents to the court. If no agreement is reached, the provider of professional assistance sends a report to the court detailing the counselling process and recommending further professional support. If there is a reasonable prospect that the parents could reach an agreement within a certain timeframe, the court may postpone the hearing for up to three months (MSK, n. d.).

In Case XY, the parents attended four sessions at the psychological counselling centre — two joint and two individual ones. These sessions focused primarily on de-escalating the parental conflict. In cooperation with the professional from the psychological centre, a temporary custody arrangement of 2–2–3 days was established,

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under which the child alternated between the parents' homes. This arrangement had already been in place within the family and was satisfactory to all parties. However, from a long-term perspective, it was unsustainable. The child was due to start kindergarten in the coming months, and the arrangement would become even more challenging once the child started school. Throughout this period, the father continued to pay maintenance only in the amount he had proposed in his initial court filing.

As mentioned earlier, the first hearing typically takes place approximately three weeks after the proceedings begin. If the parents appear at the hearing without having reached an agreement—despite receiving comprehensive support from the Department of Child Welfare and counselling—the court shifts its approach. From that point onward, it is the court, rather than the parents, that determines what is in the child's best interests. On what basis does the court decide?

Expert reports are excluded at this stage because, despite the parents' inability to reach an agreement, they are still presumed to be fully competent in their parental role. An expert report would only be appropriate if the parents were deemed incompetent. Instead, the court primarily evaluates the parents' conduct during the proceedings. It focuses on which parent is able to distinguish the parental role from the partner conflict, who is capable of attuning to the child's emotional needs, who respects the other parent as a co-parent, who adheres to the interim agreement, and who demonstrates a cooperative attitude with professionals. Particular attention is also paid to how each parent presents themselves before the court, the Department of Child Welfare and professional service providers. In its decisions, the court also prioritises the best interests of the child while ensuring the fulfilment of the child's participatory rights.

In case of XY, the parents were informed that their proposed custody arrangement was unsustainable in the long term. The need to consider the child's upcoming enrolment in an educational institution is supported by the Constitutional Court's decision of 30 May 2014, which states that, when determining shared custody, it is crucial to take into account the child's impending school enrolment. The ruling emphasises maintaining stability in the child's upbringing and such stability should not be disrupted with each new stage of the child's life.[28] In case XY, the father expressed his willingness to adjust the custody arrangement to a weekly alternating schedule and was prepared to modify his work commitments accordingly. However, the mother attended the hearing accompanied by her lawyer, and from that point onward, refused to make any compromises.

There were no allegations questioning either parent's ability to care for the child, and both expressed mutual trust each other in this regard. Nonetheless, their communication issues persisted and could not be resolved even with the assistance of professionals. Consequently, the court was compelled to make an authoritative decision, which in this case meant shared custody in a weekly alternation arrangement with the aim to stabilise the child's environment and reduce the number of transitions between households, given that the parents lived approximately 25 minutes apart. The court further recommended that the child, in the future, attend only one school, located within a reasonable commuting distance from both residences. Despite the intensive involvement of the institutions in the case, the parents could not be guided toward an amicable resolution. According to the court, the turning point occurred when the mother brought her lawyer to the proceedings.

[28] Decision No. I. ÚS 1506/13, of 30th May 2014 of the Constitutional Court of the Czech Republic.

4.10 Comparison: Cochem Practice in the Písek District

As previously noted, approximately thirty courts in the Czech Republic currently apply the Cochem practice. It is therefore appropriate to compare the practice with another region.

In the Písek district, the Cochem practice was implemented in 2019 as part of the project *Interdisciplinary Cooperation in the Implementation of Cochem Practice in the Písek and Milevsko Regions* (Matoušek et al., n. d., p. 13). The first cooperating entities included the District Court in Písek, the Department of Child Welfare, and the counselling centre Arkáda. The objective was to introduce the Cochem practice in this region, drawing inspiration, among others, from the District Court in Nový Jičín. while adapting the practice to local conditions and available staffing capacities. *"The result of the two-year collaboration is close working relationships between the involved entities, clearly defined communication channels, a developed methodological framework, a customised Parental Plan, and, most importantly, an educated and coordinated team of professionals."* (Matoušek et al., n. d., p. 13).

The Cochem practice was initially "tested" on cases in which parental arrangements for a child were being decided for the first time. Generally, cases involving parents who return to court at a later stage are considerably more challenging, as these parents failed to adopt the principle of mutual agreement from the outset, making it significantly more difficult to guide them toward cooperation later on. The aim was to determine in which situations the Cochem practice could be effectively applied and in which it should be excluded entirely. It was ultimately concluded that the Cochem practice is not applicable in the following cases: *"proposals to reduce or increase maintenance; families where domestic violence is demonstrably occurring; cases where one parent faces significant obstacles to exercising parental responsibility, such as serious mental illness or disorders, or addictions to alcohol or other substances, etc." (*Matoušek et al., n. d., p. 15).

As in Nový Jičín, the Department of Child Welfare in the Písek district placed strong emphasis on educating parents. Meetings were conducted with both parents present, ensuring that neither parent felt disadvantaged by individual consultations. Parents were also tasked to draft a parental plan, which proved challenging in most cases: parents frequently returned to the Department of Child Welfare with an uncompleted parental plan. When parental plans were completed, they were typically submitted in two separate versions, each parent having independently completed their own, leading to significant discrepancies in the key areas of the plans. In light of these negative experiences, the requirement to complete a formal parental plan was eventually abandoned in the Písek district. Instead, parents are now provided with the plan only in the form of an informational leaflet. This leaflet outlines situations that parents are likely to encounter in the future and will need to address in a certain manner.

The process of determining the child's opinion differs from the practice in Nový Jičín. It has been agreed that the opinions of children under six years of age will not be determined at all, as local institutions consider it unlikely that children of such a young age are capable of forming an independent perspective. The opinions of children over six years are elicited solely by a Department of Child Welfare worker, either in a special playroom located in the municipal office building or within the premises of the school attended by the child. The court itself determines the child's opinion only in cases where a deep parental conflict persists and cannot be resolved over an extended period (Matoušek et al., n. d., p. 17). In contrast, the District Court in Nový Jičín does not impose age limits on the determination of the child's opinion. Judges at this court affirm that the

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child's opinion contributes significantly to resolving cases, and report that children often appreciate the opportunity to express themselves (See the statement of Mgr. Káňová, judge of the Nový Jičín District Court). I had the opportunity to review an anonymised interview with a four-year-old girl. In that case, the mother prevented the father from seeing their daughter, claiming the visits caused the child distress. The interview with the child was conducted with considerable sensitivity it revealed that the girl enjoyed spending time with her father and her older stepbrother, and that she liked staying at her father's home. She also mentioned feeling a little sad at night because she missed her mother, which is entirely age-appropriate. Additionally, the girl stated that her mother discouraged her from visiting her father, describing him as "bad" and saying that "he found a new lady." The girl provided a substantial amount of valuable information about the family dynamics. Given that young children generally speak openly ("what they do not know, they do not invent"), the child's testimony offered insight into the family environment. Her testimony undoubtedly played a meaningful role in the court's decision-making process and proved genuinely beneficial to the case (this information stems from the knowledge gained during my practice at the District Court in Nový Jičín in 2019). Age limitations, therefore, do not appear to be the most appropriate approach, as children's maturity levels differ, and some preschool-aged children can provide constructive perspectives on their family situations.

The results of implementing the Cochem practice in the Písek district have been unequivocally positive. The number of cases in which parents reach mutual agreements has increased, thereby reducing the need for courts to make authoritative decisions in many instances. There has also been a rise in interest in joint custody arrangements, which had previously been ordered only exceptionally in the region (Matoušek et al., n. d., p. 20).

5. SLOVAK EXCURSE

Interdisciplinary cooperation has already expanded in various forms to other European countries. For example, the *Dutch Civil Code* recognises two legal concepts of dissolving a marriage: divorce and legal separation. If spouses or registered partners who have children under eighteen from their relationship divorce or terminate their registered partnership, they are legally required to draw up a parental plan.[29] This obligation applies not only to married and registered partners, but also to cohabiting partners with minor children. The plan includes an agreement regarding the child's care, how the care will be divided between the parents, and if parental responsibility lies with only one parent, the agreement must include visitation arrangements. The parent without parental responsibility does not participate in the child's upbringing but retains the right to maintain contact with the child. In Norway, divorce is governed by *the Marriage Act* which establishes that a parental agreement is desirable. Divorcing spouses who have a child under the age of sixteen are required to participate in mediation before the divorce proceedings may be initiated.[30] The details of the mediation process are regulated by *the Children Act*. If it is established that the agreement serves the best interests of the child, the court will approve it. If the parents fail to reach an agreement, "*the court has the authority to make decisions regarding parental responsibility, contact arrangements, and the child's permanent residence*." (Šmíd and Šínová et al., 2013, p. 279). Another country worth mentioning is Poland. The main principle of Polish law – just like the Czech one –

[29] Section 1:247a of the Dutch Civil Code.
[30] Section 26 of the Marriage Act.

is the best interest of the child. Since 2005, Polish courts have been authorised to recommend mediation in cases of parental divorce, however, participation remains voluntary. (Kordasiewicz et al., 2017, p. 34). However, Poland lacks regulation regarding any form of interdisciplinary cooperation and systemic support, which leads to prolonged legal disputes, affecting the child's needs and interests, and failing to contribute to improved parental relationships. Efforts to at least minimally improve the system exist in the form of alternative methods. Independent organisations, often described as educational institutions (*placówki oświatowe*), are dedicated to this cause. These organisations, however, operate independently of state institutions. It is therefore at the parents' discretion to use their brochures or consult with their workers (*Komitet ochrony praw dziecka*, 2019, pp. 3-9). Each country thus adopts a different model of interdisciplinary cooperation. For example, in the Netherlands, a parental plan is promoted, while in Norway, emphasis is placed on meetings with a mediator. The Cochem practice, which closely resembles the Czech model, is most commonly encountered in Slovakia.

Family law in Slovakia is regulated by Act No. 36/2005 Coll., the Family Act, as amended. Similar to the Czech Republic, Slovak courts are required to assess and prioritise the best interests of the child. According to the judgment of the Regional Court in Nitra from 9 April 2014, an authoritative court decision on the modification of parental rights and duties should be made only after parents have failed to reach an agreement. Courts should primarily consider the child's emotional bond with both parents, as well as with extended family, friends, and the broader upbringing environment. Additional factors include the stability of the upbringing environment and the child's developmental needs, such as health, leisure activities, and age. Courts are also urged to reflect the child's opinion on the post-divorce family arrangement (Fabiánová and Frištiková, 2017, p. n/a). Efforts to promote the Cochem practice are also evident in Slovakia, and it has been gradually implemented in several courts. The transformation of family courts began in Slovakia in 2018, when several pilot courts were selected to start applying the Cochem practice (Introduction of Cochem practice in Slovakia, online). The reason for introducing the Cochem practice into Slovak judicial practice was primarily the need to streamline guardianship proceedings. As in the Czech Republic, emphasis is primarily placed on the best interests of the child (particularly the effective realisation of the child's participatory rights and the prompt resolution of guardianship cases), as well as encouraging parents to find their own best solution for post-separation/divorce arrangements. Similarly, children are often viewed merely as subjects of a dispute, insufficiently informed about court proceedings, and not provided with the opportunity to express themselves. In particular, the opinions of younger children are completely disregarded. Moreover, children frequently lack adequate support within both the family and the system, which may lead to feelings of isolation. The implementation of the Cochem practice in Slovak courts therefore aims to ensure that children are not seen merely as subjects of a legal dispute, but as participants in the proceedings. The fulfilment of children's participatory rights is a central objective and is ensured primarily by providing them with information from the court. Subsequently, parents are presented with the child's perspective on their dispute, as well as the impact of the conflict on the child. The Cochem practice further focuses on restoring communication between parents in a manner that does not negatively affect the child (Kutlík, 2018, pp. 9–12). The principles of the Cochem practice are promoted by the website Cochemskaprax.eu, which details the transformation that cooperating institutions must undergo to enhance the system's efficiency. These institutions include courts, couple counselling, family mediation, attorneys, the Department of Child Welfare, and court experts. As in the Czech Republic, the role of

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experts in the Slovak version of the Cochem practice is intended to be minimised. Expert involvement is reserved primarily for cases involving a suspicion of physical abuse or sexual exploitation.

In contrast, there is a deliberate effort to involve lawyers in cooperation with other professionals (Introduction of Cochem practice in Slovakia, online), whereas such interdisciplinary involvement of lawyers remains somewhat challenging in the Czech Republic. The effectiveness of the Cochem practice in our neighbouring country is illustrated in the District Court in Košice I.[31] Out of 104 cases in which the Cochem practice was applied, 61 parental agreements were reached, while one case resulted in an authoritative decision. Furthermore, parents withdrew their petitions in two cases, and in the remaining cases, the proceedings had not yet been concluded (as of 26 April 2020) (Rak, 2020).

6. CONCLUSION

It is acknowledged that the Cochem practice is not the only model of interdisciplinary cooperation in guardianship proceedings. As demonstrated above, some European countries use different methods of interdisciplinary cooperation, many of which can likewise be considered beneficial. The aim of this article was to introduce the Cochem practice and its functioning (not only) in Czech courts. When reflecting on the historical background and origins of the Cochem practice, it is important to emphasise that the legal situation in Germany in the 1990s differed significantly from that of the present-day Czech Republic. At that time parental responsibility was often entrusted to only one parent. In the case of divorce, it was commonly recommended that the child maintain a relationship primarily with the parent with whom they resided, while significantly reducing ties with the other parent. These factors, along with intense parental conflict—which was undoubtedly exacerbated by the limited opportunities of one parent to maintain and further develop a relationship with the child—led to the creation of the Cochem practice. The fundamental objective and core principle of the entire system is to preserve the involvement of both parents in the child's life even after the dissolution of the marriage and to restore mutual communication between the parents.

A challenge of the Cochem practice lies in the fact that it is not anchored in the law. Under its current principles, formal codification would not even be possible, as the entire system relies on the voluntary cooperation of individual institutions. It is difficult to envisage a legal regulation that could effectively govern and enforce such interdisciplinary cooperation. Furthermore, not all relevant institutions have been successfully integrated into the system, and their involvement does not seem realistic (see the aforementioned statement from the Bar Association). The entire system should be flexible, as it must be adapted to individual situations. Moreover, judicial practice of individual courts shows that individual courts have adopted the practice in different ways (compare Nový Jičín with Písek).

The Cochem practice is often criticised for allegedly "pressuring" the parties into an agreement (Rogalewiczová, 2019, p. 244). This criticism may be contested. First, it should be the parents who are best positioned to determine which post-divorce arrangement will serve the child's best interests as they know their child best. While it is difficult to find common ground in the context of a partnership conflict, parents who are genuinely concerned about their child's well-being should be willing to seek professional assistance and make an effort, even though it is undoubtedly difficult, to find a mutually

[31] Data collection took place from April 2019 to January 2020.

acceptable solution. Second, if the parents refuse to reach a common agreement and reject any form of communication, none of the experts or the mentioned institutions can compel them to do so. This article aims to contribute to the ongoing debate about the Cochem practice.

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THRESHOLDS FOR AUTHORSHIP AND ORIGINALITY IN AI-GENERATED AND AI-ASSISTED WORKS: A COMPARATIVE STUDY OF CHINESE AND EU COPYRIGHT CASE LAW

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Abstract: *This paper examines the intersection of originality and authorship in copyright law, focusing on the treatment of AI-generated and AI-assisted works in China and the European Union. It identifies the conceptual oscillation between the two terms and addresses it by introducing a unified analytical scaffold, the Two-Tier Matrix, distinguishing between an objective layer of originality (independent creation and minimal creativity) and a subjective layer of authorship (free and creative choices by a natural person). The analysis traces how statutory provisions, doctrinal debates, and judicial decisions in both jurisdictions can be mapped onto this two-tier structure. In China, courts and scholars emphasise the objective tier, lowering the threshold for minimal creativity while requiring demonstrable human involvement. By contrast, the EU situates protection firmly within the subjective tier, demanding discernible human creative choices as established in Court of Justice of the European Union case law such as Infopaq and Painer. The comparative framework reveals not only the different doctrinal trajectories of the two systems but also highlights their convergences and the challenges they face in regulating AI creativity. By adopting the Two-Tier Matrix, this study provides a coherent tool for evaluating emerging copyright questions and contributes to the broader academic discussion on the future governance of AI-authored works.*

Key words: *AI-generated Works; AI-assisted Works; Copyrightability; Copyright Law; Originality; Authorship; Chinese Law; EU Law*

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1. INTRODUCTION

The rise of artificial intelligence (AI) challenges the foundations of copyright law, particularly the concepts of "work," originality, and authorship. While AI-assisted creation can often be integrated into established frameworks, fully AI-generated outputs expose the limits of current statutory and doctrinal approaches. This paper examines how two leading jurisdictions, the People's Republic of China and the European Union, approach the copyright status of AI-generated and AI-assisted works. The comparison highlights the divergences in their legal thresholds and explores the implications for legal certainty.

The study pursues two goals: first, to map the legal thresholds for authorship and originality in the EU and China; and second, to assess the impact of these thresholds on legal certainty in the treatment of AI-generated and AI-assisted works. The working hypothesis is that China's user-centric approach provides a more flexible and innovation-friendly framework for AI-generated works than the EU's natural-person model,

facilitating protection for a wider range of AI-assisted outputs, while the EU's model offers greater predictability regarding the fundamental requirement of human creative choice.

Methodologically, the paper adopts a comparative doctrinal analysis, drawing on statutory provisions, case law, and scholarly commentary in both jurisdictions. This study takes into account both AI-generated and AI-assisted works when addressing the copyright and AI issue. AI-generated works are created with little to no human involvement, whereas AI-assisted works incorporate human creative decisions reinforced by technical tools. In actuality, the majority of conflicts fall within the assisted group, where current authorship and originality requirements are already applied by courts and doctrine (Gaffar and Albarashdi, 2025, p. 44). Fully AI-generated outputs, on the other hand, highlight the shortcomings of the existing legal systems and raise the question of whether more protection is required (Xiao, 2023, pp. 6-7). The paper aims to capture the entire range of human-machine creativity by looking at both groups, with the consideration that the clear doctrinal distinction will strength the comparative study and will link the theory with practical disputes.

To avoid conceptual oscillation between "originality" and "authorship," this study adopts a unified definitional scaffold, which is the Two-Tier Matrix. This matrix distinguishes between (i) the objective layer of originality, assessed through criteria such as independent creation and minimal creativity, and (ii) the subjective layer of authorship, captured by the notion of free and creative choices made by a natural person. By presenting this analytical tool at the outset, the paper ensures coherence across sections and provides a common reference point for evaluating statutory provisions, doctrine, and case law.

The Two-Tier Matrix may be illustrated as follows:

Table 1: Illustration of the Two-Tier Matrix for Originality and Authorship

Tier 1 – Independent Creation (Objective Layer)	➢ *China:* "*original intellectual achievements*" (2020 Copyright Law, Art. 3)[1] — judicial interpretation and case law commonly treat this as requiring demonstrable independent creation / human input. ➢ *EU:* "*the author's own intellectual creation*" (CJEU,[2] *Painer*, C-145/10) — emphasis on human intellectual effort.
Tier 2 – Minimal Creativity (Subjective Layer)	➢ *China:* "*the work must contain a minimum of creativity*" ((Yang, 2024). ➢ *EU:* originality interpreted as a low threshold under the formula "*the work must be the result of the author's own intellectual creation*" (CJEU, *Infopaq*, C-5/08).

The paper is structured in three main parts. The first sets out the statutory framework governing the definition of "work" in Chinese and EU copyright law. The second examines doctrinal debates that shape the interpretation of authorship and originality in the context of AI. The third turns to judicial practice, analysing case law from both jurisdictions to illustrate how courts apply these principles in practice. Together,

[1] Article 3 of the 2020 Copyright Law of the People's Republic of China uses the phrase "*original intellectual achievements*." The explicit wording "*by a natural person*" is not a literal statutory text but a common interpretive reading in Chinese doctrine and judicial practice. See Beijing High People's Court guidance and subsequent case law for how courts characterise the human-authorship requirement.

[2] The used abbreviation **CJEU** refers to Court of Justice of the European Union.

these sections provide a comprehensive view of how copyright law is adapting, or resisting adaptation, to the challenges posed by AI-generated creativity.

This article contributes to the ongoing debate on AI and copyright by adopting a comparative doctrinal approach that brings together the jurisprudence of China and the European Union. These two jurisdictions are chosen not only because of their global significance but also because they represent contrasting regulatory logics: China illustrates a pragmatic, policy-oriented model where courts have progressively lowered the originality threshold to accommodate technological change, while the EU demonstrates a formalist and case-law driven system where the threshold of originality has been carefully stabilised around the standard of "the author's own intellectual creation." By analysing how both systems interpret originality and authorship in the context of AI, the paper clarifies the trajectories of judicial interpretation and highlights their implications for the future of copyright protection.

2. STATUTORY FRAMEWORK AND THE DEFINITION OF "WORK"

2.1 China's Copyright Law

The Copyright Law of the People's Republic of China (hereinafter referred to as "**CLC**"), first enacted in 1990 and most recently amended in 2020,[3] provides the fundamentals of China's copyright system. The CLC is supplemented by the Regulations for the Implementation of the Copyright Law,[4] which function as an important interpretative instrument, and further supported by judicial guidelines issued by courts. Within this framework, the concept of "work" holds a pivotal role, as copyright subsists only in protectable works. Unlike some jurisdictions, the CLC does not provide a general statutory definition of a "work," but instead sets out in Article 3 an open-ended catalogue of categories, ranging from literary, musical, dramatic, choreographic, artistic, photographic, and cinematographic works to architectural designs, maps, models, computer software, and a residual category of "other works." The definitional gap has been bridged by Article 2 of the Implementing Regulations, which defines a "work" as an "*original intellectual achievement in the fields of literature, art, and science that can be reproduced in a tangible form*." This provision introduced cumulative requirements: originality, intellectual achievement, domain specificity (literature, art, or science), and fixation in a reproducible form. The 2020 amendments to the CLC introduced an explicit statutory definition of "works" in Article 3, describing them as "*original intellectual achievements in the fields of literature, art, and science that can be presented in a certain form*." This revision replaced the earlier requirement that works be "*reproducible in a tangible form*," signalling a legislative intention to broaden the scope of protection by reducing dependence on physical fixation. The residual category was also reformulated to encompass "*other intellectual achievements meeting the characteristics of works*," thereby opening the door to new and emerging forms of creation (Wan and Lu, 2021). Despite this broadening trend, neither the CLC nor its Implementing Regulations specifically address AI-generated content, leaving its legal status to be determined under the general requirements of originality and intellectual achievement (Dai and Jin, 2023, p.

[3] Copyright Law of the People's Republic of China of 11 November 2020, Gazette of the Standing Committee of the National People's Congress 2021, No. 1, as amended. The amendments reflect the state's effort to adapt to technological progress and international commitments while retaining a strong emphasis on human authorship.

[4] Regulations for the Implementation of the Copyright Law of the People's Republic of China. (2002). State Council of the People's Republic of China, Decree No. 359, effective September 15, 2002.

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246) and (Wang, 2023, p. 910). Chinese doctrine increasingly emphasises that the definition of "work" in the 2020 CLC, which relies on the notion of "*original intellectual achievement*," leaves open the interpretive question of whether originality requires subjective personality or can instead be assessed through objective indicators such as independent creation and minimal creativity (Han, Xinyu and Zhuobin, 2024, pp. 369-370). This orientation reflects the objective originality tier of the Two-Tier Matrix, since protection depends on demonstrating independent creation and at least a minimal degree of creativity, rather than on the author's subjective personality.

To be eligible for copyright protection under China's copyright law, a work must meet three conditions. First, it must be declared a work of authorship. Second, the CLC states that copyright is inherent in certain ''original'' works, even if they are unpublished. Originality can be further classified as "independent creation" and "creativity." Independent creation refers to the work being conceived independently, whereas creativity implies that the work exhibits spiritual exertion and mental judgment on the side of the author(s) (Hutukka, 2023, p. 1062). For copyright protection, originality refers to a work that is selected, arranged, developed, and made by the author (or collaborators) without being replicated, mimicked, or plagiarised. The author(s) must have created the work independently, without copying from another work. Third, the work must be in a palpable form of expression. The ''fixed nature'' requirement requires a work to have a certain form (Hutukka, 2023, p. 1062).[5]

2.2 EU's Copyright Law

The European Union copyright acquis represents the cumulative body of legislation, case law, and international commitments that govern copyright across member states. It is primarily built on directives such as the InfoSoc Directive (Directive 2001/29/EC, 2001), the Term Directive (Directive 2006/116/EC, 2006), the Database Directive (Directive 96/9/EC, 1996), the Computer Programs Directive (Directive 2009/24/EC, 2009), and most recently the DSM Directive (Directive (EU) 2019/790, 2019) which adapts copyright to the realities of the digital environment. As noted in the literature, while the InfoSoc Directive and later the DSM Directive address digital technologies, they remain firmly grounded in a natural-person model of authorship (Zhuk, 2024). Furthermore, while all these directives provide detailed rules on rights, duration, and scope, they stop short of offering a unified statutory definition of "work." Instead, the acquis anchors protection in the principle of originality, which appears explicitly in certain instruments (such as the Computer Programs and Database Directives) and is implied in others. This legislative choice reflects the EU's reliance on judicial interpretation, particularly by the Court of Justice of the European Union, to refine the contours of authorship and originality. As such, the statutory framework provides the foundation but not the full answer to the challenges posed by AI-generated and AI-assisted works—questions that are developed further in doctrinal debate and case law. This legislative framework is complemented by the jurisprudence of the Court of Justice of the European Union, which has clarified key notions such as originality, authorship, and communication to the public (Hugenholtz and Quintais, 2021). At the same time, the acquis is shaped by

[5] In Article 2 of the Regulations for the Implementation of Copyright Law, the phrase "a certain form" means that the work "can be reproduced in a tangible form" (Regulations for the Implementation of Copyright Law of the People's Republic of China, 2013).

international obligations under the Berne Convention,[6] the WIPO Copyright Treaty, and TRIPS, embedding EU law within the wider global intellectual property order. Together, these instruments establish a harmonised yet evolving framework that continues to confront new challenges, including the status of AI-generated and AI-assisted works (Synodinou, 2018) where, generally, the Berne Convention allows for an open model of categorisation, meaning that new forms of expression can be recognised as works as they emerge (Synodinou, 2018, p. 109).

In fact, legal scholarship has emphasised that the Court of Justice of the European Union plays a central role in shaping the concept of "work," progressively developing criteria to determine authorship and originality in the absence of legislative guidance (Rosati, 2013). Scholarly analysis of the CJEU's jurisprudence has synthesised this approach into a functional four-step test for a protected "work" under EU law (Hugenholtz and Quintais, 2021):

1. Domain Requirement: The output must be produced in a literary, scientific, or artistic domain.
2. Human Intellectual Effort: The output must reflect some level of human intellectual involvement.
3. Originality or Creativity: The output must demonstrate originality, which is defined as the "author's own intellectual creation." This implies that the creator made free and creative choices during the production process. The Court of Justice of the European Union has emphasised that originality can manifest through various creative decisions made by the human contributor at different stages of the creative process.
4. Expression: Finally, creativity must be expressed in a perceptible form. This means that there should be a clear link between the author's creative act and the resulting output. The expression does not require a high artistic merit level; it suffices that the work reflects the author's creative choices (Hugenholtz and Quintais, 2021, pp. 1200-1205).

This approach corresponds to the subjective authorship tier of the Two-Tier Matrix, where the decisive element is whether the output bears the imprint of a natural person's free and creative choices.

3. DOCTRINAL AND JUDICIAL APPROACHES TO AI-GENERATED WORKS IN CHINESE AND EU COPYRIGHT LAW

In Chinese academic debate, two main approaches emerge on whether AI-generated and AI-assisted works can be treated as copyrightable. On one side, some theories minimise the role of human authorship, even suggesting that machines and humans can co-create in a way that produces works jointly shaped by both. This view goes so far as to describe AI as participating in the act of intellectual creation, though without granting it legal personhood. On the other side, there is a much stricter position, which insists that copyright cannot exist without identifiable human input. This line of thought stresses that AI, however sophisticated, cannot replicate the kind of personalised expression that lies at the core of human creativity, and that protecting outputs without this element risks undermining the very foundations of copyright (Yang, 2024, pp. 20-21). Viewed through the lens of the Two-Tier Matrix, these debates demonstrate that Chinese

[6] World Intellectual Property Organization, Berne Convention for the Protection of Literary and Artistic Works, Paris Act of 24 July 1971, as amended by the 1979 Amendment, WIPO Collection of Laws for Electronic Access (CLEA).

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doctrine increasingly stretches the objective originality tier, accepting independent creation and minimal creativity as sufficient to establish copyrightability, even where subjective authorship is thin or indirect.

Chinese courts have moved from a restrictive to a more permissive stance on AI-generated works. Early guidance, including the 2018 trial guideline of the Beijing High People's Court and the *Feilin* decision of the Beijing Internet Court,[7] rejected copyright protection on the grounds that AI-generated content lacked human authorship. This position shifted with the 2019 *Tencent/Dreamwriter* case,[8] where the Shenzhen Nanshan District Court recognised an AI-generated financial report as a copyrightable literary work, emphasising the role of human input in shaping the output (Dai and Jin, 2023, pp. 246-248). Scholars have suggested that this development reflects several distinctive features of the Chinese approach: a broad interpretation of "human participation" that accepts preparatory input as sufficient, the lack of a strict distinction between computer-assisted and AI-generated works, and the application of an objective standard of originality. Together, these elements help explain why China has become the first jurisdiction to formally recognise AI-generated works within the framework of copyright law (Dai and Jin, 2023, p. 249).

The doctrinal approach in EU law concerning AI-generated or assisted work emphasises the importance of human creativity and involvement, establishing a framework that balances technological advancement with traditional notions of authorship and copyright protection. The analysis suggests that while the current EU copyright framework is generally adaptable to AI-assisted creation, complexities arise concerning the interpretation of authorship, originality, and the extent of human involvement (Hugenholtz and Quintais, 2021, pp. 1196-1213). Analyses of Court of Justice of the European Union case law suggest that the decisive question for AI-assisted outputs is whether human creative choices are sufficiently expressed in the final product. The principle of originality remains the cornerstone of copyright protection within European national legal systems. Without this criterion, a work cannot qualify for copyright protection, making originality the primary benchmark for determining whether "work" should be protected or excluded. Although foundational, EU Directives define originality only in relation to specific categories—namely computer programs, databases, and photographs—describing it as "*the author's own intellectual creation*." Consequently, EU law does not universally impose originality as a prerequisite for copyright protection, except in these narrowly defined instances. Nevertheless, the Court of Justice of the European Union has been instrumental in interpreting and expanding the concept of originality to address new challenges, including those presented by AI-generated works. Traditionally, the notion of an author's own intellectual creation applied only to specific categories, but the Court of Justice of the European Union has gradually extended this standard to a broader spectrum of works (Gaffar and Albarashdi, 2025, pp. 41-42). Nonetheless, some scholars argue that the rise of AI-generated works challenges the traditional definition of "author," which is typically understood as "*the person by whom the arrangements necessary for the creation of the work are undertaken*." These commentators suggest that the EU framework may need to be revisited to better accommodate the distinctive nature of AI-assisted and AI-generated outputs. A more inclusive approach could recognise individuals who contribute substantial support or input in the creation of a work, thereby broadening the scope of authorship. This

[7] Beijing Internet Court, Feilin Law Firm v. Baidu Technology Company, Judgement No. 239, 2018.
[8] Nanshan District Court in Shenzhen, Tencent Computer Company v. Yingxun Technology Company, Judgement No. 14010, 2019.

perspective acknowledges the collaborative character of contemporary creative processes and aims to foster an equitable system that rewards both human ingenuity and collaborative contributions in the production of copyrighted works (Gaffar and Albarashdi, 2025, pp. 43-44). From the standpoint of the Two-Tier Matrix, this reflects the EU's firm anchoring of protection in the subjective authorship tier, where copyrightability depends on the discernible imprint of a natural person's free and creative choices, thereby excluding outputs generated without such input.

Taken together, the doctrinal debates and the emerging case law in China and the EU reveal that the central question remains the threshold of originality and authorship in the context of AI. Both jurisdictions implicitly or explicitly require that copyrightable works reflect human intellectual input, yet they diverge in how broadly they interpret this requirement. In China, courts have been willing to treat preparatory and organisational choices as sufficient to establish human authorship, while in the EU, the standard is tied more closely to demonstrable creative expression by the author. These differences underscore that the challenges raised by AI-generated and AI-assisted outputs cannot be understood solely on the level of statutory frameworks or doctrinal debates. They must also be examined through the lens of judicial practice, where questions of originality and authorship are tested against concrete disputes. The following section therefore turns to case law in both China and the EU, in order to show how courts operationalise these thresholds in practice.

4. ORIGINALITY AND AUTHORSHIP IN COPYRIGHT CASE LAW

The comparison under the previous title suggests that, despite their differences, both Chinese and EU approaches converge on the decisive role of originality and human participation as thresholds for copyright protection. While Chinese courts have broadened the notion of "human participation," EU doctrine, as refined by the Court of Justice of the European Union, places greater emphasis on whether creative choices are expressed in the final output. Both contexts thus show that the assessment of AI-generated or assisted works ultimately turns on originality and authorship—questions that will be explored in the following section (Dai and Jin, 2023; Hugenholtz and Quintais, 2021). In China, courts and scholars increasingly favour an objective originality test, where even minimal or preparatory human input may suffice to qualify AI outputs as works (Dai and Jin, 2023). The objective originality test in China is shaped by a combination of judicial precedents and scholarly debate, emphasising the importance of human involvement in the creative process of AI-generated content. As technology advances, the legal landscape will need to adapt to ensure fair and effective copyright protection for both AI-generated and human-created works (Yang, 2024). By contrast, the EU relies on the subjective standard of the "author's own intellectual creation", demanding that the work reflect free and creative choices attributable to a human author (Hugenholtz and Quintais, 2021). This section examines how these thresholds are articulated in doctrine and case law, drawing on secondary analyses of landmark decisions in both jurisdictions, and highlights the extent to which they diverge in balancing technological innovation with the protection of human creativity.

4.1 Chinese Case Law

Framed by the Two-Tier Matrix, Chinese case law shows a trajectory from a restrictive, personality-based approach toward a more permissive, objective-originality approach: courts increasingly treat preparatory, supervisory, or organisational human

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choices as evidence of sufficient human input. The analysis of Chinese jurisprudence relies on a set of landmark cases that have become central to scholarly and judicial discussions of AI and copyright. These cases were selected because they represent turning points in the judicial interpretation of originality and authorship, and because they are consistently referenced in the academic literature as benchmarks for understanding the evolving Chinese approach. Together, they provide a coherent picture of the oscillation between restrictive and permissive standards in determining whether AI-assisted or AI-generated works can qualify for copyright protection.

In China, the originality test focuses on two main aspects: uniqueness and creativity. Uniqueness refers to the work's independent creation, while creativity involves a certain level of intellectual input (Yang, 2024, p. 27). Recent scholarship confirms that the key dispute in Chinese doctrine lies in how originality is defined, with one school adhering to a subjective, personality-based notion of authorship, and another supporting an objective test grounded in independent creation and minimal creativity (Han, Wu, and Zhu, 2024, pp. 370–372).

The application of these criteria in the context of AI-generated works has evolved significantly over the past decade, as Chinese courts have coped with balancing the statutory requirement of natural person authorship with the realities of machine-driven creativity. Initially, the Beijing High People's Court Guidelines (2018)[9] mandated that copyright protection hinges on works being created by natural persons, setting a restrictive baseline. This restrictive stance was confirmed in *Beijing Film Law Firm v. Baidu* (Beijing Film Law Firm v. Baidu Netcom Science & Technology Co. Ltd., 2019). While acknowledging that the AI-generated report involved selection and judgment, the court denied protection on the basis that authorship requires a natural person. Here, the lack of identifiable human authorship disqualified the work, even though minimal originality was arguably present (Wang, 2023). Referring to the details, we can note that this case addressed whether an analysis report generated by AI software constituted a written work. The ruling indicated that although the report was original, copyright law requires written works to be created by natural persons, reinforcing the necessity of human authorship. The case sets a precedent for future disputes where AI-generated content is involved, particularly in the realm of copyright law (Yang, 2024, p. 21).

However, an appellate decision in the Automated Video Recording case (2016 ruling overturned in 2020–21)[10] marked an early shift toward recognising minimal human contribution, broadening the scope of "human participation." In its second instance, the Beijing Intellectual Property Court, and later upheld by the Beijing High People's Court, held that an automatically recorded video screenshot could be protected as a photographic work if the human operator had made preparatory choices such as camera placement, framing, and technical settings. This ruling acknowledged that even indirect human involvement could satisfy the originality threshold (Dai and Jin, 2023).

This development came to fuller expression in the Dreamwriter Case (Shenzhen Tencent v. Shanghai Yingxun, 2019) it was concluded that the content generated by Tencent's AI, Dreamwriter, is considered a legal person's work, confirming that AI-generated content can be protected under copyright law if there is sufficient human involvement, thus shifting the threshold by allowing preparatory and supervisory human contributions to satisfy originality. Namely, the court recognised that while the AI

[9] Beijing High People's Court. (2018, April 20). *Guidelines for the trial of copyright infringement cases* [Trial guidelines]. *Beijing High People's Court*. Retrieved from https://www.lawinfochina.com/display.aspx?EncodingName=big5&id=33877&lib=law

[10] Beijing Intellectual Property Court, *Automated video screenshot copyright case* (2020, aff'd Beijing High People's Court 2021).

produced original content, the human element in the creative process was essential for copyright protection (Yang, 2024, p. 26). In the words of copyright, the Shenzhen Nanshan District Court recognised a financial report generated by Tencent's Dreamwriter software as a literary work. The court emphasised that human teams made *choices regarding data input, themes, and style*, meaning that AI was treated as a tool within a broader creative process. The court adopted an objective standard of originality, focusing on the existence of selection, judgment, and arrangement rather than personal expression and shift the threshold of originality and authorship, establishing a precedent in Chinese copyright (Dai and Jin, 2023, p. 248).

The doctrinal analyses of the previously mentioned cases note that Chinese courts, therefore, oscillate between focusing on minimal originality (independent creation + small degree of creativity) and insisting on human authorship as a statutory requirement. The *Dreamwriter* case reflects the former approach, aligning originality with human input in preparatory or supervisory stages, while *Beijing Film Law Firm v. Baidu* exemplifies the latter, where originality is not sufficient without a natural person author (Wang, 2023, pp. 903-907). This duality corresponds with what certain authors identify as the "objective originality test," in which protection is granted when some human intellectual activity can be demonstrated, but denied when the creative process is wholly automated (Zhuk, 2024, pp. 1302-1304).

The most recent development can be seen in the *AI Text-To-Picture Case* (Li v. Liu (Stable Diffusion AI-generated image case), 2023) where the Beijing Internet Court addressed originality in images generated using Stable Diffusion and therefore the complexities of AI-generated images. The court highlighted that the user's choices and arrangements during the generation process must reflect their creativity for the output to be recognised as original. For an AI-generated work to be recognised as original, it must demonstrate a minimum degree of creativity. This includes showing distinct differences from existing works through the user's intellectual input, aesthetic choices, and personalised judgments during the creation process. In the AI Text-to-Picture case, the user's selection of initial models, keywords, and settings has been crucial in determining authorship. The court recognised that these choices constitute significant intellectual contributions (Yang, 2024, p. 22). Furthermore, the court acknowledged the contributions of a human who designed prompts and made aesthetic judgments, thus granting copyright to the AI-generated graphic work (Lu, 2025, p. 88). This development aligns with the growing view in Chinese doctrine that originality should be assessed through objective external criteria, whether the work itself reflects identifiable differences and minimal creativity, rather than the creator's subjective personality (Han, Xinyu and Zhuobin, 2024, pp. 371-373).

Taken together, the case law reveals a clear developmental arc in Chinese jurisprudence. The initial restrictive stage, exemplified by *Beijing Film Law Firm v. Baidu* and reinforced by the 2018 Beijing High Court Guidelines, denied protection in the absence of natural person authorship. This was followed by a pragmatic opening, most notably in *Dreamwriter* and in appellate rulings on automated video recording, where courts began to recognise minimal originality grounded in preparatory or supervisory human input. The most recent decisions, such as *AI Text-To-Picture Case*, reflect a nuanced stage in which originality is tied to demonstrable human aesthetic judgment and intellectual direction, even when execution is machine-driven. Overall, this trajectory suggests that while Chinese courts continue to anchor authorship in the principle of natural person creation, they have progressively lowered the threshold for originality by accepting human contributions at different stages of the creative pipeline. The result is a hybrid model in which protection is extended when human input leaves an apparent

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creative imprint, but outputs generated independently by AI remain excluded from the statutory copyright framework (Wang, 2023). In terms of the Two-Tier Matrix, these developments show the gradual lowering of the threshold on the objective originality tier: Chinese courts extend protection where demonstrable human direction or selection exists, even if the AI executes the work.

4.2 EU Case Law

Framed by the Two-Tier Matrix, CJEU jurisprudence consistently anchors protection in the subjective authorship tier, emphasising that a work must bear the imprint of a natural person's free and creative choices to satisfy originality. In addressing the originality and authorship thresholds under EU copyright law, this study focuses on the jurisprudence of the Court of Justice of the European Union rather than national case law. The reason for this choice is twofold. First, EU copyright protection has been progressively harmonised, with the Court of Justice of the European Union playing a central role in defining the concept of a "work" and the standard of originality as the "author's own intellectual creation." National courts are bound to apply these interpretations, meaning that the Court of Justice of the European Union's case law provides the most authoritative and uniform benchmark across Member States (Rosati, 2023). Second, while national courts have begun to encounter disputes involving AI-generated or AI-assisted outputs, the doctrinal framework they apply ultimately derives from the principles developed by the Court of Justice of the European Union. Accordingly, a focus on the Court of Justice of the European Union's jurisprudence allows for a consistent analysis of originality and authorship thresholds.

The determination of authorship and originality in EU copyright law, as we already mentioned, has been shaped primarily by the jurisprudence of the Court of Justice of the European Union. Since the directives (mentioned in the section Statutory framework and the definition of work) themselves provide no general statutory definition of "work," the Court of Justice of the European Union's case law has progressively harmonised the threshold across Member States. Scholars consistently point out that this reliance on judicial interpretation makes the Court of Justice of the European Union (referred as the Court in the analysis of the cases elaborated in the following part) the central authority in defining when creative outputs, including those assisted by new technologies such as AI, qualify as copyright-protected works (Hugenholtz and Quintais, 2021; Rosati, 2023).

The modern line of reasoning begins with *Infopaq International A/S v. Danske Dagblades Forening* (C-5/08, 2009), where the Court articulated the now-standard test: a work is protected if it is "*the author's own intellectual creation*." This formula sets originality as the decisive threshold across the EU, grounding copyright not in effort or skill, but in the personal intellectual contribution of the author. By finding that even the reproduction of eleven words could constitute a protected work if it reflected the author's free and creative choices, the Court shifted the emphasis away from quantitative thresholds and towards qualitative assessment of intellectual input (Rosati, 2023, pp. 89-91). Scholars have noted that this test set a deliberately low bar for protection, embedding flexibility into the acquis while reaffirming the indispensability of human creativity (Lu, 2025).

The standard was then clarified in *Painer v. Standard Verlags GmbH* (C-145/10, 2011), which emphasised that originality results from the author's free and creative choices. Even in technically constrained contexts, such as portrait photography, the Court emphasised that the author exercises originality through choices of angle, lighting, framing, and post-editing. For commentators, *Painer* demonstrates the Court's willingness to locate originality in even modest acts of discretion, thereby reinforcing the

notion that what matters is not the scale of human involvement but the presence of identifiable creative judgment (Hugenholtz and Quintais, 2021, pp. 1200-1205). This reasoning has become a touchstone for discussions of AI-assisted creation, since it suggests that where humans shape conception or final editing, even if execution is delegated to machines, protection can still be justified. Building on the reasoning in *Painer*, commentators identify three phases of the creative process: conception, execution, and redaction. This reflects the EU's broader reliance on a personality-based conception of originality, where copyright protection hinges on the author's free and creative choices, thereby excluding autonomous AI outputs but leaving space for human–machine collaboration (Zhuk, 2024, pp. 1300-1301).

While AI systems may dominate execution, human input at the conception and redaction stages often provides the necessary creative choices. Where these choices shape the outcome, the result can qualify as a copyright-protected work; where they are absent, no "work" arises. Importantly, the unpredictability of AI outputs does not in itself exclude protection, provided the final result aligns with the author's overall creative intent (Hugenholtz and Quintais, 2021, p. 1212).

The Court further refined the threshold in *Football Dataco Ltd v. Yahoo! UK Ltd* (C-604/10, 2012), where it rejected the notion that "*skill and labor*" alone suffice for protection. Databases of football fixtures lacked originality because their structure was dictated by technical and functional requirements, leaving no room for free and creative choices. The Court rejected the so-called "*sweat of the brow*" doctrine by ruling that mere labour, investment, or skill in compiling data does not suffice for copyright protection. Instead, the Court insisted on creative choice in the selection or arrangement of data as the marker of originality. As academic commentary highlights, this judgment further clarified that originality requires subjective decision-making, excluding works that are purely the product of mechanical effort (Hugenholtz and Quintais, 2021). This distinction is of particular relevance to AI outputs: just as databases compiled without creative discretion cannot qualify as works, content produced autonomously by AI systems, absent human choices, struggles to meet this standard. For AI-assisted works, this reasoning signals that mere prompting, data processing, or technical effort cannot ground protection unless coupled with genuine creative decisions by a human author.

Later judgments reinforced and consolidated this framework. In *Levola Hengelo BV v. Smilde Foods BV* (C-310/17, 2018), the Court held that the taste of cheese could not qualify as a work because it was not identifiable with sufficient precision and objectivity. While not directly about technology, the decision highlights an important condition: works must embody a perceptible form of expression. This requirement has clear implications for AI, where outputs must be sufficiently concrete and attributable to human creative choices to qualify as copyrightable subject matter. Similarly, in *Cofemel – Sociedade de Vestuário SA v. G-Star Raw CV* (C-683/17, 2019), the Court confirmed that originality is the sole requirement for protection, rejecting additional national standards such as artistic merit. And in *SI, Brompton Bicycle Ltd v. Chedech/Get2Get* (C-833/18, 2020), the Court held that functional designs may be protected if they reflect free and creative choices not wholly dictated by technical constraints. Both cases reinforce the human-centric originality test while making clear that external or technical limitations cannot erase creative freedom altogether. These cases demonstrate that fully automated works produced solely by AI, without meaningful human input, generally fail to satisfy the originality standard. By contrast, AI-assisted works, where human creativity is present, can be eligible for copyright protection, provided they bear the imprint of the author's personality through free and creative choices. Human involvement remains decisive in fulfilling the originality requirement, reflecting the broader rationale of copyright: to

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incentivise authors to create original works utilising their unique abilities (Gaffar and Albarashdi, 2025, pp. 43-44).

In *Funke Medien NRW GmbH v. Bundesrepublik Deutschland* (C-469/17, 2019), the Court stressed again that originality arises when an author can make free and creative choices and thereby stamp the work with their personal touch. Taken together, these decisions illustrate a clear trajectory: the Court of Justice of the European Union has consistently rejected protection for outputs lacking identifiable human authorship, while affirming that technological or functional tools do not negate protection when human creativity is present (Rosati, 2023).

Finally, in *SAS Institute Inc. v World Programming Ltd* (C-406/10), the Court reaffirmed the limits of protection by excluding ideas, methods, and functional elements from copyright, underscoring that only expressive acts of intellectual creation fall within the scope of the acquis. Scholars argue that this judgment highlights a crucial boundary for AI: outputs that are essentially functional or generated without expressive human choice remain outside copyright's reach, no matter how technically sophisticated (Lu, 2025).

These cases were chosen for analysis because they form the core acquis of originality case law as they are repeatedly cited in scholarship as the foundation of the EU's originality threshold (Hugenholtz and Quintais, 2021; Rosati, 2023). Across them, one can observe a strong tendency: the Court has consolidated a uniform, human-centred originality test that requires free and creative choices expressed in the final work. The trend has been toward consistency and harmonisation, rejecting national deviations such as "skill and labour" or artistic value tests. For AI-generated and AI-assisted works, the implication is clear: the absence of human creative input precludes protection, while AI used as a tool within a process guided by human intention can support originality. In this sense, the Court of Justice of the European Union's jurisprudence sets a high but stable threshold, ensuring that copyright remains tied to human authorship, even as new technologies challenge the boundaries of creative production.

Read together, these decisions chart a trajectory in which the Court of Justice of the European Union has consistently applied and elaborated the "own intellectual creation" standard across different domains, from text and databases to photography and software. While the standard has proven flexible, accommodating even minimal creative discretion, it has also drawn a clear line against works produced without human input. As the academic debate underlines, this case law provides the essential benchmark for evaluating the copyright status of AI-generated and AI-assisted works: it affirms that protection hinges not on effort or technological sophistication but on whether the final output embodies discernible human creative choices (Hugenholtz and Quintais, 2021; Rosati, 2023). Applied to the Two-Tier Matrix, the Court of Justice of the European Union's line of cases reinforces the subjective authorship tier: where a discernible human imprint exists (free creative choices), protection follows; where it does not, protection will generally be denied.

Below is a comparative case-law table that applies the Two-Tier Matrix (Tier 1 = independent creation / "human intellectual effort"; Tier 2 = minimal creativity / "author's own intellectual creation" or "free-creative choices") to the most-cited Chinese and EU decisions discussed in the manuscript. The abbreviations C and E are used for Chinese and EU case law, respectively.

Table 2: Comparative case law with application of the Two-Tier Matrix

Juris-diction	Case year	Tier 1 – Independent Creation / Human Intellectual Effort	Tier 2 – Minimal Creativity / Author's Own Intellectual Creation
C1	**Beijing Internet Court** *Film Law Firm v. Baidu* (AI-generated article) 2018	**No** – The court held that the article was produced solely by the AI system; no human author could be identified.	**No** – Without a human author, the "*author's own intellectual creation*" requirement was unmet.
C2	**Shenzhen Nanshan District Court** *Tencent v. Yingxun* (Dreamwriter financial report case) 2019	**Yes** – The human team provided data input, chose themes, and supervised the AI-generated report, giving the work a human origin.	**Yes** – The court emphasised that the team's "*selection, judgment and arrangement*" of information reflected creative choices, thus meeting the originality threshold.
C3	**Beijing Internet Court** *Automated Video Screenshot* (camera-placement & framing case) 2020 affirmed 2021	**Yes** – The operator's decisions on camera placement, framing and technical settings were deemed sufficient human contribution.	**Yes** – The court recognised that the human choices in camera placement and framing, despite being influenced by technical constraints, demonstrated a sufficient degree of minimal creativity, illustrating a lower threshold than the EU's "*free creative choices*" standard.
C4	**Beijing Internet Court** *Li v. Liu* (Stable Diffusion AI-generated image case) 2023	**Yes** – The court found that the plaintiff's design of prompts, selection of keywords and iterative parameter tuning constituted "*human intellectual input*" that directed the AI output.	**Yes** – The court held that the plaintiff's "personal aesthetic judgment" and "*creative choices*" were reflected in the final image, satisfying the "*author's own intellectual creation*" standard (adapted from Chinese doctrinal commentary).
E1	**Infopaq International A/S v. Danske Dagblades Forening** (C-5/08) 2009	**Yes** – The newspaper excerpt was created by a journalist; the court recognised human authorship.	**Yes** – The Court held that originality requires "*the author's own intellectual creation*," i.e., free choices in selection, sequence and combination of words.
E2	**Eva-Maria Painer v. Standard VerlagsGmbH** (C-145/10) 2011	**Yes** – The photographer made free choices about angle, lighting, composition.	**Yes** – The Court emphasised that even modest artistic decisions satisfy the "*author's own intellectual creation*" test.
E3	**Football Dataco Ltd v. Yahoo! UK Ltd** (C-604/10) 2012	**No** – The football fixture database was compiled by a computer; no human creative input beyond data collection.	**No** – The Court rejected "*skill and labour*" as a basis for originality; without free creative choices, the work lacked protection.
E4	**Levola Hengelo BV v. Smilde Foods BV** (C-310/17) 2018	**No** – The Court held that a taste is not a "work" as it lacks a "*perceptible form of expression*," a prerequisite for copyright protection. The question of human intellectual effort is secondary.	**No** – The Court held that for a subject matter to be classified as a "work," it must be expressed in a manner that makes it identifiable with sufficient precision and objectivity. The taste of cheese was deemed too subjective and variable to be perceived and defined in such a precise and objective form, thus

Juris-diction	Case year	Tier 1 – Independent Creation / Human Intellectual Effort	Tier 2 – Minimal Creativity / Author's Own Intellectual Creation
			failing the fundamental requirement for copyright protection.
E5	**Cofemel v. G-Star Raw CV** (C-683/17) 2019	**Yes** – The designer made creative choices in the garment's design and presentation.	**Yes** – The Court stressed that the work must bear the "*personal stamp*" of the author; the design satisfied this requirement.
E6	**Funke Medien NRW Gmb H v. Bundesrepublik Deutschla nd** (C-469/17) 2019	**Yes** – The author's selection of facts and wording in the report showed human input.	**Yes** – The Court affirmed that originality does not demand artistic merit, only free creative choices.
E7	**Brompton Bicycle Ltd v. Chedech/Get2Get** (C-833/18) 2020	**No** – The technical constraints of the design (functional requirements) left little room for creative choices.	**No** – The Court held that when the work is dictated by technical rules, the author's personal imprint is absent, so originality fails.
E8	**SAS Institute Inc. v. World Programming Ltd** (C-406/10) 2012	**No** – The program's output was a purely functional algorithm; human input was limited to functional specifications.	**No** – The Court excluded ideas, methods and purely functional elements from copyright protection.

5. CONCLUSION

This comparative analysis, framed by the Two-Tier Matrix, confirms the study's initial hypothesis: China's user-oriented framework offers greater flexibility for accommodating AI-generated works, while the EU's author-centric model prioritises doctrinal stability, albeit at the cost of excluding autonomous AI outputs. The trajectories of both jurisdictions reveal how their distinct applications of the Matrix's two tiers have shaped their responses to the challenge of AI creativity.

In China, the statutory definition of a work as an "*original intellectual achievement*" has been interpreted by courts through a pragmatic expansion of the objective originality tier. By recognising preparatory, supervisory, and aesthetic human inputs—from data selection in *Dreamwriter* to prompt engineering in *Li v. Liu*—Chinese jurisprudence has progressively lowered the threshold for "*minimal creativity*." This approach effectively decouples protection from a deep inquiry into subjective personality, focusing instead on demonstrable human intellectual contribution at any stage of the creative process. The result is a hybrid, adaptable model that extends copyright protection to a wider range of AI-assisted outputs, providing legal certainty for commercial users and developers.

Conversely, the EU, in the absence of a uniform statutory definition, has leveraged CJEU jurisprudence to consolidate a rigid and harmonised threshold within the subjective authorship tier. Landmark rulings from *Infopaq* to *Brompton* have consistently anchored protection to the "*author's own intellectual creation*," demanding that a work bear the imprint of a natural person's free and creative choices. This personality-based conception provides remarkable coherence and safeguards the traditional copyright paradigm. However, it inherently resists the accommodation of AI-generated works where such a direct, subjective human imprint is absent, creating a legal vacuum for fully autonomous machine outputs.

Thus, the Two-Tier Matrix not only provides the analytical scaffold that elucidates this fundamental divergence but also delivers precise closure to the comparative argument. China's path demonstrates the legal consequences of prioritising the objective tier, fostering a flexible environment for technological integration. The EU's approach illustrates the implications of an unwavering commitment to the subjective tier, ensuring doctrinal purity but potentially at the expense of technological adaptability. Ultimately, this comparison, clarified by the Matrix, illuminates the core tension in modern copyright law and provides a coherent tool for assessing future reforms in the global governance of AI-generated and AI-assisted works.

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INTER-STATE APPLICATIONS AGAINST THE UNITED KINGDOM IN THE EUROPEAN REGIONAL HUMAN RIGHTS PROTECTION SYSTEM

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Abstract: *The subject of this article is the inter-state application operating within the European regional human rights protection system. The inter-state application is an important element of the monitoring mechanism created to ensure respect for the rights and freedoms set out in the European Convention on Human Rights and its Additional Protocols. This paper focuses on applications brought against the United Kingdom. This country, despite being one of the founders of the Council of Europe, is also the addressee of the largest number of inter-state applications right after the Russian Federation and Turkey. The article attempts to answer why this is the case.*

Key words: *European Convention on Human Rights; Council of Europe; Inter-State Application; United Kingdom*

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1. INTRODUCTION

The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights (**ECHR, the Convention**), was opened for signature in 1950 and is one of the crucial legislative acts for the protection of individual rights in Europe. The Convention, along with subsequent Additional Protocols, covers a number of rights and freedoms vested in the individual human being. These rights are safeguarded by a control mechanism, which relies mainly on an application system consisting of individual and inter-state applications.

Those entitled to bring an individual application include individuals, non-governmental organisations or groups of individuals (art. 34 ECHR). The right to bring an inter-state application is only vested in member states of the Council of Europe (**the Council, CoE**) which are also parties to the ECHR (art. 33 ECHR). Currently, following the exclusion of the Russian Federation from the organisation, 46 member states have the right to use this remedy.

In recent years, between 2 and 3 applications are lodged annually with the Strasbourg Court. Comparing this with the number of individual applications (40,000 to 50,000 cases per year), it can be seen that an application brought under Article 33 of the Convention constitutes a negligible percentage of cases heard by the European Court of Human Rights (**ECtHR, the Court**). However, the uniqueness of this remedy lies in the fact that it is to be brought by a State signatory to the ECHR against another Member State of the Council, which is also bound by that international agreement (Risini and Eicke, 2024).

When analysing the parties to proceedings in cases brought under Article 33 ECHR, it can be noted that the vast majority of them are brought as a result of an ongoing political or military conflict between the States parties to the Convention. Even a cursory

examination of the content of the applications filed after 2006 shows that the nature of that remedy has changed significantly. From Georgian applications to Ukrainian, Armenian and Azerbaijani cases, it is becoming apparent that the inter-state application, instead of ensuring the protection of rights and freedoms as defined in the ECHR and the Additional Protocols, serves as a foreign policy tool used by the states participating in the conflict.

The paper discusses the nature of the inter-state application and its use by States Parties to the Convention. The paper focuses on applications brought by Council member states against the United Kingdom.[1]

The paper is intended to examine the causes and effects of applications alleging violations by the United Kingdom and its authorities.

2. INTER-STATE APPLICATION

The inter-state application, alongside the individual application and the ECtHR, is a key element of the review mechanism which allows States parties to the Convention to report human rights violations that have occurred in other Member States. Pursuant to Article 33 ECHR, each of the High Contracting Parties may file an application with the Court if it considers that another High Contracting Party has infringed the provisions of the Convention or Protocols thereto. The provision does not specify the subject-matter of the application, but merely points to an infringement of the provisions of the Convention and Protocols. The substantive scope of an inter-state application is significantly broader than that of an individual application. These may also include, apart from the violations of human rights and fundamental freedoms set out in the Convention and the Protocols, allegations of failure to enforce final judgments of the Court (Machowicz and Tabaszewski, 2023). By December 2024, all applications brought by States parties to the ECHR concerned rights guaranteed by the Convention or its Protocols.

The formal requirements of an application as a pleading are set out in Rule 46 of the Rules of Court (Rules of Court of the European Court of Human Rights). Pursuant to the Rules, an inter-state application must contain the following elements:

- the name of the Contracting Party against which the application is made;
- a statement of the facts; a statement of the alleged violation(s) of the Convention;
- the relevant arguments;
- a statement on compliance with the admissibility criteria (exhaustion of domestic remedies and the time-limit) laid down in Article 35 § 1 of the Convention;
- the object of the application;
- a general indication of any claims for just satisfaction made under Article 41 of the Convention on behalf of the alleged injured party or parties;
- the name and address of the person or persons appointed as Agent;
- copies of any relevant documents.

By December 2024, a total of 47 inter-state applications were filed with the EComHR and the ECtHR[2] (Table 1). The ECtHR heard 38 cases in total. The difference between the number of applications filed and the number of cases results from the fact

[1] The United Kingdom should be understood as the United Kingdom of Great Britain and Northern Ireland.
[2] Before 1998, applications used to be filed with the European Commission of Human Rights. After that date, applications are brought directly to the European Court of Human Rights in accordance with Additional Protocol No. 11.

that certain cases have been joined for joint consideration. This was the case, for example, with applications against Greece. In the so-called first Greek Case, Denmark (3321/67), Sweden (3322/67), Norway (3323/67) and the Netherlands (3344/67) brought four separate cases against Greece. The same case was with the applications of Denmark, France, Norway, Sweden and the Netherlands against Turkey[3] and some of the applications of Georgia and Ukraine.

The decision of the Court and, previously, the European Commission on Human Rights (**EComHR, the Commission**) to join cases for joint adjudication is most often based on the content of the application itself. Cases that are based on the same facts where the defendant is a particular State, are examined jointly. Such a solution allows faster processing of the case, while reducing the costs of trial.

3. THE IMPORTANCE OF THE INTER-STATE APPLICATION IN THE RELATIONS OF THE MEMBER STATES OF THE COUNCIL OF EUROPE

The inter-state application is governed by Article 33 of the Convention. It plays an essential role in the system of human rights protection in Europe. The application enables CoE member states to cooperate and mutually monitor their adherence to human rights, thus fostering a culture of respect for these rights. Through this remedy, it is possible to exert pressure on countries that do not comply with their obligations under the ECHR and the Additional Protocols (Aznaurashvili, 2023).

Three circumstances can currently be distinguished in which an inter-state application can be filed. The first situation is the bringing of an application against a State which is accused of breaching the rights and freedoms set out in the Convention and the Additional Protocols in relation to persons under its jurisdiction. This model is closest to the individual application mechanism set out in Article 34 ECHR. An example can be the application *Austria v. Italy* filed in 1960.

The second situation is where the applicant state finds that the legislation or administrative practice of another Member State of the Council of Europe is contrary to the provisions of the Convention. In such a situation, the applicant State is required to demonstrate examples underlying the charges relied on in the application. An example of such a case is the application *Ireland v. the United Kingdom* brought in 1971 (Ploszka, 2011).

The third circumstance concerns the situation where the application contains questions about the compliance of legislation and administrative practice in a given State with the provisions of the ECHR. This mode of procedure does not require that the applicant present examples of infringement of rights and freedoms committed by the defendant State (Zimmermann, Ulfstein and Risini, 2021). An example of this type of application is the so-called "Second Greek Case" i.e. the application *Denmark, Norway, Sweden and the Netherlands v. Greece* filed in 1970.[4]

An inter-state application, regardless of the circumstances it concerns, must be filed in the public interest. The public interest means compliance with the Convention rules. I. Risini argues that the authors did not intend that the application serve as an additional remedy for the implementation of international policy by the States, even if they were in conflict with each other (Risini, 2015). Inter-state cases that have been brought in the last twenty years show that the purpose of that remedy is different from that

[3] Applications: 9940/82, 9941/82, 9942/82, 9943/82, 9944/82.

[4] See Denmark, Norway, Sweden, Netherlands v. Greece, Report of the Commission of 4 October 1976, Application no. 4448/70.

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pursued by the ECHR's authors. More and more, the purpose is the pursuit of particular interests of the applicant State.

The analysis of the cases brought by 2024 clearly shows that the vast majority among the applications filed are those that fall into the second group. By contrast, cases brought in the public interest constitute the clear minority.

In the past, it has been extremely rare for States parties to the Convention to choose to use the remedy available to them in the form of an application against another international-law entity (Table 1). There have been years, even decades, in the history of the Court and the ECHR when no single inter-state application was filed.[5] The increase in the use of the application began in 2007, stemming from the conflict, first political, then armed, between Russia and Georgia, both ECHR signatory States (Leach, 2021). Recent years have shown an increased interest in the inter-state application by CoE Member States. In this context, H. Küchler even refers to the "golden age" of this long-forgotten instrument for the protection of human rights (Küchler, 2020).

Year 2007 initiated a series of applications brought more as a means of international pressure on the States which knowingly committed numerous violations of conventional rights and in which governments took a totalitarian or at least authoritarian form. One may point here to e.g. Russia or Turkey. At the same time, it has become apparent that an inter-state application has begun to be seen as an additional means of pursuing international policy, partially losing its original character of a means for ensuring respect for the rights and freedoms enshrined in the Convention.

Table 1: List of inter-state applications filed with the EComHR and ECtHR

Item	Parties	File no.	Lodging date	Case status
1	Greece – United Kingdom	176/56	07.05.1956	Closed
2	Greece – United Kingdom	299/57	17.07.1957	Closed
3	Austria – Italy	788/60	11.07.1960	Closed
4	Denmark, Norway, Sweden, the Netherlands – Greece	3321/67, 3323/67, 3344/67	27.09.1967 25.03.1968	Closed
5	Denmark, Norway, Sweden, the Netherlands – Greece	4448/70	10.04.1970	Closed
6	Ireland – United Kingdom	5310/71	16.12.1971	Closed
7	Ireland – United Kingdom (II)	5451/72	06.03.1972	Closed
8	Cyprus – Turkey	6780/74	10.09.1974	Closed
9	Cyprus – Turkey (II)	6950/75	21.03.1975	Closed
10	Cyprus – Turkey (III)	8007/77	06.09.1977	Closed
11	Denmark, France, Norway, Sweden, the Netherlands – Turkey	from 9940/82 to 9944/82	01.07.1982	Closed
12	Cyprus – Turkey	25781/94	22.11.1994	Closed (ECtHR judgment)
13	Denmark – Turkey	34382/97	07.01.1997	Closed (ECtHR judgment)
14	Georgia – Russia	13255/07	26.03.2007	Closed (ECtHR judgment)
15	Georgia – Russia (II)	38263/08	12.08.2008	Closed (ECtHR judgment)
16	Georgia – Russia (III)	61186/09	03.12.2009	Closed (deleted from the list)

[5] 1961-1966; 1983-1993; 1998-2006.

Item	Parties	File no.	Lodging date	Case status
17	Ukraine – Russia	20958/14	13.03.2014	Pending
18	Ukraine – Russia	43800/14	13.06.2014	Pending
19	Ukraine – Russia (III)	49537/14	09.07.2014	Closed (deleted from the list)
20	Ukraine – Russia	8019/16	13.03.2014	Pending
21	Slovenia – Croatia	54155/16	15.09.2016	Closed (decision on the lack of ECtHR jurisdiction)
22	Ukraine – Russia	38334/18	11.08.2018	Pending
23	Georgia – Russia (IV)	39611/18	22.08.2018	Pending
24	Ukraine – Russia (VIII)	55855/18	29.11.2018	Pending
25	Latvia – Denmark	9717/20	19.02.2020	Closed (case deleted from the list)
26	Liechtenstein – Czech Republic	35738/20	19.08.2020	Pending
27	Armenia – Azerbaijan	42521/20	27.09.2020	Pending
28	Armenia – Turkey	43517/20	04.10.2020	Pending
29	Azerbaijan – Armenia	47319/20	27.10.2020	Pending
30	Ukraine – Russia (IX)	10691/21	19.02.2021	Pending
31	Armenia – Azerbaijan (II)	33412/21	29.06.2021	Pending
32	Russia – Ukraine	36958/21	22.07.2021	Pending
33	Armenia – Azerbaijan (III)	42445/21	24.08.2021	Pending
34	Armenia – Azerbaijan (IV)	15389/2022	24.03.2022	Pending
35	Azerbaijan – Armenia (II)	39912/22	18.08.2022	Pending
36	Ireland – United Kingdom (III)	1859/24	17.01.2024	Pending

Source: Author's own study[6]

Any member state of the CoE can be a defendant under an inter-state application. Of the 47 States Parties to the Convention[7] only 10 States have so far been defendants in inter-state cases. The remaining 37 States were not defendants under Article 33 ECHR.

The Russian Federation is the addressee of the largest number of applications. A total of 11 applications were filed against that country. In second place is Turkey with 7 applications. The United Kingdom closes the "winners podium" with 5 applications (Chart 1). These three countries were defendants in a total of 23 inter-state cases, accounting for half of all applications filed since the early 1950s.

Problems with compliance with Convention rights are not only a feature of countries where the idea of human rights is just being introduced or of countries having problems with democracy. Infringements of the ECHR are also committed by countries which have a long history of protecting fundamental rights, as well as by democratic states built on the rule of law and social justice. An example of such a democracy with a long history of protecting human rights and civil rights is the United Kingdom. It was one

[6] Based on ECtHR: Inter-State applications. Available at: https://www.echr.coe.int/inter-state-applications (accessed: 30.05.2024).

[7] A total of 47 states were parties to the European Convention on Human Rights at its peak (February 2022). Currently, following the exclusion of the Russian Federation from the Council of Europe, there are 46 signatory States.

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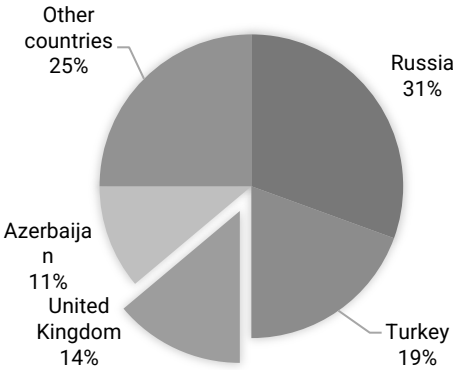
of the founders of the Council of Europe and also one of the first to ratify the ECHR. The UK, with its long history and strong position in the world of so-called Western democracy, also has a dark side, such as numerous violations of the Convention and Additional Protocols. Being one of the CoE founders in 1949, the United Kingdom was still a colonial state. By the turn of the 1950s, the position of the UK was becoming significantly weaker, and the colonial empire, over which the sun never set, was slowly falling apart. In these circumstances, the United Kingdom has become one of the pillars of the European regional system for the protection of human rights in its efforts to unite Europe and promote human rights.

Taking as a criterion the distinction between democratic and non-democratic states or those with democracy problems, it is the UK that is the addressee of the largest number of inter-state applications among members of the first group. This situation is due to several reasons.

The first important factor was that, at the time of the creation of the RE, the UK was a colonial state with numerous overseas possessions, with different legal statuses such as: dominions, colonies, protectorates, mandate territories and other dependent territories. As one of the founding states of the Council, the UK pursued an active foreign policy aimed at maintaining this colonial empire, which had been disintegrating since the 1920s. Conducting this kind of foreign policy often required the British authorities to make difficult and drastic radical decisions. The second factor was the unresolved question of Northern Ireland's legal status. This country was part of the United Kingdom of Great Britain and Northern Ireland in the 1940s and 1950s. At the same time, the Republic of Ireland, supported by a section of the population of Northern Ireland, claimed the right to this disputed territory.

In trying to retain its position as a superpower, the United Kingdom had to take appropriate political action on the one hand, and on the other it was bound by compliance with the ECHR and the Additional Protocols. This situation resulted in that the country often had to take political decisions with the risk of violating the Convention.

Chart 1: Structure of inter-state applications filed with the ECtHR, division by defendant States



Source: Author's own study[8]

[8] Based on ECtHR: Inter-State applications. Available at: https://www.echr.coe.int/inter-state-applications (accessed: 30.05.2024).

4. APPLICATIONS OF GREECE AGAINST THE UNITED KINGDOM

The first application against the United Kingdom was brought by Greece on 7 May 1956. The case registered as ref. no. 176/56 was the first inter-state application to reach the system of the Council of Europe and not directly the ECtHR. In its first application Greece alleged violations of arts. 3, 5, 6, 8, 9, 10, 11, and 15 of the ECHR.

It is worth noting that the Strasbourg Court was established only in 1959, three years after the first international case was brought. The first years of the Court are referred to in the literature as 'human rights diplomacy'. This period is often characterized as a time of 'state sovereignty hegemony'. Bates (2010) calls this period of the ECHR's functioning the time of the 'sleeping queen'. This situation was due to the fact that in the first years of its operation, there were just few complaints brought before the Court. In its first ten years of operation, the Court issued only 10 judgments in inter-state and individual cases.

The first Greek application against the United Kingdom concerned human rights violations in Cyprus, which was a British colony at the time. In the 1950s, Cyprus was an arena of conflict between the Greek majority striving toward reunification with Greece (the enosis movement) and the Turkish minority which opposed to these efforts. The United Kingdom, as the country in control of the island, was actively involved in the conflict. The application concerned alleged breaches of the Convention by the British colonial authorities in Cyprus. The EComHR declared the application admissible on 2 June 1956. The procedure initiated by the Greek application resulted in the adoption by the Committee of Ministers of the Council of Europe of a resolution that there were no grounds for further action. The resolution of the Committee of Ministers resulted from the political settlement of the issue of the independence of Cyprus.

In the Greek case, a margin of appreciation appeared for the first time in Strasbourg jurisprudence.[9] Currently, States Parties to the Convention frequently raise this principle in proceedings before the Court. Developed in the late 1950s, the margin of appreciation principle was introduced into the Preamble of the Convention by Additional Protocol No. 15.

The second application against the United Kingdom was brought by Greece on 17 July 1957. The case concerned alleged violations of the ECHR by the British colonial authorities in Cyprus. Greece's complaint concerned 49 cases of alleged torture and degrading and inhuman treatment of persons by police and military forces in Cyprus. The Greek government also drew attention to the obligation to obtain the Attorney General's consent to prosecute members of the administration or security forces. The legislation imposing the obligation to obtain the Attorney General's consent came into force after the trial of two British officers accused of ill-treating detainees during interrogations (Stavridi, 2021).

The action was declared admissible in respect of 29 cases and inadmissible on the ground of non-exhaustion of domestic remedies in the remaining 20 cases.[10]

On 12 October 1957, the application was declared admissible by the EComHR. The procedure initiated by the Greek application resulted in the adoption by the Committee of Ministers of the Council of Europe of a resolution that there were no

[9] European Commission of Human Rights, Greece v. United Kingdom, No. 176/56, Decision (26 September 1958).
[10] European Commission of Human Rights, Greece v. United Kingdom (II), No. 299/57, Decision (12 October 1957).

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grounds for further action. The resolution of the Committee of Ministers resulted from the political settlement of the issue of the independence of Cyprus.

5. APPLICATIONS OF IRELAND AGAINST THE UNITED KINGDOM

The first application of Ireland against the United Kingdom[11] before the ECtHR was brought on 16 December 1971. The applicant alleged that the United Kingdom had used torture during the Northern Ireland crisis between 1969 and 1975. The pleading contained allegations of violation of Article 3 of the Convention (torture and inhuman treatment) against detainees in Northern Ireland. In addition, the Irish Government accused the British party of infringing Article 5 (right to liberty and security) in conjunction with Articles 14 and 15 and Article 6 (right to a fair trial). The Irish side accused the United Kingdom of using five interrogation techniques that were of a torture nature. These techniques included:

- Forcing a stress position ("wall-standing");
- Restricted access to sleep;
- Restricted access to food and water;
- The use of noise as a form of mental pressure;
- Placing a bag over the detainee's head and keeping it at all times, except for interrogations (Dembour, 2023).

The Irish Government held that people detained in Northern Ireland by the British authorities had been subjected to inhuman treatment. As an example, the applicant referred to physical and psychological abuse, as well as to the use of many other forms of violence.

The UK argued, inter alia, that the security measures used by British law enforcement agencies, including interrogation techniques, were necessary to prevent further terrorist attacks and to protect the civilian population. The UK argued that the interrogation techniques used were not torture but rather questioning methods designed to obtain necessary information from suspects. The defendant State also argued that the measures it had used were not only in accordance with the applicable law but were also necessary in an emergency situation.

In January 1976, following the proceedings, the EComHR prepared a report, which was then forwarded to the Committee of Ministers of the Council of Europe. The EComHR found that the investigative techniques used by the UK authorities on detainees met the definition of torture. In March 1976, the Irish Republic, exercising its powers, brought the case before the ECtHR.

In its judgment of 18 January 1978, the Court stated that the interrogation techniques used by the authorities of the defendant State constituted inhuman and degrading treatment, i.e. an offence prohibited under Article 3) of the Convention, alleged in the application. At the same time, the ECtHR considered that the UK's interrogation methods were not torture within the meaning of Article 3 ECHR. The Court found that, at the time indicated in the application, there had been a state of public emergency in Northern Ireland threatening the life of the nation within the meaning of Article 15 (1) of the Convention, alleged in the application. That situation meant that there was no infringement of Article 5 in conjunction with Articles 14 and 15. Nor did the Strasbourg Court find the infringement of Article 6 of the Convention, alleged in the application.[12]

[11] ECtHR, Ireland v. United Kingdom, app. no. 5310/71, 18 January 1978.
[12] *Ibid*.

Based on the first Irish case, the Court formulated a definition of torture. The definition of "torture" by the Strasbourg Court was widely criticised. According to some legal scholars and practitioners, the ECtHR defined "torture" too narrowly (Bonner, 1978). For example, Article 1 of Resolution 3452 (XXX) of the United Nations General Assembly on torture provides that *"(1) (…) torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons (...) (2) (…)Torture constitutes an aggravated and deliberate form of cruel, in human or degrading treatment and punishment."*[13]

Currently, the concept of torture developed by the ECtHR based on the Irish cases is widely used in the Georgian and Ukrainian cases. The ECtHR's resolution of the first Irish complaint against the United Kingdom has also been used by the US government for counter-terrorism purposes. The definition of torture developed by the ECtHR on the basis of the Irish complaint was used to narrow the concept of torture from that contained in Article 1 of the Convention against Torture.[14]

On 4 December 2014, the Irish government requested a review of the judgment, providing as the reason for the review the existence of documents that could have a decisive influence on the Court's judgment. Following the review/appeal proceedings, the Strasbourg Court found that the government of Ireland had failed to prove the existence of facts which were unknown to the Court at the time or which could have had a decisive influence on the 1978 judgment.

Ireland brought a second application against the United Kingdom on 6 March 1972. The case contained allegations of human rights violations by British security forces in Northern Ireland in the 1970s. Ireland accused the United Kingdom of using illegal methods of interrogation, torture and inhuman and degrading treatment of detainees. This case was Ireland's second application against the United Kingdom concerning events during the Northern Irish conflict in the late 1960s and early 1970s.

Ireland's second application contained allegations of infringement of Article 1 (obligation to respect human rights), Article 2 (right to life), and Article 3 (prohibition of torture), Article 5 (right to liberty and security), Article 6 (right to a fair trial), Article 14 (prohibition of discrimination) and Article 15 (derogation in time of emergency). On 1 October 1972, the EComHR declared the application partly admissible and partly inadmissible.

Both applications brought by Ireland had a significant impact on the political relationship between the applicant and the defendant. Both the first and second Irish applications revealed serious human rights violations in Northern Ireland, which, moreover, remains part of the United Kingdom to this day. This has exacerbated the already tense relationship between Ireland and the UK. The finding by the Court in Strasbourg that the questioning techniques used by the British services were inhuman has affected the perception of British action in Northern Ireland on the international stage. The judgment of the Court forced the United Kingdom to make substantial changes to questioning methods and the policy for Northern Ireland and the population living in the

[13] Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - General Assembly Resolution 3452 (XXX) of 9 December 1975.
[14] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution 39/46 of 10 December 1984.

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disputed area. The Strasbourg Court's ruling has become a reference for further human rights reforms not only in the UK but also in Europe.

The case in question has led to a greater Irish cooperation with international organisations regarding the protection of human rights, as well as increased pressure on the UK to respect these rights.

The ECtHR ruling also had a long-term impact on the Northern Ireland peace process that began in the 1990s. Changes in the perception of violations of human rights and freedoms were a key element in building trust between the parties to the conflict. The Irish application also had a significant impact on the development of human rights in Europe, which in turn had important implications for future judicial cases.

On 17 January 2024, a third Ireland's application against the United Kingdom was filed with the Strasbourg Court. The case concerns the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 which was signed on 18 September 2023. The purpose of the Act is to address the legacy of the conflicts in Northern Ireland, which took place intermittently from the late 1960s to 1998.

The applicant argues that the provisions of the Act are contrary to the ECHR. Ireland points to violations of Article 2 (right to life), Article 3 (prohibition of torture and inhuman or degrading treatment), Article 6 (right to a fair trial), Article 13 (right to an effective remedy) and Article 14 (prohibition of discrimination) of the Convention.

The Irish Government holds that Articles 19, 39, 40 and 41 of the Act guarantee immunity from prosecution for offences committed during the conflict in Northern Ireland, provided that certain conditions are met, which is contrary to Articles 2 and 3 of the Convention. The Irish side claims that parts 2 and 3 of the Act replace the current mechanisms of information recovery regarding offences related to the Northern Ireland conflict with the review carried out by the newly established Independent Commission for Reconciliation and Information Recovery. This situation, in the opinion of the applicant State, is not compliant with Article 2, Article 3 and Article 13 ECHR. In its application, the Irish side points out that Article 43 of the Act prevents the opening of new and continuation of pending civil proceedings related to the conflict in Northern Ireland. The situation, in the applicant's view, is contrary to Article 6 (right to a fair trial) considered both separately and in conjunction with Article 14 (prohibition of discrimination) of the Convention.

In accordance with the rules of procedure of the Strasbourg Court, once Ireland filed its application, the Court's Registry notified the defendant State. The Vice-President of the ECtHR assigned the application to Chamber I. The case is currently under examination for admissibility.

6. CONCLUSION

The applications brought against the United Kingdom and the decisions made on their basis have significantly enriched the case-law of the ECtHR. The best example is the judgment delivered by the Court in the case initiated under Ireland's first application. As part of the case, the Strasbourg Court created and introduced a definition of torture. The concept of torture was later widely used in the cases of Georgia and Ukraine brought against the Russian Federation.

It is also worth noting that the Greek applications against the United Kingdom were the first to be filed with the Strasbourg system. With the two cases initiated by the Greek government, mechanisms (procedural frameworks) were created to ensure compliance with the Convention.

The applications brought against the United Kingdom clearly showed that it is not only the former "Eastern Bloc" countries but also the founding states with democratic traditions that have a problem with compliance with the ECHR.

The inter-state application is an important element of the European system of human rights protection, enabling member states to monitor and enforce the adherence to rights under the ECHR. This mechanism allows not only the resolution of disputes between the Member States of the Council of Europe, but also the promotion of human rights protection standards throughout Europe. The growing interest of CoE member states in the use of inter-state applications means the increasing number of such applications entering the Strasbourg Court. On the other hand, the manner of use of inter-state applications by some CoE member states provokes certain concerns.

The last twenty years have shown more and more that the purpose of resorting to this remedy is changing. The inter-state application, instead of protecting human rights, is turning into a tool for waging international disputes. Political and military conflicts of the past two decades have shown that some countries use the application as an additional instrument of pressure in international relations. It is evident in the applications filed by Ukraine, Russia, Azerbaijan, Armenia, Georgia and Turkey. Applications involving these countries constitute the vast majority.

Is the inter-state application under the ECHR and the CoE necessary? In my opinion, it definitely is. Consideration should be given to introducing changes to the inter-state application that would allow it to retain its nature. One should also consider whether the CoE accession procedure needs reform.

In the context of a growing number of human rights violations around the world, it can be assumed that the importance of this remedy will grow and its effectiveness will be crucial for the future of the European human rights protection architecture.

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THE RIGHT TO A FIRM IN THE LEGAL DOCTRINE AND JUDICIAL PRACTICE OF THE RUSSIAN EMPIRE

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Abstract: *The article examines scientific, theoretical and practical approaches to the issue of the right to a firm in the law of the Russian Empire in the period from the 1880s to 1917. In pre-revolutionary law, doctrine and practice, the right to a firm was understood as the right of a merchant or industrialist to carry out entrepreneurial activity under a certain designation, called in commercial life "firm". Both legal science and then judicial practice understood a firm as a trade (commercial) name. Unlike many Western countries, as well as the Far East (e.g., Japan), this concept was never codified, although such attempts were repeatedly made. The authors conclude that the doctrine that emerged during this period of time significantly outpaced the adoption of relevant legislation, and sometimes even the judicial practice. The treatises of such researchers as A. Bashilov (1887), G. Shershenevich (1888), A. Hol'msten (1895), Vs. Udintsev (1907), A. Fyodorov (1911), A. Kaminka (1912), and others were used as an analysis of the doctrine; the authors also conducted an analysis of a number of judgments of the 4th (later the Judicial department) of the Governing Senate on the issue of the right to a firm, as well as the judgments of some courts of the European states.*

Key words: *Right to a Firm; Commercial Name; Corporate Law; Competition law*

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1. INTRODUCTION

With the development of commodity-industrial relations, commercial and industrial enterprises appeared, as well as countless individual traders, each of whom offered his goods to the public. However, how to distinguish the goods of one trader from another? This is how the first firms and trademarks appeared. A trade name not only denotes the affiliation of a certain enterprise, store or establishment to a certain merchant or owner – in the minds of the public, that is, the clientele, buyers, the firm is associated with the quality of the goods, as well as the owner of the enterprise or merchant, the origin of the goods, and, without a doubt, with the reputation of the enterprise earned during its work. A trade name (or the "firm", as it is called in the work of pre-revolutionary scholars) is necessary to distinguish an enterprise or establishment from similar, homogeneous businesses. Since the reputation of the enterprise or its owner is embedded in the trade name, there is a practice of unfair competition, when one trader appropriates the name of another firm, or makes his name as similar as possible to the "original", which leads to deception of the public, since by such actions the dishonest entrepreneurs seek to convert the clientele of their rival to themselves. What are the methods of legal protection? In many countries of the world, this is a civil claim for damages, as well as a ban on using someone else's firm (unless the right to use the firm was previously legally granted to the merchant). There are also administrative

methods – for example, a ban on registering similar or identical names. Modern technology, of course, now allows a lot. However, what can be said about the 19th century, when the electronic computers were unavailable, registers existed exclusively in paper form and were cumbersome, and the number of enterprises and sole traders grew exponentially? Thus, legal systems had to answer these questions, regulate the registration of firms, secure the right of the merchant to exclusive use of the firm, and determine the conditions for the assignment (transfer) of the firm. Thus, significant legislative initiatives on the issue of the firm can be traced in German law (German Code of Commerce of 1861 and 1897), as well as in Swiss law (Swiss Code of Obligations of 1881). The French Code of Commerce of 1806 also contained several provisions on firms, and the protection of the right to a firm was secured by a separate law of 1824, the picture was also supplemented by extensive judicial practice. In the Russian Empire, the concept of "firm" was developed in commercial life, and was not regulated by law. The protection of the right to a firm, the registration of firms and their assignment were not regulated in any way by law, leaving the resolution of these issues to commercial life, customs, and judicial practice. We will tell the reader about this in this article.

2. HISTORICAL DEVELOPMENT OF THE CONCEPT OF A FIRM

The historical development of the concept of a firm is rather vague. For example, G. Shershenevich (1888) believed that a firm has a similarity with a noble coat of arms – comparing how in the Middle Ages the nobility hung their coats of arms on a castle, so did medieval merchants, placing a figure above their establishment, most often with an image of an animal, the same also concerned the branding of goods, as a rule, with the same images. Further, the author notes, as with the development of literacy among the nobility, the need arose to indicate aristocratic origin with the help of a signature, so in the commercial life of those times, signs began to recede into the background due to the development of forms of trade legal relations, which began to be expressed in written execution of transactions, where, accordingly, there was a need to formalise the signature of the firm (Shershenevich, 1888, pp. 122-123). E. Danilova (1915) also claims that the concept of a firm originates from the Middle Ages, when there was an active development of urban life, and accordingly, industrial and commercial legal relations. Partnerships engaged in trade sought to distinguish themselves from each other in order to prevent confusion on the part of the public, i.e., clients, which led to these partnerships conducting business under the names of all partners, and the given names were subsequently indicated in written transactions concluded by these partnerships. The signature had subsequently received the name "*firmare*" (Danilova, 1915, p. 72). A. Kaminka in his article "*Trading firm*" (1908) points out that the origin of the concept goes back to medieval practice: since people of that time were mostly illiterate, everyone had their own distinctive sign. In the everyday life of medieval lawyers, as the author pointed out, the term "signa" was used, which was used by both individual traders (merchants) and partnerships; the partnership signs consisted of a mixture of the signs of each of the partners.

Beginning in the 13th century, partnerships also used the sign named "*titulus societatis*", under which various transactions and obligations were concluded. Later, the signature in commercial life was reduced to the designation of the firm that the partnership owned (Kaminka, 1908, pp. 2022-2023). A. Fyodorov (1911) in his book on trade law points out that the emergence of the concept of "*firm*" was facilitated by a medieval custom, which consisted in distinguishing one trading establishment from another with the help of a special sign, which was called "*signum mercatorum*", often

depicting something fantastic. Merchants used this sign both in trade transactions and documents, and in designating their goods – i.e., their origin and affiliation, in essence, they were used as trademarks. After the development of literacy of the population, images were replaced by signatures that more or less corresponded to the civil name of the merchant, the practice of entering the names of these enterprises in special registers began to spread, later being placed in specialised printed publications. According to Fyodorov, some of these customs have survived until very recent times (i.e., until the end of the 19th – beginning of the 20th century), consisting of relative freedom in choosing the name of the firm, as well as the constancy of this name, even despite the fact that the identity of the owner could have already changed by that time (Fyodorov, 1911, pp. 174-175). Continuing with what was said earlier, the German researcher Robert Haab (1888) in his doctoral dissertation points out that the prototype of the firm was drawings, also because before the 14th century in many countries there were no established surnames, and only the addition of a symbol (i.e., a drawing) to the signature could provide sufficient distinction among many identical names.

In the Middle Ages, Haab writes, personal signs were known (which could obviously be considered the prototype of both firms and trademarks), when peasants applied signs to livestock, artisans to their tools, and merchants to the packaging of their goods (Haab, 1888, pp. 6-7). The merchants' marks, as the German researcher Josef Kohler (1884) writes, were not only important from the point of view of distinguishing one manufacturer from another, but also as a kind of proof in the event of a shipwreck (if the goods were transported by sea), or in the event that the goods were lost or stolen. The right of ownership of these goods (i.e., before their sale), as Kohler points out, was recognised precisely by this trademark (*signa mercatorum*), and the presumption of ownership of these goods was in effect, based on it (Kohler, 1884, pp. 24-31). The American lawyer Edward Rogers (1910) considers the origin of the firm to be a phenomenon from Antiquity: in Ancient Greece, inscriptions with the name of the manufacturer were used in pottery – thus, something similar was found on Etruscan vases, which dated back to the 8th – 5th century BC. In Ancient Rome, artifacts with the names of workers, manufacturers, merchants, drawings and chronograms were found; names and trademarks of manufacturers were also found on ancient Roman clay lamps (Rogers, 1910, pp. 30-31). There is also a known imprint of a city on a famous cheese from the Etruscan goddess of the Moon (Diana), which may well be considered a prototype of a trademark or firm name. In the modern sense of the word, trademark law was most likely born in France, where already in the 14th century every worker and trader had to have his own distinctive sign, in order to distinguish who was responsible for this work. Also known is the Declaration of Amiens (1374), which obliged every blacksmith to put a sign on his metal products to distinguish himself from others; subsequently, these rules were extended to textile workers and some other professions (Rogers, 1910, p. 34). Kohler, however, considered the examples of marking goods and indicating the names of manufacturers on ancient artifacts to be only rudiments; in his opinion, this institution began to fully develop only in the Middle Ages (Kohler, 1884, pp. 27-31).

A rather interesting interpretation of the emergence of the right to a firm, i.e., a commercial or trade name (in French: *Nom commercial*) can be found in the doctoral dissertation of the French lawyer Adrien Klotz (1898). Thus, Klotz writes that, on the one hand, the concept of a commercial name (i.e., a firm, as it was called in pre-revolutionary legal literature) is a fairly modern concept, but on the other hand, this does not mean that it was, in principle, unknown in Ancient Rome or in monarchical France (in French: *Ancien Régime*). Thus, in Ancient Rome, the place of production of certain goods was often indicated – for example, wines or textiles. This indication of the place of production

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implied the origin of the goods and their quality – in the classical sense, this is difficult to call a trademark or commercial name of the goods. Klotz gives an example that when one Roman promised to deliver clothes to another, he could not avoid liability if he received the goods from another place – i.e., it would not be what he promised him, and if the supplier succeeded in misleading the buyer about the place of origin of the goods, it would be considered fraud about the nature and quality of these goods. A similar situation existed in monarchical France, where fraud was prevented, which consisted of deception about the quality of the goods supplied. However, at that time, legal protection was not provided to individual merchants or industrialists, but to the production of corporations, which were usually located in large cities. The idea, however, was the same: to suppress deception and fraud about the quality and place of origin of goods. Thus, there were inspectorates that were tasked with checking the quality of goods, and industrial city guilds could prevent fraud by selling goods whose place of production was falsely indicated.

The manufacturers' trademarks were practiced everywhere. Ancient rules prescribed that manufacturers use trademarks that indicated the name of the manufacturer, and even if an individual merchant was "absorbed" by a corporation, each trading house, in addition to its name, had its own seal and signature, and, of course, a name. In addition, royal privileges established the right to transfer a trading house by inheritance, and the establishment "outlived" its founders due to the passage of time, and the successor became the owner of the trade designation, essentially the brand of the manufacturer, in which, in Klotz's opinion, one can find the concept of a firm, i.e., the commercial name of an enterprise (Klotz, 1898, pp. 6-12). Haab (1888) mentions in his dissertation on the dogmatics of firms that in the Middle Ages, at least until the beginning of the 19th century, individual traders conducted their respective business under their civil name, and there are no sources indicating that they conducted business under any other name, or used it when drawing up various transactions and documents. The common old German law did not contain any statutory provisions related to the protection of the right to a firm, and the protection of the owner of the enterprise with respect to his trade name was completely alien to the common law, even to the point that it was allowed to call the enterprise by another name, if it did not contain *dolus* (fraud in Roman law), *falsum* (fraud, forgery in Roman law), or *injuria* (moral damage) (Haab, 1888, pp. 13-15). According to Haab, from a number of provisions of the General State Laws of the Prussian States of 1794 (Part 2, Title 8, Articles 621-622), one can derive the right of the owner to exclusive use in managing his firm (which is what it is called in the text of the General State Laws of 1794) (Haab, 1888, p. 21). Thus, Article 621 suggests that when determining the name of a firm, it should be ensured that it is sufficiently distinctive from those firms that have previously been publicly declared. Article 622 states that if it turns out that another partnership created earlier is already using this firm name, then the newly created partnership will have to change its firm name.[1] In the judgment of the Royal Privy Supreme Tribunal of October 27, 1847, in a dispute concerning the use of the name of a firm that was manufacturing cupronickel products, the court said that no one had the right to choose another person's civil name as the name of a firm without special permission to do so, while recognising that German common law permitted freedom of choice of firm name.[2]

[1] *Allgemeines Landrecht für die Preußischen Staaten* (1794), Th. 2, Tit. 8, § 621-622.

[2] Königliche Geheimer Ober-Tribunal (Preußische Ober-Tribunal), Erkenntniß vom 27. Oktober 1847, Nr. 35. Entscheidungen des Königlichen Geheimen Ober-Tribunals, herausgeben im amtlichen Auftrage von dem Geheimen-Ober-Tribunals-Räthen. Dr. Seligo, Ruhlmeyer und Wilke I. Funfzenter Band. Berlin: Verlag von Carl Heymann, 1848, pp. 329 – 337.

One of the early researchers of German firm law, W. Endemann (1868) calls a firm the name under which a merchant conducts business and signs his name, calling it an independent name of the firm. Apparently, the given point of view came from Art. 15 of the German Commercial Code of 1861 (Endemann, 1868, p. 90-92). In fact, the presented point of view was, in one way or another, shared by the majority of pre-revolutionary scholars.[3] Another French scholar, L. Deshayes de Merville (1883), based on French practice, called a firm to be a type of trademark, indicating that there are two types of trademarks: the first is an emblematic sign, which should be considered a trademark, the second is the name of a merchant or manufacturer, which should be understood as a firm (in French: *Nom commercial*) (Deshayes de Merville, 1883, pp. 92-93). It should be noted, however, that there were other opinions in the doctrine regarding the relationship between a firm and a trademark – for example, A. Hol'msten (1895) believed that a trademark is one of the means of external expression of a firm, along with such attributes as a sign, a firm signature and invoice forms (Hol'msten, 1895, pp. 51-52). Deshayes de Merville also mentions that in France of the *Ancien Régime*, the concept of a trademark or a firm, as such, did not exist – it was a mere signature of the manufacturer or the trader on a certain product, and it was also a certificate of state regulatory authorities, which indicated the quality of the product, its origin, weight, and other characteristics. Government structures established parameters for each type of product, their production conditions, etc., and only after it was determined that the product complied with state standards, a stamp was placed on this product, which corresponded to the state guarantee (Deshayes de Merville, 1883, pp. 92-93).

As P. Kolumbus (1882) notes in his article on trading firms, the regulation of the firm's name was known from provisions of the French Commercial Code (French: *Code de commerce*) of 1808: for example, Article 21 of this Code states that "*The names of partners may be part of the firm's name*" (here the term *raison sociale* is used to designate the firm), which, in the author's opinion, will lead to the fact that the transfer of the firm in a full or limited partnership (a limited partnership) to other persons will be impossible. This same rule assumed that in the above-mentioned types of partnerships, the firm's name should include only the civil surnames of one or more full partners, which is confirmed, as Kolumbus writes, by Article 25, according to which the name of a partial partner cannot be part of the firm's name. These provisions, in his opinion, were made in order to prevent the occurrence of a circumstance in which a certain trading firm, after the withdrawal from it of one of the founders who enjoyed significant respect in the firm, could unlawfully use his name, which would be closely associated with respect and trust in him in the firm (Kolumbus, 1882, pp. 93-94). In 1824, a law was passed in France (French: *Loi du 28 juillet 1824*), which provided protection to the right to a firm under the sanction of criminal prosecution: thus, the provisions of Article 1 established that anyone who adds, or conversely, changes or deletes the name of the manufacturer, different from the one who produced them (the goods), or the trade name of the factory, different from where the goods were produced, or the name of the place, is subject to punishment according to Article 423 of the Criminal Code. The second part of this rule stated that any merchant is subject to criminal prosecution if he or she deliberately puts up for sale

[3] Opinions that differ from the majority opinion (see below) can be found in the works of the two following authors: G. Shershenevich (1888) and V. Rosenberg (1914).

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goods under fictitious or modified names.[4] An early case of the unlawful use of a plaintiff's name in the business dealings of defendants is known from the English court decision of 1847 in *Routh v. Webster*: the directors of a joint-stock company engaged in passenger transportation began to publish advertising brochures indicating the plaintiff's name as a trustee, which he was not: the court sided with the plaintiff, pointing out that his name was at risk due to the defendants' unauthorised use, and imposed an injunction on the use of his name.[5]

There were at least two known attempts to codify the concept of a "firm" in the Russian Empire in 1910-1911, but none of them were ultimately adopted. In the draft law of the Ministry of Trade and Manufacture of 1910, in addition to defining a firm (Article 1), it was also assumed that each firm that was newly established had to be different from other similar firms, and if, when entering a new firm into a trade record, a similar name was found, then an addition had to be made to the name of the newly registered firm that would distinguish it from the already existing firm (Article 6). It was also assumed that the firm could be alienated and could be transferred for use, but not the firm itself separately, but the firm together with the enterprise, and the agreement on the establishment of the firm, or its transfer for use, had to be in writing (Article 7). It is also known that this draft law was based on the German Code of Commerce.[6] In turn, Article 1336 of the draft Restatement of Civil Laws, concerning the right to a firm, assumed that a merchant conducting his business under a firm alone has the right to use his surname to designate it, and if necessary, his first name and patronymic, and also has the right to add other indications to its name, but not such that could lead to the idea that this firm belongs to a partnership. Article 1337 of the draft Restatement of Civil Laws of 1910 assumed the possibility of alienability of a firm (though only together with the enterprise) and its transfer for use to other persons, and the agreement on all the above actions must be executed in writing. The sources indicated in the draft Restatement are the German, Swiss and Hungarian Codes of Commerce, as well as Norwegian, Swedish and Finnish laws on the protection of the right to a firm (Proekt Grazhdanskago Ulozhenija, 1910, pp. 1207-1211). We indicate these definitions of the firm contained in the draft laws:

[4] Loi du 28 juillet 1824 relative aux altérations ou suppositions de noms sur les produits fabriqués. Schmoll, I. (1879) Traité pratique des brevets d'invention: dessins modèles et marques de fabrique, noms commerciaux, enseigenes, et autres designations d'etablissements et produits industriels comprenant la législation ètrangrée et les traités internationaux. Troisiéme édition. Paris: Librairie Polytechnique de J. Baudry, p. 166.
[5] *Routh v. Webster*, 10 Beav. 561, 28 January 1847. Reports of Cases in Chancery, Argued and Determined in the Rolls Court during the time of Lord Langdale, Master of the Rolls. Vol. X. 1846, 1847. Beavan, Ch. (ed.) London: William Benning and Co., 1849, pp. 561–563.
[6] Pravo. Ezhenьdel'naya yuridicheskaya gazeta [Law. Weekly legal newspaper]. 1911 g. № 21, Voskresen'e, 29 maya, pp.1239-1240.

Table 1: The definitions of the firm in the draft laws

Year	Author of the draft law	Article	The definition of the firm
1910	The Supremely approved editorial commission for the drafting of the Restatement of Civil Laws	1336	A firm is a name under which a person conducts his business in trade, industry, or craft[7].
1911	Department of Trade and Manufacture	1	A firm is the name under which a single owner of a commercial or industrial enterprise, or a partnership, or company, conducts its business (Proekt Grazhdanskago Ulozhenija, 1910, pp. 1207-1211).

There are also two known attempts to codify the concept of a firm in the 1880s. In 1883, a preliminary draft of the "*Regulation on Trade Records*" was developed, in Section I of which the norms dealt with the issue of firms (Danilova, 1915, p. 93). Thus, according to Art. 12 of the draft law, "A firm is a name under which a person acts in trade and by which he or she signs." The next, Art. 13 of the draft law assumed that a sole merchant could use only his last name as a firm, with the addition of his first and middle names, if desired, or their initials. Nevertheless, the merchant was prohibited from adding any additions to the firm's name that would indicate the existence of a partnership. According to the commentary to the provision, if a merchant encountered a situation where in another city where he wanted to conduct his trade, there already existed a trading firm with the same name as his, he would have to make an addition to the firm's name, for example, by adding the word "merchant" to it, but the functioning of two firms with the same name was prohibited, and the merchant could not rely on the fact of having such a first and middle name as a natural right (i.e., the right to a name). The Moscow Commercial Court, having become familiar with this project, proposed in such cases to add to the name of the merchant's firm the city in which this merchant had a settlement (Rzhondkovskij, 1883, pp. 446-447).

In 1886, a draft regulation on trade registration for the Prisvilin governorates was developed in the city of Warsaw, and in 1889, on the basis of two drafts from 1883 and 1886, a "*Draft Regulation on Trade Registration and Firms*" was developed, divided into two parts – the first was devoted to trade registration, the second – to the issue of firms. The latter was based on the provisions of Art. 15-27 of the German Trade Code of 1861, most of which were almost completely adapted from it. Art. 43 of the draft Regulation of 1889 provided an expanded definition of a firm: "*A firm is the name under which the sole proprietor of a trading enterprise, or a partnership or company conducts trade and which the owner or representatives of the partnership or a firm sign*." This definition was a borrowing from Art. 15 of the German Code of Commerce and Art. 10 of the Hungarian Code of Commerce, and also took into account the comments and comments on the preliminary draft of 1883 (Danilova, 1915, pp. 93-94). In 1894, the Department of Manufacture and Commerce published the "*Collection of Foreign Legislation on Trade Registration and on Firms*" which was devoted to Western European legislation on this

[7] *Ibid*.

issue; the material indicated that the Ministry of Finance was engaged in collecting preparatory material for the development of regulations on trade registration and on firms.[8]

3. THE RIGHT TO A FIRM

The definition of a firm, or a commercial name, is quite complex. If we proceed from the historical understanding of a firm, then here it is enough, as V. Schreter once noted in his article "*Unfair Competition*" (1915), that the clientele, i.e., the public, which expects to purchase a selected (or perhaps, if the reader pleases, a favourite) product, discovers that the product is sold, most often, not by the manufacturer itself, but by a merchant (who may have nothing to do with this product), and hence, the only way to understand the origin of this product is through external manifestations, such as original packaging, a brand (trademark), as well as the firm and the name of the enterprise (Shreter, 1915, pp. 428-429). Thus, these attributes are signs of the origin of the goods, and the firm is one of the main ones. Let us see how the firm was defined in the pre-revolutionary doctrine of law. Let us say right away that in the 19th-early 20th centuries there were two approaches to defining a firm – one, as a name under which a merchant conducts his business, and the other – as the name of an enterprise; a minority of scholars were inclined to the latter. The first, obviously, was borrowed from the German doctrine of law, for example, from the already mentioned definition of Endemann, based on Article 15 of the German Code of Commerce (Endemann, 1868, pp. 90-92). The same opinion was held by the Austrian author Franz Pollitzer (1895), who also based his definition on Article 15 of the Code of Commerce, indicating that a firm is the name under which a merchant conducts his business and the name used by the merchant as a subordinate in commercial matters (Pollitzer, 1895, p. 73).

Based on the definition of the 4th Department of the Governing Senate No. 191 of February 6, 1892[9] (see commentary on the case below), Vs. Udintsev (1907) also believes that a firm should be understood as the name of a merchant and his affiliation, but it acquires value only in connection with a trading establishment, since it indicates a group of legal relations associated with it. Udintsev finds that a firm should be understood as the name by which the owner of an enterprise signs, fencing the commercial and industrial sphere of his activity from the household, adding that a firm is used wherever it is necessary to distinguish the sphere of activity of an enterprise from any other, and it can be used as a signboard, for signing various business documents, as well as for marking goods (brand) (Udintsev, 1907, pp. 226-227). P. Tsitovich (1891) calls a firm the name under which the entrepreneur-trader conducts his trade, saying that if he conducts trade alone (i.e., a sole trader), then in this case, his civil name will be the firm of his trade, but when trade is conducted under the name of a partnership, the firm name must be different from the civil names of its participants (Tsitovich, 1891, p. 60).

A. Hol'msten (1895) gives a similar definition, adding that under the name of the firm the enterprise becomes known to the public, as well as to those who have business ties with this enterprise, and the firm also makes the individualisation of the trading enterprise, since it is with this that the idea of its type, quality and condition is associated. If there is a positive impression of the enterprise (for example, as a manufacturer of high-

[8] Ocherk postanovlenij zapadno-evropejskih zakonodatel'stv o torgovoj zapisi i o firmah. Vѣstnik finansov, promyshlennosti i torgovli. № 1, Yanvar'-fevral'-mart 1894, pp. 27-32.

[9] Pravitel'stvuyushchij Senat (4 Departament), opredelenie ot 6 fevralya 1891 g. № 191 // Grebner, V. Praktika 4-go Departamenta i Vtorogo Obshchago Sobraniya Pravitel'stvuyushchago Senata po torgovym delam 1889-1896 gg. Chast' II. S.-Peterburg: Tipografiya M. M. Stasyulevicha, 1896., № 35, pp. 71-73.

quality and affordable goods), then the firm acquires economic significance for the owner, since the clientele of the enterprise grows, the volume of income increases, etc., in this case, the enterprise itself comes to the fore, and not the merchant or its owner, and the people, or business partners, will trust this enterprise (Hol'msten, 1895, p. 48). A. Fyodorov's definition is also quite separate, according to which a trading enterprise has its own name, under which it conducts trade, which may not coincide with the civil name of the owner of the enterprise. Fyodorov" also says that when a trader is engaged in entrepreneurial activity alone, then it is permissible to use a civil name as a firm, but when trade is conducted by a partnership, it often turns out that it is quite difficult to include all civil names and surnames in the name of the firm, and necessity forces partners in such cases to choose a more convenient name for the firm, therefore, in a number of Western countries, legislation (e.g., codes of commerce) addressed the issue of both sole traders' firms and partnerships (Fyodorov, 1911, pp. 173-175).

G. Shershenevich (1888) had a different opinion about a firm: he calls a firm the name of an enterprise, explaining this with an example: a merchant, obviously, can have only one civil name, but he can be the owner of several firms, and he could register one as a founder, and he could easily receive another in another way, for example, by inheritance, he could purchase a third, etc., and the name given to an enterprise can be preserved for a long period of time, despite the fact that its owners could have already changed more than once (Shershenevich, 1888, p. 122). Rosenberg (1914) expressed doubts that a trade name could be characterised as a personal name, and believed that it should most likely be attributed to the name of a trade and industrial enterprise. Also, in his opinion, lawyers, economists and industrialists do not understand the term "firm" in the same way, because the latter related the firm to a trade business and identified this term with a trade and industrial enterprise (Rosenberg, 1914, pp. 1-3) (and not with the owner of the enterprise, as is found in the opinions of other scholars). According to the judgment of the St. Petersburg Commercial Court of February 13, 1882, "*a firm is the name under which a merchant conducts his trading enterprise, which he uses on signs, labels, announcements and similar items with which he signs*." The court adds that in the case of sole traders, a firm usually consists of a surname, to which a first name may be added, and a patronymic.[10]

It should be assumed that the right to a firm, or the right to a commercial (or trade name) has a property value for the merchant, who once took this name. Thus, the French lawyer Joséph-Armand Lallier (1890) wrote very well about this in his book on the protection of the right to a name. Thus, he points out that when a merchant takes a fictitious name under which he sells goods, he gives a reputation to his establishment, and thus, he acquires an exclusive right of ownership to it, but only for commercial purposes, i.e., for trade. Hence, a commercial name, i.e., a firm, deserves the same protection as a person's name, and accordingly, its appropriation gives the right to go to court for compensation for damages (Lallier, 1890, p. 409). The Paris Court of Appeal, in its judgment of July 28, 1892, confirms the position of the Seine Civil Court of May 25,

[10] Sankt-Peterburgskij Kommercheskij Sud, opredelenie ot 13 dekabrya 1882 g. // Vil'son, V. Sudebnaya praktika po torgovym dьlam: rьsheniya S. Peterburgskago Kommercheskago Suda i Pravitel'stvuyushchago Senata (4 D-ta i Obshchago Sobraniya). S.-Peterburg: Knizhnyj magazin" yuridicheskoj literatury D. V. Chichinadze, 1896, pp.176-177, D. № 97.

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1891, where the court of first instance clearly stated that a trade name is subject to private property rights, just like a trademark.[11]

The German lawyer and researcher Otto Hahn (1870) in his work on German business law says that by signing the name of the firm, the merchant thereby declares himself as an entrepreneur, and signing the name of the firm obliges the merchant – he thereby acquires rights and obligations, and obliges himself with the signature of the firm, just as someone in civil life obliges himself with the signature of his name (Hahn, 1870, p. 56). A. Hol'msten (1895) agrees with Lallier's position, not only defining the right to exclusive use of a firm, but also developing principles for protecting the right to a firm, which at that time was not defined in any regulatory legal act. Holmsten means by the right to a firm the exclusive right to use a firm name in a certain area (Hol'msten, 1895, p. 49). His last expression (i.e., concerning the trading area) is interesting and is continued by A. Kaminka (1912) in his "*Essays on Commercial Law*", where the author notes the importance of the spatial aspect in the work of a firm: thus, it is impossible to allow an entrepreneur to be granted exclusive use of a firm in the size of the entire country, regardless of the size of the enterprise.

On the other hand, A. Kaminka denotes, the principle of exclusivity of the firm must be observed, i.e., each firm must be different from each other. But what to do when an entrepreneur, for example, uses a surname that is quite popular in the country, and what difficulties can such a position create in the business turnover? Therefore, A. Kaminka suggests relying on the German Code of Commerce of 1896, Article 30 of which provides for the protection of a trade name (firm) only within the administrative-territorial unit where the registration judge is located. However, according to A. Kaminka, it is necessary to distinguish between the trade turnover of enterprises, where one can trade only within the framework of an administrative-territorial unit, and then, for its owner, it will not matter whether a similar firm exists in another city with the same name or not, and another, when a trading enterprise is designed for more than one city, and sometimes, is not even designed for it at all (here A. Kaminka gives the example of winemaking, in which case the sale of products is less designed for the place of their production). The German Code of Commerce, however, did not make such distinctions in corporate law, but in such a case, the manufacturer of goods would be protected by the law on the prevention of unfair competition (Kaminka, 1912, pp. 157-158).

The right of exclusive use of a firm, according to Hol'msten (1895), is expressed in three aspects: it implies, firstly, that its use by another person is prohibited, since this will cause damage to the owner of the enterprise; in such a case, the violation of this right will consist in borrowing someone else's name, or name to designate one's enterprise, which can be of two types – complete, when the entrepreneur uses another name and surname, completely different from his own, and incomplete, when the name and surname coincide only partially, but do not coincide in general; and secondly, this is the right to use the firm name, which also comes in two types: personal – i.e., will coincide with the name and surname of the entrepreneur, and impersonal – i.e., it will be completely removed from the name and surname of the entrepreneur, and can acquire any form that does not contradict the law; how to call the firm is already left to the discretion of the entrepreneur himself. Finally, the third aspect is the right to use the firm, but only in a certain area. A. Hol'msten's position here largely coincides with the opinion of A. Kaminka two decades later, and Hol'msten also adds here that damage to the

[11] Trib. civ. de la Seine (1re Ch.), 25 mai 1891 / Cour d'Appel de Paris, 28 juillet 1892. Annales de la propriété industrielle, artistique et littéraire. Quarante-deuxime annee. Tome XLII. Paris: Chez Arthur M. Rousseau, Editeur, 1896, pp. 314-316, Art. 3885.

entrepreneur can only be real if the firm is "borrowed" (or as they say "usurped" in French[12] and Belgian[13] jurisprudence) only if it happened in the area of the clientele of the enterprise whose firm is "borrowed". Therefore, if a certain entrepreneur trades only within the city or village, he cannot in this case claim the right to exclusive use of the firm throughout the country, but the situation will be quite different if the clientele of this entrepreneur is substantially wider than the place where the enterprise is located (Hol'msten, 1895, pp. 49-51).

According to Vs. Udintsev, exclusive rights to a firm are expressed in two ways – in a ban on the use of someone else's firm, i.e., the commercial name of the enterprise, and in a claim in court for compensation for damages incurred due to the unlawful use of the firm by an outsider. Since the legislation has not provided for provisions on the protection of the right to a firm, it remains to turn only to the general rule, which assumes compensation for damages and harm – Art. 684 of Volume X of the Restatement of Laws, p. 1 (Borovikovskij, 1888, p. 252). This means of protection, according to Vs. Udintsev, is not effective enough, since the calculation of damages itself lies not with the judge, but with the plaintiff, as does the requirement to prove these damages (Udintsev, 1907, pp. 232-233). It should be noted that pre-revolutionary legislation (in Article 684, Volume X of the Restatement of Laws, p. 1), or in other norms, did not define exactly how the concept of "damages" should be understood, and what they included.

The judgment of the Governing Senate's Civil Cassation Department No. 99 of April 2, 1880, comes to the rescue, the essence of which, in brief, was as follows. A merchant (the plaintiff) leased land from the provincial secretary (defendant) for a period of 9 years, paying rent for the entire land, starting in 1874. For reasons beyond his control, in 1876 the plaintiff was unable to use approximately ¼ of the land, since it was given to the peasants as an allotment, because of which he filed a claim for damages against the defendant. According to the judgment of the district court, the plaintiff won the case, but the court chamber (the court of appeals) in its judgment had significantly reduced the amount of damages (approximately in 10 times), citing that the plaintiff had the right to recover only damages for not owning the land, but had no grounds to seek benefits that could have been extracted from the land if he had used it. The Senate did not agree with the interpretation of the court chamber, and interpreted Article 684 as follows: "… *By damage, the law means not only positive material damage to property, but also the deprivation of benefits that could have been obtained from the property*." Further, based on this argument, the Senate overturned the judgment of the court chamber, sending the case for rehearing.[14] Bashilov considered this interpretation to be the influence of commercial law on general civil law, since in commercial law, this type of damage constituted the most predominant of all damages (Bashilov, 1887, pp. 136-137).

By the way, the Hungarian Code of Commerce of 1875, Article 24, protecting a firm name from usurpation, states the following: "*The presence and amount of damages*

[12] See, for instance, the judgment of the Court of Cassation of France: Cour de Cassation (Chambre Criminelle), 18 novembre 1904. Annales de la propriété industrielle, artistique et littéraire. Cinquante et unieme tome. Tome LI. Paris: Chez Arthur M. Rousseau, Editeur, 1905., pp. 181-185, Art. 4524.

[13] See the following cases from the judicature:

(1) Trib. comm. de Bruxelles, 4 avril 1931 // Trib. comm. de Bruxelles, 27 janvier 1932 // Cour d'Appel de Bruxelles, 4 juin 1932 , *La Jurisprudence commerciale de Bruxelles*, 1932, 237.

(2) Cour d'Appel de Bruxelles (1re Chambre), 19 avril 1939. Le Journal des Tribunaux (Belge) (1939), Bruxelles : F. Larcier., № 3573, col. 326-329

[14] Pravitel'stvuyushchij Senat (Grazhdanskij Kassacionnyj Departament), rѣshenie ot 1880 goda 2 aprelya dnya. № 99. Rѣsheniya Grazhdanskago Kassacionnago Departamenta Pravitel'stvuyushchago Senata. 1880. S.-Peterburg. Tipografiya Pravitel'stvuyushchago Senata, 1881, pp. 384-388.

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are resolved by the court at its discretion, based on the circumstances of the case, and possibly after hearing experts".[15] Thus, we can find in the judgment of the Hungarian Royal Curia of 1913 the conclusion that in order to prove damage caused by the unauthorised use of a firm, it will be sufficient that the text of the firm used creates the appearance that the owner of the firm is related to the person whose name he or she uses.[16] A. Nevzorov (1912) also notes that the protection of the right to a firm in pre-revolutionary law is very problematic due to the lack of a clear provision of the law on this right, however, unlike Bashilov, he recommends turning not to Art. 684 of Volume X of the Restatement of Laws, p. 1, but to Art. 685, i.e., "*to destroy what has been arranged*," as Nevzorov writes, and Art. 684, in his opinion, will be very difficult to implement because it will be impossible to accurately prove the amount of damages and lost profits, and criminal prosecution (according to Art. 1353 and 1357 of the Statute of Punishments) is possible only if the unauthorised use of the firm is associated with a trademark (brand) (Nevzorov, 1912, pp. 128-129).

A. Hol'msten had developed a unique system for protecting the right to a firm, which, in his opinion, should include judicial and administrative means. The first case includes a civil suit for a) prohibition of use of the firm; and b) a claim for damages, as well as c) criminal prosecution on a private complaint for illegal use of a trademark (brand) if it is combined with the name of the firm (in other cases, this becomes impossible, unless the court could potentially regard the use of forms, price lists and other papers of the firm as fraud). The claim for injunction should be based on the principles that the use of someone else's firm infringes on the material interests of its true owner, due to which the right to the firm can be restored by the court on the basis of a court ban on the defendant using someone else's firm. At the same time, Hol'msten considers such a means of protection not particularly effective due to the fact that such claims are not provided for by law at all, and where the court is not recognised as having the right to impose a fine or demand a "*cautio de non amplius turbando*" (the so-called agreement on non-disturbance in the exercise of one's right, known from Roman law). Such claims should be classified as claims for the destruction of things on which the plaintiff's firm was illegally reproduced, and things through the production of which damage was caused (Hol'msten, 1895, pp. 58).

A claim for compensation for damages, according to Hol'msten, may be based on Articles 574, 644 and 684 of Volume X of the Restatement of Laws, p. 1., the only drawback of these rules in this matter, in his opinion, is the very broad wording, however, it is not possible to claim that such a remedy is not available. The question is only about the effectiveness of this method of protection, which he also finds very low because the plaintiff must prove the damage exactly, and he must prove the amount of lost profits, which seems difficult for the plaintiff to do. Speaking about administrative means, these preventive measures aim to prevent the use of someone else's firm. As an example, this is the issuance of trade tickets by treasuries of city councils, where a rule had already been developed according to which trade tickets were not issued to those who used someone else's firm. In addition, the structures whose functions include supervision of trade must not allow the imprinting of another firm on the sign of a trading establishment, since such an establishment will not be the enterprise that the trader has the right to open and operate. What is more, the Department of Trade and Manufacture, which had a

[15] Kereskedelmi törvénykönyv (Magyarország). 1875-ik evi orszaggyülesi Törvenyczikkek. Budapest: Kiadja Rath Mor, 1875, p. 223.

[16] A Királyi Curia, 1913 április 29. 734/912. v. sz. a. IV. p.t. Gallia Béla (szerk.): Hiteljogi döntvénytár. (váltó-, csőd-, kereskedelmi és tőzsdei ügyekben) VII. kötet. Budapest: Franklin Társulat Magyar Irod. Intézet és Kőnyvnyomda., 1914., Nr. 178., pp. 291-292.

function to approve trademarks, may refuse to register it if the image of another firm is placed on it, on the grounds that something similar has already been registered (Hol'msten, 1895, pp. 58-63).

A. Bashilov wrote about the right to exclusive use of a firm at one time, and he derived several regularities from this issue. In his opinion, this right in itself indicates that only the person who owns the firm, and only he (she), or, in extreme cases, his (her) legal representative, can trade under it, since this entrepreneur is considered to be the owner of the firm. Firstly, when establishing a new enterprise, the founder is obliged to contact the local registration authority and check whether there is a firm with such a name, since no trading enterprise can be called by the name of another enterprise. If we are talking about a sole trader who conducts business under his (her) real name and surname, then he (she) should make sure that a similar surname does not appear in the registers, and if such a surname already exists, he or she, in this case, should modify the name of the firm so that the name differs from the firm already declared by someone else. Secondly, it is considered that the use of someone else's firm will be considered a violation of the right to exclusive use of the firm, and the injured party will have the right to file a lawsuit in court not only with a demand to prohibit the use of the firm, but also for compensation for damages. The court will also have to establish that the hypothetical plaintiff was in fact the first to register the firm, and whether the plaintiff had actually suffered losses will be decided at the discretion of the court (Bashilov, 1887, pp. 131-133). Thus, the Governing Senate (4th Department) in a decree of December 8, 1883 prohibited the defendant from using the plaintiff's firm, in addition, pointing out the malicious intent of the defendant's actions, who, in the opinion of the court, attempted to mislead the public by actually using his commercial name, and also established that the violation of the exclusive right to use the firm could be restored with the help of judicial protection.[17] Udintsev, briefly mentioning this judgment, says that judicial practice recognises the existence of a firm, relying on trade custom, and thus this legal institution, although not being codified in the law of the Russian Empire, is not subject to doubt in its existence (Udintsev, 1907, p. 231).

Speaking about the protection of the right to a firm, Vs. Udintsev points out that the name (and a firm is, in his opinion, the name of a merchant and the merchant's affiliation) is the affiliation of a person, and therefore is subject to judicial protection from the encroachments of other persons in the event of its unlawful appropriation. The trade name will also need protection, since it will be the reputation of a merchant conducting business activities and the basis for public trust, and Vs. Udintsev calls the right to a firm the regulation of a person's trade name. He also attaches importance to the registration of companies: again, the legislation did not contain any provisions on this account, except for the registration of trading houses, which, as its norms assumed (Article 59 of the Statute of Commerce), could be opened and could receive its name upon the submission of the relevant registration documents to the City Council, and in the cities of St. Petersburg, Moscow and Odessa[18] – to the merchant council; in another case, the registration of joint-stock companies is subject to publication in the Collection of Laws and Orders of the Government (Article 2197 of the Volume X of the Restatement of Laws, p. 1) (Udintsev, 1907, pp. 228-229; Hessen, 1910, pp. 45-47). The same procedure,

[17] Pravitel'stvuyushchij Senat (4 Departament), Ukaz ot 1883 goda 8 dekabrya dnya. // Vil'son V. Sudebnaya praktika po torgovym dьlam: rьsheniya S. Peterburgskago Kommercheskago Suda i Pravitel'stvuyushchago Senata (4 D-ta i Obshchago Sobraniya). S.-Peterburg: Knizhnyj magazin yuridicheskoj literatury D. V. Chichinadze, 1896, pp. 172-175, D. № 96.

[18] Until 1917, the city of Odessa was under the jurisdiction of the Russian Empire.

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according to A. Hol'msten, also took place with firms – in the capitals and in the city of Odessa, a firm was declared upon the establishment of a trading house to the Merchant Board, and in other cities – to the City Administration, which, in turn, transmitted these facts to the Department of Manufacturing and Trade (Hol'msten, 1895, pp. 53-54).

In the case of sole traders, there were no provisions in the legislation on this matter; in trade turnover there was a certain custom, according to which notification of newly created firms was issued in the form of circulars (Udintsev, 1907, p. 229). Fyodorov (1911) mentioned that some Merchant Boards published directories and books with lists of enterprises and some data from them, which submitted documents about themselves for the current year. It is also said that when issuing trade documents, a check was made to determine who owned the firm; traders who did not update documents were excluded from the lists. Information that an enterprise had ceased to exist, or that there had been a change in the composition of the firm, was sent out using circulars (Fyodorov, 1911, pp. 185-186). Bashilov mentioned that in the case of sole proprietorships (i.e., where a merchant is engaged in business alone), the only method of disclosure will be the reference books of merchant boards, and if such books were not kept, then sole proprietorships were not announced at all (Bashilov, 1887, p. 140).

The question of the legal nature of the right to a firm is also highly controversial. For example, A. Kaminka derives the right to a firm from the personal rights of a person, i.e., the right to protect one's own personality – such as the right to life, physical integrity,[19] freedom and honour. Kaminka does not agree with Haab on the issue that the violation of the right to a firm cannot be seen as a violation of personal rights due to the fact that the firm is not closely connected with the individual, and that the right to protect the firm is caused by public interests, in this issue Kaminka is of the opinion that these "public" interests require that the interests of the individual be protected, and the law protects the right to a firm precisely because the individual must be guaranteed the fruits of activity, which, in this case, are expressed in the creation of a certain industrial enterprise (Kaminka, 1912, pp. 161-162). A position similar to Kaminka's can be found in the German jurist Ferdinand Regelsberger (1897) – he argues that although it would not be reasonable to create a special right for each individual manifestation of personality, such individual rights can be created, and already exist – such as the family name, the firm and the industrial hallmark (i.e., trademark) (Regelsberger, 1897, pp. 234-235). Thus, it can be stated that the right to a firm pertains to individual (personal) human rights. Nevertheless, Bashilov" supports the idea that the firm is, in some way, separated from the personality of the merchant, which, in his opinion, was caused by the need to separate trade turnover from private and family matters, as well as to separate the property of the enterprise from, again, the personal property of the merchant. Thus, the merchant will consider his own enterprise as something separate from his personality, and as a partially independent object of trade relations (Bashilov, 1887, pp. 126-127).

Haab, in his doctoral dissertation, notes that without the adoption of a *lex specialis* (special laws) on firm law, the adoption of a trade name by a merchant would qualify as a fact, but not as a subjective right, because not everything that has the

[19] The right to physical inviolability was officially confirmed in the judgment of the Governing Senate (Criminal Cassation Department) in the case of Dr. Modlinskiy (No. 33 of 1902), where the court considered it inadmissible to perform a laparotomy operation on a female minor patient without her consent and the consent of her parents, which led to the death of the patient, despite the fact that no negligence was found on the part of the operating doctor during the operation. Pravitel'stvuyushchij Senat (Ugolovnyj Kassatsionnyj Departament), rѣshenie ot 19 noyabrya 1902 g. (po dѣlu doktora meditsiny P. Modlinskago), № 33. // Rѣsheniya Ugolovnago Kassatsionnago Departamenta Pravitel'stvuyushchago Senata. 1902. S.-Peterburg: Senatskaya tipografiya, 1902., pp. 84-91.

freedom to do or desire something will provide for the existence of some subjective right for it (Haab, 1888, pp. 50-51). However, both Bashilov and Kaminka argued that judicial protection of the right to a firm in pre-revolutionary courts was quite limited – both in the courts of general jurisdiction and in the commercial courts due to the need to prove not only the connection of losses with a specific offense (i.e., appropriation of the name of someone else's firm), but also the need to calculate and prove the amount of losses themselves. For example, Kaminka mentioned that even if we assume that trade turnover has decreased, this does not prove that the turnover has decreased due to someone's unfair competition. Therefore, both authors agree that such lawsuits in the courts would often be doomed to failure (Bashilov, 1887, pp. 133-134; Kaminka, 1912, pp. 163-164).

It should also be noted that in the law of the Russian Empire there was no civil law protection of the right to a name in the form in which, for example, it existed since 1896 in the German General Civil Code (§12)[20], receiving the tentative name "*Namensrecht*"[21] or "*Namensschutz*"[22] in judicial practice. Thus, as the German Supreme Court (Reichsgericht) says in the 1910 case of *Graf Zeppelin*, where the plaintiff was suing for the use of his name and image on tobacco trademarks (the judgment of the final instance, i.e., the Reichsgericht, was upheld in favour of the plaintiff): "*The unauthorized use of a name within the meaning of Art. 12 of the German General Civil Code occurs not only when someone appropriates another's name specifically to designate his own person; cases where someone unlawfully uses another's name for advertising purposes, to designate goods, on signs, etc., also fall under the law on the protection of names*".[23]

In the practice of the German Supreme Court on issues of protecting firm names, it is worth highlighting a judgment from 1904, in which the plaintiff owned a company whose name was completely different from his real name, and he also filed a claim against another company whose firm coincided with one of the surnames indicated in the plaintiff's firm. The Higher Regional Court (in German: *Oberlandesgericht*) rejected the claim on the grounds that the plaintiff had no right to refer to Art. 12 at all, since he did not bear the disputed surname, but only owned a company that was so named. The Supreme Court agreed with this position, and added that the right to a name is granted not only to individuals, but also to legal entities, since they themselves are the bearers of the protected name. But based on Art. 37 of the Commercial Code (recently adopted in 1897),[24] the Supreme Court held that the former Article 27 remains in force and that these provisions were considered sufficient to protect the firm name, and that it is not permissible to apply the statutory provisions on the protection of names in corporate law in a general way. Thus, the Supreme Court concludes that in this situation, the owner of the company (i.e., the plaintiff) has no right to claim the judicial protection provided for in Article 12 of the German General Civil Code in the context of a name that he did not bear himself, but used in the name of the firm he managed. Therefore, the plaintiff's appeal was rejected.[25]

[20] Bürgerliches Gesetzbuch (Deutschland) vom 18. August 1896, RGBl. 1896, Nr. 21, S. 195 – ff.
[21] See, for instance, the following two judgments of the German Supreme Court (Reichsgericht) upon the given subject: Reichsgericht, Urt. v. 26.09.1924, Az. Rep.: II 578/23 (*ERG in Zivilsachen*, Bd. 109, S. 213 – 215); Reichsgericht, Urt. v. 11.06.1926, Az Rep.: II 327/25 (*ERG in Zivilsachen*, Bd. 114, S. 90 – 97).
[22] See the following judgment of the German Supreme Court: Reichsgericht, Urt. v. 03.06.1927, Az.: Rep. II. 346/26 (*ERG in Zivilsachen*, Bd. 117, pp. 215 – 226).
[23] Reichsgericht, Urt. v. 28.10.1910, Az.: Rep. II. 688/09 (*ERG in Zivilsachen*, Bd. 74, S. 308 – 313).
[24] Handelsgesetzbuch (Deutschland), vom 10. Mai 1897, RGBl. 1897, Nr. 23, S. 219 – ff.
[25] *Reichsgericht*, Urt. v. 09.12.1904, Az.: Rep. II. 61/04 (*ERG in Zivilsachen*, Bd. 59, pp. 284 – 287)

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According to the Swiss judicial practice, both the provisions of the Swiss Code of Obligations of 1881[26] and the provisions of the Swiss Civil Code of 1907,[27] in particular Article 28 on the protection of a name,[28] are suitable for the protection of a trade name. The Hungarian Code of Commerce, which we have already mentioned (Article 24), as follows from the judgment of the Royal Curia of 1913 (see the reasons for the judgment of the Second Instance Court – *Budapesti királyi tábla* No. 2025/911 of 25 April 1912), protects not only all firms that were entered in the Commercial Register, but also the right to a name, and thus not only traders or enterprises may suffer damage as a result of the unauthorised use of a trade name, but even non-traders may also suffer such damage if their name is included in the trade name[29]. A similar system was adopted in the Japanese Code of Commerce 1899. Article 20 of the Code provided that one whose trade name has been registered may seek an injunction to prevent the use of the same or a similar trade name for the purpose of unfair competition. This article of the code also provided that a merchant who uses a trade name already registered in the same administrative unit for the same business is already presumed to be using the name for the purpose of unfair competition (Hang, 1911, p. 12). The Supreme Court of Japan in its judgment of June 5, 1914, recognises that the right to protect a firm, or as the court puts it in this case, a trade name, can only arise from the moment of registration of the trade name, and a merchant who uses an unregistered firm name cannot use the firm name of another merchant who operates in this administrative-territorial unit. From this, the court concludes that the right of a merchant to demand that someone has not used a similar trade name for the purpose of unfair competition comes from Articles 19-20 of the Code, which provide for the exclusive right to use a firm because of the registration of this firm.[30] From the given examples of legislation, as well as judicial practice, we see that for the effective implementation of corporate law, it is necessary to enshrine it in law, therefore we agree with the German jurist Haab on this issue (Haab, 1888, pp. 50-51).

As we see from the above, the right to a firm, or a commercial name, also has roots in the right to a name, which did not receive civil-law protection in pre-revolutionary law. For example, V. Katkov (1897) expresses the opinion that a commercial name enjoys more serious legal protection than a civil name due to the fact that abuses in this area are much more frequent than in the case of an ordinary civil name (Katkov, 1897, p. 59). Being a personal right, as M. Agarkov (1915) writes, the right to a name was ignored for a long time not only in legislation, but also in legal science. Personal rights violated the traditional structure of Romano-Germanic civil law, where the rights actually concluded where property interest ended; traditionally, the family law was also included in civil law, and everything else (including personal rights) was alien to it. Agarkov paid specific attention to Article 12 of the German Civil Code, as an example of the codification of the right to a name (Agarkov, 1915, pp. 73-74). Ironically, in pre-revolutionary law, neither the

[26] Bundesgesetz über das Obligationenrecht, vom 14. Juni 1881. Bbl 1881 III 109, Nr. 26, S. 307-310 (Art. 865-876).

[27] Schweizerisches Zivilgesetzbuch vom 10. Dezember 1907, AS 24, 233., §28

[28] See the two following judgment of the Swiss Federal Tribunal: *Bundesgerichtshof Schweiz* (Tribunal Federal Suisse), Urteil der I. Zivilabteilung vom 21. November 1914, Nr. 100. BGE 40 II 601, pp. 601-607; Arrêt de la Ire Section civile du 15 decembre 1926, Nr. 64, BGE 52 II 393, S. 393-400 (the text of the first judgment is provided in German, while the text of the other – in French, so the signature of the case differs).

[29] *A Királyi Curia*, 1913 április 29. 734/912. v. sz. a. IV. p.t. Gallia Béla (szerk.): Hiteljogi döntvénytár. (váltó-, csőd-, kereskedelmi és tőzsdei ügyekben) VII. kötet. Budapest: Franklin Társulat Magyar Irod. Intézet és Kőnyvnyomda., 1914., Nr. 178., pp. 291-292.

[30] **大審院**, **大正四年六月五日第三民事部判決**, **大審院民事判決録**（**民録**）21**輯**898**頁** (Supreme Court of Japan, Judgment of the 3 Civil Division of June 5, 1914, Protocols of the civil judgments of the Supreme Court (Minlu), vol. 21, p. 898).

right to a civil name, nor the right to a firm ever received civil-law protection. Thus, the Governing Senate in its judgment of June 13 / October 31, 1891, indicates that trade "under a firm" is known in commercial life.[31]

In the pre-revolutionary doctrine of law, there was an opinion that the right to a name should be understood as a non-property and inalienable right, and is "non-negotiable" (i.e., *res extra commercium*), and it gave rise to both the right and the obligation to use it, and as for the right, the right to use a name was subject to sufficiently special rules that Katkov called it a "*sui generis*" right (Katkov, 1897, p. 47). The situation with the firm is different: as is the case with the ruling of the Governing Senate No. 191 of February 6, 1891, the right of ownership of the firm may well be recognised.[32] Hol'msten, speaking about the transfer of the right to a firm, mentions that for the owner of the enterprise the firm is a property value, however, it cannot be alienated separately from the enterprise – in such case, if this happened, it would mislead all the clients, as well as all the contractors of the enterprise, and of course, it would look like a fraud. In the case of the transfer of a firm from one owner to another, a note should be made, for example, "former", "successor", "sons", etc (Hol'msten, 1895, pp. 54-55).

In exactly the same way, the Brussels Court of Appeal (Belgium) ruled in its judgment of December 30, 1893, stating that the acquirer of a firm and its attributes must indicate in it, "*successor of such and such…*", or "*former trading house of … and …*", in order to avoid confusion of his identity with the identity of his predecessor.[33] Thus, here we can cite the judgment of the St. Petersburg Commercial Court of December 13, 1882. Once a certain merchant was engaged in trade under a firm that bore his name. This merchant died, and another merchant P. began to conduct his trade (sell books) in the same premises, calling his own firm "*former …*", and indicating the name and surname of the deceased merchant, moreover, not being his successor, and never purchasing his enterprise, but simply conducting trade in the same premises as the deceased merchant. The guardian of the property of the deceased merchant filed a claim with the St. Petersburg Commercial Court. The Commercial Court found that the defendant's conduct of trade in the same premises as the once deceased merchant does not give him the right to call his firm that and to use this name in advertising publications, on the books he sold, and on the sign of his establishment, since such use of the firm's name could be permissible only if the defendant lawfully continued the trading affairs of the deceased merchant. The court noted that the defendant had not provided any evidence of the defendant's right to call his firm "*former*" and that he should be prohibited from using the firm of the deceased merchant. Thus, in this case, the court prohibited the defendant from using the firm of the deceased merchant, prohibiting him from the utilisation the name of someone else's firm in all publications, on books sold and on a sign. The commercial court noted that given the custom of sole traders to conduct their business under a firm consisting of a first and last name (i.e., the civil name of the merchant) and the possibility of acquiring a reputation and trust through such trade, it is

[31] Pravitel'stvuyushchij Senat (4 Departament), opredelenie ot 13 iyunya / 31 oktyabrya 1891 g. № 904/1526 // Grebner, V. Praktika 4-go Departamenta i Vtorogo Obshchago Sobraniya Pravitel'stvuyushchago Senata po torgovym delam 1889-1896 gg. Chast' II. S.-Peterburg: Tipografiya M. M. Stasyulevicha, 1896. № 34, pp.68-71.

[32] Pravitel'stvuyushchij Senat (4 Departament), opredelenie ot 6 fevralya 1891 g. № 191 // Grebner, V. Praktika 4-go Departamenta i Vtorogo Obshchago Sobraniya Pravitel'stvuyushchago Senata po torgovym delam 1889-1896 gg. Chast' II. S.-Peterburg: Tipografiya M. M. Stasyulevicha, 1896., № 35, pp. 71-73.

[33] Cour d'Appel de Bruxelles, 30 décembre 1893 // Journal des Tribunaux (Belge) (1894), 13me année – 1894. Bruxelles: Vve Ferdinand Larcier, Libraire-Éditeur. No. 1026. (21 janvier 1894), Col. 87-89.

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necessary to consider the firm, i.e., the name under which trade is conducted, as property of obvious value.[34]

Thus, it can be concluded that already in the early 1880s the right to a firm was afforded with judicial protection. Let us now consider the ruling of the Governing Senate on a similar case that took place the following year. Both the plaintiff and the defendant were engaged in the trade of tobacco products. The plaintiff's firm was called "*M. Duruncha*" after his last name, and the defendant called his firm "*Durunch" I. I. B.*", after which the plaintiff applied to the St. Petersburg Commercial Court to prohibit the defendant from using the name of the plaintiff's firm; in the first instance, the court satisfied the claim. The defendant, through an attorney, brought a complaint to the Governing Senate (which acted as an appellate court in relation to commercial courts), in which he claimed that the defendant's firm could not be identical to the plaintiff's firm, while the latter's firm was called "*M. Duruncha*", and the defendant's full name of the firm was called "*Trading House under the firm Durunch" I.I.B.*", that there are differences between the names "*Duruncha*" and "*Durunch*" (see below), and that the fact that the defendant had already made announcements about this in newspapers, and this can also be confirmed by the appearance of the sign, sufficiently guarantees against confusion of names.

The Governing Senate did not agree with these arguments of the defendant. Firstly, based on the defendant's statement to the Merchant Board, the name of the defendant's firm should be understood as "*Durunch*". This, in the opinion of the Senate, is also confirmed by the sign, on which the main word "*Durunch"* was written in large font, the "trading house" was not mentioned at all, and the defendant's surname was written in small font. The plaintiff's firm was named "*Duruncha*", and means a kind of oranges and tangerines, as in the case of the defendant, and therefore, the Senate says, there can be no talk of the non-identity of the names. Regarding the defendant's second argument about the warning against mixing up the names of firms made in printed publications, the court also refutes this argument. The sign of the defendant's shop indicated the opposite – it actually read "*Shop for tobacco, cigars and cigarettes "Durunch""*, under which were written in small letters the initials of the defendant, decorated with two gold medals, which enclosed a monogram of the letters I. and B., from which it seems that the tobacco products sold in defendant's shop were produced by the "*Durunch"* factory (which had a certain reputation among the public), which had even been awarded various medals, but in no case, the shop of the owner of a tobacco shop, which sold tobacco from other manufacturers. Therefore, in the opinion of the court, the newspaper advertisements of the defendant regarding the warning against mixing the two names of the companies, in general, cannot have any significance.

The Senate also took into account that the defendant had a trading house in the very place where the main business of the "*Durunch"* factory had previously been located. Moreover, based on the circumstances of the case, the plaintiff had notarised a warning to the defendant about the inadmissibility of using such a firm name, the defendant ignored this, but later nevertheless removed the sign. The court notes that the plaintiff's firm has existed for quite a long time, while the defendant only recently began trading in tobacco products, and, in addition, he had previously had permission from the plaintiff

[34] Sankt-Peterburgskij Kommercheskij Sud, opredelenie ot 13 dekabrya 1882 g. // Vil'son, V. Sudebnaya praktika po torgovym dъlam: rъsheniya S. Peterburgskago Kommercheskago Suda i Pravitel'stvuyushchago Senata (4 D-ta i Obshchago Sobraniya). S.-Peterburg: Knizhnyj magazin yuridicheskoj literatury D. V. Chichinadze, 1896, pp.176-177, D. № 97.

(i.e., in fact, was actually acquainted with him) to trade under his firm, but then lost this privilege, and therefore the court finds that when the defendant requested permission to trade under the firm *"Durunch"* from the Merchant Board, he set himself the goal of attracting a clientele familiar with the products of the plaintiff's factory. The Senate found that the "guarantee" against error and confusion of firm names, which the defendant spoke of, not only does not prevent confusion, but on the contrary is aimed at misleading public. Thus, the Governing Senate recognises the plaintiff's right to exclusive use of the firm as violated, approving the judgment of the St. Petersburg Commercial Court.[35]

4. CESSION AND TRANSFER OF A FIRM

Many questions arise regarding the assignment (cession) of a firm. Can it be considered the same asset as the property of the enterprise? Does the firm pass as an inheritance to the descendants of a deceased merchant or entrepreneur? How should the sale or transfer of a firm for use take place? Pre-revolutionary legislation had never developed a specific answer to these questions, except for unadopted bills (which are discussed below). Difficulties also arose in the doctrine, in which the issues of assignment and transfer of a firm were raised by far from all authors who wrote about trade law and the firm in particular. Well, then, let us consider the theoretical and practical part of this issue in the final section of our article. In French law, as in pre-revolutionary law, there were no special provisions regarding the transfer or assignment of a firm. However, A. Klotz (1898) believed that the transfer of a firm is entirely legally possible, indicating that when such a transfer does not have some illegal motive or will not contribute to unfair competition, then it occurs together with the transfer of business from one person to another. He also emphasises that when a commercial establishment is transferred, it will be natural that the public and clientele will be informed of the change of owner (for example, through the press – Auth.), but the name will remain the same, as will all the customs and traditions of the enterprise that previously constituted its reputation.

At the same time, noting an interesting detail, Klotz is of the opinion that the right of the recipient of the firm is not absolute, and the right of ownership of the firm is not transferred (unless the parties have agreed otherwise) forever. He mentions that there is a custom of commercial turnover, according to which the buyer of a firm can continue to use the old name of the predecessor for some time to "transfer" the clientele, but after such a period the heirs of the seller (if he died, here it is logical to imagine that this could be the seller himself, if he is alive at this time) can demand to stop using the old name of the firm in order to avoid abuses (Klotz, 1898, pp. 79-81). Apparently, it was this postulate that the Governing Senate used in the judgment of 1891, confirming the right of the plaintiff to demand the termination of the use of the firm even after its sale to the defendant (concerning this case, see below).[36]

[35] Pravitel'stvuyushchij Senat (4 Departament), Ukaz ot 1883 goda 8 dekabrya dnya. // Vil'son V. Sudebnaya praktika po torgovym dьlam: rьsheniya S. Peterburgskago Kommercheskago Suda i Pravitel'stvuyushchago Senata (4 D-ta i Obshchago Sobraniya). S.-Peterburg: Knizhnyj magazine yuridicheskoj literatury D. V. Chichinadze, 1896, pp. 172-175, D. № 96

[36] Pravitel'stvuyushchij Senat (4 Departament), opredelenie ot 13 iyunya / 31 oktyabrya 1891 g. № 904/1526 // Grebner, V. Praktika 4-go Departamenta i Vtorogo Obshchago Sobraniya Pravitel'stvuyushchago Senata po torgovym delam 1889-1896 gg. Chast' II. S.-Peterburg: Tipografiya M. M. Stasyulevicha, 1896. № 34, pp. 68-71.

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Another French scholar, Marcel Oudinot (1912), in an article on the transfer of a firm in German law, mentions that the buyer of a firm does not have the right to use it for any other type of business, and can only use it to continue doing business with the enterprise that was intended for him. He also noted that German law has deduced three conditions under which the acquisition of a firm is possible, namely: 1) the affiliation of the assignor and the acquirer to "*Vollkaufmann*", i.e., to the so-called "*full merchants*"; 2) the acquisition of the firm by him of a business managed by the assignor, and 3) the obvious consent to the sale of the firm of the assignor, or his heirs (Oudinot, 1912, pp. 360-362). Thus, on this account Rosenberg (1914) notes that French practice allows the transfer of a firm only between those persons who, according to French Code of Commerce, can be recognised as trade and industrial entrepreneurs. In the realities of the Russian Empire, such a characteristic did not exist exactly: thus, the fact that a certain person was engaged in some trade and industrial activity was confirmed by industrial certificates, and the person's belonging to the merchant class, in turn, was confirmed by the payment of guild fees (in the guild to which the merchant belonged). At the same time, from the point of view of pre-revolutionary law, transactions regarding the right to a firm could be concluded by all the people who, according to the law, had the right to conclude contracts (Rosenberg, 1914, pp. 129; 131).

J.-A. Lallier (1890) discusses the question of whether a legal successor can conduct business under the name of his predecessor. He believes that he can, but not fully: he can use the name of the firm in various business documents, signs, etc., but he must accompany it with his own name – otherwise, he believes, he will present himself as an agent or manager of his predecessor, which he, by definition, cannot be, and thereby mislead the public. At the same time, the legal successor has the right to conclude an agreement with his predecessor, according to which he will have the right to use the name of the firm for a certain period of time. If there is no such agreement, then the firm can be used for as long as it takes to "transfer" the clientele. The heirs, believing that their name was on the sign for a long enough time, will have the right to go to court for protection in order to restore their right to the exclusive use of the name (Lallier, 1890, pp. 411-412). The French scholar A. Auschitzky (1909) in his doctoral dissertation on the commercial name (firm) defends the point of view that it is impossible to transfer a firm separately from the enterprise and all the components of its business, since the enterprise together with all its elements (including the firm) is an inseparable whole, and the firm itself without the enterprise is, in fact, nothing. He suggests imagining three options in which a firm is alienated from an enterprise, and how this situation would look: 1) the owner of the enterprise sells his entire business to one recipient, and sells the firm to someone else; 2) a merchant who left the business, whose business was liquidated, after a few years suddenly decides to sell his (no longer operating) firm to someone else, and 3) a merchant leases out his own firm without a clientele. In such cases, in his opinion, even if such a transaction took place, the acquirer has no right in any way to claim the title of successor of the former owner of the firm, and by acting in this way, the acquirer misleads third parties (i.e., the public) regarding his status (Auschitzky, 1909, pp. 131-132). Auschitzky's position, by the way, is expressed in the German Commercial Code of 1897, Article 23, according to which a firm cannot be sold without the commercial enterprise for which it is used.[37]

The French scholar Roger Lévy (1905) in his doctoral dissertation on the commercial name (and at that time several such dissertations were defended in France at different universities) also mentions the rare practice of leasing a firm. Such an

[37] *Handelsgesetzbuch* (Deutschland), vom 10. Mai 1897, RGBl. 1897, Nr. 23, p. 219 – ff.

operation can occur in two cases – illegal (for fraud and misleading the public), and, on the other hand, completely legal, and then the leasing of a firm can be permitted, but in such a case that the lessee of the firm assumes responsibility for all operations and transactions that take place under his name (Lévy, 1905, pp. 69-71). The Paris Court of Appeal, in its judgment of 18 February 1904, asserts that the assignment of a firm is a commercial act that does not require the parties to the transaction (i.e., the counterparties) to draw up a written act, and can be confirmed by means of witnesses or presumptions of fact.[38] It is interesting that both draft laws on the firm, which existed in the Russian Empire in 1910 and 1911, assumed exclusively written confirmation of the transaction on the transfer of the firm.[39]

Let us consider the judgment of the Governing Senate of June 13/October 31, 1891, No. 904/1526, which is one of the central precedents on the issue of the assignment of a firm in pre-revolutionary law. The case began at the Moscow Commercial Court, which handed down a judgment on the case at the end of 1889. The plaintiff, R.A., sold to the father (already deceased at the time of the trial) of the defendant Yu. F. a coffee shop in Moscow on Tverskaya Street together with the furnishings and all the goods, however, as the plaintiff claimed, not with the firm, and therefore he, the plaintiff, demanded that the sign with the name "R.A." be removed from the store. The defendant, citing the testimony of witnesses, claimed that the firm was also sold along with the store. However, the court ruled in favour of the plaintiff, stating that no written evidence of ownership of the firm was provided, and witnesses were not present at the final transaction for the sale of the store, but were present only at preliminary negotiations. Therefore, the court ordered that the sign with the firm "R.A." to be removed from the store within two weeks, thus satisfying R.A.'s claim (Pustorosleva, 1891, p. 167).

The commercial court's ruling was appealed by the defendant to the Governing Senate, which heard the case in the second (and final) instance. The court, first of all, finds that the plaintiff has every right to use his first and last name (i.e., the court thereby unambiguously recognises the right to a name, which actually was never done in pre-revolutionary legislation), including in commercial life, and the defendant would have the right to trade under the plaintiff's first and last name only under certain circumstances – with his consent, or with the presence of certain acquired rights. Therefore, the court recognises the plaintiff's claim as entirely valid, noting that the outcome of the case would depend on whether the defendant can provide evidence that he has the right to use the plaintiff's firm name on the sign in his store. The defendant based his right to use the plaintiff's name on the sign on the fact that his father had acquired the firm in perpetuity together with the store itself (and, accordingly, the store along with all its accessories had been inherited by him); the defendant, in accordance with his father's testament, was his heir, and hence his right to use the sign with the firm "R.A." on the establishment arose. In this regard, he referred to the testimony of two witnesses, M. and F. (who took part in the proceedings at the court of first instance), as well as the content of the petition to the Moscow Chief of Police, dated April 19, 1889.

The Governing Senate, considering the testimony of witness M., notes that, according to him, in 1882 the plaintiff invited the witness to his place and told him that he was selling him the establishment together with all the furnishings, goods and firm, and since they had not entered into any written agreement on this matter, he stated that

[38] Cour d'Appel de Paris, 18 février 1904, Dalloz. Jurisprudence Générale. Recueil périodique et critique de jurisprudence, de legislation et de doctrine. Année 1907. Paris: Au Bureau de Jurisprudence Générale., II Partie, pp. 201-205 (Dall. Per. 1907 II 201, pp. 201-205.).

[39] See chapter "Historical development of the firm".

he wanted M. to be a witness to the sale. Witness M. also noted that by the word "firm" they understood the commercial name of the establishment (as a firm should be understood according to the overwhelming majority of doctrine and judicial practice), and that the sale was not conditioned by anything, and was not made for any specific period (i.e., during which the defendant could use the plaintiff's firm). Witness F., who worked as a servant in the coffee establishment, reported that the plaintiff, when selling the establishment, asked her to stay, saying that he "*was leaving his last name in the trade*." From this testimony, the Governing Senate concludes that the firm was nevertheless assigned, however, this testimony of witnesses does not provide grounds to say that the defendant thereby acquired an indefinite and unconditional right to use this firm, in the opinion of the court, in the words of the plaintiff, cited by the witnesses, there is no indication of such a right, and the words of the witness M. that this sale of the establishment was not made for a period and did not depend on any conditions, the court regarded as the personal opinion of the witness, rather than the confirmation of something that he actually saw or heard. As for the plaintiff's petition to the Moscow Chief of Police, it also did not prove the defendant's exclusive rights to the plaintiff's firm, but rather the opposite, since it stated that the plaintiff allowed the defendant to use his firm on the sign along with the medal, but until the plaintiff's first demand that it be removed (which is what eventually happened – Auth.). Confirmation of the temporary right to use the plaintiff's firm A. was also confirmed in the defendant's father's letter to the plaintiff in 1886, as well as in the plaintiff's petition to the post office to remove obstacles to receiving correspondence in the store that previously belonged to the plaintiff, moreover, the defendant's father did not refer to the right to the firm acquired by him, but claims that the plaintiff does not trust him enough.

In the plaintiff's petition to the post office, the Governing Senate saw an important detail: the plaintiff asked to transfer correspondence addressed to the store in the name of the defendant's son, but not indefinitely, namely until September 1, 1886, from which the court concludes that if the plaintiff had transferred the right to the firm indefinitely, then he would not have set such time limits, and third parties should have been notified of the change in the owner of the store, which was not at all in the case materials, and which the defendant did not mention at all. Thus, it remains unproven that the defendant's deceased father acquired an unconditional, perpetual right to use the plaintiff's firm, and the Governing Senate notes that there is no reason to enter into an assessment of the evidence of the transfer of the firm to the defendant as an inheritance from his father. The Senate concludes that the plaintiff's permission to the defendant's father to use the firm was temporary, although it did not specify a time limit, and given the plaintiff's expressed reluctance to have the defendant engage in trade in the coffee shop under a sign containing his name and surname, the Senate found the commercial court's ruling to be correct and upheld it, thus dismissing the defendant's complaint.[40] The Governing Senate also spoke about the legal nature of the firm. Here we will briefly indicate its main statements:

- The trade legislation (i.e., the Statute of Commerce and other legislative acts) does not know the concept of trade "*under the firm*" for sole proprietors and merchants, but knows this only in relation to partnerships;

[40] Pravitel'stvuyushchij Senat (4 Departament), opredelenie ot 13 iyunya / 31 oktyabrya 1891 g. № 904/1526 // Grebner, V. Praktika 4-go Departamenta i Vtorogo Obshchago Sobraniya Pravitel'stvuyushchago Senata po torgovym delam 1889-1896 gg. Chast' II. S.-Peterburg: Tipografiya M. M. Stasyulevicha, 1896. № 34, pp. 68-71.

- trade of an individual "*under the firm*" is not prohibited, and it is permitted to the extent that it does not contradict civil and commercial life;
- the acquisition of the right to a firm is a property value, and can be carried out by any means known to the law by which movable property is acquired, including by means of an agreement;
- the right of an individual to trade under a firm may become the subject of a contract between two private individuals, and, moreover, since the law does not provide for the mandatory conclusion of a contract – written or verbal – for the acquisition of movable property, the Senate considers the right of an entrepreneur to trade "*under a firm*" as a "composite" right, providing for certain powers that may not always be possible to "verbally" transfer between counterparties;
- the acquisition of the right of an entrepreneur to trade "*under a firm*" is often associated with obligations towards third parties, which in most cases requires such a transaction (i.e., the sale of a firm) to be in writing;
- the trade reputation, based on credit and personal trust, is very important in the commercial world, therefore, agreements on the transfer of a firm are characterised not only by a property but also a personal element, due to which only that entrepreneur who has acquired the right to a firm untimely and unconditionally can be recognised as the one who already has his own personal right to the firm, independent of the previous owner.
- the Senate concludes that if the transaction for the transfer (assignment) of the right to a firm is concluded not in writing, but in oral form, the evidence of the transfer of the firm and its conditions should be checked with particular caution.[41]

The next case raises two issues: who inherits the firm in the event of the death of the testator who owned it, and whether a perpetual lease agreement can grant ownership of the firm. The answer to these questions was given in the ruling of the St. Petersburg Commercial Court on November 13, 1889, and this judgment was upheld on appeal by the Governing Senate on June 26, 1890. Both of these court judgments have survived to this day thanks to publication in professional literature, so we will consider them both. Thus, the plaintiff Sh.-P., by means of a deed of sale, at the end of 1887 acquired from the city dweller P. two tea shops in St. Petersburg at No. 30-31 on Zerkalnaya Line of Gostiny Dvor, which the citizen P. had received by inheritance from the merchant G.; in 1889, the city dweller P. transferred the firm "I.G." to plaintiff in full ownership, the firm was so called in honour of the first owner of the establishment. Then the merchant M., to whom tea shop No. 30 was leased, himself began to use the firm "I.G." The plaintiff's attorney in the suit against the merchant M. claimed that the term of the lease agreement with the widow of the deceased merchant I.G. expired on April 20, 1889, meanwhile, the merchant M. moved his trade to another premises and continued to use the firm "I.G." and therefore, the plaintiff's attorney demanded that the merchant M. be prohibited from using a firm that did not belong to him.

The court finds that initially under the firm "I.G." was conducted by the deceased merchant I.G. himself, and if during his lifetime the right to use the firm was forever assigned to someone else, then the right of ownership of the firm, as property

[41] *Ibid*.

representing a certain kind of value (verbatim from the court judgment), and being an integral part of the enterprise, passes from the testator to the heirs on the general basis of the Volume X of the Restatement of Laws, p. 1, Articles 1254 and 1258. Based on the fact that the plaintiff acquired the right to the firm together with all the trading premises from the city dweller P., who was the heir of the deceased merchant I.G., then, as the court believed, she should be recognised as having the right to sue the merchant M. for the fact that he uses her firm in the course of his trade. The court considered the defendant's objections and found that back in 1867, the merchant M. and his colleague I. entered into a contract with the merchant I.G. for the lease of the tea shop No. 30 for a period of six years for the trade in tea, sugar and coffee, with the right to receive all customer demands, as well as all correspondence that was addressed to the shop. Along with this, the contract also stipulated the right of M. and I. to use the firm I.G., although we note that this contract did not say anything about the transfer of the right to perpetual use of the firm, or its purchase, etc.

The court, drawing attention to this, asserts that if the contract of 1867 mentioned the transfer of the firm, then such transfer refers to the assignment for the term of the lease agreement, therefore the above-mentioned contract did not give the defendant M. and I. the right to ownership of the firm "I.G." and did not have such a purpose to establish it. The court examined the second contract, between the defendant M. and I., by which I. transferred all his rights under the partnership contract to M. in 1880, and said that the said document was also of no importance from the point of view of proving M.'s right of ownership of the firm, since I. could only transfer in the contract to M. those rights in relation to the trading enterprise which he himself had, and he, as is known, did not in any way own the right to the firm "I.G." M.'s attorney asserted that in the contract concluded with the widow of the merchant I.G. in 1873, M. and I. recognised themselves as the owners of the firm, and the widow of the merchant I.G. signed this agreement, but the court also does not accept this argument in consideration of the fact that the fact that M. and I. mistakenly indicated themselves as the owners of the firm, while having the right to the firm on the basis of a fixed-term lease agreement, could not change their right in any way, and the consent to transfer the use of shop No. 30 to merchant M. (to the defendant, and judging by the text of the agreement, only to him) implied only consent to the transfer of rights and obligations under the lease agreement to M., for the transfer of the firm to I. to M. such an agreement of the widow of the deceased merchant was no longer required. Finally, M.'s attorney claimed that defendant had acquired the firm by prescription, but the court did not agree with this argument either: until 1880 M. and. I. used the firm on the basis of fixed-term lease agreements, from the same year M. began to use the firm alone, and before the claim was filed, 10 years had not passed, as a result of which the court concludes that the defendant M. has no right to use the firm "I.G.".[42]

An appeal was filed against this judgment to the Governing Senate, and without recounting all the circumstances of the case again, which is unnecessary; we will note that the Senate points out that M. obviously did not consider himself the owner of the tea shop. Firstly, in 1881 he again entered into a lease agreement with the widow of the deceased merchant I. G., to whom, according to her husband's will, the tea shop was left for lifelong possession, the defendant managed to wring out for himself the terms of

[42] Sankt-Peterburgskij Kommercheskij Sud, rѣshenie ot 13 noyabrya 1889 g. // Vil'son, V. Sudebnaya praktika po torgovym dѣlam: rѣsheniya S. Peterburgskago Kommercheskago Suda i Pravitel'stvuyushchago Senata (4 D-ta i Obshchago Sobraniya). S.-Peterburg: Knizhnyj magazin yuridicheskoj literatury D. V. Chichinadze, 1896, pp. 177-180 (D. № 98).

lifelong use (not into possession! – *Auth*.), which he would not have had any need to do if the firm belonged to him. The Senate also commented on the agreement between M. and I. from 1880, in which they are designated as the owners of the firm, and the court notes that this cannot have decisive significance, since the following year M. again entered into a lease agreement, from which it follows that he could not in any way be the owner of the firm. The appellant also claimed that I.G. was aware during his lifetime that he had transferred the firm to the defendant as his property, but the court points out that if this were actually the case, he would have mentioned this in his will. The Governing Senate does not consider M.'s argument that he has been using the firm for over 20 years to be valid, since he used the firm on the basis of fixed-term lease agreements, and the right to use the firm each time fell within the term of these lease agreements, and it is obvious that such a right of use cannot give ownership. The Senate thus concludes that M.'s ownership of the firm "I.G." has not been proven, and that he had no right to use the firm "I.G.", having upheld the previously mentioned judgment of the St. Petersburg Commercial Court.[43] Let us briefly outline the main theses regarding the firm law based on this case:

- The firm is a "known value", and obviously is a *property*, and it can be inherited like any other property. Since the courts in this case repeatedly mention property rights to the firm, it is obvious that the right to the firm is a property right. The firm can also be inherited;
- The firm can be leased to another person, and he can use it for as long as stipulated in the lease agreement. However, neither a fixed-term lease agreement, nor even an indefinite one, gives ownership rights to the firm. Only the complete acquisition of the enterprise with the firm gives such a right.
- Obviously, the very fact that the merchant's firm, named after his first and last name, is used by another merchant for a certain period of time on the basis of an agreement, is not contrary to the civil and commercial principles of law and trade customs.

The following case also concerns the question of the assignment of a firm, the right of ownership and the right to use the firm, and was resolved by the Governing Senate in the ruling of February 6, 1892 as the court of appeal in this case. In the deed of February 1, 1878, the plaintiff sold some movable property (shops) to the merchant A., and also allowed him to use the firm "E.O.B." In a receipt dated June 29, 1881, she indicated that she had nothing against the use of the firms by another merchant K., to whom the merchant A. sold these shops. Then these shops passed into the ownership of merchants M. and K., against whom the plaintiff filed a claim in the Moscow Commercial Court with a demand to remove the sign with the firm in one of the shops.

The commercial court rejected this claim, on the grounds that the firm should be recognised as movable property, and the firm can be transferred, just like any movable property, from one person to another; the court referred to the prevailing trade custom that a firm is transferred together with the goods and other accessories, and is also transferred from one person to another, which can often lead to the fact that under a firm with one name and surname, a person with a completely different name and surname is

[43] Pravitel'stvuyushchij Senat (4 Departament), opredelenie ot 7 iyunya 1890 g. № 871 // Grebner, V. Praktika 4-go Departamenta i Vtorogo Obshchago Sobraniya Pravitel'stvuyushchago Senata po torgovym delam 1889-1896 gg. Chast' II. S.-Peterburg: Tipografiya M. M. Stasyulevicha, 1896., № 36, pp. 73-76.

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already trading, and then, that according to the above-mentioned act of appearance, the plaintiff B. had already sold her stores together with the companies to the merchant A., who decided to sell them to the merchant K, and the merchant A., moreover, informed the plaintiff about this. The court also found that the plaintiff had not proven that the stores were sold without the firm, and that she reserved the right to consent to its use when transferred from one owner to another, and finally, the court asserts that at the present time (i.e., at the time of the consideration of the case) the owner of the store is merchant K., and that he acquired the stores together with the firms from merchant A., and that he has the right to sell them (including with the firms) to other persons, or transfer them into temporary possession, which he did in favour of merchants M. and K. on August 31, 1888. Based on these arguments, the court decided to dismiss the claim.[44]

The Governing Senate overturned this judgment of the commercial court and concluded that the court of first instance based the property rights of the defendants M. and K. on a receipt issued by the plaintiff in 1881, which allegedly certified the fact of transfer not only to the stores (which were not in dispute), but also to the disputed firms. Meanwhile, based on the text of the receipt issued to merchant K., who acquired the store from merchant A., it is said only that she granted him the right to use the firms, and also that there were no obstacles on her part in terms of merchant K.'s use of these same firms. However, there was actually no talk of her completely transferring or selling the firms to either merchant A. or merchant K. At the same time, the defendants' attorney argued the opposite: he believed that the meaning of the receipt was that the plaintiff transferred the firm to merchant A. (to whom she first sold the stores) precisely as property, since she did not stipulate her right to dispose of this firm in any way, or the right to express her consent to the transfer of the firm from one merchant to another, and during the period from 1878 to 1891, she allegedly did not exercise her rights to the firm in any way.

But the Senate did not agree with these arguments, considering that the firm is the name and surname of the plaintiff, and by this fact alone it can be considered her property, thus, it is the defendants who must prove that the plaintiff renounced her right to the firm (in their favour, or in favour of their predecessors), and added that the absence of any stipulation in the receipt (or anywhere else in the documents) about how the plaintiff will dispose of her right to the firm is of no importance, and the manifestation of the plaintiff's right of ownership of the firm could well be expressed in the receipt itself. If the firm belonged to merchant A., then the consent of the plaintiff would not be required to transfer the right to use the firm to merchant K., and the fact that merchants A. and K considered it necessary to obtain the consent of the plaintiff to transfer the firm proves that they did not consider the firm to be their property. It follows that the ownership of the firm of merchant A. remained unproven, just as such ownership of his successors, including defendants. Whereupon, the Governing Senate overturned the judgment of the commercial court and ordered the defendants to remove the sign with the firm "E.O.B." from their trading establishment.[45]

There is another well-known case in the practice of the Governing Senate (at that time, the Judicial Department) related to the protection of the right to a firm, the judgment on which (decree) was issued on January 24, 1914. The plaintiff, N. B., filed a lawsuit against the defendant S. for using the name of the firm "Vladimirskoye Bureau of Funeral

[44] Yuridicheskij vѣstnik [Legal messenger]. 1891. Tom VII. Kniga pervaya (yanvar'), p.167.
[45] Pravitel'stvuyushchij Senat (4 Departament), opredelenie ot 6 fevralya 1891 g. № 191 // Grebner, V. Praktika 4-go Departamenta i Vtorogo Obshchago Sobraniya Pravitel'stvuyushchago Senata po torgovym delam 1889-1896 gg. Chast' II. S.-Peterburg: Tipografiya M. M. Stasyulevicha, 1896., № 35, pp. 71-73.

Processions B.", namely, for actions in the form of naming his funeral bureau "Vladimirskoye," "*first in execution*", and indicating the surname "B." both on the establishment's signs and in business documentation. The court, however, refused to satisfy the plaintiff's claim, citing that the plaintiff does not use the firm B., and that the defendant has the right to use the funeral bureau's firm by virtue of an agreement that was concluded in February 1912 with V. B. (maybe, some relative of the plaintiff). The Senate, however, disagreed with this conclusion, considering the issue of evidence that the plaintiff also used this firm. And here is what was found: the plaintiff, N.B., presented invoices in the name of the firm for 1909-1911, which were written in the name of the firm "First Vladimirskoye Bureau of Funeral Processions N.P.B." Then plaintiff presented numbers of local newspapers in which advertisements were published in 1909-1910 on behalf of the same firm, and the Senate further points out that, as is evident from the certificate of the Merchant Council of 1912, the plaintiff continued to conduct his business under the same firm. The defendant relied on the fact that on the sign of the plaintiff's establishment there was a slightly different inscription, namely: "A government-authorised bureau of funeral processions. First Founding N.P.B. Founded 1892".

However, the Governing Senate notes that this fact is not of fundamental importance, since this inscription does not contain the name of the firm, and as is often the case in commercial life, the name of the firm is not always placed on the signs. Thus, the question of whether the plaintiff used his firm is resolved in the affirmative. Now the Senate moves on to the question of whether the defendant has the right to use the bureau with the surname "B.", since this surname is of great importance for the plaintiff's firm, and the court comes to the following conclusions. The defendant bases his right to the firm (i.e., to use it) on the basis of a contract signed with a relative of the plaintiff, to whom he sold him a funeral home with the right to use the firm. The Senate notes that, based on the certificate of the Merchant Board, since September 1910, the funeral home of N.P.B. was located at the address of the enterprise, and since February 1912, another funeral home also existed at the same location, but the contract was signed by the defendant, peasant S., and no other funeral homes were observed in this premises. Meanwhile, in February 1912, the Merchant Board issued an industrial certificate to the V. B., which gave him the right to maintain a funeral home, but before that time, he had never been issued such a certificate.

The Senate thus establishes that despite the fact that the plaintiff's relative chose an industrial certificate for maintaining a funeral home, he did not actually maintain one, which means that the defendant could not have acquired a funeral home from him. The Governing Senate concluded that since the surname "B." is, without a doubt, the most important part of the firm name of the plaintiff's establishment, and the plaintiff used this firm much longer than the defendant, therefore, the defendant, by using the firm B., who in fact did not own this firm, violates the interests of the plaintiff, and therefore has no right to use the plaintiff's firm either on signs or use it in business documentation. The Senate also emphasised that the name of the defendant's firm, which includes "Vladimirskoye", already gives grounds to talk about the confusion of the firm's name with the plaintiff's establishment, and thus, it misleads the public. Thus, the Governing Senate, on the one hand, having recognised the claim as unproven in the part prohibiting the defendant from using the name "*first in execution*", satisfied the claim in another part – in the requirement to prohibit the defendant from using the name of his bureau "Vladimirskoe" and the surname "B." Thus, defendant S. was prohibited from using the

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name of the funeral home he owned, the name "Vladimirskoye" and "B.", both on signs and in documentation.[46]

5. CONCLUSION

With the development of trade and industrial relations, there arose a need for some kind of marking of trade establishments, distinguishing one establishment from another. Thus, in the German Code of Commerce of 1861, from which pre-revolutionary scholars often drew ideas, this name of the establishment was called "firm", which was then interpreted under different names, for example, "trade name" and "commercial name". Both the majority of European and the majority of pre-revolutionary scholars understood the firm as the name of the merchant under which he conducts his business, signs and uses it in documents. This definition was modelled on Art. 15 of the German Code of Commerce and the commentary of W. Endemann; other legislation of that time, most often, did not provide a clear definition of what a firm is and how it should be understood (for example, in France, in commercial life, as well as in judicial practice, the terms "*raison sociale*" and "*nom commercial*" were developed). It was very difficult to determine the history of the emergence of the firm, its main differences from trademarks in earlier times. We can trace the history of the firm in the works of scholars from Europe (Haab, Kohler, Klotz, Deshayes de Merville), as well as from the USA (Rogers), who noted in their works that although the firm is a relatively modern concept, its prototypes appeared both in antiquity and in the Middle Ages.

Pre-revolutionary scholars (Shershenevich, Danilova) linked the emergence of the firm with the practice of merchants in the Middle Ages to mark their establishments with drawings and coats of arms in the manner of coats of arms in aristocratic dynasties, and appearance of written names of firms – with the development of literacy among the population. An analysis of the legal support for the concept of "firm" in the Russian Empire showed, on the one hand, a developed doctrine of this issue, often built on the basis of foreign law, and on the other hand, a complete absence of any legislative regulation (despite four bills in the 1880s and 1910s), the gaps of which were filled by scientific literature and judicial practice. Thus, complex theoretical issues of the functioning of firms are considered by scientists Bashilov, Hol'msten, Udintsev, Fyodorov, Kaminka, Nevzorov, Rosenberg, Danilova. For example, Holm'sten put forward a theory of the exclusive right to use a firm, which was expressed in filing a claim for damages and compensation for damage caused on the basis of Art. 684 of Volume X of the Restatement of Laws, p. 1, Rosenberg in his dogmatic work on firms examined many issues of foreign laws and judicial practice on this topic, and Bashilov was one of the first to raise the issue of firm registration, and was also one of the first to comprehensively present the concept of a firm in pre-revolutionary literature (earlier this topic was touched upon, as far as we know, only by Columbus in an article of 1882. Danilova in her article "Firm and Enterprise Name" (1915) conducted a comprehensive analysis of the firm legislation of the 19th - early 20th centuries in the German, French and Swiss codes of commerce. It should be noted that pre-revolutionary literature was very often built on foreign examples of legislation and sometimes, judicial practice, as well as foreign doctrine of firm law. Such scholars, whose works were cited in this article, include

[46] Pravitel'stvuyushchij Senat (Sudebnyj Departament), ukaz ot 24 yanvarya 1914 g. № 186. Pravo. Ezhenьdel'naya yuridicheskaya gazeta [Law. Weekly legal newspaper]. 1914 g. № 11, Voskresen'e 16 marta., pp. 933-934.

Endemann, Haab, Lallier, Klotz, Oudinot and some other authors. Among the postulates developed in the pre-revolutionary doctrine and judicial practice, we can cite the following:

1. A firm is the name under which a merchant or partnership conducts trade, as well as conducts all business and documentary part of it. Sole merchants, as a rule, conducted their trade under their own name, partnerships chose other names, or indicated in the name the names of all full partners.
2. The exclusive right to own a firm is expressed in not allowing any use of the same names of two or more different firms, since this will lead to deception of the clientele. There were different ways to protect the right to a firm, the effectiveness of each, however, raised questions and doubts among scholars.
3. The right to a firm is a property right that can be inherited, like any other property. In the judgment of 1892, the Governing Senate recognised a firm as movable property.
4. A firm can be assigned or sold in any way, including by concluding an agreement to this effect. At the same time, it is not prohibited to transfer a firm in a lease agreement (i.e., for use). At the same time, the use of a firm does not give property rights to this firm. It is considered that a merchant is the owner of a firm only if there is written evidence of the acquisition of the firm. Otherwise, it will be extremely difficult to prove property rights to the firm.

The concept of a firm in pre-revolutionary law remained within the framework of doctrine, custom and rarely encountered judicial practice. But at the same time, scholars have managed to develop quite complex theoretical structures of the functioning of firms, often based on the best examples of legislation, judicial practice and customs of Western European countries. The authors express the hope that this study will contribute to the study of laws, doctrine and judicial practice of past centuries for a better understanding of the foundations of law in different time periods.

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RECONCILING ADMINISTRATIVE EFFICIENCY WITH PROCEDURAL SAFEGUARDS IN THE ADM SYSTEM

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Abstract: *The use of automated systems for making administrative decisions has recently increased to improve efficiency and speed in completing tasks. However, ensuring that administrative effectiveness aligns with procedural safeguards when using an Automated Decision-Making (ADM) system is crucial to maintaining adequate performance and ensuring that ADM use remains safe for individuals. Using a descriptive methodology, the article collected and analysed data on striking a reconcile between administrative efficiency and procedural protections in the ADM system to present a precise and straightforward overview of current literature. Sources for data included books, reports, conferences, conventions, and internet resources. The article revealed several key mechanisms that help reconcile administrative efficiency with procedural safeguards in the use of ADM for administrative tasks. These include compliance with the law, ensuring fairness, exercising rights freely, pursuing justice, adding human oversight, avoiding decisions made solely by automated systems, ensuring transparency, explainability, and interpretability of ADM-based decisions, and maintaining accountability. The analysis suggested that future investigations should examine how core elements of administrative decisions, such as jurisdiction, form, and purpose, are influenced by ADM, and should also evaluate the principles of reason-giving and nondelegation of power.*

Key words: *Reconciling; Administrative Efficiency; Procedural Safeguards; Automated Decision-Making; Artificial Intelligence*

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1. INTRODUCTION

Artificial intelligence is increasingly integrated into everyday life. From healthcare to transportation, it is moving from research phases to real-world use. In 2023, the FDA approved 223 medical devices that use artificial intelligence, a significant increase from just 6 in 2015. Self-driving cars are no longer just experimental; for example, Waymo, one of the largest operators in the United States, offers more than 150,000 autonomous trips weekly, while Baidu's affordable Apollo Go robotaxi operates in various cities across China (Maslej et al., 2025). AI involves automating tasks related to human thinking, such as decision-making, problem-solving, and learning (Russell and Norvig, 2010).

Administrative decisions are a vital part of management activities that have been automated using AI, which assesses inputs and other variables essential for informed decision-making under challenging conditions, allowing policymakers to make decisions more quickly and consistently (Nešpor, 2024). Automated Decision-Making (ADM) refers

to the use of digital technologies to automate decision-making processes that humans would typically handle.[1]

Integrating AI systems into administrative workflows could lead to major changes in administrative procedures by transforming current customs, organisational structures, and procedural methods in administrative law (Parycek et al., 2023). Additionally, administrative law decisions could benefit from the use of ADM. Automated systems can manage various types of decisions in accordance with fair standards, thereby improving administrative outcomes by enabling efficient decision-making in a short time, increasing overall system efficiency by reducing lead times and resource requirements for mass decision-making.[2] Furthermore, the use of algorithmic systems to automate decision-making is increasingly prevalent in the public sector, a necessary element in the growth of the digital welfare state, which promises better efficiency and fairness in the provision of public services (Kaun, 2023). Likewise, algorithmic automation significantly cuts transaction costs, streamlines processes, and supports informed decision-making in complex situations. Tools such as comparators, rating systems, ranking systems, and recommendation systems are essential for comparing and ranking products. Algorithms facilitate cost-effective and efficient flagging, filtering, content moderation, and removal.

Managing complexity, virality, and uncertainty in today's world requires algorithms in modern societies.[3] Automated systems can be used in many ways within administrative decision-making. They can suggest options to decision-makers, including decision support systems that provide comments about the decision-maker, relevant laws, case law, and policy references throughout the process, and offer summaries or preliminary assessments. Internal decision-makers can also automate parts of the fact-finding process, which could influence later choices, such as using data from additional sources, including data matching or data uploaded directly by individuals or entities.[4] Roehl and Hansen (2024) note that while ADM is crucial for digital government reforms aimed at making administration more efficient and streamlined, it also raises concerns about traditional public administration values (Roehl and Hansen, 2024).

However, ADM faces challenges that could impact individuals' safety. The Commonwealth Ombudsman (2025) states it is inappropriate when automating an administrative task would: violate legal requirements of legality, fairness, and reasonableness under administrative law; lack transparency; breach laws protecting data security, privacy, or other rights (including human rights, rights, and responsibilities); jeopardise decision-making accuracy; and significantly undermine public trust in government management.[5] Allars (2024) indicates that using ADM inherently involves

[1] European Law Institute (2023). EU Consumer Law and Automated Decision-Making (ADM): Is EU Consumer Law Ready for ADM?. Available at: https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Interim_Report_on_EU_Consumer_Law_and_Automated_Decision-Making.pdf (accessed on 25.10.2025).

[2] Law Council of Australia (2025). Use of Automated Decision-Making by Government: Consultation Paper, 24 January 2025. Available at: https://lawcouncil.au/publicassets/be8251b1-d4dd-ef11-94af-005056be13b5/4643%20-%20S%20-%20Use%20of%20automated%20decision-making%20by%20government.pdf (accessed on 12.10.2025); and Rizk and Lingren (2024).

[3] European Law Institute (2022). Guiding Principles for Automated Decision-Making in the EU. Available at: https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Innovation_Paper_on_Guiding_Principles_for_ADM_in_the_EU.pdf (accessed on 24.10.2025).

[4] Commonwealth Ombudsman (2025). Automated Decision-making – Better Practice Guide, March 2025. Available at: https://www.ombudsman.gov.au/__data/assets/pdf_file/0025/317437/Automated-Decision-Making-Better-Practice-Guide-March-2025.pdf (accessed on 28.10.2025).

[5] *Ibid.*

risks and a higher chance of violating administrative law criteria (Allars, 2024). Hubková (2024) notes that several issues, challenges, and obstacles are associated with the use of ADM tools. Hubková (2024) stated that, legally, there is a risk of diminishing or diluting public officials' responsibility (Hubková, 2024). Mokander et al. (2021) noted that ADMS runs the risk of producing unjust outcomes, violating individual privacy, and undermining human autonomy. Hence, to help institutions create and run ADMS ethically, new governance systems are needed so that society can fully benefit from the economic and social advantages of automation (Mokander et al., 2021).

Alfred et al. (2019) highlight some significant challenges, notably the difficulty most individuals face in fully understanding the processes and mechanisms involved. When these processes affect outcomes, decisions are made automatically. The core assumption behind ADM regulation is that a computer will make the decision, which could threaten a person's dignity and autonomy. The earliest rules governing automated decision-making were based on the idea that such systems would produce subpar results, especially when compared to human judgments. ADM systems may lack transparency, as individuals are often unaware that one has been used. Consequently, they cannot exercise their data subject rights under data protection law or seek alternative services that do not use ADM. Even if individuals are aware that ADM has been employed, they may not fully understand how it works. This presents significant challenges, particularly for correlation-based ADM systems, which are more complicated to explain and understand than causality-based systems. Many see actors using ADM as a threat to justice. Depending on how the phrase is defined, an ADM system might be considered unjust if it intentionally incorporates protected characteristics, such as race, age, or gender, or their proxies. Alternatively, ADM systems could be viewed as unfair if they produce unequal predictive performance, including false-positive and false-negative rates, across various groups, especially those protected by law.

Thus, two facing considerations exist: the right of the administration to gain efficiency, velocity, and consistency in the work via ADM, and the right of individuals to procedural safeguards, which provided by primarily compliance with the law, ensuring fairness, exercising rights freely and pursuing justice, human oversight, avoidance of decisions made solely by automated system, transparency, explainability and interpretability, and accountability, that lead to justice in administrative law simultaneously.

Although Automated Decision-Making and Artificial Intelligence are connected, they are not synonymous. AI is a broad scientific field encompassing techniques allowing machines to simulate specific human abilities, such as learning, reasoning, and problem-solving. ADM, however, is the utilitarian application of these or any other digital devices to make or assist decisions that would be made via human judgment otherwise. In these cases, ADM can be grounded in AI methods such as machine learning and natural language processing. However, it can also be implemented using more straightforward programming rules or decision trees that follow static legal or procedural rules. Therefore, any AI-based decision-making system is indeed ADM, but not every ADM process necessarily must be AI. This is an important difference in public administration, as it affects both the character of oversight required and the level of legal protection that must be applied to automated devices.

This research aims to provide a systematic and critical review of existing legal solutions that seek to reconcile administrative efficiency with procedural protections in Automated Decision-Making (ADM) systems. By bringing together and analysing scattered international and European literature, it seeks to delineate the primary mechanisms by which efficiency and procedural fairness can be reconciled in automated

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administrative environments. As the issue remains scientifically under-researched, particularly in Central and Eastern Europe, the article helps fill this gap by systematising current knowledge, delineating conceptual boundaries, and suggesting a coherent framework for subsequent empirical and comparative research.

While this paper is not a venture to provide fresh empirical evidence, it is new in that it consolidates disparate positions on how procedural protection and administrative efficiency might go together in a computer-aided decision-making framework. By synthesising and organising the extant literature within a framework that reconciles them, the article reveals a clear point of departure for further in-depth investigations. Each of the mechanisms discussed, i.e., legality, equity, human oversight, or openness, could be developed into an independent line of inquiry.

The paper first helps individuals understand their legal rights regarding automated administrative decisions, whether issued or contested. Second, it provides policymakers with insights into enacting and enforcing laws and regulations related to the ADM system. Third, it emphasises the need for repeatability in ADM studies to establish trust in the system and credibility, thereby influencing discussions. Fourth, it assesses the reach and constraints of ADM in human endeavours.

The remainder of this paper is organised as follows: Section 2 focuses on methodology, and Section 3 details how to reconcile procedural protections with efficiency. Section 4 offers results and discussion. Finally, Section 5 concludes the article.

2. METHODOLOGY

This paper adopts a doctrinal legal research approach. Rather than providing empirical data, the analysis relies on a systematic study of primary and secondary legal sources to determine how to align administrative effectiveness and procedural protection in the context of automated decision-making. Primary materials include constitutional rules, administrative legislation, EU regulations such as the General Data Protection Regulation and the AI Act, and judgments or ombudsman decisions on ADM. Secondary materials include academic writing, policy briefs, and reports from international institutions. These were examined to identify shared legal principles, interpretative approaches, and areas of tension between automation and administrative legality. The article thus goes beyond the description of these materials: it comparatively examines how different legal systems approach efficiency and safeguards. It integrates these lessons into a productive analytical framework that can inform both scholarship and practice.

3. RECONCILING EFFICIENCY WITH PROCEDURAL SAFEGUARDS MECHANISMS

Several mechanisms are employed to reconcile administrative effectiveness with procedural safeguards when the ADM system is operational. Previous research has shown that applying ADM technologies in sensitive areas, such as the legal justice system, may have unfavourable societal effects, including widespread discrimination (Szafran and Bach, 2024). The European Union has a prominent set of legal tools for personal data protection, namely, the General Data Protection Regulation (GDPR) and the EU Data Protection Directive (DPD). The mechanisms that reconcile management efficiency with procedural safeguards can be summarised as follows:

3.1 Compliance with the Law

The principle of law compliance, also known as the principle of lawfulness, is a fundamental legal rule that must be followed across all areas of law enforcement, including administrative functions. Automation should be designed with consideration for laws, rules, and principles of justice and ethics (Wihlborg et al., 2016). It supports the rule of law, establishes the country's legal framework and institutions, and boosts legitimacy. Compliance with the law involves the procedures and processes within a specific program that ensure adherence to laws and government standards (Idowu et al., 2013). Regarding ADM, an operator who chooses to use ADM for a particular purpose must ensure that its design and operation comply with the rules applicable to a similar manual decision-making system.

Should machine technology be employed to carry out a task under a particular law, its operation must comply with all the enforceable constitutional rules, not merely those arising from data protection legislation. Administrative authorities need to follow, alongside the ordinary law requirements, such as legality, proportionality, due process, and reason-giving, constitutional rules stemming from national constitutional traditions and the EU Charter of Fundamental Rights. In common-law regimes, they are sometimes called "common law obligations" of fairness, reasonableness, and accountability. However, their opposites appear in civil-law regimes as an integral part of good administration. Where ADM systems process personal data, the General Data Protection Regulation (GDPR) and related legislation provide the primary protection. However, ADM may also operate on non-personal data (e.g., environmental, statistical, or operational data). In such cases, legality is achieved through sector-specific regulations, ethical standards, and the overall requirements of the EU Artificial Intelligence Act, which impose transparency, human oversight, and accountability requirements, even where no personal data is involved. There is a broad legal framework that enables efficient government automation and compliance with human rights.

Relevant considerations will often include privacy rules, freedom of information laws, and anti-discrimination legislation.[6] The doctrine of legal compliance serves two primary roles. First, it acts as a restriction or negative factor in determining when ADM use is permitted, how much it can be used, and whether additional protections or policies are necessary. In some cases, an ADM should be limited or prohibited if it cannot be fully developed or operated in accordance with current laws.[7]

In addition, the constitutional rule of legality requires that all administrative acts, including those supported by automated decision-making, have a specific and unambiguous legal basis. The basis for this is the general rule of law principle that ensures public authorities operate only with the authority vested in them by law. From a practical perspective, in the ADM sense, it means that computerised tools cannot replace human decision-making unless authorised by primary legislation or secondary legal documents that define their scope and bounds, as well as the guarantees and warnings. In the absence of such legal justification, the ADM system application would be unlawful and could violate constitutional safeguards against arbitrary administrative action and

[6] NSW Ombudsman (2021). The new machinery of government: Using machine technology in administrative decision-making, A special report under section 31 of the Ombudsman Act 1974. Available at: https://cmsassets.ombo.nsw.gov.au/assets/Reports/The-new-machinery-of-government-special-report_Front-section.pdf (accessed on 24.10.2025).

[7] European Law Institute (2022). Guiding Principles for Automated Decision-Making in the EU. Available at: https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Innovation_Paper_on_Guiding_Principles_for_ADM_in_the_EU.pdf (accessed on 24.10.2025).

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due process. Hence, legality in ADM is not merely a matter of agreeing to comply with norms prescribed by statute, but also of upholding the constitutional order that founds administrative power on legality and responsibility.

3.2 Ensuring Fairness

Algorithmic decision-making is becoming increasingly important in individuals' daily lives. Because these autonomous systems could cause significant harm to individuals and communities, concerns about justice have become front and center (Starke et al., 2022). Commonly used as they are, ADM systems often emerge without involving the public or those affected, thereby presenting problems related to inherent biases that could perpetuate systemic inequities (Decker et al., 2024). Hence, all processes involved in decision-making should ensure fairness and transparency. In this context, fairness has two components: the procedure must be fair to the individual involved, and it should also, to some extent, be fair in substance (McCabe, 2020). Fair procedures require decision-makers to be impartial and to give the affected individual a fair opportunity to be heard. Introducing mechanical technology can introduce a specific type of bias called algorithmic bias, which refers to the idea that the results produced by an algorithm should not lead to discriminatory, prejudiced, or unequal consequences. This bias occurs when a machine consistently produces unjust or biased results against certain groups of people. Algorithmic bias can still lead to illegal decisions if they are based on irrelevant factors or violate anti-discrimination laws. It may also lead to other forms of mismanagement, as it results in or promotes unfair or improperly discriminatory actions.[8] The dangers might come from bias in data or in algorithms guiding automated decisions, as well as from the human inclination to rely on automated results. This portion shows that emerging forms of bias pose challenges concerning evidence and are unlikely to fall under the definition of bias relevant to either partially or entirely automated decisions. Regrettably, this distance reduces the likelihood of a successful judicial review in the ADM field (Huggins, 2021). In data analysis, ADM technology typically relies on programming that categorises individuals into distinct groups based on shared traits, which then influence membership decisions within those groups. Article 21 of the EU Charter of Fundamental Rights (CFR) states standards that, in theory, should prevent discrimination between groups. These criteria include 'sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.' Unless the law permits such use, ADM must be designed to exclude these factors as defining features, respect core rights, and ensure that restrictions are appropriate (Hofmann and Pflücke, 2024).

3.3 Exercising Rights Freely and Pursuing Justice

The situations involving the exercise of rights and the pursuit of justice without limitations fall into two categories: first, when a person can only claim a right through an automated process; second, when a person cannot claim a right or seek justice solely because ADM has made a decision. In the first category, the method for exercising a right, such as correcting personal data, withdrawing consent, notifying an insurer of

[8] NSW Ombudsman (2021). The new machinery of government: Using machine technology in administrative decision-making, A special report under section 31 of the Ombudsman Act 1974. Available at: https://cmsassets.ombo.nsw.gov.au/assets/Reports/The-new-machinery-of-government-special-report_Front-section.pdf (accessed on 24.10.2025); and Starke et al. (2022).

circumstances that could reduce risk and improve insurance terms, or submitting a complaint, is entirely automated during the initial phase. Hence, the individual's dependence on the automated system's correctness, acceptability, and user-friendliness is total. Still, this reliance could be unfamiliar. As a result, someone's ability to exercise their rights may be inhibited or discouraged. The automated procedure may present an insurmountable barrier that stops someone from exercising their rights. The person is nearly deprived of these rights if they have no alternative means to utilise them. In such cases, the operator must provide a human-based option. Regarding the second category, the affected individual has been impacted by an ADM decision and wants to challenge it. If an automated decision could cause irreversible harm or irreparable consequences, such as data loss or permanent loss of digital content, a process for appealing the decision before it takes effect should be available. Otherwise, the individual would have no recourse other than seeking compensation.[9]

3.4 Human Oversight

Due to the potential risks to ADM, this procedure should involve human intervention in tasks, the expression of one's viewpoint, and a challenge to decisions to ensure that devices never make final decisions affecting people's rights without human oversight. The European Data Protection Board (EDPB) stated that ADM for individuals, including profiling or not, should not result in unjustified consequences for individuals' rights; for example, there should be precise requirements for transparency and fairness, increased obligations for accountability, defined legal grounds for data processing, rights for individuals to contest profiling and, if specific criteria are met, the need to conduct a data protection impact assessment.[10] Human oversight refers to the involvement of humans in an algorithmic work process. It can be achieved through various means, such as supervision at different stages and levels of intensity. These forms of human oversight are sometimes referred to by different names, depending on when and how humans intervene (Fink, 2025). Standards require agencies to conduct a comprehensive, independent algorithmic review by an authorised expert before ADM deployment and/or at specified intervals afterward, and to obtain thorough legal verification to ensure the system complies with relevant laws.[11] Additionally, those responsible for human oversight must fully understand the strengths and weaknesses of the high-risk artificial intelligence system. They need to be able to monitor their operations effectively to quickly detect anomalies, malfunctions, or unexpected behaviours. Moreover, they should be trained to resist any potential automation bias (Hofmann and Pflücke, 2024).

3.5 Avoidance of Decisions Made Solely by an Automated System

This mechanism of reconciliation is outlined in Article 22 of the GDPR, which states that individuals have the right not to be subject to a decision made solely through automated processing (including profiling) that has legal effects for them or similarly

[9] European Law Institute (2022). Guiding Principles for Automated Decision-Making in the EU. Available at: https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Innovation_Paper_on_Guiding_Principles_for_ADM_in_the_EU.pdf (accessed on 24.10.2025).
[10] European Data Protection Board (2017). Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679. Available at: https://ec.europa.eu/newsroom/article29/items/612053/en (accessed on 29.10.2025).
[11] NSW Ombudsman (2023). „Safe and Responsible AI in Australia" discussion paper. Available at: https://consult.industry.gov.au/supporting-responsible-ai/submission/view/357 (accessed on 29.10.2025).

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significantly affects them. This right does not apply if the choice is critical to entering into or carrying out a contract between the individual and the data controller; is allowed by Union or Member State law relevant to the controller, which also defines adequate procedures to protect the rights, liberties, and legitimate interests of the data subject; or is based on the expressed consent of the data subject.[12] Certainly, ensuring the ADM system does not control individuals' decisions solely safeguards their human rights and fosters dignity.

3.6 Transparency

One of the most well-known aspects of the rule of law is that the government must be transparent and follow the rules and decisions it makes (Zalnieriute et al., 2019). Non-transparent systems are more likely to produce unfair outcomes, as it is challenging to assess and adjust their fairness, which is especially concerning for those subject to human decisions (Schoeffer, 2022). As Burrell (2026) noted, opacity appears in three forms: deliberate corporate or state secrecy, technical illiteracy, and opacity arising from the nature of machine learning algorithms and the scale required for their effective use (Burrell, 2016). Finck (2019) added that there are two leading causes of transparency issues in ADM systems. First, the ambiguity of these systems can hide various intentional and unintentional biases and manipulations. Second, the public's ability to challenge the outcomes of these systems is limited by their lack of transparency. Security is another primary concern; as ADM systems are used more frequently, the risk of malicious exploitation increases, including attempts to alter or harm them. Examples include injection or alteration attacks on training datasets or unauthorised extraction of the model (Finck, 2019).

Effective oversight requires clear explanations of when and how ADM systems are used. When a public authority explains a decision to someone affected, these reasons must be meaningful. A complete explanation should include, among other things, that automation was used, the level of automation, the data processed by the ADM system, the date and version of the technology, and a simple explanation of how the technology works. Additionally, the statement should include standard information in decision notices, such as how to challenge or review the decision and who is responsible.[13] As a comparison, the Canada Directive on Automated Decision-Making requires transparency measures, including providing advance notice before decisions, offering justifications afterward, granting access to relevant information, and recording decisions.[14] While transparency about the use of ADM may serve the interests of the administration, it may hurt individuals. Therefore, it is crucial to reconcile effective management with individuals' procedural safeguards.

The European Union AI Act, adopted in 2024, further reinforces these commitments by imposing specific requirements on transparency, explanation, and accountability for the application of high-risk AI systems, such as those used in administrative decision-making. Under Articles 13–15 of the Act, public authorities must take steps to ensure that automated systems are operated so that affected persons can

[12] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

[13] NSW Ombudsman (2023). „Safe and Responsible AI in Australia" discussion paper. Available at: https://consult.industry.gov.au/supporting-responsible-ai/submission/view/357 (accessed on 29.10.2025).

[14] Directive on Automated Decision-Making (2019). Available at: https://www.tbs-sct.canada.ca/pol/doc-eng.aspx?id=32592 (accessed on 12.10.2025).

understand how and why a decision was taken and receive intelligible information on how human control was applied. These comprise record-keeping and reporting requirements on system capabilities and restrictions. These provisions harmonise with traditional administrative law principles (legality, equity, and reasonableness) by shielding efficiency achieved through automation from compromising procedural protections. Hence, the AI Act is a modern legal framework that puts into practice the balancing exercise between innovation in administration and the protection of individual rights.

3.7 Explainability and Interpretability

The algorithms on which the AI-based ADM system relies are complex—understanding how AI systems work is challenging due to their complexity and, in some cases, complete opacity. These so-called black box models can be too complicated for even experienced users to understand.[15] As a result, combining administrative effectiveness with procedural safeguards in the ADM system requires explainability and interpretability, enabling both technical and nontechnical individuals to understand the decisions taken. Explainability refers to how easily a model can explain the logic behind its forecasts or decisions. It involves clearly and understandably explaining how the model transforms inputs into outputs. Interpretability refers to the level of understanding someone has about the reasoning behind an artificial intelligence system's decision (Ailyn, 2024). The reasons for some form of interpretability in AI systems include providing users with confidence in the system, preventing discrimination, satisfying regulatory standards or policy requirements, improving system design, assessing risk, robustness, and vulnerabilities, understanding and validating system results, and encouraging personal independence, empowers individuals to challenge decisions, and fostering a sense of agency in how they are treated.[16] To make artificial intelligence algorithms more understandable and interpretable, a range of techniques and approaches can be used. This entails model simplification, the use of visualisation techniques, feature analysis, and the creation of textual descriptions (Frasca et al., 2024).

3.8 Accountability

The development of current directorial governance requires processes that ensure state institutions remain accountable and responsive to meet the needs of the public they serve (Zhyvko et al., 2025). Administrative accountability calls for government officials to justify their actions and decisions. It comprises being held to account for the results of one's actions. Fundamentally, accountability guarantees that public officials abide by rules and laws while upholding moral principles (Public Administration Institute, n.d.). Regarding ADM, information about its creation and application is essential for assessing the legality of decisions, ensuring the proper functioning of the system, and guiding individuals who wish to protect themselves against unjust or unpredictable intrusions into their lives. It represents a connection between an actor compelled to give an account, a forum that receives it, and the accountability between them. The account's features, as well as any resulting consequences, are also taken into consideration. Accountability has five types: legal responsibility to judicial bodies; political accountability

[15] The Royal Society (2019). Explainable AI: the basics: Policy Briefing, November 2019. Available at: https://ec.europa.eu/futurium/en/system/files/ged/ai-and-interpretability-policy-briefing_creative_commons.pdf (accessed on 30.10.2025).
[16] *Ibid.*

to elected representatives and similar entities; administrative accountability to auditors and regulatory agencies; professional responsibility to internal and external colleagues; and social responsibility to community members and the public (Cobbe et al., 2021). The issue of who is accountable for ADM forms is significant. According to Finnish law, official accountability is personally held by each public official engaged with ADM. However, it has been argued that public organisations should assume responsibility for administrative decisions independently, rather than shifting accountability to individual public officials (Hirvonen, 2024). It appears that accountability for ADM use varies across legal systems. The distinction may appear to stem from the distinction between personal fault, where the fault is attributed to the public official and the public official bears compensation from their fund, and service faults, where the fault is attributed to the facility concerned, which is held liable for providing compensation. However, there are several issues regarding the accountability of algorithms in areas affecting the public sphere. Among the methods are better governance, greater transparency, and outcome monitoring (Shah, 2018). The principle of accountability helps preserve stakeholders' rights, regardless of who bears it.

3.9 The Framework for Reconciling Administrative Efficiency with Procedural Safeguards

The reconciliation of administrative efficiency and procedural safeguards in the use of ADM rests on the idea that, while automation enhances efficiency and consistency in administrative tasks by enabling decisions to be made quickly and effectively, it must be supported by procedural safeguards to protect human rights. The reconciliation process required the administration to act in accordance with established principles, without violating legal rules and principles that safeguard personal rights and freedoms. The reconciliation occurs when specific key mechanisms are satisfied, including compliance with the law, ensuring fairness, exercising rights freely and pursuing justice, providing human oversight, avoiding decisions made solely by automated systems, maintaining transparency in algorithmic decision-making processes, applying principles of explainability and interpretability when automated decisions are made, and upholding accountability standards.

Compliance with the law requires competent administration to adhere to enforceable constitutional and regulatory standards. For example, when ADM processes involve sensitive information, such as racial or ethnic background, political views, religious or philosophical beliefs, trade union membership, or data related to genetics, biometrics, health, or sexual orientation, they must be grounded in legal frameworks, uphold fundamental data protection rights, and incorporate appropriate and measures to safeguard the essential rights and interests of the individual whose data is being processed. Moreover, such processing should be necessary for significant public interest reasons and must be proportional to the intended outcome (William, 2021). About the law's compliance with the human rights safeguards, the Hague District Court of the Netherlands stated that: "*The court has decided that the legislation does not strike a fair balance, as required under the ECHR, which would warrant a sufficiently justified violation of private life.*"[17]

Concerning fairness, decisions made by algorithms should not result in unfair, biased, or unequal outcomes (Starke, 2022). Providing models can increase perceived fairness. Personalised reasoning frameworks tend to positively influence perceptions of

[17] District Court of The Hague. (2020). NJCM et al. v. The Netherlands (SyRI – System Risk Indication), ECLI:NL: RBDHA:2020:1878. Available at: https://www.escr-net.org/wp-content/uploads/2020/09/ecli_nl_rbdha_2020_1878.pdf (accessed on 29.10.2025).

fairness in automated decisions compared to human decisions, and well-crafted justifications can enhance the acceptance of automated governance (Henning and Langenbach, 2025). Furthermore, avoiding the collection of specific protected characteristics, such as race, gender, or age, for ADM can help eliminate discrimination, a form of inequality (Iwan, 2021). Regarding the exercise of rights and the pursuit of justice, the effectiveness of administrative and procedural safeguards in ADM depends on individuals' ability to assert their rights through automated processes that are legally certified, and to seek justice when affected by ADM. Both mechanisms represent the exercise of human rights, which are the right to access information and the right to seek justice before the competent courts of the state. Human oversight necessitates that decision-makers evaluate ADM system outputs, particularly in specific areas of decision-making (Sales, 2024). This requires at least one human operator to actively supervise ADM operations, evaluate the decisions, and intervene, when necessary, by correcting or validating automated outputs before a final decision is made. (Bernardo and Hernández, 2025) .

Reconciliation of administrative efficiency and procedural safeguards can be achieved by avoiding decisions made solely by automated systems, as the Court of Justice for the European Union (CJEU) ruled: "if a decision is based solely on automated processing and that decision significantly affects the individual, then the individual has the right to obtain an explanation of the decision." (Jaworski et al., 2025). Regarding transparency, the CJEU stated that individuals are entitled to comprehensible information about the rationale behind automated decision-making processes, including the significant parameters and their impact on the evaluation. The data controller must go beyond providing merely a complex mathematical formula or vague information; it must ensure that the data subject can understand how the automated decision-making mechanism operates in a specific case (Barbera and D'Ottavio, 2025). *Vis-à-vis* explainability and interpretability mechanisms, concerns how readily a model can clarify the reasoning behind its predictions or choices, and the degree of comprehension an individual has regarding the rationale behind the decisions made by an artificial intelligence system. To ensure accountability, the provider of an ADM system must clarify and justify their actions and establish mechanisms for mitigation and oversight to address and rectify issues (Aysolmaz et al., 2023).

4. RESULTS AND DISCUSSION

The article revealed that reconciling administrative efficiency with procedural safeguards in ADM's use for administrative duties can be achieved through several key mechanisms, including adherence to the law, ensuring fairness, exercising rights freely and pursuing justice, incorporating human oversight, avoiding decisions made solely by automated systems, ensuring transparency, explainability and interpretability to make the ADM- based decisions understandable, and maintaining accountability. The reconciliation between administrative efficiency and procedural safeguards in the ADM's framework usage is crucial. It ensures that ADM decisions comply with enforceable legal rules, which enhances the rule of law, prevents unfair and discriminatory decisions, protects human rights, verifies the legality and appropriateness of decisions through human intervention, respecting the dignity of the human being so that they are not merely the subject of an automated decision, providing openness and clearness in machine-based administrative decisions, clarifying the automated administrative decision-making processes, and confirms that no one escapes accountability, whether the fault is

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attributed to the concerned public official or the institution, which is in the interest of both individuals and the administration.

The main result of the article aligns with the existing literature. Veale et al. (2018) noted that there is an increasing call for greater emphasis on fairness and accountability in public decisions driven by algorithms, such as those related to taxation, justice, and child protection (Veale et al., 2018). Suksi (2020) noted that legal systems exist under which individuals responsible for or involved in software within public authorities may also be held accountable and liable for automated decision-making decisions (Suksi, 2020). Ng et al. (2020) reported that the Australian Department of Social Services' recent use of an automated debt collection system has generated controversy, underscoring how government decision-making automation raises key legal issues, such as transparency, procedural justice, and the ability to review decisions. (Ng et al., 2020) The Future of Privacy Forum (2022) indicates that, in ADM cases, the concepts of fairness and lawfulness are approached differently.[18] Green (2022) emphasised that a vital component of global efforts to regulate government algorithms is the requirement for human oversight of algorithmic decisions. Despite the widespread movement toward human oversight (Green, 2022), Malgieri (2019) pointed out that an intriguing safeguard is the ability to challenge automated decisions (Malgieri, 2019). Ailyn (2024) explained that when using complex models, such as neural networks, explainability is crucial because understanding individual predictions can be vital for informed decision-making. Conversely, in high-stakes scenarios such as legal rulings or medical diagnostics, where the model must be entirely transparent and easy to interpret, clarity is preferred (Ailyn, 2024). Similarly, Zou and Zhang (2022) demonstrated that the often-hidden inner workings of machine learning algorithms can leave individuals vulnerable if they lack the right to an explanation. Therefore, the right to an explanation of such decisions has become a significant legal concern (Zou and Zhang, 2022).

The paper's results emphasise the importance of governance mechanisms that reconcile administrative efficiency with procedural safeguards.

While this article offers valuable insights into reconciling administrative efficiency and procedural safeguards, some limitations should be noted. The paper did not cover specific ADM mechanisms, such as making systems inclusive and accessible to diverse populations, involving stakeholders in the design and development of ADM policies, providing fair and accessible methods to correct errors, and applying the principle of proportionality to match protective measures with the level of impact from automated decisions.

5. CONCLUSION

The article examined the reconciliation between administrative efficiency and procedural safeguards when the ADM system is employed. The results showed that various essential mechanisms for reconciling administrative efficiency with procedural safeguards in ADM are utilised for administrative tasks. The paper is a general framework for future research to investigate the reconciliation between administrative efficiency and primary mechanisms, such as compliance with law, human oversight, fairness, avoidance of decisions made solely by an automated system, transparency, and accountability, as independent topics. Additionally, it suggests that

[18] Future of Privacy Forum. (2022). Automated decision-making under the GDPR: Practical cases from courts and data protection authorities (Report). Available at: https://fpf.org/wp-content/uploads/2022/05/FPF-ADM-Report-R2-singles.pdf (accessed on 24.10.2025).

future research should evaluate how ADM affects jurisdiction, form, and purpose, providing reasons as fundamental aspects of administrative decisions.

The results of this paper demonstrate that procedural protection and efficacy are not contradictory values but complementary aspects of legitimate administration. An administrative automaton is only feasible for optimising quality and consistency if it is based on a transparent, accountable framework. The reconciliation model presented demonstrates that incorporating procedural assurances into the structure and operation of ADM systems ensures that administrations achieve performance improvements without compromising legality and fairness. Thus, the rule of law is a precondition of technological success rather than an external straitjacket.

These results have significant implications for policymakers and researchers. Public governments must move beyond compliance checklists and adopt proactive governance models that integrate human intervention, documentation, and transparency across all stages of ADM implementation. Future research would examine the actual use of such safeguards across EU and non-EU Member States to identify the impact of institutional design on accountability outcomes. Strengthening this empirical and comparative approach will be essential to ensuring that ADM delivers both administrative effectiveness and citizens' fundamental rights in the future.

Effectively, this work serves as a starting point for the future. Rather than creating new empirical evidence, it explains and synthesises existing knowledge to assist in structuring subsequent research into how public administrations can responsibly and effectively utilise automated decision-making.

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AI-DRIVEN WEARABLES IN HEALTHCARE: RETHINKING THE LEGAL FRAMEWORK FOR SMARTWATCHES

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Abstract: *The increasing use of wearable technologies like smartwatches has revolutionised personal health tracking, offering features such as heart rate monitoring and atrial fibrillation detection. Despite their advanced health-monitoring capabilities, these devices are still classified as consumer electronics rather than medical devices within the legal frameworks of the European Union and Slovakia. This legal distinction poses significant challenges related to user safety, device reliability, and regulatory oversight. Current regulations, including the European Union's Medical Devices Regulation, impose strict standards on medical devices that smartwatches, as wellness products, are not required to meet. This paper examines the legal rationale behind the non-classification of smartwatches as medical devices and highlights the gaps in regulatory frameworks. Through a comparative analysis of Slovak and European laws, the study reveals the challenges in regulating AI-driven wearables and suggests the need for legal reforms to better integrate these technologies into healthcare, ensuring a balance between innovation, safety, and accountability.*

Key words: *Information Technology Law; Medical Device Regulation; AI-Driven Wearables; Health Monitoring; Technologies in Healthcare*

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1. INTRODUCTION

The fast development of smart wearable technologies (hereinafter referred to as the "**smart wearables**" or the "**wearables**") over the last years has significantly influenced the way people monitor their health and overall well-being. Smart wearables are defined as a subset of the Internet of Things (Moshawrab et al., 2022). A good example of this trend is **smartwatches**, which have transformed from a simple time-keeping accessory into a multifunctional device capable of measuring vital signs, tracking fitness parameters, monitoring pulse or oxygen saturation, and even detecting potential health risks such as irregular heart rhythms (Hudock et al., 2024). These devices often **incorporate artificial intelligence** (hereinafter referred to as the "**AI**") which enables them to process health data and provide users with an interpretation of various outcomes (Hosseini et al., 2023). To illustrate, we can mention a smartwatch developed by the American company Apple, which integrates electrocardiogram functionality (hereinafter referred to as the "**ECG**") allowing users to monitor heart rhythms and detect anomalies that could indicate conditions like atrial fibrillation.[1] Nevertheless, despite offering functions that closely align with those of medical devices, smartwatches are not classified as medical devices, as they are not intended for medical purposes (Ribeiro,

[1] Apple Inc. has conducted multiple clinical trials to validate its wearable health features, including the ECG app and Irregular Rhythm Notification, demonstrating their effectiveness in detecting atrial fibrillation (Apple Heart Study, 2018).

2023). This criterion forms one of the defining characteristics of a medical device under the legislation, which will be further discussed below in this paper.

The European Union (hereinafter referred to as the "**EU**") adopted Regulation (EU) 2017/745 of the European Parliament and of the Council on medical devices[2] (hereinafter referred to as the "**Medical Devices Regulation**" or "**MDR**") that prescribes **safety requirements** ensuring that products marketed for medical purposes are clinically tested, reliable, and effective. Among its most important provisions is the obligation of a **clinical evaluation**, which Article 2(4) MDR defines as a systematic and planned process of generating, collecting, analysing, and assessing clinical data in order to verify a device's safety, performance, and clinical benefit for its intended use. The Medical Devices Regulation also provides a **legal definition of a medical device**[3] that is closely tied to its specific intended medical purpose.

In practice, however, smartwatches are marketed as tools for **consumer purposes** rather than explicit medical use, which excludes them from the legal category of medical devices (Ribeiro, 2023). Consequently, unlike certified medical devices, smartwatches are not subject to demanding conformity assessments, which leaves a regulatory gap and creates the question of whether the current legal framework should be re-evaluated to reflect the increasing medical potential of AI-driven wearables (Bouderhem, 2023).

Manufacturers such as Fitbit, Garmin, and Apple have successfully capitalised on rising consumer interest in accessible and affordable health-monitoring tools (Pekas et al., 2023). While these products undoubtedly offer valuable insights into users' daily activity, heart rate, or sleep quality, their ability to provide clinically actionable information remains disputed (Alzahrani et al., 2025). Apple and Fitbit have actively sought regulatory clearance for their ECG and irregular rhythm notification features through a process, which ensures that these features meet safety and effectiveness standards similar to other legally marketed medical devices. For example, consumer-grade wearable devices produced by Apple and Fitbit have been cleared by the United States Food and Drug Administration for pre-diagnostic detection of atrial fibrillation, indicating that these health-related functions have undergone regulatory review to ensure safety and effectiveness comparable to that required for traditional medical devices (Jamieson, 2025).

This paper studies why smartwatches are not legally classified as medical devices. It shows gaps in the current legislation and considers what reforms could be needed. The core of the study is the issue of whether smartwatches and other AI-driven wearables should be considered medical devices, since they are becoming increasingly important in health monitoring.

[2] Regulation (EU) 2017/745 of the European Parliament and of the Council on medical devices which amends Directive 2001/83/EC, Regulation (EC) No. 178/2002, and Regulation (EC) No. 1223/2009, and repeals Council Directives 90/385/EEC and 93/42/EEC.

[3] Article 2(1) of the MDR: Medical device means any instrument, apparatus, appliance, software, implant, reagent, material or other article intended by the manufacturer to be used, alone or in combination, for human beings for one or more of the following specific medical purposes:

- diagnosis, prevention, monitoring, prediction, prognosis, treatment or alleviation of disease,
- diagnosis, monitoring, treatment, alleviation of, or compensation for, an injury or disability,
- investigation, replacement or modification of the anatomy or of a physiological or pathological process or state,
- providing information by means of in vitro examination of specimens derived from the human body, including organ, blood and tissue donations,

and which does not achieve its principal intended action by pharmacological, immunological or metabolic means, in or on the human body, but which may be assisted in its function by such means.

The starting point is the assumption that EU regulations do not have the same speed as technological change. Current definitions and legal frameworks do not fully reflect the functions smartwatches now have, especially when AI is involved.

The research is based on an analysis of Slovak and EU laws on medical devices. It reviews legislation, regulations, and relevant case law to see how medical devices are defined and how smartwatches are placed within those definitions. Based on this study, the paper asks whether the legislation should be updated so that smartwatches and other similar devices are considered medical devices. In conclusion, the paper suggests ways in which the law could be changed to address innovation, aiming to balance safety, accountability, and the opportunities.

2. THE USE OF ARTIFICIAL INTELLIGENCE IN HEALTHCARE

There is no doubt that artificial intelligence has become important in health care. It is not just clinical diagnosis and treatment, but also the managing of health data and improving patient care. To the extent that AI-driven tools are more widely utilised, it is clear that legal and ethical guidelines are essential to their safe and transparent use (Al Kuwaiti et al., 2023). The health data area focuses on the management and analysis of the overabundance of health data produced by wearables, but it raises ethical data use, and privacy questions. Transparency and accountability here are crucial for keeping the users´ trust and keeping this industry growing in a responsible manner (Radanliev, 2025).

In May 2024, the European Union adopted the Artificial Intelligence Act[4] (hereinafter the "**AI Act**"), a set of rules to harmonise AI regulation with the aim of promoting the development and use of safe and reliable AI in the European market, maintaining the protection of fundamental rights. According to Article 3(1) of the AI Act , AI systems are defined as a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments.

Artificial intelligence is now an important element for health care, especially in connection with e-Health and telemedicine. These institutes provide unique opportunities for remote health monitoring, with patients being able to gain and transfer their own physiological measurements to healthcare professionals. Smart wearables, such as smartwatches, can instantly detect human physiological signals and act as a bridge between patients and doctors. But despite their effectiveness, they are not well-regulated and are in a grey zone between wellness and medical devices (Fong et al., 2011).

The current regulatory system, including the EU system, lags behind the passage of AI technology into health care, especially in the world of wearables, and is featured in several recent analyses (Brönneke et al., 2021). This regulatory deficit has been recognised, with laws evolving more slowly than technology, resulting in ambiguous oversight of AI-powered wearable devices, particularly concerning data privacy, security, and interoperability (Iqbal and Biller-Andorno, 2022).

[4] Regulation no. 2024/1689 of the European Parliament and of the Council laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act).

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The most significant developments in this space involve AI systems used for diagnosis, treatment planning, and surgery. The applications of AI in healthcare services are broad and are expected to assist, automate, and augment several healthcare services. Like any other emerging innovation, AI in healthcare also comes with its own risks and requires regulatory controls (Palaniappan et al., 2024).

3. REMOTE HEALTH MONITORING

One of the primary capabilities of AI in telemedicine is remote monitoring, which is also called **self-monitoring**. This approach allows patients to log information about their health in a nonmedical setting, giving them independence and control over their own health care. This data can then be shared with doctors so that early detection is possible, as well as continuous care and decision-making based on data. Research shows that many wearables with AI improve efficacy and accuracy while making health care more personal (Shaik et al., 2023).

Wearable technologies, such as smartwatches, equipped with **heart rate monitors and ECG capabilities**, or chest straps that measure **pulse rates**, exemplify the possibilities of AI in remote health monitoring.[5] AI-driven wearables have revolutionised patient monitoring, providing real-time health insights that enable earlier diagnosis and intervention (Bohr and Memarzadeh, 2020). **Mobile applications** available on smartphones, often connected to smartwatches, further improve patients´ ability to collect and transmit health-related data, improving the accessibility of health management tools (Li, 2019).

One of the major challenges of monitoring through wearable technologies, in the area of health care, is the seamless integration of the data they collect into electronic health records (hereinafter referred to as the "**EHR**") (Canali et al., 2022). The lack of standardised data formats, shared protocols, and interoperability means that wearable-generated health data often cannot be uploaded to electronic health records or clinical databases (Canali et al., 2022). To adequately integrate wearable technologies into the existing health record systems, it is crucial to address both the technical interoperability and the legal frameworks that govern data sharing and patient privacy (Tong, 2018).

In Slovakia, according to § 5(4) of Act No. 153/2013 Coll. on the National Health Information System (hereinafter referred to as the "**NHIS Act**"), while patients can manually enter basic data into their **electronic health book**[6], the system currently does not support uploading files such as Portable Document Format (PDF), which creates a technical gap in the integration of wearable-generated data directly into the EHR.[7] This type of communication might be beneficial in monitoring the patient's health in the long term or in dealing with various chronic conditions.

Other than the technical obstacles, one of the biggest issues is the **legal definition of wearable devices**. In the EU, the Medical Devices Regulation describes criteria for defining medical devices, including requirements for testing, certification, and compliance with safety standards. However, wearable technologies often occupy a grey area, being marketed primarily as wellness products rather than medical devices, despite their growing role in remote health monitoring. As the line between wellness wearables and medical devices becomes more difficult to distinguish, a single wearable device can already monitor a collection of different medical risk factors (Piwek et al., 2016).

[5] Devices with ECG measurement capabilities record electrical signals from the heart, providing healthcare professionals with critical information on heart rhythms and potential anomalies, such as atrial fibrillation.
[6] Section 5 (1) d) of the NHIS Act.
[7] Own research made by accessing electronic health book.

Wearable products can be broadly defined as mobile electronic devices that can be unobtrusively embedded in the user's outfit as part of clothing or an accessory. Unlike conventional mobile systems, they can be operational and accessed with little or no hindrance to user activity. To this end, they can model and recognise user activity, state, and the surrounding situation, a property referred to as context sensitivity (Lukowicz et al., 2004). This specificity, however, further complicates their legal classification, as they do not easily fit into traditional regulatory categories. The absence of clear legal definitions and classifications of such devices under **standard diagnostic, treatment, or therapeutic procedures** raises questions about their regulatory status and creates an obstacle to their being approved by doctors, healthcare providers, including insurance companies, which in turn limits their integration into formalised health care systems.

Smartwatches have the potential to transform patient care by providing continuous data streams, however, their regulatory oversight lags behind, raising questions of safety and efficacy in medical contexts (Matheny et al., 2019). Some authors also see other issues, such as concerns about system interoperability and patient data overload that pose a challenge to the adoption of wearables by healthcare providers (Dinh-Le et al., 2021). Additionally, concerns over **data security** and **patient privacy** must be addressed to ensure compliance with EU regulations, particularly those found in the General Data Protection Regulation (GDPR)[8] (Yigzaw et al., 2022).

The inclusion of AI-driven wearables in healthcare requires the re-evaluation of existing laws to ensure these technologies meet the required safety, accuracy, and accountability standards (Fong et al., 2011).

4. LEGAL FRAMEWORK FOR MEDICAL DEVICES: FOUR ARGUMENTS FOR APPLYING IT TO AI-DRIVEN WEARABLES

In the context of legislation, it is crucial to thoroughly examine the legal definition of medical devices at both the European Union and the Slovak Republic levels. At the EU level, **the key legal instrument is the Medical Devices Regulation**, which describes a medical device as any product, whether physical or software-based, intended by the manufacturer to be used for human beings with a defined medical function. These functions may include, for instance, the diagnosis, prevention, or monitoring of diseases; the treatment or compensation of injuries or disabilities; or the examination, modification, or replacement of physiological or anatomical processes. Importantly, the regulation clarifies that such devices achieve their principal intended effect without relying on pharmacological, immunological, or metabolic mechanisms, although these may assist the device's function. In vitro diagnostic purposes, such as analysing samples from the human body to provide relevant medical information, also fall within the scope of this definition.[9] Additionally, the regulation includes certain products under the category of medical devices, such as devices intended for the control or regulation of conception, and products specifically designed for cleaning, disinfecting, or sterilising medical devices.[10]

[8] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).
[9] Regulation of the European Parliament and the Council (EU) no. 2017/745 on medical devices, amending Directive 2001/83/EC, Regulation (EC) no. 17.8/2002 and Regulation (EC) No. 1223/2009 and on the repeal of Council Directives 90/385/EEC and 93/42/EEC.
[10] Regulation of the European Parliament and the Council (EU) no. 2017/745 on medical devices, amending Directive 2001/83/EC, Regulation (EC) no. 17.8/2002 and Regulation (EC) No. 1223/2009 and on the repeal of Council Directives 90/385/EEC and 93/42/EEC.

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At the Slovak national level, Act No. 362/2011 Coll. on medicines and medical devices and on the amendment of certain laws (hereinafter referred to as the "**Medicines Act**"), further differentiates between in vitro[11] diagnostic medical devices, single-use[12] medical devices, custom-made[13] medical devices, and medical devices intended for clinical trials.[14] This legislation defines medical devices in ways closely aligned with the EU regulation but introduces provisions linked to transitional circumstances such as the COVID-19 pandemic. For example, Section 143(k) of the Slovak Medicines Act defines the core legal concepts applicable to medical devices. According to this provision, a medical device encompasses a wide range of products, such as instruments, apparatuses, materials, devices, computer programs, or other products intended by the manufacturer to be used on humans for a defined medical objective. These objectives include diagnostic, preventive, monitoring, or therapeutic purposes; mitigating the effects of disease or injury; supporting or compensating for anatomical or physiological functions; or controlling human reproduction.[15] Importantly, the primary intended function of such devices must not rely on pharmacological, immunological, or metabolic mechanisms, although these may support the device's operation. The legal definition also extends to accessories specifically designed to be used in conjunction with a medical device.[16] The relevant amendment to the Medicines Act was introduced via Act No. 165/2020 Coll., which amends Act no. 362/2011 Coll. on medicines and medical devices and on the amendment of certain laws and amends certain laws, which introduced provisions regulating essential terms for the field of medical devices. These provisions encompass online distribution, manufacturer registration, clinical testing, market entry, procedures for missing or incorrect CE marking, safety and health protection measures, confidentiality obligations, and the recording of accidents, malfunctions, or failures of a

[11] **In vitro diagnostic medical device** is a medical device that is a) a reagent, reagent product, calibration material, control material, or their set, tool, device, or system used alone or in combination, intended by the manufacturer for in vitro evaluation of samples originating from the human body, including donated blood or tissue, in particular for the purpose of providing information 1. relating to a physiological or pathological condition, 2. relating to a birth defect, 3. enabling the determination of safety and tolerability for a possible recipient, 4. enabling the control of therapeutic measures, 5. enabling self-diagnosis by non-experts in the home environment, or 6. enabling evaluation of the functionality of the diagnostic medical device in vitro, b) a container for samples, regardless of whether it is of the vacuum type or not, specifically designated by the manufacturer for the direct collection of a sample originating from the human body, and for its storage for an in vitro diagnostic test, c) a product intended for general use in the laboratory, if, due to its characteristic properties, it has been specifically designated by the manufacturer for in vitro diagnostic tests, d) an accessory of an in vitro diagnostic medical device, which is specifically intended by the manufacturer for use together with an in vitro diagnostic medical device in accordance with its intended purpose, except for invasive medical devices intended for sampling and medical devices coming into direct contact with the human body, intended for obtaining a sample.
Section 2 (19) of the Medicines Act.

[12] **A single-use medical device** is a medical device intended for single use for one patient.
Section 2 (29) of the Medicines Act.

[13] **A custom-made medical device** is a medical device individually manufactured according to a medical order, which was prescribed by a doctor with the required specialisation under his responsibility and who determined the characteristic properties of the medical device and the purpose of its use only for the given patient, clearly identified by name, surname, or birth number.
Section 2 (30) of the Medicines Act.

[14] **A medical device intended for clinical testing** is a medical device intended for clinical testing by a doctor with the required specialisation or another person with professional competence to conduct clinical testing in a medical facility.
Section 2 (31) of the Medicines Act.

[15] Act No. 362/2011 Coll. on Medicines and Medical Devices and on the amendment of certain laws.

[16] Act No. 362/2011 Coll. on Medicines and Medical Devices and on the amendment of certain laws.

medical device after its release into the market. These regulations were in force from May 26, 2020, to May 25, 2021.[17]

While the Medical Devices regulation remains the primary legal framework governing medical devices, it is not the only regulation relevant to AI-driven wearables.

Recently enacted as the AI Act, it represents the European Union's first horizontal regulation focusing on the applications of artificial intelligence. Moreover, AI-driven wearables use algorithms to monitor health, classify, and predict different needs of the user. Hence, it is also necessary to analyse their inclusion in the scope of the AI Act. Its **approach is risk-based**, defining AI systems based on the potential harm they might cause to humans (health and safety) or their fundamental rights. A remarkable condition for the AI system to be classified as high-risk in this context is that it must either form a safety component of a wider product, or itself be treated as an autonomous product, and that such product be covered by one of the existing EU harmonisation acts listed in Annex I. In both cases, and only then, could it be deemed high-risk if said product must undergo a conformity assessment conducted by an independent third party before being able to legally become available on the EU market or be put into use. This regulation mechanism guarantees that AI systems employed in critical applications (like medical devices) meet the established safety and performance requirements before entering the market.[18]

Devices equipped with artificial intelligence are likely to be categorised as high-risk AI systems under the EU AI Act (Mesarčík, Gyurász et al., 2024). If such products provide real-time health recommendations, detect medical conditions, or influence treatment decisions, they align with AI systems that pose significant risks to health and patient safety (Fraser et al., 2023). However, we believe that not all AI-driven wearables are automatically deemed high-risk.

Article 6 (3) of the AI Act allows AI systems listed in Annex III to be excluded from being classified as high-risk in cases where they do not pose a greater level or type of risk, provided that the risks to health and safety or fundamental rights of individuals are insignificant and there is no significant effect or material change as a result of using the system, which mainly affects decision-making. This provision includes general wellness products such as pedometers or basic heart rate monitors. Generally, these systems are intended for well-being rather than medical applications and therefore do not meet the high-risk criteria. The difference is whether the AI features in these wearables have a direct impact on medical decision-making or health outcomes (Aboy et al., 2024).

The cross-reading of the Medical Devices Regulation and the AI Act reveals how AI-driven wearable technologies represent a regulatory limbo, where the existing legal frameworks are not able to fully understand nor to satisfactorily cover their dual nature, which combines medical features with a consumer-friendly approach and autonomous capabilities, and makes classic definitions unclear (Mennella et al., 2024).

The legal framework of the debated issue also comprises the **Regulation of the European Health Data Space** (hereinafter referred to as the "**EHDS**")[19] which aims to empower citizens with unobstructed access to and control over their electronic medical records, to secure cross-border free flow of health data in the European Union for individual care as well as for secondary purposes, and to promote a unified digital health

[17] Act No. 165/2020 Coll., amending Act no. 362/2011 Coll. on medicines and medical devices and on the amendment of certain laws and amending certain other laws.
[18] Article 6 (1)(a) and 6 (1)(b) of the AI Act.
[19] Regulation of the European Parliament and the Council (EU) no. 2025/327 on the European Health Data Space and amending Directive 2011/24/EU and Regulation (EU) 2024/2847.

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system.[20] Through implementing the EHDS, the European Union has established a harmonised legal framework for access, use, and exchange of electronic health data across member states.

No direct reference to wearables is made in the EHDS, but it could be interpreted that these are included by reading the definitions used within. For instance, the definition of an *electronic health data access service*[21] would include mobile applications that provide people with the ability to access their own electronic health data, which is something typically realised through wearable interface devices. Also, by way of the regulation, the EHDS defines an *electronic health record system or EHR system*[22] as a system, including hardware, software, or a combination, that can be used by healthcare providers or patients to store, process, or view priority categories of personal electronic health data.

As many of these wearable technologies are meant to gather and transmit such information for use by the patient or for inclusion in healthcare services, their role clearly falls within the scope of the EHDS framework.

The inclusion of wearable-derived data in the EHDS strengthens fundamental principles like the protection of data, transparency, and interoperability. AI-driven wearables also process sensitive personal data, bringing serious questions of data privacy, interoperability, and security to the fore. The electronic health record, which exists in the digital space, represents a risk in terms of its vulnerability to the disclosure of highly sensitive data. The digital age brings new ways of compromising privacy, but technologies can be used to improve and protect privacy. The application of an encryption system should contribute to this (Nastič, 2021).

Because of the nature of these devices, as many collect and analyse real-time biometric data, including heart rate, blood oxygen levels, and electrocardiogram readings, it is important that they conform to EU rules designed to protect individuals' data. AI-driven wearables additionally support the development of third-party applications, which can thereby gain access to the data collected by these devices.[23]

In doing so, such data collected through wearables should be processed lawfully, fairly, and in a transparent manner in accordance with the **General Data Protection Regulation** (hereinafter referred to as the "**GDPR**")[24], which represents the EU leading regulatory framework for personal health data. The GDPR sets out several key principles and obligations that have a direct impact on the use of AI-driven wearables in healthcare and personal health monitoring, such as lawfulness, fairness and transparency, purpose limitation, data minimisation, data security and protection measures, user control and data access rights, accountability and compliance obligations.

The balancing act of the Medical Devices Regulation, the AI Act, and the GDPR leads to a challenging labyrinth for compliance concerning AI-driven wearables, as some safety requirements for devices are covered in one framework, while governance of AI is captured by another, and data privacy with yet another:

- The Medical Devices Regulation determines whether **an AI-driven wearable is a medical device** that must adhere to safety and effectiveness criteria.

[20] Recital 1 of the EHDS.
[21] Article 2 (1)(h) of the EHDS.
[22] Article 2 (1)(k) of the EHDS.
[23] Article 29 Data Protection Working Party: Opinion No. 8/2014 on the Recent Developments in the Internet of Things.
[24] Regulation of the European Parliament and of the Council (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

- The AI Act regulates the **risk classification of AI in wearables** and imposes additional regulatory obligations with respect to high-risk AI applications.
- The GDPR **ensures the lawful and secure processing of personal health data** from AI-driven wearables, providing fundamental rights for users to have control over their biometric and health record information.

Medical device classification and smartwatches

One of the questions that's rightly been asked is whether smartwatches or other AI-driven wearables could be considered medical devices in the existing legal system.

The following are some of the most relevant criteria derived from the MDR that can be part of an analysis framework:

a) The nature of the device
b) The intended user of the device
c) The specific medical purpose of the device
d) The negative definition concerning the principal effect of the device

4.1 The Nature of the Device

To qualify as a medical device, the product must fall within one of the various categories stated in Article 2(1) of the Medical Devices Regulation, such as an **instrument, apparatus, appliance, software, implant, reagent, material, or other article** intended by the manufacturer to be used, alone or in combination, for human beings.

Before the consideration of the qualification of smartwatches under this criterion, a discussion on "software" is in order. Regulations on medical healthcare do not define what software is, but we can refer to EU documents, as in the case of guidelines regarding the Medical Devices Regulation. Although healthcare legislation does not specifically define software, this is now clarified by secondary guidelines enacted under the Medical Devices Regulation, such as MDCG 2021-24[25], which clarify that software can be considered an active medical device if it is designed for monitoring or diagnosing medical conditions.[26]

From a technical standpoint, software can be described as a structured set of programmed instructions designed to process input data and generate corresponding outputs.[27] In regulatory terms, the relevant EU guidelines frequently refer to the Medical Devices Regulation, particularly Annex VIII, which classifies certain software as active devices when they are intended, either independently or as part of a system, to acquire information for the purpose of identifying, diagnosing, monitoring, or treating physiological or pathological states, including congenital anomalies.[28] Artificial intelligence may form part of a medical device or, in the case of autonomous control, constitute standalone software, which has functions distinct from ordinary data archiving or storage (Mesarčík and Gyurász, 2020; cf. Kamanjasevic and Biasin, 2020). In this context, the judgment of the European Court of Justice in the SNITEM case[29] provides important clarification regarding the classification of software as a medical device. The

[25] MDCG 2021-24 Guidance on classification of medical devices.
[26] MDCG 2021-24 Guidance on classification of medical devices. 2021, p. 11.
[27]MDCG 2019-11 Guidance on Qualification and Classification of Software in Regulation (EU) 2017/745 – MDR and Regulation (EU) 2017/746 – IVDR, 2019, p. 5.
[28] Regulation of the European Parliament and the Council (EU) no. 2017/745 on medical devices, amending Directive 2001/83/EC, Regulation (EC) no. 17.8/2002 and Regulation (EC) No. 1223/2009 and on the repeal of Council Directives 90/385/EEC and 93/42/EEC.
[29] For a more detailed analysis of the decision, see: Minssen, Mimler and Mak (2020).

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court emphasised that it is not necessary for the software to exert a direct or indirect effect on the human body to fall under the scope of the Medical Devices Regulation. Rather, the decisive criterion is the manufacturer's stated intention: if the software is specifically designed for a medical purpose as defined in the applicable legislation, it may qualify as a medical device regardless of whether it physically interacts with the patient.[30] Conversely, the MEDDEV 2.1/6 guideline on the qualification and classification of standalone software (hereinafter referred to as the "**MEDDEV 2.1/6 guideline**") used in healthcare specifies that software cannot be considered a medical device if it merely stores, archives, or compresses data without any loss, or if it simply facilitates data retrieval. Software functioning as an electronic database, which allows searching of metadata without altering or interpreting it, does not fulfil the requirements to be classified as a medical device.[31]

MDCG 2019-11 Guidance on Qualification and Classification of Software in Regulation (EU) 2017/745 – MDR and Regulation (EU) 2017/746 – IVDR lists examples of **software that, in itself, meets the definition of a medical device**. These include, for instance, **smartwatch applications** whose medical purpose is to send alerts to a physician upon detecting abnormalities in physiological parameters. In the case of software available on wearable devices, it typically involves software designed to be used in combination with specific hardware. For instance, Apple clarifies that certain components of the Series 7 Apple Watch, such as the electrical heart sensor and ECG app, have been approved as medical devices, while others, like the blood oxygen (SpO_2) sensor, are not. According to Apple's official documentation, measurements from the Blood Oxygen app are not intended for medical use, including self-diagnosis or medical consultations, and are designed solely for general fitness and wellness purposes.[32]

By contrast, the ECG feature is classified as a medical device and comes with explicit limitations: it mandates the latest versions of watchOS and iOS, should not be used by users under 22 years old, and is unsuitable for people previously diagnosed with atrial fibrillation. SpO_2 results serve as personal wellness indicators without diagnostic value, while the ECG app has specific clearance to detect atrial fibrillation activity (Scheid et al., 2023).

Now that it has been made clear when software should be deemed to constitute a medical device, the question arises: When does this apply to smartwatches?

Smart wearables, such as smartwatches, therefore trigger interesting questions regarding which category they would belong to in Article 2 (1) of the Medical Devices Regulation. From a regulatory standpoint, such devices can be classified as instruments or appliances based on their hardware features, such as sensors, processors, and communication modules that are intended for monitoring and relaying physiological information. Meanwhile, the performance of such devices is mostly determined by operating software programs that process the accumulated data and produce medically useful information or outputs (for example, alerts or diagnostic impressions). With these two sides considered, smart wearable devices may fall into more than one device

[30] Decision of the Court of Justice of the EU of 7 December 2017 in case C -329/16, Syndicat national de l'industrie des technologies médicales (Snitem), Philips France v Premier ministre, Ministre des Affaires sociales et de la Santé , Santé decision.

[31] MEDDEV 2.1/6 – Guidelines on the qualification and classification of stand alone software used in healthcare within the regulatory framework of medical devices. 2016, p. 3.

[32] Which Apple Watch Is Right for You? Available at: https://www.apple.com/watch/compare/?afid=p238%7CsNZgeoZeS-dc_mtid_1870765e38482_pcrid_601516710177_pgrid_99322576784_pntwk_g_pchan__pexid_30368077007_&cid=aos-us-kwgo---slid-gsi8KLF7--product- (accessed on 14.07.2025).

category in Article 2 (1) of the Medical Devices Regulation. Therefore, it can be concluded that they meet the first requirement to qualify as a medical device, which is being one of the designated types of products.

4.2 The Intended User of the Device

The second characteristic that should be considered concerns the identification of the **user** of the medical device **for whom it is intended** and, in line with Article 2(1) of the Medical Devices Regulation, that user must be **only a human being**. All the smart wearables discussed, including smartwatches and other AI-driven wearables, are clearly intended for human use.

However, neither existing legislation nor European Commission guidelines provide an explicit definition of "human usability". As such, only pragmatic interpretations and *a contrario* arguments can be applied.

The MEDDEV 2.1/6 guideline provides insight into activities that do and do not fall under the scope of software for the benefit of individual patients. An example of software for the benefit of individual patients is software intended to be used for the evaluation of patient data to support or influence the medical care provided to that patient. Examples of software that are not considered as being for the benefit of individual patients are those that aggregate population data, provide generic diagnostic or treatment pathways, scientific literature, medical atlases, models, and templates, as well as software for epidemiologic studies or registers.[33]

In conclusion, AI-driven wearables used to monitor and analyse health data specific to an individual and potentially influence personal healthcare decisions are more likely to fall within the regulatory scope of medical devices, provided that other definitional criteria are also met. The health and safety monitoring function of wearable devices is mainly used for older adults, children, pregnant women, and patient groups (Lu et al., 2020).

4.3 The Specific Medical Purpose of the Device

The third criterion is more precisely defined in Article 2(1) of the Medical Devices Regulation, as it concerns the requirement that the medical device must be intended for **one of the specific medical purposes** exhaustively listed in the relevant legislation.[34]

In the Medical Devices Regulation, the term "monitoring" is not defined expansively but is limited, in Article 2(1), to the monitoring of a disease, injury, or disability. As such, this difference is important, as not all devices worn on the body are designed for these purposes. For example, a general smartwatch that monitors fitness data, such as step count or calorie intake, is not, in our view, medical monitoring. On the other hand, an

[33] MEDDEV 2.1/6 – Guidelines on the qualification and classification of stand-alone software used in healthcare within the regulatory framework of medical devices. 2016, p. 12.

[34] Medical purposes are part of the definition of a medical device:

- diagnosis, prevention, monitoring, prediction, prognosis, treatment, or alleviation of disease;
- diagnosis, monitoring, treatment, alleviation, or compensation for an injury or disability;
- investigation, replacement, or modification of the anatomy or of a physiological or pathological process or condition;
- the provision of information by means of in vitro examination of specimens derived from the human body, including blood and tissue donations, provided that the principal intended action of the device is not achieved by pharmacological, immunological, or metabolic means, although such means may assist in its function.

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instrument able to detect atrial fibrillation or to monitor blood oxygen levels in chronically ill patients, does fulfil this criterion.

Secondly, the notion of medical purpose in the Medical Devices Regulation implies that it includes activities typically involving a medical skill or professional experience. This raises the question of whether the legislation applies mainly to devices for healthcare professionals or if it also applies to wearables developed for self-monitoring by lay users. In this regard, the Medical Devices Regulation definition of "user"[35] is pertinent to note. This implies that medical devices should not only be designed for exclusive healthcare professionals but also for patients at home.

We therefore think that wearables allowing individuals to analyse their own state of health cannot be automatically withdrawn from the scope of medical devices only because they are employed by lay users.

As with the previous characteristic, existing European case law can further clarify this requirement. In particular, the Court of Justice of the EU (hereinafter referred to as the "**CJEU**") in Brain Products GmbH established that if a manufacturer did not design its product for medical purposes, it cannot be required to be certified as a medical device. A product is only classified as a medical device when it is specifically intended for a medical purpose. The subject of the dispute was a device called ActiveTwo, manufactured by BioSemi and others, used for measuring physiological signals. The company Brain Products claimed that the device fulfilled the definition of a medical device. Since it lacked the CE marking, which is mandatory for placing medical devices on the market, Brain Products sought to prohibit its commercialisation. In response, BioSemi and others argued that the ActiveTwo device was not intended for medical purposes and therefore did not fall within the scope of the medical device definition. The German national court made a reference for a preliminary ruling to the CJEU, inquiring whether the medical purpose defined by the manufacturer is an essential characteristic of what constitutes a medical device. The CJEU held that the intended medical purpose of the manufacturer is indeed a central element in ascertaining whether a given product should be classified as a medical device. This view was not only borne out by the wording of the respective rules, but also by their intention, that is, to guarantee unrestricted movement of medical devices in the EU while ensuring a high level of protection for patients' health. The Court stressed that such a freedom could be infringed only to protect public health. Moreover, the CJEU stated that if the manufacturer of a product has not intended its use for one (or more) of the medical purposes provided for by the Medical Devices Regulation, such a product cannot be subject to certification obligations. The Court gave the example that different sports equipment, which are also able to measure the operation of some human organs (in a non-medical context), could not instantly be judged to be medical devices. If they were, that would be an arbitrary way of imposing certification guidelines without a rational reason.[36]

At present, **health-monitoring features in smartwatches appear to be supplementary** rather than their primary function, often presented as wellness tools rather than medical devices (Devine et al., 2022). Problematic in the context of smart wearables is the intended use component of the definition: any device that could fulfil these purposes and may be used in such a way, but is not intended to do so, does not fall under the legal definition of a medical device and therefore falls under only minimal

[35] "User" means any healthcare professional or lay person who uses a device.
Article 1(37) of Medical Devices Regulation.
[36] Decision of the Court of Justice of the EU of 22 November 2012 in case C-219/11, Brain Products GmbH v. BioSemi VOF, Antonius Pieter Kuiper, Robert Jan Gerard Honsbeek, Alexander Coenraad Metting van Rijn, pp. 6-10.

regulation. With the variety, quantity, and easy availability of these technologies to patient-consumers versus more experienced and trained healthcare professionals, patient-consumers may be prone to use devices in ways not approved by the manufacturer (Iqbal and Biller-Andorno, 2022). This raises the question of whether the current definition of a medical device is sufficiently flexible to accommodate emerging trends in wearable health technologies. A reconsideration of regulatory criteria may be necessary to ensure that the potential health benefits of these technologies are adequately recognised within the legal framework.

4.4 The Negative Definition Concerning the Principal Effect of the Device

A medical device is characterised, under Article 2(1) of the Medical Devices Regulation, among other aspects, by the fact that it achieves its main intended action in or on the human body **by means other than pharmacological, immunological, or metabolic mechanisms.** These mechanisms may support the device's function, but they must not be the primary mode of action.

Importantly, this does not mean that a medical device must act directly on or within the body in a physical sense, it only requires that its effect is not mediated through chemical or biological processes.[37] This distinction is fundamental when differentiating medical devices from medicinal products[38] (Manellari et al., 2022). For instance, glucometers and insulin pumps comply with this definition because their principal effect, which is monitoring and delivering insulin, respectively, is not achieved through pharmacological action.

Accordingly, wearable technologies can be seen as satisfying this final requirement for classification as a medical device.

To summarise, we agree that for smartwatches to be classified as medical devices, manufacturers must navigate complex regulatory frameworks that were not originally designed to address AI-driven health technologies.

5. SUGGESTIONS

Smart wearables are the most prominent trend in fitness. But, commercial AI-driven wearables, such as smartwatches, are no longer just basic fitness trackers. Today, their functionality extends well beyond some of the more fundamental features, like counting steps and monitoring location using GPS. By contrast, they are **technologically advanced tools** that include a wide range of features designed to **monitor the user's health and physical activity**. The crossover of functionalities in practice leads to **uncertainty** about what information wearables can collect for medical purposes and what they cannot. It also gives rise to further challenges related to the **legal classification** of such technologies (Scheid et al., 2023).

[37] Decision of the Court of Justice of the EU of 7 December 2017 in case C -329/16, Syndicat national de l'industrie des technologies médicales (Snitem), Philips France v Premier ministre, Ministre des Affaires sociales et de la Santé , Santé decision.

[38] According to Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, Article 1(2) medicinal product shall mean any substance or combination of substances presented as having properties for treating or preventing disease in human beings; or any substance or combination of substances which may be used in or administered to human beings with a view to restoring, correcting or modifying physiological functions by exerting a pharmacological, immunological or metabolic action, or to making a medical diagnosis.

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A more precise legal definition would clarify the ambiguity concerning the classification of wearable health devices. In particular, the current Medical Devices Regulation might be amended to provide a clearer and explicit definition of AI-driven wearables designed for health monitoring. This would mean that all devices offering substantial health monitoring capabilities, even data-driven devices, could be subject to strict standards as well as safety, accuracy, and certification regimes.

Another such concept is a **stratified certification system** that would classify wearables depending on their functionality and medical benefit. For instance:

- **Tier 1**: Devices offering general wellness and fitness information
- **Tier 2**: Devices that can monitor vital health metrics (e.g., heart rhythm monitoring)
- **Tier 3**: Devices with predictive diagnostics, which should be considered a medical device.

This tiered approach allows flexibility, such that highly advanced gadgets, like smartwatches with medical potential, can receive the right amount of regulation while not stifling innovation for consumer products.

New studies highlight the **complexity of regulating** wearable technologies that blur the line between wellness products and medical devices (Hosseini et al., 2023). Researchers and regulators argue that the current legal frameworks may not be fully prepared to handle the nuances of these devices, especially as they become more integrated into healthcare systems. For example, while smartwatches can monitor vital signs and alert users to potential health risks, they are not designed to replace traditional diagnostic tools used by healthcare professionals (Hosseini et al., 2023); (Pekas et al., 2023). This leaves **a grey area**: if smartwatches fail to detect a serious condition, who is at fault? Moreover, the validity of health data recorded by wearables has been challenged, since several devices do not adhere to similar standards required for medical devices (Pekas et al., 2023). That is not ideal for users who may be using smartwatches as a health monitor without really understanding that they are limited devices. Legislation should be introduced to provide **certainty around legal liability for smart wearables** that fail to detect or report serious health conditions. That may involve ensuring that companies clearly disclose limitations of their devices and providing legal avenues for consumers to seek redress if a device fails them.

Besides these safety aspects, **the privacy issues** associated with AI-driven wearables for healthcare must also be considered, since such devices deal with sensitive personal health data and thus demand more stringent standards of data privacy protection to prevent misuse or abuse of users' health information. Smartwatches are used to gather huge amounts of sensitive personal health information that often is processed by third-party companies (Peres da Silva, 2023). This has significant implications in terms of data security and how personal health data could be abused.[39] However, the GDPR only partially addresses AI regulation, being focused on the processing of personal data and ensuring the protection of data subjects. It is not suitable for full protection against other AI systems (Meszaros et al., 2022). Thus, the regulatory framework will need to develop accordingly to safeguard individual´s health data and enable the adoption of novel healthcare technologies. Perhaps the answer is to update

[39] Wearables, such as Fitbit and Apple, have been involved in data breaches, exposing millions of users' sensitive health data. One notable incident involved an unsecured database containing over 61 million records from fitness trackers, raising concerns about data privacy and the security of personal health information. More details about this case are available at:
https://www.fiercehealthcare.com/digital-health/fitbit-apple-user-data-exposed-breach-impacting-61m-fitness-tracker-records (accessed on 18.01.2025).

the GDPR legislation or to develop new legislation more tailored to AI-driven wearables regarding what constitutes appropriate data collection, processing, and storage of health data. Such changes would better ensure **more robust and effective consent options for users** who wish to provide access to their sensitive health-related data, improved protocols surrounding data sharing between providers and third-party manufacturers, and increased penalties for those who fail to keep health information secure.

6. CONCLUSIONS

In recent years, there has been an exponential increase in smart wearables, especially smartwatches, that capture and process health data or provide users with practical information about their health metrics.

However, these technologies currently **lack sufficient legal support**, as they do not fully qualify as medical devices under existing regulations. Innovation in the medical sector of medical devices is often driven by start-ups, which have great ideas but lack experience in the development of medical devices in accordance with relevant regulations. Inexperience, together with difficulty in identifying the relevant regulations and translating them into technical requirements, results in the development of new innovative medical devices that are not always successful (Arandia et al., 2022).

This paper has examined a specific aspect of AI-driven wearables, **facilitated by artificial intelligence**, which **enables the monitoring of selected health attributes**, such as in home environments or non-clinical settings, and the provision of relevant health information. While smartwatches offer promising advancements for remote health monitoring, significant **legal** and **technical barriers** remain. A clearer definition of their legal status and the establishment of systems that permit safe connections between wearable data and national health records will be crucial. By filling in these gaps, the European Union would be much better placed to utilise AI tools and make significant improvements to patient care as well as modernising systems.

The results show that the current legal framework in Slovakia and the EU does not yet reflect the growing role of AI-driven wearables in health care. Obsolete definitions and regulations limit their potential and slow down their adoption in medical practice. For these technologies to be safely and properly used, the law will have to change to ensure standards of quality as well as safety for patients and healthcare professionals.

Thus, future studies need to consider several directions. One is the creation of clearer and more dynamic legislation that will be able to adapt to new technology as it evolves. Comparative studies among EU countries might demonstrate how different approaches function in practice.

And there is the technical dimension as well, centred around matters like data privacy, interoperability, and cybersecurity which are key for building trust (and linking wearables with healthcare professionals). Answering these questions will require interdisciplinary research, bringing together legal, medical, and technical knowledge.

Finally, cooperation between regulators and the private sector, consisting of medical device companies, must be highlighted. A clearer understanding of how these players interact could help convert promising ideas into dependable medical devices that stand to benefit patients and healthcare professionals alike.

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TARGETED FINANCIAL SANCTIONS AND THE EVOLVING EUROPEAN UNION AML/CFT FRAMEWORK: WHAT'S CHANGING AND WHY IT MATTERS

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Abstract: *This paper aims to examine two recent legislative initiatives of the European Union (EU)—the 6th AML Directive and the new AML Regulation, focusing particularly on the provisions that reform targeted financial sanctions as part of the EU's anti-money laundering and countering the financing of terrorism (AML/CFT) framework. The paper explores why the reform was considered necessary, highlights the key objectives and rules governing targeted financial sanctions in the context AML/CFT, and discusses the challenges, as well as the opportunities that arise. The article argues that the integration of TFS into AMLD6 and AMLR represents more than a technical adjustment. It transforms sanctions from primarily foreign-policy tools into core preventive obligations embedded in the compliance frameworks of public authorities and private actors. This reorientation, however, raises challenges of consistency, resource allocation, and rights protection that will ultimately determine the effectiveness of the EU's new sanctions architecture.*

Key words: *European Union; Targeted Financial Sanctions; Money Laundering; AML; Obliged Entities; FIU*

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1. INTRODUCTION: THE EVOLVING ROLE OF TARGETED FINANCIAL SANCTIONS

Targeted financial sanctions (hereinafter referred to as "**TFS**") are designed to restrict designated individuals and entities from accessing assets and financial resources in various contexts. Originally, TFS were primarily associated with counter-terrorism and non-proliferation efforts,[1] though their use has since broadened to serve broader objectives (Pavlidis, 2012, p. 89). They now play an important role in enhancing international security and preventing crises. They support conflict resolution, uphold international law, and hold human rights violators accountable.

At the level of the European Union (hereinafter referred to as "**EU**"), TFS have progressively become an integral component of the anti-money laundering (hereinafter referred to as "**AML**") and countering the financing of terrorism (hereinafter referred to as "**CFT**") framework. A key aspect of this integration is the use of well-known AML/CFT tools and measures—such as customer due diligence (hereinafter referred to as "**CDD**") and suspicious transaction reporting—to prevent the circumvention of TFS.

[1] See United Nations Security Council Resolutions 1267 (1999) concerning sanctions against individuals and entities associated with Al-Qaida, and 1540 (2004) on the non-proliferation of weapons of mass destruction, which established the foundational link between targeted financial sanctions, counter-terrorism, and counter-proliferation objectives.

Strengthening these safeguards has been a primary objective of Directive (EU) 2024/1640 (Sixth AML Directive, hereinafter referred to as "**AMLD6**")[2] and Regulation (EU) 2024/1624 (AML Regulation, hereinafter referred to as "**AMLR**").[3] These legislative instruments mark a step forward in the EU's efforts to embed TFS within its AML/CFT framework. Building on previous AML Directives, which focused on disrupting illicit financial flows and reinforcing the 'Crime-Does-Not-Pay' principle (European Commission, 2021, p. 18; European Commission, 2020, p. 17; Naylor, 2017), AMLD6 and AMLR introduce more explicit and effective provisions. These include enhanced enforcement of TFS, based on stricter monitoring and improved implementation mechanisms. Indeed, compared to previous initiatives, AMLD6 and the AMLR introduce a more structured and detailed approach to the implementation of TFS. This approach formally defines TFS, integrates them into AML/CFT risk assessments, and strengthens the enforcement role of Financial Intelligence Units (hereinafter referred to as "**FIUs**"), supervisory authorities, and central registers of beneficial ownership information. Additionally, the new framework contains clearer obligations for financial institutions and other obliged entities, requiring them to incorporate TFS into their internal risk assessments, internal policies and procedures, and CDD processes.

Given the significance of these provisions, a closer examination of the legal and institutional dimensions of TFS is warranted, particularly their integration within the EU AML/CFT framework. To this end, Section 2 defines the legal bases and scope of TFS in the EU legal order. Section 3 analyses how AMLD6 and AMLR incorporate TFS into risk assessments, data collection, and statistical monitoring. Section 4 focuses on the expanded responsibilities and tasks of public authorities, including FIUs, national supervisors, and central registers of beneficial ownership information, in ensuring the effective enforcement of TFS. Section 5 explores the obligations of financial institutions and other obliged entities, regarding compliance programs, CDD measures, and transaction monitoring and reporting. Finally, Section 6 addresses key challenges in the implementation of TFS, including risks of circumvention and enforcement gaps. Thus, the article aims to contribute to the academic and policy debate on the effectiveness of TFS within the EU AML/CFT framework, also considering potential future developments in EU policy on sanctions.

The central argument advanced is that the embedding of TFS within the EU's AML/CFT framework marks a qualitative shift in sanctions policy: it reframes their logic from *ad hoc* foreign policy instruments towards structural, compliance-based obligations. This transformation enhances preventive capacity but also generates tensions with proportionality, legal certainty, and national resource disparities. The following sections examine this evolution, analyse the institutional and private-sector responsibilities it creates, and highlight the challenges it entails.

This article employs a legal-analytical methodology, combining doctrinal analysis of the EU's AML instruments with a contextual reading of their legislative history, explanatory recitals, and AML policy framework. It also situates these instruments within the broader EU AML/CFT acquis and considers their interaction with adjacent areas of law, including the Common Foreign and Security Policy (hereinafter referred to as "**CFSP**")

[2] Directive (EU) 2024/1640 of the European Parliament and of the Council of 31 May 2024 on the mechanisms to be put in place by Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Directive(EU) 2019/1937, and amending and repealing Directive (EU) 2015/849, OJ L, 2024/1640, 19.6.2024.

[3] Regulation (EU) 2024/1624 of the European Parliament and of the Council of 31 May 2024 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, OJ L, 2024/1624, 19.6.2024.

and fundamental rights jurisprudence. The analysis is complemented by secondary literature and case law of the Court of Justice of the European Union (hereinafter referred to as "**CJEU**"), enabling a critical assessment of both the normative content of the reforms and their likely operational impact.

2. UNDERSTANDING THE EU'S TARGETED FINANCIAL SANCTIONS

International sanctions may take various forms: they can be multilateral restrictive measures authorised by the United Nations Security Council (Biersteker and Hudáková, 2021, p. 108), imposed at the regional level, such as within the EU, or unilaterally enacted by individual jurisdictions, such as the United States (Hufbauer and Jung, 2021; Kittrie, 2008). There is an increasing reliance on financial sanctions, which has been characterised as marking "*a new era of financial warfare*" or the "*weaponization of finance*" (Bogdanova, 2024, p. 407). Sanctions have been imposed against state actors, such as Iran and North Korea (Portela, 2015), but they have also targeted non-state actors, entities or individuals, such as terrorists or terrorist organisations. Unlike broader sanctions that apply to entire jurisdictions, TFS can be designed to restrict the financial activities of specific individuals, entities, or organisations, which are deemed to pose a risk to international security (Honda, 2020). One of the most prominent functions of TFS has been to disrupt terrorism financing by preventing designated individuals and organisations from accessing, transferring, or using financial resources to support terrorist activities (Cameron, 2011, p. 57). Similarly, TFS have played an important role in preventing the proliferation of weapons of mass destruction by restricting financial transactions linked to the development, acquisition, or trafficking of such weapons, i.e., nuclear, chemical, and biological weapons (Stewart, Viski and Brewer, 2020). In sum, the objective of TFS has been to prevent designated subjects from accessing financial resources, disrupt illicit financial flows, and minimise unintended consequences on legitimate economic activities (Drezner, 2015, p. 755).

Targeted sanctions, however, face a degree of conceptual ambiguity, if not confusion. They can be seen as hybrid measures that occupy a nebulous space between the areas of administrative and criminal law (Pavlidis, 2023b, p. 8; Ansems and Loeve, 2016, p. 64). While their primary purpose is preventive, they can also exhibit strong punitive characteristics and impose significant restrictions on fundamental rights. This is the case with property rights in the case of asset freezes, as well as with freedom of movement in the case of travel bans. The dual nature of targeted sanctions must be taken into consideration when designing procedural safeguards and judicial review mechanisms (Van der Have, 2021; Spaventa, 2006). Although the imposition of targeted sanctions does not constitute a judicial process, does not involve judicial authorities such as prosecutors and judges, and does not activate the presumption of innocence, it restricts the fundamental rights of designated individuals and entities, which must therefore be afforded the right to effective remedies and a fair trial to contest the legality of the sanction (Bílková, 2024, p. 193; Biersteker, 2010; Thony and Png, 2007). Not surprisingly, national frameworks of targeted sanctions, such as those in the US and UK, allow designated persons to seek an administrative review of their designation and, ultimately, to challenge it in court. Recent and ongoing scholarship has explored how national constitutional courts assess the compatibility of EU sanctions with domestic fundamental-rights guarantees (Terlinden 2025; Lonardo 2023; Matuška 2023; Pavlidis, 2012). Meanwhile, the European Court of Human Rights (hereinafter referred to as "**ECtHR**") acknowledges the necessity of effective remedies and judicial oversight for sanctions imposed at the request of the United Nations Security Council (Trávníčková,

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2024; Willems, 2014). While the ECtHR has affirmed that sanctions regimes must ensure access to an effective remedy and a fair trial, similar safeguards are embedded in the EU legal order through the judicial review mechanisms available before the General Court and the Court of Justice.[4] Although FTS, particularly asset freezes, are temporary restrictive measures that do not entail a transfer of ownership, they significantly impact the affected individuals by limiting their access to and control over assets and financial resources. For this reason, TFS must be subject to time limits and adhere to the principles of legality and proportionality, alongside ensuring effective remedies and judicial review (Birkett, 2020, p. 505; de Wet, 2011).

At the EU level, targeted sanctions have been imposed in several contexts, i.e., in the framework of counter-terrorism efforts, anti-proliferation efforts, as well as in response to human rights violations and the misappropriation of public funds in third countries. The EU restrictive measures, adopted within the framework of the CFSP, typically include travel bans and asset freezes, but they can also cover arms embargoes, and restrictions on specific sectors such as finance, energy, and technology. However, like most UN-authorised multilateral sanctions, EU sanctions focus largely on financial measures (Bogdanova, 2024, p. 407). Beyond counter-terrorism sanctions, the EU typically imposes measures on specific countries before designating specific individuals and entities. For example, in response to the events of the Arab Spring, the Council of the EU adopted targeted sanctions against Tunisia[5] and Egypt[6] to address human rights abuses and the misappropriation of state assets in those countries. The list of designated persons and entities subject to these sanctions has since been amended multiple times to reflect evolving circumstances. Moreover, in December 2020, the EU established a global sanctions regime for human rights violations through Regulation 2020/1998 and Decision 2020/1999.[7] More recently, the EU has introduced an unprecedented volume and scope of sanctions, targeting nearly 2,400 individuals and entities in response to Russia's invasion of Ukraine.[8] There are ongoing discussions on potential mechanisms for confiscating frozen assets in this context (Nakatani, 2024; Stephan, 2022).

According to the EU's standardised approach to asset freezes,[9] the Council of the EU: (a) establishes, reviews, and modifies the list of designated persons, entities, and bodies; (b) orders the freezing of funds and economic resources belonging to these individuals or groups; (c) prohibits participation in activities aimed at circumventing the restrictive measures; (d) determines the duration of asset freezes, with the option to extend them; and (e) grants exemptions to freezing measures to cover essential needs, legal fees, and extraordinary expenses of affected individuals.

[4] Under EU law, individuals and entities listed under restrictive measures may bring an action for annulment before the General Court pursuant to Article 263 TFEU and, where appropriate, seek damages under Article 340 TFEU. The Court of Justice has confirmed that such listings must respect fundamental rights and procedural guarantees, see CJEU, judgment of 18 July 2011, *Kadi II*, joined cases C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paras 97–133.

[5] Council Decision 2011/72/CFSP, OJ L 28, 2.2.2011, p. 62; Council Regulation (EU) No 101/2011, OJ L 31, 5.2.2011, p. 1 (as amended).

[6] Council Regulation (EU) No 270/2011, OJ L 76, 22.3.2011, p. 4 (as amended).

[7] Council Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses, OJ L 410 I, 7.12.2020, p. 1; Council Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses, OJ L 410 I, 7.12.2020, p. 13.

[8] For a comprehensive list of all sanctions, which the EU has adopted against Russia, see: https://www.consilium.europa.eu/en/topics/russia-s-war-against-ukraine/.

[9] See Council of the EU, *Basic Principles on the Use of Restrictive Measures (Sanctions)*, 2004; Council of the EU, *Guidelines on Implementation and Evaluation of Restrictive Measures in the Framework of the EU Common Foreign and Security Policy*, 2012; Council of the EU, *Best Practices on the Effective Implementation of Restrictive Measures*, 2016.

An important dimension of reform is the harmonisation achieved through the designation of sanctions circumvention as an EU crime under Article 83 Treaty on the Functioning of the European Union (hereinafter referred to as "**TFEU**") and as predicate offences of money laundering for AML/CFT purposes (Tosza, 2024). Directive (EU) 2024/1226, the so-called Sanctions Directive,[10] obliges Member States to criminalise the violation of EU restrictive measures, thereby closing loopholes that previously allowed divergent national practices. This development strengthens the preventive logic of the AML/CFT framework: breaches of TFS are not only regulatory failures but also criminal offences, reinforcing deterrence and uniformity across the Union.

In this context, it is worth noting that the EU sanctions regime has demonstrated a positive short-term signalling effect, but also exhibits significant weaknesses (Boogaerts, Portela and Drieskens 2016, p. 209; Portela, 2012). First, the restitution of assets frozen and held in the EU has proven challenging, primarily due to shortcomings in the judicial systems of third countries and the absence of criminal court judgements confirming the illicit origin of these assets (Boogaerts, 2020). Since the EU cannot maintain asset freezes indefinitely, the passage of time and the complexity of mutual legal assistance mechanisms create obstacles to asset recovery. Second, the EU's approach to sanctions relies on *ad hoc* measures, leading to a certain lack of predictability. Third, once asset freezes are imposed at the EU level, Member States are responsible for managing mutual legal assistance requests, which may result in delays and inconsistencies in judicial review standards and outcomes. Finally, TFS largely constitute a learning process for both the sanctioned entities and the jurisdictions that impose and enforce them (Bosse, 2025, p. 1720; Drezner, 2015). In this context, the EU's decision to integrate TFS into the AML/CFT framework represents a logical progression. The following chapter explores this integration in detail, examining its implications and the broader regulatory landscape.

3. THE INCLUSION OF TFS WITHIN THE EU'S AML/CFT FRAMEWORK

The incorporation of TFS into the EU's AML/CFT framework constitutes a significant development. It aims to strengthen the integrity of the EU financial system and mitigate the risk of obliged entities being exploited for sanctions evasion. It also ensures the EU's adherence to its international obligations, particularly those stemming from the resolutions of the United Nations Security Council (Sonnenfeld, 2024).

The AMLR offers a well-structured definition of TFS, providing clarity for implementation. Under Article 2(1)(49) AMLR, TFS encompass asset freezes and prohibitions to make funds or other assets available, directly or indirectly, for the benefit of designated persons and entities' pursuant to Council Decisions adopted on the basis of EU primary law. Asset freezes restrict access to or use of funds and other assets belonging to designated persons or entities (Gordon, 2019), while fund transfer prohibitions prevent the direct or indirect provision of financial resources to such subjects (Steinbach, 2023). This definition aligns with existing EU legal instruments, ensuring consistency across the relevant regulatory framework and facilitating enforcement by both obliged entities and national authorities.

The legal basis for TFS in the EU derives from a two-tier system established under the Treaty on European Union (hereinafter referred to as „**TEU**") and the TFEU. At

[10] Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive (EU) 2018/1673, OJ L, 24.4.2024 (issue number to be assigned).

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the first level, Article 29 TEU provides the foundation for the adoption of Council Decisions as part of the EU's CFSP, based on intelligence assessments and considerations of international security. At the second level, Article 215 TFEU enables the Council of the EU to adopt measures that implement financial restrictions at the EU level. This ensures that TFS measures are binding and legally enforceable across all EU Member States, requiring compliance from financial institutions and other obliged entities, as well as from supervisors and law enforcement agencies. Thus, the EU approach to the imposition and enforcement of TFS achieves to link political decision-making under the CFSP with enforceable regulatory measures under the TFEU (Eckes, 2018, p. 206).

By further integrating TFS into AML/CFT framework, the EU has strengthened its capacity to prevent, detect, and respond to risks of circumvention of sanctions (Teichmann and Wittmann, 2024). As we will see, AMLD6 and AMLR introduce more detailed obligations for obliged entities and public bodies, ensuring that TFS are implemented across the EU in an effective manner. Moreover, the structured incorporation of TFS within risk assessments, financial supervision, and due diligence processes reflects a broader shift towards a proactive and intelligence-driven approach in the fight against financial crime (Phythian, Kirby and Swan-Keig, 2024; Maguire, 2000).

4. RISK ASSESSMENTS AND DATA-DRIVEN OVERSIGHT

The integration of targeted financial sanctions within the EU's AML/CFT framework has a clear and strong preventive component. It involves a new structured approach to risk assessment and data collection, which ensures that regulatory and supervisory authorities, as well as obliged entities, can proactively identify vulnerabilities and prevent the circumvention of sanctions. Grounded in the risk-based approach (De Koker and Goldbarsht, 2024; Costanzo, 2013) which is of great importance in the AML/CFT context, the EU acknowledges the evolving tactics of sanctions evasion and the growing sophistication of illicit financial flows. More specifically, the EU establishes explicit requirements for integrating TFS into both supranational and national risk assessments while also enhancing data collection and statistical monitoring. As explained in Recital 21 of AMLD6, given the specific risks of non-implementation and evasion of targeted financial sanctions to which the Union is exposed, the assessment of risks must encompass all targeted financial sanctions adopted at the Union level.

At the supranational level, Article 7 of AMLD6 requires the European Commission, in collaboration with the newly established Anti-Money Laundering Authority (hereinafter referred to as "**AMLA**"), to assess money laundering and terrorist financing risks across the EU. Such assessments were already mandated under previous AML Directives. However, AMLD6 explicitly expands their scope to include risks associated with the non-implementation and evasion of TFS. Thus, the EU embeds TFS into supranational risk evaluations and ensures a more coordinated approach to the threats posed by sanctioned individuals and entities. Similarly, at the national level, Article 8 of AMLD6 requires Member States to incorporate TFS into their national risk assessments, taking into account country-specific vulnerabilities and the adequacy of existing preventive measures at national level. These requirements in Articles 7 and 8 of AMLD6 reflect a broader shift towards the risk-based approach, where regulatory responses are tailored to the identified threats rather than applied uniformly across all sectors and types of economic activities (De Koker and Goldbarsht, 2024; Simonova, 2011).

In addition to risk assessments, AMLD6 also strengthens data collection and statistical monitoring, ensuring that public bodies have access to comprehensive

information on the implementation and effectiveness of TFS. Article 9(2)(k) of AMLD6 explicitly requires Member States to collect and compile statistics on the enforcement of financial sanctions, including the volume of assets frozen, the volume of transactions blocked, and human resources allocated to authorities competent for implementation and enforcement of TFS. This data will be very useful in assessing the effectiveness and impact of TFS, identifying enforcement gaps and addressing challenges that also arise in the broader AML/CFT framework (Levi, Reuter and Halliday, 2018).

The integration of TFS into risk assessments and data collection mechanisms constitutes a significant advancement. Rather than relying solely on enforcement actions, the EU has adopted an intelligence-driven strategy, offering to policymakers the necessary tools to detect and mitigate the risks associated with designated persons and entities. This intelligence-driven approach will strengthen the overall effectiveness of TFS, making it more difficult for sanctioned individuals and organisations to exploit enforcement gaps. As sanctions evasion tactics continue to evolve—much like those observed in organised and financial crime (Europol, 2021)—the EU's focus on risk-based supervision and data-driven oversight will play a key role in safeguarding the integrity of the EU financial system.

5. STRENGTHENING THE ROLE OF PUBLIC AUTHORITIES IN TFS COMPLIANCE

The enforcement of TFS is not solely the responsibility of financial institutions and other obliged entities. It also rests with Member State authorities, through a complex network of regulatory and supervisory bodies tasked with ensuring compliance and preventing circumvention of sanctions (Finelli, 2023). In this context, a coordinated approach is required. AMLD6 and AMLR provide clear mandates for public authorities and enhance their responsibilities in monitoring compliance, sharing intelligence, and promoting cooperation. At the same time, these instruments reflect a broader regulatory trend of involving private actors in enforcement efforts, thereby reinforcing a shared responsibility between public authorities and obliged entities, with the ultimate goal of preventing sanctions evasion.

One of the key areas where public authorities play an important role is the verification of beneficial ownership information (Moiseienko, 2020). AMLD6 contains detailed provisions on the central registers of beneficial ownership, as well as on the powers and responsibilities of the entities managing such registers. Under Article 10(9) of AMLD6, entities responsible for managing the central registers must ensure that the individuals and entities listed are not subject to TFS. To this end, central register entities must screen beneficial ownership information against sanctions lists both upon designation and on a regular basis. Then, it is important to identify and indicate associations with sanctioned persons or entities in these registers. These requirements aim to prevent sanctioned persons and entities from using complex corporate structures, trusts, or shell companies to obscure their financial and business activities and evade sanctions. Indeed, timely detection of ownership structures enables appropriate mitigation measures. The systematic integration of TFS screening into the beneficial ownership verification will reinforce transparency in corporate ownership, making it more difficult for designated individuals to access the financial system.

In addition to beneficial ownership verification, the EU AML/CFT framework contains provisions on the functioning, powers and responsibilities of FIUs. The scope and organisation of FIUs may vary, following different models: judicial, law enforcement, administrative, or hybrid (FATF, 2025; Thony, 1996). These models differ in their access to information, investigative and law enforcement capabilities, as well as the levels of

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independence and accountability of the FIUs (McNaughton, 2023). The new AMLD6 reinforces the role of FIUs in the implementation of TFS. In addition to receiving and analysing suspicious transaction reports under Articles 69 ff AMLR, Article 21(1)(b)(xxi) of AMLD6 grants FIUs proactive access to detailed information on funds and assets frozen or immobilised under TFS measures. This expanded access enhances their ability to track and investigate potential violations. Strengthening FIUs' intelligence-gathering capacity is very important as alternative payment methods, virtual assets, and complex cross-border transactions become more prevalent. Of course, to effectively counter evolving evasion techniques, FIUs must remain adaptable and respond swiftly to emerging threats (Karapatakis, 2019, p. 128).

Supervisory authorities are also tasked with monitoring the compliance of obliged entities with TFS obligations. Under Article 37(5)(e) and Article 39(4) of AMLD6, national supervisors are responsible for ensuring that financial institutions and other supervised entities adhere to TFS requirements. In this context, supervisory authorities have the power to verify that internal compliance policies and procedures of supervised entities adequately address the risks of non-implementation and evasion. Supervisory authorities have also the power to conduct audits and to impose sanctions where necessary. Furthermore, supervisors are responsible for disseminating up-to-date information on designated persons and entities to obliged entities, giving them access to the most current listings. Ultimately, this will prevent inadvertent transactions involving sanctioned subjects. Such disseminations and information exchanges are also important for effectively tracing and identifying assets that will be subject to asset freezes and asset confiscation (Pavlidis, 2024, p. 327; Kennedy, 2007).

Given the transnational nature of TFS, strong inter-agency cooperation and information-sharing mechanisms are very important for ensuring the effective implementation of sanctions (Early and Spice, 2015, p. 339). Following this logic, Articles 61 and 66 of AMLD6 establish a structured framework for collaboration among policymakers, FIUs, supervisors, tax authorities, and the newly established AMLA. These provisions aim to mitigate enforcement fragmentation, allowing authorities across different Member States to work together and prevent forum shopping by sanctioned entities. The new AMLA is also expected to reinforce consistency in enforcement, providing guidance, coordination assistance, and oversight to national authorities (Pavlidis, 2024, p. 328), while lessons from the uneven implementation of EU sanctions across Member States (Matuška & Sabján, 2023 illustrate the challenges that a central authority must address. By overseeing the implementation of TFS by supervised entities and assisting in the analysis of non-implementation risks and evasion tactics, as mandated by its founding regulation,[11] AMLA is expected to play a central role in strengthening the effectiveness of the EU's sanctions policy.

The growing involvement of supervisory authorities and central registers in sanctions enforcement inevitably interacts with the CJEU's jurisprudence on transparency and rights. In WM and Sovim SA v. Luxembourg Business Registers (Joined Cases C-37/20 and C-601/20),[12] the Court curtailed indiscriminate access to beneficial ownership registers on proportionality grounds, thereby reminding policymakers that sanctions-related transparency must remain balanced against privacy and fundamental

[11] Article 5 of the Regulation (EU) 2024/1620 of the European Parliament and of the Council of 31 May 2024 establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010, OJ L, 19.6.2024 (issue number to be assigned).

[12] CJEU, judgment of 22 November 2022, *WM, Sovim SA v Luxembourg Business Registers*, joined cases C-37/20 and C-601/20, ECLI:EU:C:2022:912, par. 88.

rights (Zigo, 2023; likewise, in AS PrivatBank (C-78/21),[13] the Court underscored the obligations of financial institutions to ensure effective AML compliance, illustrating how judicial interpretation can reinforce the implementation of targeted financial sanctions. Yet case law alone cannot resolve the persistent divergences in national practice. Enforcement of restrictive measures remains heavily dependent on domestic institutional capacity, political will, and administrative prioritisation, which means that the same EU regulation may be applied with very different levels of intensity across Member States. Sensitive or politically exposed listings can create uneven enforcement outcomes, signalling that reliance on national authorities without strong EU-level coordination risks reputational and strategic gaps (Matuška and Sabján, 2023). This fragmented landscape is particularly problematic at a time when sanctions are central to the Union's geopolitical response to Russia's aggression, and when financial crime networks adapt quickly to regulatory arbitrage. Against this background, the creation of AMLA is not only a technical upgrade but a political necessity, aiming to guarantee that enforcement standards are applied uniformly and that the EU can credibly claim both effectiveness and fairness in its restrictive measures regime.

6. OBLIGED ENTITIES AND THEIR COMPLIANCE OBLIGATIONS

The expanded role of public authorities in TFS compliance, as described in the previous section, marks an important advancement. However, its effectiveness hinges on the engagement of the private sector. Thus, financial institutions, as well as designated non-financial businesses and professions, and other obliged entities are required to ensure the proper application and enforcement of TFS measures. This aligns with a broader trend in EU regulation, where private actors are increasingly involved in enforcement efforts (De Cock and Senden, 2020, p. 247; Eren, 2021).

More specifically, the new AMLR and the AMLD6 impose new compliance obligations on obliged entities, requiring them to integrate TFS into their frameworks of risk management, CDD processes, and monitoring procedures. As explained in Recital 21 of AMLD6, AML/CFT measures related to TFS are risk sensitive. At the same time, obliged entities are required to freeze funds and other assets of designated persons or entities and to ensure that such funds or assets are not made available to them. For its part, Recital 87 of AMLD6 correctly points out the importance of outreach activities, including the dissemination of information by the supervisors to the obliged entities under their supervision, which includes 'disseminations of designations under targeted financial sanctions and UN financial sanctions, which should take place immediately once such designations are made in order to enable the sector to comply with their obligations'.

Another key component of TFS compliance is the requirement for obliged entities to establish internal policies, controls, and procedures that mitigate the risks associated with non-implementation and circumvention of sanctions. While earlier scholarship (Cunningham, 2003, p. 60; Killick and Parody, 2007) already underscored the importance of internal controls and compliance cultures in preventing financial crime, these concerns have evolved in the current regulatory environment. More recent contributions illustrate how the logic of compliance has expanded from financial crime prevention to the enforcement of restrictive measures themselves (Moiseienko, 2024). For its part, Article 9 of the new AMLR reaffirms that obliged entities develop robust internal compliance frameworks, which must include mechanisms for screening clients against TFS lists,

[13] CJEU, judgment of 2 April 2020, *AS "PrivatBank" v Finanšu un kapitāla tirgus komisija,* Case C-78/21, ECLI:EU:C:2020:274, par. 68.

implementing automated monitoring systems, and providing regular staff training on sanctions compliance. These measures ensure that businesses remain alert to emerging risks and that employees have the necessary expertise to detect and report violations of TFS. Additionally, Article 10 of AMLR requires obliged entities to integrate TFS risks into their business-wide risk assessments, ensuring that sanctions compliance is treated as a fundamental component of broader AML/CFT strategies.

Beyond internal governance under Articles 9 and 10 of AMLR, compliance with TFS requirements is integrated into CDD processes. Typically, these processes involve identifying and verifying customer identities, understanding the purpose and intended nature of business relationships, conducting ongoing monitoring, and applying enhanced due diligence for higher-risk scenarios or simplified due diligence where risks are minimal (Mugarura, 2014). Under the new Article 20(1)(d) of AMLR, obliged entities must verify whether a customer or a beneficial owner is subject to TFS. This verification must take place before establishing a business relationship or conducting transactions. The requirement also extends beyond initial onboarding to include ongoing due diligence, where entities must continuously screen customers against updated sanctions lists. Article 26 of AMLR further reinforces this obligation by requiring obliged entities to conduct continuous transaction monitoring to detect any attempts to bypass TFS. In cases where transactions are flagged as potentially linked to a designated person or entity, financial institutions are required to freeze the funds immediately and submit a report to the relevant authorities. Another significant compliance measure relates to the exclusion of simplified CDD under Article 33(5)(e) of AMLR, if there is reason to believe that a customer is attempting to circumvent financial sanctions. This provision is particularly important in cases where clients seek to exploit legal loopholes, complex corporate structures, or third-party intermediaries to disguise their financial or business activities. Thus, AMLR ensures that high-risk transactions receive heightened scrutiny.

A key figure in enforcing AML/CFT requirements is the compliance officer, whose responsibilities are outlined in Article 11 of AMLR. In addition to the existing obligations imposed by legislation (DeMott, 2013, p. 69), compliance officers are now tasked with overseeing the implementation of TFS-related policies, ensuring the effective application of internal controls, and acting as the primary liaison between obliged entities, FIUs and supervisory authorities in this context too. Their role is particularly crucial in ensuring that automated sanctions-screening tools are properly calibrated, suspicious transactions are appropriately identified and reported, and staff receive regular updates on changes to the EU's TFS regime.

The obligations introduced by AMLD6 and AMLR reflect a shift towards a more preventive and risk-based approach to TFS enforcement. Rather than relying solely on post-transaction investigations and actions, the new AML/CFT framework requires obliged entities to identify and mitigate sanctions risks at every stage of the financial process. This includes reporting suspicions to the FIU under Articles 69 ff of AMLR, when transactions may be linked to sanctioned persons or entities. This responsibility has practical implications; it means that obliged entities must invest in technological solutions for real-time sanctions screening, adopt advanced analytics for transaction monitoring, and foster a strong culture of compliance within their organisations.

AMLD6 and AMLR embed TFS into the core functions of obliged entities. They also create a multi-layered system of compliance and enforcement, in which the private sector and regulators work together to prevent evasion of TFS. However, the effectiveness of this system will ultimately depend on the ability of obliged entities to adapt to emerging risks, as well as on the sufficiency of technological resources for sanctions screening and the capacity of supervisory authorities to provide guidance and

oversight. Evidently, the growing complexity of financial transactions—especially with the rise of virtual assets and decentralised finance—will necessitate adaptations in compliance strategies (Karapatakis, 2019) to effectively counter attempts to circumvent TFS measures, in line with the principles of proportionality and effectiveness.

Recent CJEU rulings also confirm that obligations imposed on private actors must be interpreted in light of proportionality and effectiveness. In Rodl and Partner (C-562/20),[14] the Court clarified the scope of due diligence obligations under AML law, emphasising that compliance duties extend beyond formalistic checks and must be applied with a risk-sensitive approach. This reasoning has relevance to targeted financial sanctions, where financial intermediaries are expected not only to detect listed entities but also to identify indirect ownership structures, beneficial control, and potential circumvention schemes. The Mistral Trans (C-3/24) case,[15] which narrows obliged-entity status in corporate groups and refocuses supervisory enforcement on genuinely risk-exposed actors, is likely to provide further guidance on how private operators are to balance legal certainty with proactive vigilance. Parallel developments before the European Free Trade Association (EFTA) Court, such as Joined Cases E-1/24 and E-7/24,[16] highlight the centrality of the principle of proportionality in relation to access to beneficial ownership information. They also demonstrate that such questions are not confined to the EU legal order but form part of a wider European judicial dialogue on the effectiveness of sanctions regimes. Taken together, these proceedings suggest that compliance obligations will increasingly be judicially defined at the supranational level, reducing Member State discretion in interpretation and placing private actors—especially financial institutions and logistics providers—at the frontline of sanctions enforcement. This trend raises significant policy questions: while it strengthens uniformity and closes loopholes, it also shifts considerable regulatory burdens onto private entities, blurring the line between state enforcement and delegated corporate responsibility.

7. CHALLENGES AND FUTURE PERSPECTIVES IN THE IMPLEMENTATION OF TFS

Despite the significant strides made in strengthening the EU's legislative framework for TFS through the AMLD6 and the AMLR, several challenges remain in ensuring the effective implementation of sanctions. The practical enforcement of TFS still varies significantly across jurisdictions due to differences in national supervisory practices, institutional capacity, and legal interpretations. Some Member States have well-resourced FIUs and financial supervisors that can effectively oversee the implementation of TFS, while others struggle with limited resources and inconsistent enforcement. The divergence in enforcement capacity across Member States is not merely theoretical. Larger jurisdictions such as Germany and the Netherlands have developed well-resourced FIUs with advanced IT infrastructures, allowing for real-time sanctions screening. By contrast, smaller jurisdictions including Malta or Cyprus have repeatedly been flagged in MONEYVAL assessments for under-resourcing and inconsistent application of AML obligations. Such discrepancies illustrate why the establishment of AMLA is expected to be decisive in levelling the playing field of

[14] CJEU, judgment of 17 November 2022, *SIA 'Rodl & Partner' v Valsts ieņēmumu dienests*, case C-562/20, ECLI:EU:C:2022:883, par. 38.
[15] CJEU, judgment of 5 December 2024, *'MISTRAL TRANS' SIA v Valsts ieņēmumu dienests*, case C-3/24, ECLI:EU:C:2024:999, par. 41.
[16] European Free Trade Association Court, *TC and AA*, joined cases E-1/24 and E-7/24, par. 84.

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supervision. This fragmentation creates gaps that sanctioned individuals and entities can exploit.

The establishment of the AMLA is expected to address some of these disparities by enhancing supervision at the EU level and promoting more consistent enforcement (Pavlidis, 2024, p. 328), but the extent of its impact will depend on the political will of Member States to actively support centralised enforcement efforts. A further dimension of reform is the harmonisation achieved through the designation of sanctions circumvention as an EU crime under Article 83 TFEU. Directive (EU) 2024/1226—the so-called Sanctions Directive—obliges Member States to criminalise the violation of EU restrictive measures, thereby closing loopholes that previously allowed divergent national practices. As already mentioned, this development strengthens the preventive logic of the AML/CFT framework: breaches of TFS are not only regulatory failures but also criminal offences, reinforcing deterrence and uniformity across the Union.

Another significant challenge is the increasing sophistication of evasion techniques used by designated individuals and entities to bypass TFS (Early, 2021). Traditional evasion methods, such as the use of front companies, nominee arrangements, and offshore financial structures, remain prevalent, but newer tactics involving cryptocurrencies, decentralised finance, and other privacy-enhancing technologies present additional enforcement difficulties. Virtual assets, in particular, offer avenues for sanctions circumvention due to their borderless nature, pseudonymity, and the limited, at least so far, oversight of some cryptocurrency exchanges (Tiwari, Lupton, Bernot and Halteh, 2024, p. 1630; Wronka, 2022, p. 1279). Thus, ensuring that virtual asset service providers effectively screen for TFS risks remains a challenge, while further technological advancements in blockchain analytics and AI-driven transaction monitoring will facilitate detection and prevention of illicit financial flows linked to sanctioned individuals (Pavlidis, 2023a, p. 157).

Beyond enforcement and evasion risks, the effectiveness of TFS greatly depends on the quality of collaboration and information-sharing between obliged entities, FIUs and supervisors (Sugg, 2024). Delays in receiving updated sanctions lists, insufficient guidance from regulators, and constraints on cross-border data sharing can undermine the ability to act swiftly. Thus, it is important to enhance real-time information-sharing mechanisms and foster closer cooperation between supervisory bodies, FIUs, and financial institutions to ensure that sanctions implementation remains adaptable to emerging risks. The option to establish AML/CFT supervisory colleges for cross-border cases under the new legal framework (Article 49 ff of AMLD6) constitutes an important step forward. Additionally, the use of machine learning and AI-driven compliance tools could improve the ability of financial institutions to detect complex patterns of evasion of TFS, reducing false positives and increasing the accuracy of risk detection. Finally, TFS investigations serve broader strategic goals: similar to AML/CFT investigations, they can be used to map financial networks or specific market sectors, helping to identify vulnerabilities and inform future risk mitigation measures (Moiseienko, 2024; Van Duyne and Levi, 1999).

Looking to the future, the EU will likely continue refining its TFS framework to address these challenges. One possible direction is the further centralisation of TFS enforcement, granting to AMLA stronger supervisory powers over high-risk financial sectors and facilitating greater coordination among national authorities. Moreover, as the EU's emphasis on external geopolitical threats grows, TFS are likely to become increasingly central to the EU's response to international conflicts, human rights violations, and transnational organised crime. This will extend the EU's influence on the global stage (Bradford, 2020, p. 25). Ultimately, the success of the EU's TFS framework

will depend on the ability of policymakers, regulators, and the private sector to adapt to a rapidly evolving landscape. As sanctioned individuals and entities continue to develop more sophisticated evasion tactics, the EU's regulatory response must remain agile and globally coordinated to protect the integrity of the EU financial system.

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THE PRINCIPLE OF PROPORTIONALITY AND CASH PAYMENT LIMITS: AN ANALYSIS OF EUROPEAN CENTRAL BANK OPINIONS

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Abstract: *This paper examines the European Central Bank's evolving interpretation and application of the principle of proportionality regarding national legislation limiting cash payments within the EU. Through a comprehensive analysis of ECB opinions issued over the past decade, the study traces how the ECB's assessment framework has developed from general considerations of compatibility with legal tender status to a more nuanced evaluation encompassing the appropriateness, necessity, and proportionality stricto sensu of proposed measures. It contributes to the understanding of how the principle of proportionality operates as a crucial legal standard in balancing legitimate public policy objectives with the preservation of cash as legal tender in the European monetary system in the view of ECB.*

Key words: *EU Law; European Central Bank; Proportionality; Euro; Cash; Cash Limitations*

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1. INTRODUCTION

The increasing propensity of Member States within the European Union to introduce national legislation imposing limitations on the use of cash for various transactions represents a significant development in the realm of payment systems and economic governance. This trend, often motivated by objectives such as combating tax evasion, money laundering, and the financing of terrorism, has invariably prompted scrutiny from the European Central Bank (hereinafter also referred to as "**ECB**"). The Treaty on the Functioning of the European Union "*enshrines the ECB's independence and institutional position, so that any modification requires a unanimous decision of all EU Member States. This solidifies the quasi-constitutional status of the ECB. In contrast, a simple law could alter the competences and design of other central banks*" (Egidy, 2021, p. 288), e.g., the National bank of Slovakia or any other rule regarding payments, currency matters or rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets in the member states, because they are not usually to be found on the constitutional level. The ECB, vested with the responsibility for safeguarding the euro and ensuring the smooth operation of payment systems within the Eurosystem, routinely issues opinions on such draft laws, offering critical assessments grounded in its legal mandate and economic expertise.

Central to the ECB's evaluation in the cases of cash limitations is the fundamental principle of proportionality, a cornerstone of EU law that dictates that any measures adopted by the Member States must be appropriate, necessary, and proportionate to the legitimate aims pursued. Why did we choose the principle of proportionality? Because when we look at the general principles of EU law and have to

choose one "*which has most influenced the development of public law across Europe, it seems difficult — one might almost say manifestly disproportionate — to choose any principle other than proportionality*" (Young and De Búrca, 2017, p. 133). It "*allows all different rights and principles to be weighed against each other in the same dimension*" (Sauter, 2013, p. 441). This article undertakes a comprehensive analysis of the ECB's evolving perspective on the principle of proportionality as articulated in its opinions concerning national cash payment limitations. By examining a range of ECB opinions issued over time, this analysis seeks to delineate the key factors considered by the ECB in its assessment and to illuminate the nuanced application of this crucial legal standard in the context of cash as a means of payment.

1.1 Research Hypothesis and Methodology

This article advances the thesis that the ECB's application of the principle of proportionality in opinions on national cash payment restrictions has undergone significant doctrinal development, moving from a mere formal compatibility check into a substantive analytical framework within ECB opinions on cash payment limitations, and that this evolution reflects the ECB's increasing sophistication in balancing Member State sovereignty with the protection of legal tender status of euro banknotes and coins.

This paper employs analytical legal research methodology, combining doctrinal analysis of legal sources with critical evaluation of their evolution and application. The research is based on qualitative analysis of ECB opinions between the years 2010 and 2025, specifically those addressing national cash payment restrictions and relevant case law of the Court of Justice of the European Union (hereinafter referred to as "**CJEU**") on proportionality and legal tender restrictions. It consists of systematic content analysis of ECB opinions to identify patterns in proportionality assessment to trace doctrinal evolution, and synthesis with CJEU jurisprudence to evaluate consistency with established EU law principles. The selection criterion for ECB opinions was their substantive focus on proportionality analysis of cash payment limitations.

2. ECB AND THE PRINCIPLE OF PROPORTIONALITY

We must admit that "*the principle of proportionality, which is one of the few principles expressed explicitly in the European Union acts, is widely applied in the EU legal order and is therefore one of the fundamental principles of the EU system*" (Dlugosz, 2017, p. 283). For the European Central Bank, the principle of proportionality serves as both a constraint on its authority and a framework through which it evaluates national legislation affecting monetary policy and payment systems. This part examines the intricate relationship between the ECB's institutional role and the application of proportionality in the context of financial regulations, particularly those concerning cash payment limitations. The ECB occupies a unique position within the EU's institutional architecture, wielding significant influence over monetary policy, while also serving in an advisory capacity on legislative matters falling within its competence. When evaluating draft legislation from Member States, the ECB must carefully assess whether proposed measures strike an appropriate balance between achieving legitimate public policy objectives and preserving the integrity of the euro as legal tender. This balancing act epitomises the essence of proportionality analysis.

2.1 The ECB's Power to Adopt Opinions

The obligation to consult the European Central Bank is an important element of legal cooperation between the Member States of the European Union and the European institutions, and not only in monetary policy. One of the essential features of any EU institution is its involvement in the legislative process, and in the case of the ECB this is an obligation arising from Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union (hereafter referred to as "**TFEU**"). Member States are obliged to submit such proposals to the ECB for consultation before adopting laws or other legal measures that fall within the ECB's competence.

Although Article 127 of the Treaty on the Functioning of the EU is itself among the provisions on monetary policy, we cannot conclude that the consultation obligation will apply exclusively to monetary policy. On the contrary, it is a general provision that provides for a duty to consult in the ECB's area of competence (the whole remit). While Article 127(4) TFEU provides that the ECB is to be consulted in the area of its competence, it also provides that it is to be consulted only within the limits and under the conditions laid down by the Council in accordance with the procedure under Article 129(4) TFEU. To this end, the Council has adopted a decision - Council Decision of 29 June 1998 on consultation of the European Central Bank by the national authorities on draft legislation (98/415/EC). Pursuant to Article 2(1) of that Decision, the authorities of the Member States shall consult the ECB on any draft legislation within their area of competence under the Treaty, e.g. currency matters or payment methods and more.

The legislator in Slovakia even submitted a draft law that would have introduced such a consultation obligation into the Rules of Procedure of the National Council of the Slovak Republic.[1] As the sponsors of this bill stated, its aim was to remedy the shortcomings of the Rules of Procedure of the National Council. These shortcomings consist in the absence of regulation of certain matters related to the Slovak Republic's membership of the European Union in the adoption of bills submitted by Members of the National Council or committees of the National Council, as confirmed by the European Central Bank in its opinion CON/2014/54 of 10 July 2014.[2] We learn from this ECB[3] opinion that the ECB itself also took a positive view of the main objective, which was to ensure that the relevant provisions of national legislation were submitted for consultation in an orderly and timely manner.

The ECB also positively assessed the intention of the legislators, who also had in mind those draft amendments which, during the negotiations, would turn the initially submitted proposals not falling within the ECB's competence into rules which are already subject to the consultation obligation. Even in the case of last-minute amendments, the adoption of the proposed national legislation must be postponed until the ECB has delivered its opinion. This is to ensure that the National Council of the Slovak Republic

[1] See National Council of the Slovak Republic. (2014). Draft Act submitted by Members of the National Council of the Slovak Republic Jozef Viskupič and Jozef Kollár for the adoption of a law amending and supplementing Act No. 350/1996 Coll. on the Rules of Procedure of the National Council of the Slovak Republic, as amended (Parliamentary Print No. 1197). Available at: https://www.nrsr.sk/web/Default.aspx?sid=zakony/zakon&MasterID=5140 (accessed on 29.04.2025).

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[3] Opinion of the European Central Bank of 10 July 2014 on rules governing consultation of the ECB (CON/2014/54).

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could meaningfully consider the ECB's opinion before the final vote on the draft national legislation.

2.2 On the Possibility of Adopting Limits on Cash Payments in the EU

First of all, a legitimate question that arises when limiting cash payments at EU level is whether it is possible to introduce such limits at all. After all, one of the four fundamental freedoms on which the EU was built is the free movement of capital - Article 63 et seq. TFEU. Restricting cash payments could therefore be fundamentally incompatible with the right to free movement of capital. Art. 65 TFEU, however, legitimises such necessary measures which can be justified on grounds of public interest or public security. The former President of the German Federal Constitutional Court, prof. Papier, adds to this the possible interconnection and limitation of fundamental rights under the Charter of Fundamental Rights of the European Union, namely under Article 7 - respect for private and family life, Article 8 - protection of personal data and Article 17 - right to property (Papier, 2022, p. 86, 87). However, it also notes that these rights can also be restricted under Article 52(1), second sentence of the Charter - where it is necessary and genuinely consistent with objectives of general interest recognised by the EU, or where it is necessary to protect the rights and freedoms of others, in compliance with the principle of proportionality.

Thus, although a restriction in the form of a maximum limit on cash payments relates to several EU fundamental rights and freedoms, it may be legitimate if it is proportionate and pursues the general interest or the public interest.

The CJEU has also commented in its case law on the assessment of the national cash limit and its compatibility with EU law. In its judgment of 6 October 2021 in Case C-544/19 (ECOTEX BULGARIA), it stated that "*Article 63 TFEU, read in conjunction with Article 49(3) of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding legislation of a Member State which, in order to combat tax evasion and tax avoidance, prohibits, on the one hand, natural and legal persons from making a payment in cash in the domestic territory if the amount of that payment is equal to or greater than a specified threshold and which, for that purpose, requires a transfer or deposit to be made into a payment account ...*". The CJEU has previously stated "*national legislation may constitute an obstacle to one or more of the fundamental freedoms guaranteed by the TFEU and where the Member State concerned relies on the grounds set out in Article 65 TFEU or on overriding reasons of general interest recognised by EU law to justify such an obstacle.*"[4] In its earlier case-law, the CJEU has already identified, for example, the objectives of combating tax fraud and evasion as being in the public interest in restricting the free movement of capital.[5] Moreover, in restricting the free provision of services (a freedom analogous to the free movement of capital), the CJEU has also recognised the fight against money laundering as a legitimate objective.[6]

[4] CJEU, judgement of 21 May 2019, European Commission v Hungary, C-235/17, ECLI:EU:C:2019:432, para. 64.
[5] CJEU, judgement of 7 April 2011, European Commission v Portugal, C-20/09, ECLI:EU:C:2011:214, para. 60, and the case-law cited therein.
[6] CJEU, judgement of 25 April 2013, Jyske Bank Gibraltar Ltd, v Administración del Estado, C-212/11, ECLI:EU:C:2013:270, para. 64.

3. THE PRINCIPLE OF PROPORTIONALITY IN EU LAW AND CASH PAYMENTS LIMITATIONS

The principle of proportionality, enshrined in Article 5(4) of the Treaty on European Union, dictates that the content and form of Union action must not exceed what is necessary to achieve the objectives of the Treaties. "*This principle calls for a reasonable or appropriate balance between the authority that Member States may employ to avert possible abuse, evasion, or avoidance and the implementation of the values, rights, and duties…*" (Beshi and Susuri, 2023, p. 28).

This overarching principle encompasses three sub-principles: appropriateness (or suitability), meaning the measure must be apt to achieve the desired objective; necessity, implying that there should be no less restrictive means available to achieve the same end; and proportionality *stricto sensu*, which requires a balancing of the advantages and disadvantages of the measure, ensuring that the benefits outweigh the drawbacks.

In the context of cash payments, the legal tender status of euro banknotes and coins, as recognised by Article 128(1) of TFEU, provides a crucial backdrop. While euro banknotes and coins are legal tender throughout the euro area, meaning they must be accepted in payment of monetary debts, this status is not absolute. The CJEU[7] has affirmed that Member States may, for reasons of public interest, introduce limitations on payments in cash, provided that other lawful means for the settlement of monetary debts are available. On the other hand, in a study commissioned by the European Commission, De Groen, Busse and Zarra (2017, p. 132, 133) concluded that cash restrictions do not have the desired result on terrorist financing or tax evasion. Based on their research, for some authors, such limit appears neither necessary nor proportionate (Schroth, Vyborny and Ziskovky, 2022, p. 117).

The ECB, in its capacity to promote the smooth operation of payment systems within the Eurosystem - Article 127(2) TFEU, and to be consulted by national authorities on draft legislative provisions relating to means of payment has a vested interest in ensuring that national cash payment limitations are proportionate and do not unduly impede the efficiency and accessibility of payment systems or undermine the status and public trust in cash.

3.1 ECB on Proportionality

In general, the principle of proportionality is mostly used by courts "*as an instrument to verify whether the choices of the Public Administration have been made properly*" (Poto, 2007, p. 868), so it is an ex-post control. In the case of the ECB, however, it is an ex-ante control (at least it should be), i.e. it subjects legislation to control before it is adopted, also from the point of view of the principle of proportionality (not only in the case of introducing limits on cash payments). A review of the ECB's opinions reveals a consistent emphasis on the principle of proportionality from the outset, albeit with an increasing level of detail and a more granular consideration of the potential impacts of proposed limitations.

In its early opinion concerning a Bulgarian draft law on restrictions on cash payments in 2010 (CON/2010/79), the ECB noted that EU law only regulates restrictions on cash payments in euro. Bulgaria was one of the earlier Member States to seek the

[7] CJEU, judgement of 26 January 2021, Johannes Dietrich and Norbert Häring v Hessischer Rundfunk, joined cases C-422/19 and C-423/19, ECLI:EU:C:2021:63.

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ECB's opinion on restrictions on cash payments. In 2010, the Bulgarian Ministry of Finance requested an opinion on a draft law intended to limit cash payments within Bulgaria to BGN 5 000 (approximately EUR 2 557) or its foreign currency equivalent. The stated purpose of the Bulgarian draft law, according to its explanatory memorandum, was to address the widespread issue of unrecorded cash flows in accounting practices, which was identified as a major problem for the Bulgarian economy. The prevalence of cash payments for transactions involving legal entities and individuals, as well as for employment remuneration, was linked to tax evasion and reduced social insurance and pension contributions. Consequently, the draft law aimed to significantly increase national revenue and reduce the grey economy in Bulgaria. In its opinion, the ECB acknowledged the public benefits underpinning the draft law's objectives, including addressing national revenue shortages, shrinking the grey economy, and enforcing stricter anti-money laundering measures tailored to the Bulgarian context. The ECB considered the proposed limitations on cash payments in Bulgarian lev proportionate to these pursued objectives. This early opinion set a precedent for the ECB's analysis of cash payment restrictions, emphasising the balancing of public interest goals against the impact on cash as a means of payment.[8]

By 2012, the ECB's opinions began to articulate the proportionality principle more explicitly. In its opinion on Spanish (CON/2012/33) and Danish (CON/2012/37) draft laws, the ECB stated that the effects of provisions containing practical limitations on cash payments should be proportionate to the general objective pursued and should not go beyond what is necessary to achieve this objective. The ECB also emphasised the need to carefully weigh any impact against the public benefits expected.

The opinion on a Lithuanian draft law in 2014 (CON/2014/4) introduced the crucial element of access to alternative payment methods. Noting that a significant portion of the Lithuanian population did not have payment accounts, the ECB recommended ensuring access to such accounts to mitigate the impact of cash payment limitations. This highlights the ECB's consideration of the necessity aspect of proportionality, ensuring that less restrictive alternatives are genuinely available to all.

The ECB's assessment of a Romanian draft law in the same year (CON/2014/37) further refined the proportionality analysis by focusing on the impact on transactions between natural persons and the proportion of the population without bank accounts. The ECB underscored that any negative impact of proposed limitations on this segment of society should be carefully weighed against the anticipated public benefits.

Opinions concerning Danish draft laws in 2013 (CON/2013/11) and 2017 (CON/2017/8) demonstrated the ECB's increasing scrutiny of limitations affecting relatively low-value payments. The ECB reiterated that authorities should ensure that the effects of such measures do not exceed what is necessary to achieve the stated objectives, such as combating money laundering and terrorist financing. Furthermore, the ECB explicitly noted in its 2017 opinion that the limitation should be effective and proportionate to the objective pursued.

A significant development in the ECB's articulation of proportionality came with its opinion on a Spanish draft law in 2022 (CON/2022/9). Here, the ECB explicitly stated that the broader and more general a limitation is, the stricter should be the interpretation

[8] Years later, in 2017, Bulgaria once again sought the ECB's opinion on a draft amendment to the law on the limitation of cash payments. This draft law proposed a gradual decrease in the maximum limit for cash payments to BGN 1 000 (approximately EUR 500) and the ECB in its opinion has had a different opinion in this case.

of the requirement for the limitation to be proportionate. The ECB also emphasised the need to consider alternative measures that would fulfil the relevant objective with a less adverse impact. Moreover, the ECB cautioned that cash payment limits should consider the advantages of having limits and the potential inconvenience for regular transactions, aiming to avoid a factual impact leading to the abolition of euro banknotes as a general means of payment. The ECB also raised concerns about potentially disproportionate fines for non-compliance.

More recently, in its opinion on Greek draft amendments in 2023 (CON/2023/39), the ECB questioned the proportionality of indirect limitations on cash use through tax disincentives, particularly in light of existing general prohibitions. This opinion reflects a more holistic assessment of the cumulative impact of various measures affecting cash payments. Similarly, in its 2024 opinion on Danish measures (CON/2024/2), the ECB expressed concerns about the proportionality of lowering the cash prohibition limit, questioning the substantiation provided and referencing its previous stance on a similar measure in Spain where a EUR 1,000 limit was considered disproportionate. Also in this opinion ECB noted that the effect of the current inflation rates throughout Europe on the purchasing power of money is something which should also be taken into account when assessing whether the cash prohibition limit proposed in the draft law is proportionate to the public interest objective pursued. Thus, another aspect that affects proportionality is inflation, i.e. the depreciation of money over time should also be taken into account when setting limits for cash payments.

We also see a certain shift in the ECB's opinions, or reference to other EU sources, insofar as they are relevant or considered relevant by the ECB in the proportionality assessment. These sources are the CJEU judgment in joined cases C-422/19 and C-423/19 of 26 January 2021 - Johannes Dietrich and Norbert Häring v Hessischer Rundfunk (hereinafter referred to as „**Joined Cases C-422/19 and C-423/19**"),[9] the Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (hereinafter referred to as "**Directive**").[10] The Directive is mentioned because of the limit of EUR 10 000. It is specifically this limit that has become something of a guideline and recommendation for the ECB in this context.

3.2 ECB Following the CJEU Judgment in Joined Cases C-422/19 and C-423/19

What is important in this case is not only the decision itself - the CJEU's judgment in Joined Cases C-422/19 and C-423/19, but also the Advocate General's submissions. In the present case, the absolute limitation of the possibility to pay in cash, i.e. its exclusion from the payment of certain services, was considered.

The principle of proportionality, as mentioned above, is a general principle of EU law, requiring that measures adopted by public authorities should be appropriate for attaining the legitimate objectives pursued and must not go beyond what is necessary to achieve them. In his Opinion concerning the Joined Cases C-422/19 and C-423/19,

[9] For example – the ECB opinions CON/2022/5, CON/2022/9, CON/2022/43, CON/2023/7, CON/2023/13, CON/2023/39, CON/2024/2, CON/2025/4.

[10] For example – the ECB opinions CON/2017/18, CON/2017/20, CON/2017/27, CON/2017/40, CON/2019/4, CON/2020/17, CON/2020/33, CON/2022/5, CON/2022/9, CON/2024/2.

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Advocate General G. Pitruzzella dedicated specific attention to the principle of proportionality in the context of potential restrictions on the use of euro banknotes and coins, further elaborating on its significance.

The Advocate General argued that while the EU has exclusive competence in monetary policy, including defining legal tender, this does not preclude the Member states from adopting measures, in the exercise of their own competences, that may indirectly affect the use of cash. However, such measures, enacted for reasons of public interest (which extend beyond just public order), must be compatible with the concept of legal tender under EU law and adhere to the principle of proportionality.

The Advocate General explicitly stated that legal regulations restricting the use of cash as a means of payment, whether adopted by the EU or the Member states, must establish a limitation that is proportionate to the objective pursued. He reiterated the established understanding of the principle, emphasising that the measures should be suitable for ensuring the achievement of the legitimate aims of the regulation and must not exceed what is necessary for their attainment. Furthermore, if several suitable measures are available, the least restrictive one should be chosen.

In the specific context of the Joined Cases C-422/19 and C-423/19's exclusion of cash payments for broadcasting fees, the Advocate General considered the proportionality of such a measure. He noted that while the stated aim related to the efficiency of public administration and the collection of fees in "mass proceedings," the complete and unreserved exclusion of cash payments without apparent consideration for the social inclusion function of cash for vulnerable individuals raised questions regarding its proportionality.

The CJEU also explicitly addressed the principle of proportionality in its judgment in Joined Cases C-422/19 and C-423/19. The CJEU stated (para. 68) that restrictions on the use of euro banknotes and euro coins by the Member States for public interest reasons must be proportionate to the public interest objective pursued.

The CJEU further elaborated (para. 69) that when the Member States impose restrictions that limit the possibility of generally discharging a payment obligation in euro banknotes and euro coins, they must ensure that these measures comply with the principle of proportionality, which is one of the general principles of EU law. In paragraph 70, the CJEU reiterated the settled case-law definition of the principle of proportionality, stating that the measures concerned must be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not go beyond what is necessary in order to achieve those objectives.

In this case the CJEU also emphasised a crucial point in paragraph 77, stating that it is for the referring court (the Bundesverwaltungsgericht) to ascertain whether such a limitation is proportionate to that objective, particularly considering whether the alternative means of payment are readily accessible to everyone liable to pay. If they are not, then provisions might need to be made for those without access to pay in cash.

The CJEU's judgment in Joined Cases C-422/19 and C-423/19 firmly embeds the principle of proportionality as a key criterion for assessing the legality of national restrictions on cash payments. While acknowledging that public interest objectives can justify such limitations, the Court emphasises that Member States must ensure that the measures are appropriate and necessary, and crucially, that they do not disproportionately affect individuals, particularly by ensuring the availability of alternative lawful means of payment. The ultimate assessment of proportionality in the specific case was left to the national court.

With this case, the principle of proportionality as regards the limits on cash payments has also taken on a different dimension and has been written down. However,

the views described in the CJEU judgment cannot be regarded as an absolute solution to the principle of proportionality in relation to cash payments. Despite the definition of a certain direction, the assessment of the proportionality of restrictions on cash payments remains in many respects an unwritten principle. It has to be assessed on a case-by-case basis. This case has been mentioned because the European Central Bank has also started to refer to it in its opinions on cash restrictions. Regarding the proportionality of a restriction of the legal tender status of euro banknotes, the CJEU requires not only that the measure is appropriate for attaining the public interest objective pursued, but also that it must not go beyond what is necessary in order to achieve that objective.[11]

3.3 Disproportionality Found by the ECB

As it turns out, the restriction of cash payments itself is possible and can be assessed as proportional. Even the CJEU has assessed that legal tender status implies only its acceptance in principle and therefore not absolute. Thus, some limitation of cash payments comes into consideration. However, not all limits will be in line with EU law, or so the European Central Bank's opinions tell us.

As mentioned earlier, the ECB found draft law from Bulgaria, that should lower the limit of cash payments to BGN 1000 as disproportionate. The ECB in its opinion (CON/2017/27) considered the lowering of the limit on cash payments to BGN 1000 (approximately EUR 500) by the 1 January 2019 as disproportionate, in the light of the potentially adverse impact on the cash payment system.

This opinion merely confirmed its earlier view, expressed on the Belgian draft legislation, that the ECB in its opinion (CON/2017/20) confirmed that the EUR 500 limit is too low and disproportionate. The ECB recommended raising the threshold of EUR 500 for purchases by nonconsumers of all types of old metals, copper cables or goods containing precious materials, as this threshold is disproportionately low, despite the intention of combatting money laundering and the handling of stolen goods, especially by travelling criminal groups. In the case of vendors selling jewels with dubious origins traders are, in any case, not supposed to enter into such transactions, irrespective of their amount, as this would give rise to a breach of criminal law on account of concealment.

The ECB also commented on the EUR 1000 cash limit, which also failed the proportionality test. In its opinion (CON/2022/9) ECB stated that the EUR 1 000 limit on cash payments set by the Law and to which the explanatory memorandum accompanying the Law refers as "the general limit for cash payments" should take into account the advantages of having limits on cash payments in place and the potential inconvenience thereof for regular transactions in certain market segments. Against this background, the ECB considered the lowering of the limit on cash payments in transactions where any of the parties acts in a professional or business capacity to EUR 1 000 to be disproportionate. It would have an adverse and undesired impact on the legal tender status of euro banknotes. In addition, this cash payment limit significantly reduces the ability of payers to use euro banknotes and the freedom of citizens to choose how to pay.

[11] E.g., point 7 of the ECB opinion - CON/2023/7.

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3.4 Can an Absolute Restriction on Cash Payments Be Proportionate?

On the other hand – could the absolute limitation of cash payments be proportionate? It is a legitimate question whether a complete restriction on cash payments can be proportionate at all.

We can mention the ECB opinion on limitations on cash payments in the context of payment of wages (CON/2013/11) where the draft law provided that wages should, in general, be paid into a bank account designated by the employee. The aim is to reduce the use of cash, and thereby to make it more difficult for employers to make undocumented payment of wages. Payment of wages in cash was still permitted under "compelling reasons," such as when an employee does not have a bank account or when circumstances beyond the employer's control prevent timely access to wages. Employees without a bank account were not required to open one and can still receive wages in cash. The ECB concluded that the restrictions were proportionate to the objectives pursued, as they carefully balance the public benefits of combating tax evasion against any negative impacts, which were expected to be minimal. However, as the ECB has also noted, the restriction on cash payments had many exceptions. This was not actually an absolute restriction on cash payments. Thus, there is a significant difference between this regulation and the regulation prohibiting cash payments for insurance premiums in the Slovak Republic.

The ECB was somewhat more lenient in its opinion (CON/2022/43) in relation to the German legislation, which also introduced the complete impossibility of cash payments for the purchase of real estate. Regarding the condition that a cash restriction should be proportionate, ECB concluded that it was not specifically described in the explanatory memorandum to the draft law to what extent alternative and equally or more effective measures, other than the strict prohibition of cash payments in the real estate sector, could be adopted that would also fulfil the objective of the draft law. So, it was difficult for the ECB to assess whether the prohibition could be considered proportionate to the objective pursued.

The ECB's opinions do not give us a clear answer as to whether even an absolute cash restriction can be proportionate. However, the question is partly answered by the CJEU in the judgment in Joined Cases C-422/19 and C-423/19, in which it stated (para. 76) that the limitation at issue in the main proceedings appears to be both appropriate and necessary in order to achieve the objective of actually recovering the radio and television licence fee, in that it enables the administration to avoid having to bear an unreasonable financial burden given the cost that would be involved in the widespread establishment of a procedure that allows licence fee payers to pay the radio and television licence fee in cash. What is interesting, CJEU stated that it is for the referring court to ascertain whether such a limitation is proportionate to that objective, in particular in the light of the fact that the lawful alternative means of payment of the radio and television licence fee may not be readily accessible to everyone liable to pay it, which would entail providing for those without access to such means of payment to be able to pay in cash.

4. PROPORTIONALITY PRINCIPLE AND ECB OPINIONS IN RELATION TO CASH LIMITATION IN SLOVAKIA

First, it should be noted that the ECB in its opinion (CON/2012/83) has been very conservative about our limit on cash payments, which the Slovak Republic intended to introduce by the 2012 law. It did not specify whether it was proportional or disproportionate but only made a recommendation to our authorities that the limits on

settlements in cash should be proportionate to the objectives pursued and should not go beyond what is necessary to achieve such objectives. Any impact of the proposed limits should be carefully weighed against the public benefits expected to be derived from the proposed restrictions on settlements in cash. In view of the fact that the measures affect relatively low-value payments, the competent authorities should ensure that the effects of these measures do not go beyond what is necessary for achieving the objective of combating tax fraud and evasion.

It is interesting to note then that when the cash limit was changed to EUR 15 000, i.e. increased, the ECB has already strongly addressed the proportionality of this limit. In its opinion (CON/2023/13) ECB stated that regarding the proportionality of the draft law, the threshold of EUR 15 000 introduced by the draft law does not seem to go beyond what is necessary in order to achieve the objective of combatting tax fraud and evasion.

Another case was the ECB's position – opinion (CON/2023/7) in relation to the limitation of cash payments for public social insurance contributions. The ECB considered that our authorities have not sufficiently assessed the proportionality of the new limitation on cash payments. As the explanatory memorandum phrases the public interest objectives only in a vague manner and as the legislator has not provided any concrete impact assessment, it is difficult for the ECB to assess whether or not the limitation of cash payments to the Social Insurance Agency could be considered proportionate in light of the public interest objectives pursued. Our authorities should ensure that restrictions on cash payments are appropriate and necessary to achieve the public interests pursued and do not call into question the possibility, as a general rule, of discharging a payment obligation in legal tender.

We can see that the cash limits introduced in the Slovak Republic appeared to the ECB to be proportionate, while the absolute limitation of cash payments for insurance premiums was evaluated by the ECB very critically, especially about the quality of the explanatory memorandum. In fact, the legislator only vaguely described the objective pursued and it was not even clear whether such a measure would contribute to its achievement. The ECB probably did not even want to say that such a restriction was disproportionate, but if it was not sufficiently justified, it had no choice either.

5. THE PRINCIPLE OF PROPORTIONALITY AND THE INTRODUCTION OF AN EU LIMIT ON CASH PAYMENTS BY THE ECB

From the Opinion of the European Central Bank of 16 February 2022 on a proposal for a directive and a regulation on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (CON/2022/5) 2022/C 210/06, several points can be inferred regarding the principle of proportionality, particularly in relation to the proposed limit to payments in cash outlined in Article 59 of the proposal (the provision was eventually adopted with several changes as Article 80).

First of all, the ECB explicitly addressed the principle of proportionality in the context of the proposed prohibition on cash payments exceeding EUR 10 000. It noted that while combating money laundering is in the public interest, any restrictions on the right to use legal tender (but also the property right according to Art. 17 of the Charter of Fundamental Rights of the European Union) must be evidence-based and comply with the principle of proportionality, meaning they must be appropriate for attaining the legitimate objective and not go beyond what is necessary.

The ECB also referred to the mentioned judgment of the CJEU, which established conditions for restrictions on the legal tender status of euro banknotes. It welcomes that

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the threshold for the intended prohibition is set sufficiently high to avoid a factual impact leading to the abolition of euro banknotes.

However, the ECB raised concerns that the proposed prohibition is absolute and does not follow the risk-based approach applied so far in the AML/CFT framework, impacting all citizens and travellers to the EU. The ECB highlighted the importance of lawful alternative means of payment being readily accessible to everyone and noted the lack of proposed exceptions in the proposal for situations where alternative means of payment might not be available (e.g., power outages). The ECB encourages the inclusion of such amendments to enhance the proportionality of the intended measure and to provide necessary exceptions. This directly addresses the "necessary" aspect of the proportionality principle by pointing out a potential overreach of the prohibition in certain circumstances. In this context, i.e. for exceptions ECB also suggested considering notification obligation for transactions above a certain threshold. This again relates to the proportionality principle by advocating for the consideration of alternatives with a less adverse impact.

In summary, the ECB's opinion focused significantly on the principle of proportionality in the context of the proposed cash payment limit. While acknowledging the legitimate aim of combating money laundering, the ECB stressed the need for the measure to be appropriately tailored, to include necessary exceptions, and to avoid an undue impact on the legal tender status and usability of euro banknotes, particularly for those who rely on cash or lack access to alternatives. The ECB's analysis aligns with the principles established by the Court of Justice of the European Union regarding restrictions on cash payments. The adopted provision dealing with the cash limit already contains exceptions, thus the legislator complied with the ECB's comment.

6. CONCLUSION

In its opinions the ECB has provides additional guidance among other things on whether cash limitations are proportionate. In particular, the ECB has noted that the broader and more general a limitation is, the stricter should be the interpretation of the requirement for the limitation to be proportionate to the objective pursued.

In conclusion, the European Central Bank’s opinions on national cash payment limitations consistently underscore the paramount importance of adhering to the principle of proportionality. The systematic doctrinal analysis of ECB opinions from 2010 – 2025 validates the hypothesis that the European Central Bank's approach to proportionality in evaluating national cash payment restrictions has undergone substantial doctrinal evolution. Also, thanks to the evolution in CJEU case law. The ECB's assessment has shifted from mere formal legality checks to deep, substantive proportionality analyses that balance Member States' policy autonomy with the protection of euro banknotes and coins as legal tender. The main conclusion is that the principle of proportionality has become a critical and nuanced legal standard in the ECB’s view for assessing national cash payment limitations. The ECB now requires that such measures, to be compatible with EU law, must be evidence-based, appropriate, necessary, and proportional stricto sensu to their legitimate public policy objectives (like fighting money laundering, tax evasion, or financing terrorism). The ECB meticulously examines the public interest objectives, the level and scope of the limits, the accessibility of alternatives, the potential adverse impacts, and the justification provided by national authorities. The analysis of ECB opinions herein demonstrates the ECB's commitment to ensuring that while Member States may legitimately pursue public interest goals through cash payment limitations, they must do so in a manner that is carefully calibrated, avoids

disproportionate burdens, and respects the fundamental role of cash within the broader payment landscape of the European Union. The ECB's opinions serve as invaluable guidance for national legislators, promoting the implementation of proportionate and effective cash payment regulations that strike a judicious balance between public policy objectives and the principles underpinning the EU's legal and economic framework.

At the outset, it should be stressed that ECB opinions are not legally binding, but they are nonetheless an important source for understanding EU law in relation to national legislation. If the ECB expresses an opinion in an area under its jurisdiction, it is very likely that other EU institutions (e.g. the European Commission) can and will share its view.

It is the national courts and the CJEU on whose shoulders rests the assessment of the proportionality of a particular Member State's authorisation. The ECB's opinion can to some extent act as an initial guide, a non-binding but useful resource. Also, the CJEU stated that it may take the ECB opinions into consideration where they provide useful guidance for the interpretation of the relevant provisions of EU law (para. 48, CJEU judgment in joined cases C-422/19 and C-423/19).

The ECB's opinions are not binding, nor do we need them to be binding, but they represent a qualified technical and, ultimately, legal view (although ECB does not have the power to interpret EU law in a binding manner) on issues that have a broader impact (not only) on the stability of the euro, the payment system and the monetary system. Consultations should take place before the relevant legislative act is adopted, but as it turns out, this is not always the case, and this is also true in Slovakia. Therefore, the aim is not so much to make the ECB's opinions binding, but rather to give members of the National Council of the Slovak Republic the opportunity to obtain a fundamental opinion from a third party (ECB in this case) whose area of expertise covers the draft law to be discussed. This third party has the appropriate apparatus to assess the change in question and can point out shortcomings that the national legislator may not necessarily have noticed (or may not even have considered to be shortcomings). In conclusion, we can therefore propose an amendment to the Rules of procedure of the National Council of the Slovak Republic so that if the parliament is to adopt a law that should have been consulted with the ECB but has not been, it must contact the ECB in appropriate time, wait for its opinion to be adopted, consider this opinion, and only then vote on the act. Requesting the ECB's opinion before adopting a law and taking it into account should therefore be a mandatory condition, without which members of parliament would not be allowed to vote on the act.[12]

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[12] A similar proposal was already discussed in Slovakia in the past, and the ECB itself commented on this issue in the opinion of 10 July 2014 on rules governing consultation of the ECB (CON/2014/54).

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SEXUAL VIOLENCE IN ARMED CONFLICT: PROSECUTORIAL STRATEGY OF THE INTERNATIONAL CRIMINAL COURT AND PERSISTENT OBSTACLES

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Abstract: *When we think about weapons of war, guns, bullets, and bombs come to our mind, not rape or sexual violence. But rape does more than just wound, it is a military strategy used to deny and destroy the identity of a targeted community. Historically, sexual violence in armed conflicts was considered a byproduct of war, simply as unrestrained sexual behaviour amid lawlessness and a breakdown of societal infrastructure. By digging deeper into the aims and intentions, sexual violence developed into a strategic tool of discrimination and hate, and a weapon of warfare, largely targeted at humiliation, torture, demoralisation, and individual or collective shaming. This article will discuss the evolution of recognising sexual violence as a crime from ancient times, when it was not a crime at all. By spotlighting these facts, this article will define a comprehensive understanding of sexual violence acts in armed conflict considered as a crime. There will be a discussion on the International Criminal Court (ICC)'s prosecutorial strategy on perpetrators and some existing obstacles of the ICC in addressing and charging sexual violence.*

Key words: *Sexual Violence; Armed Conflict; International Criminal Court (ICC); Prosecutorial Strategy; Victims*

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1. INTRODUCTION

Wartime rape and sexual violence have long been shrouded in silence, historically considered as an inevitable consequence of war as a product of chaos, lawlessness, and the collapse of societal order. Acts of sexual violence were perceived merely as uncontrolled acts of aggression in the absence of authority in a broken society, these heinous crimes leave deep and long-lasting physical as well as psychological scars on victims. It displaces, terrorises, and destroys individuals, families, and even entire communities. It can leave the survivors with emotional trauma and psychological damage, coupled with physical injuries, unwanted pregnancies, and sexually transmitted diseases (STDs) like HIV, thus bearing consequences for generations (O'Brien, 2015, pp. 386-406).

But what happens with the rapists? History shows that most of the time they get away with it because the rape and sexual violence against women in armed conflicts were yet to be acknowledged as a war crime by the international instruments. In 2008, the United Nations Security Council adopted Resolution 1820, which emphasised the immediate cessation of all sexual violence against civilians in armed conflict and called upon member states to prosecute individuals responsible by ensuring the exclusion of

any amnesty provisions.[1] Furthermore, the Rome Statute of the International Criminal Court includes comprehensive prohibitions against sexual and gender-based crimes under Article 8 of such Statute. The International Criminal Court (**ICC**) has detailed the elements of crimes involving sexual violence through its Elements of Crimes, which outlines the specific legal criteria for prosecuting acts such as rape, sexual slavery, enforced prostitution, and any other forms of sexual violence under International Criminal Law.[2] For such acts, the individual perpetrators are subject matter of the International Criminal Court prosecution under the principle of complementarity applies to national jurisdiction of the member states, or even non-member states when the Court's jurisdiction is triggered by UN Security Council referral to establish their direct or command responsibility.

Despite these normative advancements, the practical implementation of the ICC's mandate has revealed both progress and enduring challenges. The Court has faced issues of under-reporting, evidentiary difficulties, prosecutorial discretion, and inherent gender biases that often impede effective accountability. While landmark cases such as Prosecutor v. Jean-Pierre Bemba Gombo have advanced the development of international criminal jurisprudence concerning sexual violence, notable reversals and acquittals have underscored significant limitations in prosecutorial strategies, evidentiary standards, and survivor participation. During the tenure of Fatou Bensouda as the second Prosecutor of the International Criminal Court, substantial progress was made in addressing earlier limitations in investigations and prosecutions, particularly concerning sexual and gender-based crimes (**SGBC**). A landmark development came in 2014 with the adoption of the Policy Paper on Sexual and Gender-Based Crimes by the Office of the Prosecutor (**OTP**), which introduced a structured, gender-sensitive framework for conducting investigations and prosecutions.[3] This Policy Paper was described as a game-changer in the prosecutorial strategy in the matter of sexual violence as it embraces such acts may affects all genders not only women.[4] More importantly, Prosecutor Bensouda affirmed her intention to pursue SGBC under multiple legal classifications, namely as genocide, crimes against humanity, and war crimes depending on the circumstances in which the crimes were committed.[5] Charges would be applied cumulatively to reflect the severity and complex nature of SGBC, ensuring that offenses are recognised both in their own right and as manifestations of broader violations such as torture or persecution.[6] By placing SGBC at the centre of prosecutorial priorities, the OTP signalled a decisive shift toward greater gender sensitivity in its jurisprudence.

However, even in this 21st century, wars have continued around the world and so have rapes and other forms of sexual violence which are not only limited to women and

[1] United Nations Security Council (2008). Security Council Demands Immediate and Complete Halt to Acts of Sexual violence against Civilians in Conflict Zones, SC/9364. Available at: https://press.un.org/en/2008/sc9364.doc.htm (accessed on 14.10.2025).
[2] International Criminal Court (2013). Elements of Crimes, article 8(2)(a). Available at: https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf (accessed on 13.10.2025).
[3] Office of the Prosecutor, International Criminal Court (2014). Policy Paper on Sexual and Gender-Based Crimes. Available at: https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf (accessed on 14.10.2025).
[4] *Ibid.*, paras. 18–20.
[5] Fatou Bensouda. (2014). Statement to the Assembly of States Parties, ICC-ASP/13/20.
[6] Office of the Prosecutor, International Criminal Court (2014). Policy Paper on Sexual and Gender-Based Crimes, para 71. Available at: https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf (accessed on 14.10.2025).

girls but also men are also becoming victims of such violence.[7] This article aims to provide a comprehensive understanding of how and why sexual violence has been employed in armed conflicts throughout history. It will examine instances of sexual violence in ancient times and the evolution from 'no crime' to as a 'core crime' under International Criminal Law. The article will focus on the appropriate definitions and criteria for considering sexual violence a crime in both non-international and international armed conflict situations. In doing so this article will focus on legal prosecuting strategy of the International Criminal Court on sexual violence crime. It will interrogate the gaps between normative commitments and operational obstacles which are remaining unable to stop the exploitation of sexual violence in armed conflict.

2. A BRIEF HISTORY OF SEXUAL VIOLENCE IN ARMED CONFLICT

The use of sexual violence in armed conflict is not new but rather as ancient as the Bible-Deuteronomy, as stated in chapter 21 about "beautiful captive women".[8] In ancient warfare, it was common for victors to take women captive for the purposes of desire and enslavement. Historical texts from various cultures, including the Romans, Greeks, and Vikings, reflect the widespread practice of capturing women as war trophies (Vikman, 2005, pp. 24-29). Throughout history, women have often been regarded as the "spoils" of war, entitled to soldiers and victorious warriors. Additionally, the use of sexual violence served as a means to undermine the pride of entire communities; men who failed to protect their women faced shame and humiliation as a form of punishment. Despite this long history, sexual violence often remains unreported due to the trauma and shame it inflicts on victims, their families, and the broader community. The historical context of sexual violence in wartime is profoundly troubling; however, for an extended period, records have significantly underreported its prevalence. This silence can be attributed to the fact that such acts were perpetrated by both sides involved in the conflict. This complicity made it challenging to hold any party accountable, leading many victims to accept sexual violence as an unfortunate and inevitable aspect of armed conflict.[9] Even in the mid-20th century, discussions surrounding sexual matters and the complexities faced by victims were cloaked in social stigma. It was only after World War II that the issue of sexual violence began to gain traction as a topic of discussion, particularly concerning the recognition of atrocities committed against Asian women and girls who were subjected to enforced sexual slavery by the Japanese Army.[10] The Japanese government's official apology for compelling these women to serve in the military marked a significant acknowledgment of conflict-related sexual violence, as survivors were referred to as "comfort women".[11]

Following World War II, the establishment of war crimes tribunals in Tokyo and Nuremberg paved the way for the legal prosecution of war criminals and aimed to regulate the conduct of hostilities. However, the Charters of Nuremberg and the Tokyo Tribunals did not specifically cover sexual violence crimes. During the trial of General

[7] International Committee of the Red Cross (ICRC) (2016). Q&A: Sexual Violence in Armed Conflict, 22 September 2016. Available at: https://www.icrc.org/en/document/sexual-violence-armed-conflict-questions-and-answers (accessed on 18.10.2025).
[8] The Bible (2011). New International Version. Grand Rapids, MI: Zondervan, Deuteronomy 21:10-14.
[9] United Nations (1998). Sexual Violence and Armed Conflict: United Nations Response, Women 2000. New York: United Nations. Available at: https://www.un.org/en/preventgenocide/rwanda/pdf/sexual-violence-and-armed-conflict-1998-UN-report.pdf (accessed on 12.10.2025).
[10] *Ibid.*
[11] *Ibid.*

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Matsui, the Tokyo Tribunal made a charge which expressly pointed accusations regarding the heinous acts of rape. A substantial amount of compelling evidence was presented, demonstrating that these atrocities occurred during the brutal Japanese occupation of Nanking. As a result of this substantial evidence, he was convicted of crimes against humanity. However, none of the women who had suffered rape were called to testify during the trial, and the victimisation of these women received only incidental attention, underscoring a significant gap in the judicial recognition of sexual violence in wartime.[12]

In the wake of the traumatic experiences of World War II, the four Geneva Conventions were established in 1949 to enhance the protections available to victims of war. In 1977, two additional protocols were adopted to further strengthen these conventions. These treaties included specific provisions aimed at safeguarding women and children, particularly in relation to maternity issues, as well as regulations concerning the treatment of female prisoners, specifically addressing instances of sexual violence. However, there was no explicit mention of sexual violence in armed conflict as a crime punishable under the laws of armed conflict. The extensive reports of rape during the 1971 Bangladesh conflict raised significant concerns about the plight of women in wartime, particularly regarding pregnancies resulting from war-related sexual violence by considering genocidal rape upon a religious group (Stanley, 1997, p. 72). While the Fourth Geneva Convention explicitly prohibits acts such as rape, enforced prostitution, and any form of indecent assault under its provisions against outrages upon personal dignity and violence directed at women, it simultaneously conveys an implicit recognition of sexual violence as a pervasive and grave concern in situations of armed conflict.[13] These initiatives taken by the UN on the issue of wartime sexual violence were almost ignored by the Iraq invasion of Kuwait in 1990 and the frequent occurrence of sexual violence against Kuwaiti women were reported. In light of such conflict, the UN decided to create a Compensation Commission to compensate for the damage that occurred as a result of the unlawful invasion of Iraq in the land of Kuwait, and the commission also addressed the compensation for the physical and mental injuries arising from sexual assault (Lillich, 1995, pp. 141-307).

In 1993, the creation of *ad hoc* tribunal for the former Yugoslavia took one step forward on the recognition of sexual violence in armed conflict as a crime. The statute of the International Criminal Tribunal for former Yugoslavia (ICTY) expressly referred rape as constituting a crime against humanity.[14] The first indictment of ICTY exclusively dealt with sexual violence took place in the South-East Sarajevo by the Serb forces to many Muslim women who were detained and repeatedly raped by the soldiers.[15] The Tadic case is the first ever case in which the trial chamber heard the first testimony at the international level for the charge of raping female prisoner in the Omarska camp.[16]

With the prosecution of Tadic case the discussion of criminalising sexual violence in conflict had already been evolved, yet incidents of such violence remain pervasive. For instance, during the 1994 Rwandan genocide, thousands of women and

[12] *Ibid.*

[13] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, (1949), Art. 27.

[14] The International Criminal Tribunal for former Yugoslavia (ICTY) Statute (1993). Art. 5(g), UN Security Council Resolution 827.

[15] International Criminal Tribunal for Former Yugoslavia (ICTY) (1996). The Prosecutor v. Dragan Gagović et al. Case No. 96-23, Indictment, 26 June 1996.

[16] International Criminal Tribunal for Former Yugoslavia (ICTY) (1997). Prosecutor v. Duško Tadić (Appeals Chamber), Case No. IT-94-1-A, 15 July 1999. Available at: https://www.refworld.org/jurisprudence/caselaw/icty/1999/en/40180 (accessed on 23.10.2025).

children experienced rape, sexual mutilate on, and forced prostitution aimed at the destruction of the Tutsi ethnic group. Mass rapes were perpetrated by Hutu civilians and the Rwandan military as a means to systematically annihilate a targeted ethnic group recognised as genocidal rape under the Statute of International Criminal Tribunal for Rwanda (ICTR) 1994 (Thompson, 2007, pp. 375-380). Following the establishment of the International Criminal Tribunal for Rwanda (ICTR) as an *ad hoc* tribunal to prosecute war criminals, progress was made toward addressing sexual violence. Although the nature of the conflicts in Rwanda and the former Yugoslavia differed as Rwanda's conflict was classified as non-international, while the conflicts in the former Yugoslavia were both non-international and international in nature (Stewart, 2003, pp. 313-318). The Statute of Rwandan Tribunal identified rape as a crime against humanity. It also categorised rape, enforced prostitution, and indecent assault as violations of Article 3 of the Geneva Convention and the Additional Protocol II, which specifically addresses non-international armed conflicts. Despite this framework, the tribunal made minimal efforts to investigate the sexual violence that occurred in Rwanda in 1994. For instance, the original indictment in the case of Jean-Paul Akayeshu did not include any charges of sexual violence, despite the appalling nature of the reported abuses. As the trial progressed, testimony from victims in the Taba community highlighted their experiences, prompting the tribunal to revise the original indictment to include charges of sexual violence. Although Akayeshu may not have personally committed these acts, his failure to take action to prevent them, given his power and authority, rendered him responsible.[17]

Since the Nuremberg and Tokyo Trials, and extending to conflicts in Rwanda, sexual violence has been a consistent issue addressed in various contexts. Cultural factors and social stigma have often hindered women from openly sharing their trauma and suffering. Additionally, the lack of protection for victims and witnesses created significant barriers for women to testify at the Rwanda Tribunal, as fear of death and harassment loomed large.[18] The establishment of the International Criminal Court in 1998 under the Rome Statute marked a significant development in international criminal justice, explicitly including provisions for addressing all forms of sexual violence in armed conflict. The formal recognition of sexual violence is a crucial step toward safeguarding women and girls. However, achieving more positive outcomes requires outreach efforts to the victims to address their needs in the aftermath of war.

3. DEFINING SEXUAL VIOLENCE UNDER INTERNATIONAL INSTRUMENTS

Akayesu's case of the ICTR provided a significant definition of sexual violence, "a physical invasion of sexual nature, committed to a person under coercive circumstance".[19] This definition includes a broader picture that sexual violation is not limited only to physical invasion of the human body but also threats and intimidation for rape or sexual violence. Thus, the question arises: what threshold does sexual violence need to reach for it to be considered a war crime? To answer this question, the Statute of the ICC should be referred to, which criminalises specific acts considered crimes under its jurisdiction, such as sexual slavery, forced prostitution, forced pregnancy, enforced

[17] International Criminal Tribunal for Rwanda (ICTR) (1996). Prosecutor v. Jean Paul Akayesu, Indictment, Case No. ICTR-96-4-I.
[18] United Nations (1998). Sexual Violence and Armed Conflict: United Nations Response, Women 2000. New York: United Nations. Available at: https://www.un.org/en/preventgenocide/rwanda/pdf/sexual-violence-and-armed-conflict-1998-UN-report.pdf (accessed on 12.10.2025).
[19] International Criminal Tribunal for Rwanda (ICTR) (1998). Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4, Judgment (Trial Chamber), 2 September 1998; see also O'Brien (2015).

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sterilisation, or any form of sexual violation of comparable gravity. Therefore, the Statute of the ICC raises the same questions regarding the requirements for the threshold of these crimes.

There is no clear-cut definition of sexual violence in armed conflict, there are however case law and legal writings that provide a number of additional examples of sexual violence, e.g. trafficking for sexual exploitation,[20] mutilation of sexual organs,[21] forced abortion (Gaggioli, 2014, pp. 503-538), enforced contraception, [22] forced inspection for virginity,[23] and forced public nudity.[24] For a more conclusive and refined definition one should look at the 'Elements of Crimes' of the ICC. Article 8(2)(b)(xxii-1) says that an act is considered as rape if: i.) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body; ii.) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.[25]

Sexual violence in armed conflict can also be defined as a systematic tool of war that reinforces gendered power dynamics and perpetuates women's subordination. From the feminist point of view, sexual or gender-based violence in armed conflict is deeply rooted in patriarchal structures for asserting dominance over body and identity of the victims. By targeting individuals based on their gender, such violence becomes a tool for asserting dominance and performing masculinity, ultimately destabilising communities and reinforcing gendered hierarchies. Studies have shown that 95 % of victims of conflict-related sexual violence are women and girls, which highlights the gendered nature of the atrocity during the war (De Moor, 2025). Sexual violence in armed conflict is quite different from sexual violence during peacetime, as the key distinction lies in the *war nexus*, that whether such acts are committed in the context of an armed conflict. While it is associated with a more brutal form of rape aiming at different goals including the humiliation and subordination of the whole community, terrorising, and spread of disease, primarily or directly connect to the dynamics and objectives of warfare.

International Humanitarian Law also known as laws of war already sets the rules for protection for civilians, prisoners of war, and other non-combatants during international and non-international armed conflicts through which it sets out the prohibition for rape and other forms of sexual violence as a reflection in Article 27 of the Fourth Geneva Convention and Article 76 of Additional Protocol I.[26] However, such prohibitions are not enumerated among the *grave breaches* of Geneva Conventions as it does in International Criminal Law, particularly as codified in the Rome Statute of the International Criminal Court expressly criminalises rape and other forms of sexual

[20] United Nations (2000). Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (UNTS 319), 15 November 2000, Art. 3.
[21] International Crimes Tribunal for Rwanda (ICTR) (2008). Prosecutor v. Théoneste Bagosora, Case No. ICTR-96-7, Judgment (Trial Chamber), 18 December 2008, para. 976.
[22] *Ibid.*
[23] *Ibid.*
[24] Geneva Convention (iv), supra note 16.
[25] International Criminal Court (2013). Elements of Crimes, article 8(2)(a) (b)(xxii)-1. Available at: https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf (accessed on 13.10.2025).
[26] United Nations (1948). Convention on the Prevention and Punishment of the Crime of Genocide, Art. 2. Available at: http://www.unhchr.ch/html/menu3/b/p_genoci.htm (accessed on 18.10.2025).

violence as war crimes, crimes against humanity and acts of genocide. The Fourth Geneva Convention on the protection of civilians in international armed conflicts under Article 27 provides that, "women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."[27] The expression of "outrages upon personal dignity" is also prohibited under Additional Protocols I and II as a fundamental guarantee for civilians and persons *hors de combat*.[28] such prohibition covers in particular, humiliating and degrading treatment, enforced prostitution, and any form of indecent assault, additionally, Article 4 adds specifically "rape" to this list.

In spite of significant historical trauma and legal prohibitions, sexual violence remains widespread during armed conflicts these days, used by the militants as a tactic or strategic means of weakening the opponent directly or indirectly, by targeting the civilian population. The impact of sexual violence in a conflict is devastating, causing immeasurable harm that affects every aspect of a victim's life, including physical, psychological, economic, and social. The repercussions of sexual violence rarely end with the cessation of war rather often affect victims and their families for generations (Aroussi, 2016, p. 497).

4. PROSECUTIONS UNDER THE INTERNATIONAL CRIMINAL COURT

Recent advancements in International Criminal Law by adding subs-article 8(2)(b)(xxii)-1 in "Elements of Crimes" have led to notable progress in the investigation and prosecution of sexual violence as a war crime and a crime against humanity. Despite the prohibition of such acts in binding and non-binding international instruments and additional norms in soft law, sexual and gender-based violence persists in the 21st-century armed conflicts. As the sole permanent body dedicated to international criminal justice, the ICC bears core objective to investigate and prosecute those responsible for these crimes, inherently complementary and subsidiary intervening only when national jurisdictions are unwilling or unable to genuinely carry out such proceedings.

However, the prosecutorial strategy for charges related to sexual violence tends to be more vulnerable and narrower in scope compared to other crimes, often resulting in such charges being dropped in the early stages of proceedings. Even when comprehensive charges of widespread sexual violence are brought forward, prosecutors face significant challenges in substantiating these allegations with sufficient evidence for the court. Consequently, this often leads to the acquittal of perpetrators accused of committing systematic and widespread sexual violence during times of war (Cvercko, 2018).

Despite being established for two decades, the ICC has seen only a small number of cases related to conflict-related sexual violence go to trial, with even fewer yielding convictions (Shackel, 2019, pp. 187-208). The success of a court should not be judged solely by its conviction rate; however, in its twenty-year history, the ICC has only brought eight cases involving conflict-related sexual violence to trial. Among these, six had their charges confirmed, and only two resulted in convictions (Altunjan, 2021, pp. 878-893). The prosecutorial approach of the ICC to sexual violence crimes has proven to be

[27] International Committee of the Red Cross (1949). Geneva Convention Relative to the Protection of Civilian Persons in Time of War (IV Geneva Convention), 75 UNTS 287, Art. 27. Available at: https://www.refworld.org/legal/agreements/icrc/1949/en/32227 (accessed on 17.10.2025).
[28] International Committee of the Red Cross (1977). Additional Protocol I, Art. 75(2); International Committee of the Red Cross (1977). Additional Protocol II, Article 4(2).

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relatively less effective in achieving the immediate goals of accountability and deterring persistent patterns of violence against women during armed conflicts (Jackson, 2025, p. 86). This part of the study will Offer a concise examination of cases involving sexual violence, highlighting the various technical, procedural, and evidentiary challenges encountered before the court. This discussion will also explore how these cases charged, presented, and decided within the ICC proceedings.

The first case addressing widespread sexual violence at the International Criminal Court was brought against Thomas Lubanga, the Congolese warlord, during the investigation into the conflict in the Democratic Republic of Congo.[29] Despite substantial evidence and testimonies regarding the use of girl soldiers as sexual slaves and the resultant unwanted pregnancies, Lubanga was not charged with conflict-related sexual violence, raising significant debate about the fairness of the prosecution. During the trial, ninety-nine victims, mostly former child soldiers, testified about rampant rape and the coercion to perform abortions in unsanitary conditions.[30] The omission of sexual violence crimes from the indictment indicated a troubling perspective among prosecutors, who often viewed such violence as a byproduct of war. The trial chamber criticised this neglect and noted that sexual violence should have been addressed (Jackson, 2025, pp. 90-105).

Notably, this case marked the first instance of the ICC implementing reparations for the harm caused by the crimes. The Appeals Chamber acknowledged that sexual violence constituted "harm" related to Lubanga's convictions, allowing victims of sexual violence to benefit from reparations through the Trust Fund for Victims (TFV), despite Lubanga not being convicted for those specific crimes.[31]

Germain Katanga, a former Congolese rebel leader, was formally charged with rape, sexual slavery, and forced marriage as part of accusations related to war crimes and crimes against humanity. However, he was acquitted of all charges related to sexual and gender-based violence, based on the argument that such violence did not form part of the attacks on the civilian population of the Democratic Republic of Congo.[32] Similarly, in the case of Mbarushimana, charges included instances of sexual violence, such as miscarriages resulting from rape, along with other horrific acts.[33] However, the trial could not proceed due to a lack of sufficient evidence. In this situation concerning the Republic of Kenya, ICC prosecutors brought charges of sexual violence for widespread rape and persecution. Nevertheless, the pre-trial chamber denied the confirmation of charges, and the accused were ultimately acquitted of all allegations.[34]

The ICC secured its first conviction for sexual violence crimes against Jean-Pierre Bemba Gambo in the Central African Republic, even though Bemba was acquitted later by the Appeal Chamber, which weakened the case's significance (Jackson, 2025, p. 87). He was charged with rape, which only referenced the unwanted pregnancies resulting from it, while other forms of sexual violence, like forced pregnancy, were not

[29] International Criminal Court (2006). The Prosecutor v. Thomas Lubanga Dyilo, 7 February, 2007, Case No. ICC-01/04/-01/06-803-tEN.
[30] *Ibid.*
[31] International Criminal Court (2015). Lubanga case: ICC Appeals Chamber Amends the Trial Chamber's Order for Reparation to Victims, 3 March 2015, ICC-CPI-20150303-PR1092.
[32] International Criminal Court (2014). The Prosecutor v. Germain Katanga, Summary of Trial Chamber II's Judgement (pursuant to article 74 of the Statute), 7 March 2014. Available at: https://www.icc-cpi.int/sites/default/files/itemsDocuments/986/14_0259_ENG_summary_judgment.pdf (accessed on 12.10.2025).
[33] International Criminal Court (2011). Prosecutor v. Mbarushimana, Pre-Trial Chamber I, 3 August 2011, Case No. ICC-01/04-01/10-330-AnxA-Red.
[34] *Ibid.*

included.[35] Although this case marked a significant conviction, it was criticised for not adequately addressing sexual and gender-based violence. The acquittal did not specifically relate to sexual violence charges but may impact future prosecutions, limiting the incorporation of additional evidence later in trials. It is often noted that evidence in sexual violence cases surfaces late due to survivors' reluctance to testify, and the Bemba appeal effectively restricts the Prosecutor from responding to new evidence during such trials (Powderly, 2018, pp. 1031-1079).

Dominic Ongwen, a former commander of a Ugandan rebel group, became the first successful conviction of sexual violence in armed conflict by the ICC on February 4, 2021. He was found guilty of forced marriage as a crime against humanity under Article 7(1)(k) of the Rome Statute, marking a significant precedent in international criminal law for sexual and gender-based crimes (Kenny, 2024, pp. 153-160). Despite the conviction, the case faced challenges regarding victim prosecution and participation, but the court implemented protective measures for victims, including psychological support and anonymity (Shackel, 2019, pp. 187-208). Similarly, Bosco Ntaganda, the alleged Deputy Chief and Commander of Congolese forces, was convicted of rape, sexual slavery, and persecution as war crimes and crimes against humanity. Ntaganda was held accountable under command responsibility for crimes committed by his troops, highlighting the ICC's commitment to supporting victims of sexual violence in legal proceedings.[36]

A further promising development is the trial on broad nature of sexual violence and gender-based persecution charges and resulting conviction in Al Hasan case in the ICC situation of Mali.[37] It is noteworthy that in Al Hasan case constitutes an important progress within the ICC framework concerning crime of persecution on intersecting religious and gender grounds. The religious and gender-based persecution also became part of the ICC investigation in the situation of Afghanistan.[38] Besides the preliminary examination of Nigeria, which was not particularly limited in crimes against women rather the investigation on forced persecution of men and boys was also reported.[39]

Examining previous prosecutions for sexual violence crimes within the ICC reveals significant achievements alongside notable challenges, underscoring both technical and practical difficulties as well as cultural and systemic barriers. Even though the conviction rate of the ICC in the matter of sexual violence and wartime rape was not very satisfactory, the establishment of the Rome Statute should be marked as a substantial advancement in the prosecution of a wide array by criminalising sexual and gender-based violence in armed conflicts (Shackel, 2019, pp. 187-208). For instance, the Rome Statute identifies offenses such as rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, and various forms of sexual violence as crimes against humanity and war crimes (Altunjan, 2021, pp. 878-893). However, this clear prohibition against the use of sexual violence in armed conflict has not been sufficient to

[35] International Criminal Court (2016). Prosecutor v. Jean-Pierre Bemba Gambo, Trial Chamber III, 21 June 2016, Case No. ICC-01/05-01-08-3399.
[36] International Criminal Court (2019). The Prosecutor v. Bosco Ntaganda, Trial Chamber VI, 08 July 2019, Case No. ICC-01/04-02/06.
[37] International Criminal Court. (2024). Situation in Mali, The Prosecutor v. Al Hasan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18.
[38] International Criminal Court. (2020). Situation in the Islamic Republic of Afghanistan, ICC-02/17. Available at: https://www.icc-cpi.int/victims/situation-islamic-republic-afghanistan (accessed on 28.10.2025).
[39] The Office of Prosecutor of ICC (2019). Report on Preliminary Examination Activities, 5 December 2019, p. 47. Available at: https://www.icc-cpi.int/sites/default/files/itemsDocuments/191205-rep-otp-PE.pdf (accessed on 29.10.2025).

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prevent its occurrence. Recent investigations by the ICC have identified reasonable grounds to believe that numerous incidents of sexual violence have taken place in Ukraine, Palestine, the Philippines, and Venezuela.[40] These investigations are characterised by multiple suspects and complex legal assessments.

5. PERSISTENT OBSTACLES IN ICC PRACTICE

The ICC obtained a very progressive and strong legal framework, but in case of practice relating to sexual violence is not very satisfactory. After two decades, the ICC secured only one final conviction regarding sexual violence charges, and another was overturned on appeal, which put at risk the fulfilment of ending sexual violence and gender crimes under international criminal law. The ICC's practice over the sexual violence case almost failed at all stages of proceedings which indicated some persistent reasons such as investigation, making charge, gathering evidence, ensuring participation of victims and witnesses, and very lengthy process until reach out the final verdict.

The effects of sexual violence are often less visible compared to other crimes, the scars are even deeper in psychological than physical. It is therefore crucial that the investigators act with more sensitivity in regard to cultural issues, gender roles in every individual situation with an understanding of the impact of sexual violence on survivors and their communities. But in practice sexual violence get less prioritisation to be considered sufficiently systemic in nature to fulfil the threshold under crime against humanity or war crime (Altunjan, 2021, pp. 878-893). If the investigators remain unable to include sexual violence crimes as the early stage of the proceeding, it will be more difficult to amend the charges later on.

In cases involving charges of sexual violence, the ICC applies a policy of cumulative charging against individuals, which requires a higher evidentiary threshold in each case before the Court. This pattern of charging individual creates barriers from evidence gathering perspective, make complexity of the cases, and eventually creates a backlog for the cases of ICC. If the prosecutor thinks there is enough evidence to convict the defendant they can pursue with charging, but gathering more evidence against each and every individual would lead to same outcome direct the trial lengthier and more complex (Jackson, 2025, p. 90).

Furthermore, the attention to sexual and gender-based crime is mostly diverted to the serious nature of such violations. While the Rome Statute expressly directs that "any forms of sexual violence" can be prosecuted,[41] the practice of the ICC considers it under comparable gravity to other crimes. Such an approach of the ICC raises a question about recognising that certain acts of sexual violence are less worthy of prosecution. For example, in the Bemba case, the prosecutors focused only on forced pregnancy, which diverted attention from other forms of serious violations like forced abortion, forced maternity, or intentional destruction of reproductivity.[42] Therefore, focusing on specific sexual violations may lose the broad-reaching approach of the Rome Statute, which codifies several other serious sexual offences. The prosecutors also should keep considering that focusing on more specific sexual violence may make it narrow which decreases the likelihood of a successful conviction by proving the intention of defendant to affect the whole community of any population (Jackson, 2025, pp. 90-91).

[40] International Criminal Court (2025). Situations under Investigation. Available at: https://www.icc-cpi.int/situations-under-investigations (accessed on 30.10.2025).
[41] Rome Statute of the International Criminal Court, 17 July 1998, Art. 7(1)(g), 8(2)(b)(xxii), 8(2)(vi).
[42] International Criminal Court (2016). Prosecutor v. Jean-Pierre Bemba Gambo, Trial Chamber III, 21 June, 2016, Case No. ICC-01/05-01-08-3399.

From the history of the sexual violence used as the weapon or strategic of war required more analysis with gravity assessment on sexual violence as ethnically motivated violence. In the case of Kenyatta described conduct of forced circumcision or penile amputation were not as a violence of sexual nature rather used as prejudice the whole ethnic community and demonstrate cultural superiority.[43] Such misconceptualisation of sexual violence make it extremely restrictive and fail to take into account ethnic dimensions. Such act of violence along with enforced sterilisation should consider as destruction of reproductive capacity with intention to ethnic cleansing of the whole community (Altunjan, 2021, pp. 878-893).

The protracted nature of proceedings at the International Criminal Court is attributed to the complexity of cases, difficulties in collecting reliable evidence from conflict zones, ensuring participation and safety of victims and witnesses, and the frequent lack of cooperation of the States contributes significantly to procedural delays. The ICC is conducting active investigations, ongoing cases that never reach the trial stage because the suspects remain at large even after issuing arrest warrants, for example, Sudanese President Omar Al Bashir, Taliban Leader Akhundjada, Chief Justice of Afghanistan Abdul Hakim Haqqani, have never been surrendered or transferred to the ICC. These pending cases highlight that the norm for victims' justice has failed to some extent, that "justice delayed is justice denied."

6. CONCLUSION

Recent developments in International Humanitarian Law and International Criminal Law have seen significant progress in the investigation and prosecution of sexual violence in the form of war crimes and crimes against humanity. However, challenges persist particularly in concerning implementation and adjudication, which expose shortcomings in existing mechanisms of international criminal justice. Often, the lack of judicial recourse for sexual violence has gone unaddressed, frequently for two main reasons, first, there is the difficulty in identifying physical perpetrators, and second, the challenge of charging non-physical perpetrators those who are geographically distant but hold responsibility as political leaders or military commanders. Additionally, principles of head-of-state immunity and complementarity further hinder the successful prosecution of these individual perpetrators.

Armed conflicts, whether non-international or international, have persisted for decades, resulting in widespread devastation, displacement, and suffering. The recent wars of the 21st century showcase profound grievances, political conflicts, and external geopolitical interests that continue to incite violence. Despite numerous global initiatives aimed at fostering peace, a long-lasting resolution remains out of reach. Achieving enduring peace demands a commitment to justice, mutual recognition, and substantive dialogue among the parties involved. Immediate action towards achieving a world free from rape and all forms of sexual violence in armed conflict must prioritise the strengthening of legal frameworks and the rigorous enforcement of laws to hold perpetrators accountable. Additionally, protecting survivors should involve ensuring access to healthcare, legal support, and long-term rehabilitation in a transformative manner.

[43] International Criminal Court (2012). Prosecutor v. Kenyatta, Decision on the confirmation of charges, January 2012, Case No. ICC-01/09-02/11. Available at: https://www.icc-cpi.int/CourtRecords/CR2012_01006.PDF (accessed on 02.11.2025).

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ARTIFICIAL INTELLIGENCE IN THE UKRAINIAN PUBLIC ADMINISTRATION SYSTEM: LEGAL DEVELOPMENT AND IMPLEMENTATION RISKS

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Abstract: *The study explores the integration of AI into the Ukrainian public administration system in the context of global regulatory developments. It identifies the main development vectors, legal challenges, and governance risks associated with AI implementation. The research combines comparative legal analysis, systemic interpretation, and predictive modelling to assess the current state and future trajectories of AI regulation. Based on international and Ukrainian experience, the paper proposes key directions for developing a coherent legal and institutional framework to ensure transparency, accountability, and human-rights protection in AI governance, as well as the capabilities of the "state in a smartphone" and the use of AI in local self-government.*

Key words: *Artificial Intelligence in Public Administration; Smart City; Digital Transformation; Urban Digitalisation; Legal Regulation; AI-based Decision-Making; Innovative Governance Technologies*

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1. INTRODUCTION

AI has become one of the defining technologies of the 21st century, influencing nearly every sphere of public life. In Ukraine, despite significant progress in digitalisation, the integration of AI into public administration remains fragmented and uncoordinated. The lack of a comprehensive legal and ethical framework creates both institutional uncertainty and practical risks for governance quality.

The growing importance of AI technologies in decision-making processes requires the development of a coherent strategy that ensures transparency, accountability, and protection of human rights in the public sector. Therefore, the present research aims to identify the main development vectors and legal implementation risks of AI in the system of Ukrainian public administration, with comparative reference to European and American experience.

While global debates emphasise both efficiency and legitimacy of AI governance, Ukrainian scholarship often limits itself to descriptive overviews, lacking a unified legal or methodological approach. This paper attempts to fill this gap by addressing the following research question: *How can Ukraine develop a coherent legal framework for integrating AI into its public administration system while ensuring transparency, accountability, and protection of human rights?*

To achieve this goal, the following tasks are expected to be implemented:

1) to analyse the peculiarities of legal regulation of digitalisation of state bodies, including local self-government bodies;

2) identify the main theoretical and practical problems related to the practice of applying such legislation, taking into account foreign experience;
3) to develop a step-by-step strategy for implementing legal regulation of AI in Ukraine.

1.1 Methodology

The methodological framework of this paper combines comparative legal analysis, systemic interpretation, and elements of predictive legal modelling. This approach allows identifying not only the current state of AI regulation in public administration but also potential trajectories of its development in Ukraine.

The comparative component involves examining the regulatory approaches of the European Union, selected EU member states (France, Denmark, Estonia and Poland), and the United States. The goal is to determine which elements of these models can be adapted to Ukraine´s legal and institutional environment. The systemic interpretation method was applied to assess the coherence of Ukrainian legal norms governing digital governance, administrative procedures, and data protection. Predictive legal modelling was used to identify potential risks and institutional challenges arising from the implementation of AI technologies in administrative decision-making.

The methodology thus combines descriptive, analytical, and prognostic elements, ensuring both conceptual and practical relevance of the study.

2. THEORETICAL APPROACHES TO DIGITALISATION AND INTEGRATION OF AI INTO PUBLIC ADMINISTRATION

The digitalisation of government agencies in Ukraine opens new opportunities to enhance the transparency, accessibility, and efficiency of public services. This process contributes to engaging local communities in municipal governance, improving the quality of life, and strengthening democratic standards at both local and regional levels. However, successful digital transformation requires not only technological innovation but also adequate legal regulation to fully unlock the potential of digital technologies in municipal governance and public service delivery at the national level.

Several Ukrainian scholars have studied specific aspects of the legal regulation of digitalisation in public administration and governance, particularly T. Chernadchuk and I. Kozachok, as well as A. Klyan (2024), K. Savon (2021), A. Mykoliuk (2022), M. Baimuratov and B. Kofman (2022), O. Batanov (2023), V. Kravchenko (2003), I. Diorditsa and J. Zhuravel (2023a; 2023b). In particular, the authors T. Chernadchuk and I. Kozachok (2022, p. 194) note that the Ukrainian government has argued that, in Ukraine's public sector, digital technologies are a key area of public administration reform and a concrete example for the whole country of how to leverage the digital world. However, given the ongoing dynamics of this phenomenon, I consider it necessary to outline the novelties in the legal regulation of digitalisation of local self-government within the context of modern municipal reform.

In foreign studies, the issue of digital transformation in public administration is often associated with the introduction of AI and the technological tools it uses in public administration processes. Most researchers advocate greater implementation of AI technologies by public authorities, including municipal governments. For example, Desouza (2018) advocates intensifying this process within the framework of public-private partnerships. This involves engaging the academic community, addressing issues in the planning, development, and deployment of AI in a step-by-step manner, and

developing an AI maturity model to assess progress in state and municipal institutions. W. Wang and K. Siau (2018), recognising the technological advantages of AI, warn the state and business about the likely increase in unemployment and further social instability associated with the displacement of many professions in the public service and corporate sector by virtual assistants and assistants, as well as the need to develop a legal framework for regulating the AI sphere, which requires a broad social discussion on the degree of freedom of AI and the limits of its implementation at the current stage of society´s development.

D. West D. and J. Allen (2018), recognising the diversity and effectiveness of AI-based public administration tools, emphasise the need to protect ethical values and ensure an appropriate degree of openness and control over AI, which should ensure the necessary level of legal responsibility for decisions made using AI. S. Mikhaylov, M. Esteve, A. Campion (2018) touch upon such an equally important area of AI application as the development and transformation of public policy in the context of high uncertainty in the modern world, when AI helps to process large amounts of information and choose the optimal vector for implementing state policy, ranging from the practice of providing public services to the strategy of industrial development.

Thus, modern public administration, increasingly shaped by AI technologies, has become a widespread and systematic practice rather than an art or privilege reserved for a limited elite. Scholars worldwide continue to study the legal frameworks governing AI in the public sector and the potential risks associated with its implementation. Moreover, the growing integration of AI demands new professional competencies from public managers, including digital literacy and technological proficiency. Over time, this transformation may lead to a partial substitution of managerial roles with AI systems, fundamentally reshaping the nature of governance.

3. DEVELOPMENT VECTORS OF AI ON THE PUBLIC ADMINISTRATION OF UKRAINE

Significant progress in Ukraine´s digitalisation process began in the autumn of 2019, when **digital transformation was officially recognised as a key priority of state policy**. Following this, the **Ministry of Digital Transformation of Ukraine** and several other institutions responsible for digital development were established.

In Ukraine, the **concept of AI** is defined by the **Cabinet of Ministers of Ukraine** as "*an organised set of information technologies that can be used to perform complex tasks by applying a system of scientific methods and algorithms for processing information received or independently generated during operation, as well as to create and use knowledge bases, decision-making models, and algorithms for achieving set objectives*" (Obolenskyi, Kosytska and Rvach, 2023, pp. 126-127).

Despite the ongoing war, the **introduction of AI-based technological solutions in public administration and the wider public sector has intensified**. Significantly, these developments are not limited to the security and defence domain.

For instance, the Ministry of Digital Transformation is developing a comprehensive policy to integrate AI into public authorities' operations. Among its flagship projects is the creation of a virtual assistant within the Diia mobile application,

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which will help users locate the nearest Administrative Service Centre (ASC) and access information on available public services.[1]

In 2021, the Kyiv City State Administration planned to introduce an **AI-powered intelligent transport management system** designed to reduce congestion, prevent accidents, and optimise traffic flow. Although the project was postponed in 2022, it has since been **reinstated as part of Kyiv´s Smart City strategy.**[2]

Additionally, the Ministry of Digital Transformation, in cooperation with the **State Statistics Service of Ukraine**, has launched the **Government BI analytical platform**, enabling public authorities to collect, analyse, and use data more effectively when making decisions.[3]

In 2024, the **Ministry of Agrarian Policy and Food of Ukraine**, together with private companies, launched an **AI-driven agricultural monitoring system**. Using neural networks and satellite imagery, it analyses crop conditions in real time, forecasts yields, and enhances agrarian resource management.[4]

In April 2024, the **Ministry of Foreign Affairs of Ukraine** introduced an **AI avatar named Victoria**, which began issuing statements on consular issues for Ukrainians abroad.[5] This product is one of the first cases, and the Ministry does not plan to stop there. In particular, the Ministry intends to develop an **AI simulator to train young Ukrainian diplomats** and improve the skills of experienced employees in preparation for international negotiations. In addition, the Ministry is considering delegating the preparation of inquiries about relations with the country where the embassy is opening to the AI system.

At the beginning of 2025, the Ministry of Digital Transformation also launched the **WINWIN AI Centre of Excellence**, a centre for the development and integration of AI solutions in the public sector, defence, medicine, education, and business. Currently, the key tasks of the newly created hub include laying the technical foundation for the country´s AI sovereignty with its own LLM model.[6]

"From the very beginning of the creation of the Ministry of Digital Transformation to the present day, our goal has remained unchanged - to build the most convenient digital state in the world. We believe that the future of Ukraine lies in the development of the digital economy and innovations. AI is an important part of this path. Today, AI is already being used in Ukraine in various areas, from military technologies to govtech. We also see a strong

[1] Tips for the responsible use of artificial intelligence by public servants. (2025, March). *Ministry of Digital Transformation of Ukraine [E-book].* https://nads.gov.ua/news/prezentovano-posibnyk-pro-vidpovidalne-vykorystannia-shtuchnoho-intelektu-publichnymy-sluzhbovtsiamy (accessed on 23.05.2025).

[2] Traffic jams in Kyiv will be fought with the help of artificial intelligence. (2021, February 16). *Glavcom.* https://glavcom.ua/kyiv/news/stolichna-vlada-zayavila-pro-plani-za-pyat-rokiv-likviduvati-zatori-na-dorogah-737009.html (accessed on 23.05.2025).

[3] The Ministry of Digital Transformation and the State Statistics Service are creating a Government BI analytical platform for high-quality management decisions. (2023, April 13). *Ministry of Digital Transformation of Ukraine.* https://thedigital.gov.ua/news/mintsifra-razom-z-derzhstatom-stvoryuyut-analitichnu-platformu-government-bi-dlya-yakisnikh-upravlinskikh-rishen (accessed on 23.05.2025).

[4] White paper on AI regulation in Ukraine: The vision of the Ministry of Digital Transformation. (2024, June). *Ministry of Digital Transformation of Ukraine [E-book].* https://storage.thedigital.gov.ua/files/c/fc/36c4cae89deedfbf3781ec6bceddffcc.pdf (accessed on 23.05.2025).

[5] The Ministry of Foreign Affairs of Ukraine has introduced Victoria, an AI avatar that will now comment on consular information. (2025, May 1). *The Village Ukraine.* https://www.village.com.ua/village/city/city-news/350289-mzs-ukrayini-predstavilo-shi-avatara-viktoriyu-yaka-teper-komentuvatime-konsulsku-informatsiyu (accessed on 23.05.2025).

[6] The Ministry of Digital Transformation launches WINWIN AI Centre of Excellence. (2025, February 4). *Ministry of Digital Transformation of Ukraine.* https://thedigital.gov.ua/news/mintsifra-zapuskae-winwin-ai-center-of-excellence-tsentr-peredovogo-dosvidu-z-rozrobki-ta-integratsii-shi (accessed on 23.05.2025).

focus on developing AI technologies across education, healthcare, economics, urban planning, and many other areas. This will allow our country not only to adapt to global trends but also to become a leader in this field."[7]

The analysis of AI development vectors in Ukraine demonstrates a steady institutional commitment to digital transformation, even amid external challenges and limited resources. The government´s focus on integrating AI into various sectors — from transportation and agriculture to diplomacy and public services — reflects a strategic shift toward innovation-driven governance. However, to ensure the sustainability and transparency of these initiatives, Ukraine must complement technological advancements with robust legal frameworks, ethical standards, and inter-agency coordination. In this context, the experience of the European Union and other international partners provides a valuable roadmap for aligning Ukraine´s AI development with global norms of accountability, security, and public trust.

4. LEGAL AND INSTITUTIONAL CONTEXT OF AI IMPLEMENTATION

The use of AI has the potential to transform Ukraine´s public administration by optimising workflows, automating routine and time-consuming bureaucratic procedures, and ensuring a more transparent and equitable distribution of public resources. The prospects for integrating AI into the public service will continue to expand as technology develops. However, this process requires an adequate legal framework that guarantees accountability, data protection, and respect for human rights. Therefore, before considering Ukraine´s alignment with European standards, it is essential to examine the current state of AI regulation at both the national and local levels.

Article 54 of the Constitution of Ukraine (Verkhovna Rada of Ukraine, 1996) establishes a fundamental principle by guaranteeing citizens the freedom of scientific and technical creativity and the protection of intellectual property, moral, and material interests arising from creative activity. This constitutional provision underpins the legal foundation for safeguarding the results of scholarly and innovative work, including AI systems and digital technologies developed within local self-government. It reflects Ukraine´s recognition that technological progress must be accompanied by mechanisms protecting both inventors´ rights and the ethical use of their creations.

Despite these guarantees, Ukrainian legislation still lacks a coherent legal framework regulating AI use in the public sector. The Law of Ukraine On Local Self-Government in Ukraine remains one of the key legislative acts governing municipal authorities, yet it does not reflect modern digital realities. Its provisions contain only general references to administrative procedures, without addressing the integration of new technologies into municipal governance. Article 33 of the Law defines the powers of local self-government but does not mention the use of digital or automated systems. Similarly, Section XI "Local Self-Government" omits any reference to digitalisation or AI tools (Verkhovna Rada of Ukraine, 1997).

Article 146 of the Constitution (Verkhovna Rada of Ukraine, 1996) provides a reference norm, stating that other aspects of local self-government organisation, structure, and responsibility shall be defined by law. However, the absence of specific implementing legislation creates uncertainty about the practical application of these provisions. This highlights the need for local governments to adopt bylaws — such as

[7] White paper on AI regulation in Ukraine: The vision of the Ministry of Digital Transformation. (2024, June). *Ministry of Digital Transformation of Ukraine [E-book].* https://storage.thedigital.gov.ua/files/c/fc/36c4cae89deedfbf3781ec6bceddffcc.pdf (accessed on 23.05.2025).

internal regulations or methodological guidelines — that define the procedures for developing and operating automated information and analytical systems. Such instruments would ensure procedural consistency and prevent arbitrary decision-making.

Further evidence of legal fragmentation can be found in Article 46 of the Law On Local Self-Government in Ukraine, which refers to the procedure for considering electronic petitions. Although it mentions that council sessions may be convened to review such petitions, the Law itself does not regulate their submission or consideration (Verkhovna Rada of Ukraine, 1997). Instead, this issue is governed by a separate act — the Law of Ukraine "On Amendments to the Law of Ukraine "On Citizens´ Appeals" regarding electronic appeals and petitions" (Verkhovna Rada of Ukraine, 2015). The lack of direct reference between these two acts creates legal uncertainty and complicates the practical exercise of citizens participatory rights at the local level.

A more progressive step can be seen in the Final and Transitional Provisions of the Law On Local Self-Government in Ukraine, which temporarily allowed local councils and executive committees to hold sessions via video or audio conference during the COVID-19 pandemic. This norm, although limited in scope, represents an essential precedent for legitimising online administrative procedures. However, given the digital transformation of governance, such provisions should be moved from the transitional to the permanent sections of the Law to ensure the continuity of remote and hybrid administrative formats (Verkhovna Rada of Ukraine, 1997).

In June 2024, the Ministry of Digital Transformation introduced the White Paper on AI Regulation in Ukraine,[8] outlining a vision for responsible innovation and regulatory convergence with the European Union. The document provides guidance for businesses and public authorities on preparing for future AI legislation, emphasising safety, accountability, and ethical considerations. It also proposes the creation of voluntary codes of conduct, a legal assistance platform for enterprises, and regulatory sandboxes to test AI products before formal regulation takes effect. This initiative demonstrates the government´s recognition of AI as a national priority and an instrument of European integration.

Complementing this, the Ministry has also published Recommendations for the Responsible Use of AI by Public Servants, which establish ethical and procedural standards for the deployment of AI in administrative work. These recommendations promote responsible interaction with AI systems by protecting personal and sensitive data, ensuring confidentiality, and respecting human rights, in accordance with the General Rules of Ethical Conduct for Civil Servants and Local Government Officials. Although these recommendations are non-binding, they represent a significant step toward institutionalising ethical governance principles.

At the same time, Ukraine´s legislative system continues to rely on general acts rather than sector-specific regulations. While initiatives such as the Law "On Administrative Services" and the Diia digital platform have advanced digital governance, the Concept for the Development of AI in Ukraine primarily addresses technological innovation rather than administrative, ethical, or legal oversight. This imbalance leads to fragmented implementation and inconsistent practices across ministries and agencies.

[8] Regulation of artificial intelligence in Ukraine: The Ministry of Digital Transformation presents a White Paper. (2024, June 26). *Cabinet of Ministers of Ukraine.* https://www.kmu.gov.ua/news/rehuliuvannia-shtuchnoho-intelektu-v-ukraini-mintsyfry-prezentuie-bilu-knyhu (accessed on 23.05.2025).

Although Ukrainian legislation has taken specific steps toward digital governance — most notably through the Diia system[9] and the Law "On Administrative Services" — there is still no comprehensive definition of AI in national law, nor any general act regulating its use in the public sector (Serhiichuk, 2025).

The Concept of the Development of AI in Ukraine (Verkhovna Rada of Ukraine, 2020) focuses primarily on technological and innovation policy rather than on administrative, legal, or ethical regulation. While it declares the need for human-centred and responsible AI, its practical implementation remains limited. The absence of sector-specific guidelines or binding legal rules leads to inconsistent practices across ministries and agencies.

In contrast, the European Union has developed an extensive regulatory and ethical framework for AI, including the forthcoming AI Act,[10] the Ethics Guidelines for Trustworthy AI (European Commission, 2019) and several directives concerning data protection and automated decision-making (Gstrein et al., 2024).

These instruments emphasise risk-based governance, transparency, and accountability — principles that should inform Ukraine´s efforts to align its legal framework with EU standards.

The United States, meanwhile, applies a decentralised and sectoral approach based mainly on executive orders and voluntary guidance. This model prioritises innovation and market flexibility but often raises concerns about human rights protection and algorithmic bias (Engler, 2023).[11]

For Ukraine, the key challenge is balancing innovation and accountability. National institutions still operate without unified ethical standards, impact assessment mechanisms, or clear liability rules for algorithmic decision-making errors. This legal vacuum risks both administrative arbitrariness and erosion of public trust.

Therefore, adopting a **specialised Law on AI** and harmonising national legislation with the EU framework should become a key priority. This step will not only advance European integration but also enhance investor confidence and establish Ukraine as a competitive player in the digital economy through transparent, risk-based, and innovation-friendly regulation.

5. COMPARATIVE ANALYSIS AND CHALLENGES FOR UKRAINE

AI is gradually becoming a fundamental tool in public administration worldwide, significantly enhancing efficiency, transparency in decision-making, and reducing bureaucratic burdens. For Ukraine, which cannot develop its AI potential in isolation, participating in international cooperation—such as joining the Council of Europe´s Ad Hoc Committee on Artificial Intelligence (CAI)—is a strategic step towards aligning its governance practices with global standards.

European and international experiences demonstrate various approaches to AI deployment in governance, reflecting each country´s legal traditions, institutional maturity, and technological readiness. In October 2024, the European Commission

[9] Diia reaches 23 million users: Ukraine´s digital government becomes the new normal. (2025, October 15). *Digital State UA*. https://digitalstate.gov.ua/news/govtech/ponad-23-milyony-ukrayintsiv-uze-korystuiutsia-diyeiu-tsyfrova-derzava-stala-novoiu-normoiu (accessed on 23.05.2025).

[10] Regulation (EU) 2024/1689 of the European Parliament and of the Council. (2024, June 13). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32024R1689 (accessed on 23.05.2025).

[11] AI Watch: Global regulatory tracker - United States (2025, September 24). *White&Case*. https://www.whitecase.com/insight-our-thinking/ai-watch-global-regulatory-tracker-united-states (accessed on 23.05.2025).

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(2025) announced the launch of its own generative AI system, GPT@EC, designed to assist officials in drafting documents, preparing summary reports, and developing sectoral policies. This initiative serves as a practical example of how AI can enhance bureaucratic efficiency while maintaining high ethical and data protection standards. For Ukraine, such a model illustrates how AI can facilitate administrative efficiency, provided that strong oversight mechanisms ensure accountability and transparency.

The United States exemplifies a different governance model, in which AI integration is primarily driven by sectoral innovation and self-regulation. For instance, in 2022, the U.S. Treasury Department introduced machine learning tools to analyse vast volumes of financial data, identifying fraud through anomaly detection (Shaikh, 2025). This approach highlights the benefits of flexible regulation and innovation-led experimentation. However, for Ukraine, adopting similar decentralised mechanisms without sufficient institutional safeguards could risk regulatory fragmentation and inconsistencies across agencies.

In France, AI-based systems have streamlined administrative procedures by automating the issuance of permits and licences, facilitated by inter-agency data exchange. Here, AI functions as an accelerator of administrative processes, enhancing citizen access to public services while minimising human error and corruption risks.[12] This case demonstrates that, with appropriate legal guarantees and interoperability frameworks, AI can significantly increase both efficiency and trust in government institutions—an area where Ukraine still faces systemic challenges.

The United Kingdom offers another relevant perspective. Recent reforms there have promoted digital decentralisation—transferring digital governance practices from central authorities to local administrations. This model, supported by newly elected local leaders, underscores the importance of distributing AI-related competencies across all tiers of government (Kvitka, Novichenko and Bardakh, 2021). Ukraine, which has embarked on decentralisation reforms, could similarly empower local self-government bodies to adopt AI tools for service delivery and community management, thereby deepening democratic participation.

A particularly illustrative case is New York City, where AI supports municipal emergency management by processing real-time data during crises (Kvitka, Novichenko and Bardakh, 2021). The use of AI in risk assessment and operational coordination demonstrates the role of data analytics in enhancing resilience and preparedness—an experience directly applicable to Ukraine´s civil protection system, especially in wartime conditions.

Similarly, the Danish city of Odense presents an integrated model for balancing local and state interests through AI-driven resource management. Local authorities use AI to address environmental, economic, and social challenges—ranging from waste management and intelligent energy to urban planning and citizen engagement. This approach reflects a holistic vision of AI governance, where technological innovation serves sustainable development goals (Kvitka, Novichenko and Bardakh, 2021).

A comparative analysis shows that different legal traditions approach AI governance in distinct ways. While Western legal systems emphasise the balance between innovation and human rights, many post-socialist states, including Ukraine, are still forming basic legal principles for AI integration in the public sector. This asymmetry underscores the importance of adopting a gradual, risk-based regulatory model.

[12] Report Algorithms, AI systems and public services: what rights do users have? (2024). https://www.defenseurdesdroits.fr/sites/default/files/2025-01/DDD_rapport_algorithmes-systemes-d-IA-et-services-publics_EN_2024_20250109.pdf (accessed on 23.05.2025).

The EU AI Act[13] proposes a classification of AI systems according to risk — unacceptable, high-risk, and low-risk categories. For Ukraine, this model could serve as a roadmap for sectoral adaptation, particularly in public service delivery, taxation, and administrative justice.

The Estonian "KrattAI" strategy[14] shows how legal norms, institutional coordination, and public participation can coexist within a unified AI governance framework. Ukraine could adapt similar governance principles through pilot projects and regulatory sandboxes.

Poland´s Programme for the Development of AI[15] explicitly links AI to public trust, emphasising citizen participation and ethical oversight — vital for Ukraine, where institutional legitimacy remains fragile.

The U.S. approach (Rawal et al., 2025), rooted in self-regulation and executive guidance, offers flexibility but limited enforceability. For Ukraine, such decentralisation could risk fragmentation of authority and inconsistent implementation.

The comparison suggests that Ukraine should adopt a hybrid model combining EU-style risk management and U.S.-style innovation incentives to foster technological progress while protecting individual rights.

Achieving AI performance indicators in public administration requires constructive changes to public authorities' processes. Changes in the structure, models of interaction between public authorities, and improvement of the technological basis used in real management processes. Digital transformations in public administration cannot be limited to changes in service delivery processes or in increasing their quantitative measurement. Still, they must completely rebuild their work to meet the capabilities and requirements of AI (Kvitka, Novichenko and Bardakh, 2021).

In conclusion, achieving meaningful AI-driven transformation in Ukraine´s public administration requires more than technological adaptation. It demands **institutional restructuring, inter-agency coordination, digital literacy among officials, and a coherent legal strategy** grounded in democratic accountability. Only through such systemic reforms can Ukraine transform AI from a technological novelty into a sustainable instrument of effective, transparent, and citizen-oriented governance.

6. IMPLEMENTATION RISKS AND GOVERNANCE CHALLENGES

Discussions regarding the role and place of AI in modern society remain active and diverse, often polarised between optimism and scepticism. From a pragmatic standpoint, AI should not be seen as a replica of human intelligence but rather as a technological tool that complements human cognitive capacities. While speculative notions of artificial consciousness belong to science fiction, real-world AI provides practical solutions to the challenges of the digital age — from managing vast datasets and distributed registries to advancing communication and smart infrastructure.

AI´s peculiarity is that it can solve the problems humanity faces at the current stage of development — the transition from an information to a digital society — much

[13] Regulation (EU) 2024/1689 of the European Parliament and of the Council. (2024, June 13). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32024R1689 (accessed on 23.05.2025).

[14] Estonia's National Artificial Intelligence Strategy (Kratt Strategy) for 2022–2023. https://www.kratid.ee/en/_files/ugd/980182_4434a890f1e64c66b1190b0bd2665dc2.pdf (accessed on 23.05.2025).

[15] Policy For The Development of Artificial Intelligence in Poland from 2020 (n.d.). https://www.scribd.com/document/729839345/Policy-for-the-Development-of-Artificial-Intelligence-in-Poland-from-2020-eng-4?utm_source (accessed on 23.05.2025).

faster and more efficiently than humans. First of all, these are large databases, distributed registries, high-speed network communications, the Internet of Things, and finally, space exploration (European Commission, 2019). A human being is a living being. AI is a developed technology, and considering its integration from a transhumanist perspective is a profoundly philosophical question that has remained unresolved since ancient times. From this point of view, AI can be defined as a digital technology used by humans in a digital society to solve everyday and long-term problems of scientific, technological, and socio-economic progress (Mikhaylov, Esteve and Campion, 2018).

Based on international experience and the works of leading Ukrainian and foreign scholars, several **key vectors of AI application in municipal administration** can be identified:

1. **Digital Security:** AI enhances cybersecurity by detecting anomalies, predicting system failures, and minimising human error, thus strengthening the resilience of public administration systems (Rawal et al., 2025).
2. **Financial Management:** AI supports fiscal oversight through predictive analytics and automated data processing, enabling evidence-based decision-making (Shaikh, 2025).
3. **Healthcare:** AI-powered diagnostics and predictive systems assist doctors in identifying diseases at early stages and in personalising treatment (Hassan and Omenogor, 2025).
4. **Traffic Management:** Smart transport systems use AI to optimise routes, manage congestion, and reduce accidents in large cities (European Commission, 2025).
5. **Education:** Adaptive learning systems personalise curricula to students´ needs, increasing learning outcomes (OECD, 2023).
6. **Demographic Management:** AI analyses big data to predict migration flows and resource needs, improving urban planning (Gstrein et al, 2024).
7. **Supervisory and Control Activities:** AI enables preventive governance by shifting the focus from punitive measures to early detection of corruption-prone environments (Desouza, 2018).

These examples illustrate the multifaceted nature of AI in improving governance efficiency. However, their successful implementation depends on addressing the **associated risks** — legal, ethical, institutional, and technological.

Of course, this is not a complete list of AI use vectors in municipal governance. Further research will open new horizons for digital transformation and for using digital technologies to develop communities and their residents.

Also, business sector experts say that "*the biggest benefits of using AI are increased speed of work (44%), idea generation (18%), content creation (10%), and reduced routine*".[16]

Another argument in favour of the expediency of managing the efficiency of the territorial organisation of power using AI is that AI development activities should contribute to overcoming economic, social, and environmental inequality, promoting sustainable development, and improving the quality of life for the population (UNESCO, 2022).

The main problems of introducing AI into municipal governance are the same as in public administration — they are related to governance, legal, and ethical challenges. In

[16] AI Watch: Global regulatory tracker – United States. (2025, September 24). *White & Case*. https://www.whitecase.com/insight-our-thinking/ai-watch-global-regulatory-tracker-united-states (accessed on 23.05.2025).

Ukraine, where there is a lag in AI implementation across state and local governments, the relevance of digitalisation lies in the need to catch up with advanced countries actively pursuing digital transformation. The implementation of AI in Ukraine´s public administration system entails numerous governance, legal, and ethical risks stemming from gaps in institutional capacity and the absence of accountability mechanisms[17].

AI and automated systems can process vast amounts of information, but misuse or insufficient protection of personal data may violate citizens´ rights. The use and development of AI systems may result in the following risks and violations related to personal data protection, among others:

1. **Legal and Regulatory Risks:** Ukrainian law does not explicitly regulate the use of AI in administrative decision-making. This creates uncertainty regarding liability, appeal procedures, and the protection of citizens´ rights. The absence of "explainability" and "human-in-the-loop" requirements risks non-transparent decision-making.
2. **Ethical and Human Rights Risks**: Key risks include discrimination, data bias, and privacy violations. The EU experience underscores the importance of algorithmic transparency, ethical oversight, and mandatory risk assessments — areas where Ukraine still lacks institutional mechanisms.
3. **Institutional and Operational Risks:** Institutional fragmentation remains a challenge: ministries and agencies develop digital tools independently, causing duplication and incompatibility. Public officials often lack the digital and ethical competencies needed for responsible AI management.
4. **Governance and Accountability Risks:** The lack of precise accountability mechanisms for AI-related errors undermines trust. Developing frameworks for liability, auditing, and public reporting is essential for democratic control.

In addition, it is worth noting the conflict arising from uncertainty about liability for incorrect AI-generated performance and the content of texts created with its help, such as ChatGPT. Legislation does not define who should be liable for damage caused by AI´s actions or results. Legal practice in Ukraine and the EU suggests that liability may be imposed on the manufacturer, operator, owner, or user of AI, depending on the circumstances.

It should be noted that by Resolution 2015/2103[18] (INL), the European Parliament of 16 February 2017 establishes that liability for causing damage to AI may be imposed on one of the so-called human agents, namely, the manufacturer, operator, owner, or user of AI. Also part 2 of Article 1187 of the Civil Code of Ukraine (Verkhovna Rada of Ukraine, 2003), stipulates that "*damage caused by a source of increased danger shall be compensated by a person who, on the appropriate legal basis (ownership, other property right, contract, lease, etc.), owns (...) a mechanism or other object, the use, storage or maintenance of which creates increased danger*".

Thus, the ChatGPT user should bear full responsibility for the text generated by the system. At the same time, when handling personal data, a public official should carefully assess all risks associated with AI use. To minimise potential harm, personal

[17] White paper on AI regulation in Ukraine: The vision of the Ministry of Digital Transformation. (2024, June). *Ministry of Digital Transformation of Ukraine [E-book]*. https://storage.thedigital.gov.ua/files/c/fc/36c4cae89deedfbf3781ec6bceddffcc.pdf (accessed on 23.05.2025).

[18] European Parliament and Council of the European Union. (2017, February 16). *Resolution with recommendations to the Commission on Civil Law Rules on Robotics*. (No. 2015/2103 (INL). https://www.europarl.europa.eu/doceo/document/TA-8-2017-0051_EN.html?redirect (accessed on 23.05.2025).

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data should be avoided when interacting with publicly available AI platforms. Unauthorised interference with AI systems, especially by individuals with criminal intent, is a serious threat. Even the most sophisticated algorithms are not entirely secure, as hackers can exploit vulnerabilities in AI to steal data, manipulate results, or destabilise processes. When using AI in their work, public servants should follow cyber hygiene principles to protect personal data, confidential information, and security measures.[19]

AI systems can be deliberately used to develop and even launch catastrophic biological, chemical or digital attacks and enable the unprecedented use of a group of robotic devices as weapons. In the virtual space, cyber threats are intensifying, driven by AI capabilities. AI also has significant potential to improve the efficiency of public servants by offering accuracy and speed in data analysis. However, algorithmic tools can sometimes lead to negative consequences, such as discrimination and distortion of results. In this regard, a public servant should possess critical thinking skills and carefully review information generated by AI to avoid the risks of discrimination and human rights violations.

Despite the rapid pace of AI system development, they are also capable of making mistakes, creating inaccurate, absurd, or disconnected-from-reality text—"hallucinating". Therefore, public officials should anticipate the possibility of generating false or fictitious information and try to minimise the negative consequences. At the same time, public officials are obliged to verify the accuracy of factual information provided by AI.

When using AI in their work, public servants can employ various strategies to minimise incorrect answers and enhance the reliability, accuracy, and trustworthiness of the output data. They should also adhere to basic cyber hygiene principles to protect personal data, confidential and proprietary information, and security measures.

7. CONCLUSIONS

The introduction of AI in Ukraine is one of the vectors of European integration for transforming the territorial organisation of power. Implementing AI in the activities of public authorities will be a challenging task, as it will require solving problems of various social, economic, ethical, and legal nature (Ivanenko and Pichyk, 2024).

One of the main difficulties lies in the **fragmentation of Ukraine´s digitalisation legislation**. The absence of a specialised law governing the use of AI in public administration has led to a scattered regulatory landscape. Provisions on digital transformation are scattered across numerous acts and do not fully reflect the realities of the digital era, leading to legal ambiguity and interpretative uncertainty.

Despite these shortcomings, Ukraine demonstrates **institutional flexibility and adaptability**. The recognition of AI´s potential impact on human rights, both domestically and globally, calls for a balanced and incremental approach. Rather than introducing rigid regulation immediately, Ukraine could follow the **risk-based model proposed in the EU White Paper on AI**, which offers voluntary tools for businesses and public institutions to prepare for the forthcoming **EU AI Act (Regulation (EU) 2024/1689)**. Gradual harmonisation with EU law will not only support European integration but also enhance investment attractiveness through legal convergence.

[19] Tips for the responsible use of artificial intelligence by public servants. (2025, March). *Ministry of Digital Transformation of Ukraine [E-book].* https://nads.gov.ua/news/prezentovano-posibnyk-pro-vidpovidalne-vykorystannia-shtuchnoho-intelektu-publichnymy-sluzhbovtsiamy (accessed on 23.05.2025).

Certain areas of social relations affected by AI should continue to be regulated by sectoral legislation, particularly where AI is instrumental rather than determinative of legal consequences. Until a specialised law is adopted, compliance with existing national norms—especially those on **personal data protection and automated decision-making**—remains mandatory. Individuals retain the right to protection from computerised decisions that have significant legal effects. Once AI-specific regulation is enacted, these guarantees should be expanded and clarified.

AI implementation can optimise administrative workflows, automate routine functions, and promote equitable distribution of public resources. However, public servants must carefully assess **cybersecurity and data protection risks**, as insufficient AI literacy or reliance on unverified tools may endanger institutional information systems and, ultimately, state security. Strengthening digital competencies and establishing AI ethics and security standards within the public sector are therefore pressing priorities.

In this regard, integrating AI into Ukraine´s public administration requires a **comprehensive, multi-level approach** that balances innovation with legality and accountability. Comparative analysis suggests that effective AI governance rests on three core principles: **algorithmic transparency, institutional coordination, and citizen trust.** Ukraine should adopt these principles through targeted legislation, ethical oversight, and capacity-building measures.

In my opinion, **a hybrid regulatory model**—combining the EU's risk-based classification with the United States´ innovation-oriented flexibility—would enable Ukraine to sustain technological progress while safeguarding fundamental rights. Legal reforms should therefore introduce **explainability and appeal mechanisms** for **algorithmic decisions**, establish **independent oversight bodies**, and ensure **human control in high-risk administrative procedures.**

The scientific novelty of this research lies in reconceptualising AI governance within Ukraine´s public administration as a legal and institutional system rather than a merely technological process. The paper proposes an integrative methodological framework combining comparative, systemic, and predictive legal analysis.

The practical contribution includes policy recommendations to align Ukraine´s national AI regulation with EU standards (in particular, the adoption of the law on AI in public administration), to introduce ethical and institutional oversight mechanisms, and to foster responsible innovation in the public sector.

I would like to conclude with one **final remark.** Ukraine stands at a strategic crossroads between technological advancement and legal modernisation. Establishing a coherent, transparent, and ethically grounded AI governance framework is not only a prerequisite for European integration but also a foundation for sustaining public trust and democratic accountability in the digital era.

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(RE)DEFINITION OF A CRIMINAL GROUP IN SLOVAK LEGISLATION AS A MEANS OF A MORE EFFECTIVE FIGHT AGAINST ORGANISED CRIME

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Abstract: *We consider organised crime to be one of the most dangerous types of criminal activity. At the same time, it is one of the most significant problems in the globalised world, in which this phenomenon took root in people's consciousness hand in hand with progress. Organised crime significantly threatens a democratic society and violates the basic human rights and freedoms of its inhabitants. The main motive for committing organised criminal activity is a deliberate, long-term and purposeful effort to achieve maximum profit or other benefit, regardless of the means used. Committing a criminal activity is therefore not a goal, but a means to achieve the set goal. Organised crime is classified as a type of crime characterised by a more sophisticated way of committing criminal activity than other types of crime. With the above in mind, we believe that ensuring protection against organised crime is currently one of the biggest challenges both from a social and legal point of view.*

Key words: *Organised Crime; Criminal Activity; Human Rights; Organised Criminal Group; Criminal Group; Structured Group*

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1. INTRODUCTION

The main goal of submitted academic paper is an unbiased evaluation of the legal regulation of the organised crime, *de lege lata*. In order to reach the primary goal of the submitted academic paper, several partial objectives had to be defined right from the start of writing the paper. The partial objective of the introductory part of the text is to present several definitions of an organised crime so that this phenomenon is clearly defined and thus allowing us to work with it, afterwards. A partial objective shall be to map whether the theoretical definition of organised crime in question by legislator leaves sufficient space to punish it and/or whether there exist problems in the application practice that need to be legally resolved. In the presented text, the reader shall also be informed about the issue of organised crime regulated under the Italian legislation, and from the information obtained in this way, such amendments shall be highlighted that could serve as a basis for national legislation. The author is convinced that such a thorough analysis shall provide not only the reader, but we believe that also the academic community with proper findings that shall serve beneficial for the legal order of the Slovak Republic and create opportunity for further discussion. Last but not least, we add that more clarity and legal certainty shall be brought to the examined issue through legislative motions, *de lege ferenda*.

2. THEORETICAL DEFINITION OF BASIC TERMINOLOGY ASSOCIATED WITH ORGANISED CRIME

For the purposes of the presented academic text, the author shall apply the terms organised criminality and organised crime as identical ones. We share the opinion that these terms are identical in content, and/or they express identical activity. But for the sake of order, we present that, especially in American literature, the term organised crime has a narrower meaning, since it includes only highly structured forms of crime committed by mafia groups (Ivor, 2012).

As the Slovak Republic is aware of danger connected with organised crime, it actively participates in bilateral and multilateral cooperations of various international institutions. The result of one of such cooperation was the formulation of the definition of a criminal group pursuant to model of the UN Convention against Transnational Organised Crime: ***"Organised criminal group"*** *is a structured group of three and more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention in order to obtain, directly or indirectly, a financial or other material benefit".*

Proceeding from the specialised literature, it is clear to us that the fight against organised crime is an extremely complex phenomenon, demanding both in the personal staff, the professional qualification of investigators, as well as in terms of the funds spent.

We believe that at the moment our society is in a crisis of terminology related to the subject of our work, that is, organised crime. Definitions of organised crime are different. Organised crime is by some people perceived as: *"A unique and dynamic phenomenon that spreads through all areas of the society. It is a serious problem primarily due to the enormous social and economic consequences, as well as political consequences, since organised groups of perpetrators can infiltrate into various state and political structures through corruption and thus directly or indirectly affect democratic development in individual countries."* (Dianiška et al., 2016, p. 405). Others characterise it as a very complex phenomenon, affecting social, economic, political and legal sphere of life in the society. Others, in turn, define it through the characteristics of its activities, that, in our opinion, is not correct, since organised crime has been extremely flexible, that is, it has adapted to the current circumstances in society without any problems and on this basis develops or otherwise changes the types of activities that are being dealt with.[1] Attempts to create a unified definition, initiated a discussion both on academic and legislative grounds, resulting in more than two hundred definitions of organised crime that can be found in specialised legal literature (Souleimanov, 2012, p. 18).

In order to present given issue meaningfully, it is inevitable to endeavour to define it theoretically, which from the academic point of view we regard as – *conditio sine qua non* – of the presented academic text.

The primary objective being followed by organised crime today is primarily to obtain financial gains or other benefits, regardless of the means used to achieve them. These facts, together with other factors, make organised crime an exceptionally dangerous phenomenon, which is a global threat for the whole society. The dominant areas of organised crime include, in particular, crimes related to trafficking in human beings, trafficking in weapons and drugs, money laundering, smuggling, corruption, cybercrime, financial crime and many others.

[1] Available at: https://euractiv.cz/section/vnitro-a-spravedlnost/news/organizovany-zlocin-a-terorismus-se-v-dobe-pandemie-meni-varuje-europol/ (accessed on 16.03.2024).

We shall point out the principal elements of organised crime through the definition of terms such as group structure, consistency, planning, hierarchical structure of the group, division of tasks, striving for maximum profit, infiltration into official social structures, protective measures against disclosure and punishment, the subsidiary role of violence, internationalisation of the organised group, flexibility and the use of modern infrastructure. Also, on the basis of them, a comprehensive view of the issue of organised crime through the partial elements of its criminal activity shall be presented.

The paper demonstrates that organised crime is not a new phenomenon. Since the early nineties of the 20th century, it can be observed how it has become more changeable and sophisticated. This is happening as a result of taking advantage of new communication technologies, but also as a result of political and economic changes in Europe and the world. The opening of borders has led to an almost pandemic spread of organised crime and its export to the whole world. Thus, global trade has been expanded with the possibility of world economic activity and the free movement of people, goods and services. However, hand in hand with this progress, new opportunities for the operation of organised criminal groups have also opened up. There can be found the reason of simplification of cross-border cooperation itself within the framework of the criminal activities carried out.

Organised crime threatens politics, political parties and politicians as well. The bosses of criminal groups strive to abuse public officials, influence their strategic decision-making and thus directly or indirectly influence their key decision-making in their favour. Organised crime also threatens the economy, in particular by introducing illegal practices into the economic system. It successfully succeeds in infiltration into the financial circles in individual economic systems under the disguise of legal entrepreneurship, thereby trying to legalise the proceeds of crime. Last but not least, the economy is weakened by the fact that society spends a considerable amount of money to fight against organised crime (Smolík et al., 2010, p. 259).

For the complexity of presented academic paper, we shall also point out the definition of organised crime in the legal order of the Slovak Republic referring to possible shortcomings in its regulation and we shall try to bring more clarity to the issue through legislative motions *de lege ferenda*. Foreign legislation, namely that of the Italian Republic, shall help us in this regard. The percipient shall also be provided with a comparison of legal definitions of the terms, organised group and criminal group, and that is on the basis of the case-law of the Supreme Court of the Slovak Republic.

2.1 Introduction and Historical Context of Organised Crime

As far as the formation of organised crime is concerned, historians date it to the 19th century. However, in this connection, the 17th century can be considered a real breakthrough. This is a period when the Thirty Years´ War raged in Europe, in Southern Europe (namely in Italy) foreigners from Spain and France took turns and exploited this Southern people. In China, the Manchu Qing Dynasty replaced the ancient Chinese Ming Dynasty, and in Japan, a period of peace followed after the Civil War (Nemec, 1995, p. 13). It was during this period that various groupings and groups began to be formed to support and protect individuals exploited by the dominance of foreigners. These secret organisations, and/or secret syndicates were formed either by uniting families in consanguineously bound "big family – clan", or by uniting individuals without blood ties who made a blood oath to the head of such a family. These clans were built on a hierarchical structure, they had their own principles of behaviour, but also sanctioning mechanisms to punish possible indiscipline of their members. It would be naive to

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assume that in these early days these secret organisations or clans were formed for the purpose of committing criminal offenses. The truth is that **the original idea of their founders was the establishment of social justice and the elimination of foreign dominance from their country**.

The development of society slowly but surely changed the original idea of the founders of the organisations. From the mid-19th century until the first World War, after political changes, several of the organisations began to focus on criminal activities, in an attempt to increase their capital, but especially with the vision of gaining power. On the basis of the above-mentioned, it may be concluded that although the original idea of the founders of secret organisations was, one might say, good-natured, its subsequent transfer into criminal organisations is a proof of a rapid idea´s change for which they were founded.

2.2 Formation and Development of Organised Crime in the Slovak Republic

Following available sources, it may be noted, that the organised crime was not identified in the territory of the Slovak Republic until 1989, which does not mean that it did not exist in the former Czechoslovakia. On the contrary, its existential manifestations, however, were different, therefore, big changes occurred after the socio-political changes in 1989. Significant activity was the distribution of goods in short supply, illegal exchange of currency (illegal money changing), thefts or sale of real estates. The economic crisis was culminating in the eighties of the last century, and it was during this period when a parallel, the so-called informal economy largely flourished, which provided citizens with what the state could not arrange, i.e. goods in short supply and services were acquired on the black market by people. In this period, corruption, reaching to the highest political and state spheres, developed considerably.

The real problem came into existence after the collapse of the totalitarian regime, the subsequent manifestation of which in our society was the boom of a group of entrepreneurs for whom the rate of profit was decisive, regardless of the means used. These people often used harsh practices to achieve their goal, and their lack of interest in legalizing their business connected them with an organised crime. Since the Slovak Republic was going through a process of transformation at that time, it did not have a sufficiently developed legal system and was not ready to face the danger of organised crime. Thus, it may be concluded that **organised crime is a reaction to a weak society and a weak state**. Weakening of state power and social institutions, caused by for example revolutionary social changes tends to be an opportunity for criminal organisations to assert themselves in an uncontrolled space. These factors instigated organised criminal groups from abroad to choose the Slovak Republic as the environment for their illegal activities.

The fact is that modern forms of illegal business were imported into our territory from foreign states, for example, the States of the former Soviet Union, Yugoslavia or the Balkans. All these are territories where organised crime has had its marked pathway for years and therefore the opportunity provided by the Slovak Republic, with insufficient laws, legal order, but especially with insufficient experience of the police on this issue, was unrepeatable and immediately taken advantage of. The truth remains that after mapping the terrain by Slovak organised groups, even they also joined International Organised Crime, or their activities began to intersect.

At present, Slovakia is a long-established transit country for people smuggling. The most frequently smuggled nationalities include people from Serbia, Syria, Afghanistan, Somalia, Ukraine, Bosnia and Herzegovina, Bangladesh and Pakistan. This

criminal market was aggravated by the war in Ukraine. It is reported that smugglers and traffickers were waiting at the Slovak-Ukrainian border for Ukrainians leaving their country during the first stages of the war. In the second half of 2022, the situation began to deteriorate even on the Slovak-Hungarian border, many illegal migrants were passing through Slovakia towards the west. A tenfold increase in the use of false travel, residence and other documents for the purpose of people smuggling has been documented. Both local and transnational criminal networks are heavily involved in people smuggling in Slovakia.[2]

Slovakia also serves as a source country for illegal firearms, especially those that can be easily reactivated or converted for smuggling to other EU states. The war in Ukraine has brought new problems associated with the export of weapons from Slovakia and through Slovakia. This market is an important source of income for people from the lower layers of organised crime. In addition, transnational groups, mainly from the Eastern Europe and the Western Balkans, have increased their presence in the country. Illegal trade with goods subjected to consumption tax, specifically, tobacco products has been present on the Slovak market for several decades. Recent raids have uncovered illegal cigarette factories in Eastern Slovakia run by organised criminal groups with elements from Ukraine and Belarus. Despite the existence of a black market, the country still has one of the lowest rates of intentional counterfeit purchases in Europe.[3] However, with rising inflation and expected rise in tobacco prices, changeover to illegal alternatives such as smuggled or illegally manufactured cigarettes can be expected.

Slovakia, within the drug industry, serves as a transit and destination country for heroin, which comes mainly from Afghanistan and comes to the country through Hungary along the Balkan route. Several gangs operate in the trade, especially from Balkan countries such as North Macedonia, Kosovo and Serbia. Drugs smuggling is generally considered as one of the most important sources of income for organised criminal groups in Slovakia, many of which are involved in smuggling heroin shipments from Asia. Slovakia is also a transit and destination country for cocaine. Cocaine trafficking in Slovakia is the main activity of organised groups, as well as smaller groups of individuals using the drug. Most of the cocaine comes from the Netherlands or Belgium. Organised criminal groups involved in the trafficking of cocaine and the transport of this drug through Slovakia include groups of Balkan and Italian origin. Slovakia is also a source and destination country for cannabis trafficking. Cannabis is domestically produced and is also imported from the Czech Republic. Cannabis produced for local consumption is widely distributed without the involvement of organised criminal groups. Cannabis is the most sought-after drug in Slovakia and more and more addicts are trying to get treatment. In the field of synthetic drugs, Slovakia is a source, destination and transit country. Synthetic drugs such as methamphetamine have been largely produced domestically in Slovakia in recent years. It is known that criminal groups are involved into extensive procurement of precursors and the production of methamphetamine. Ecstasy and methamphetamine are the most commonly consumed synthetic drugs in Slovakia. In addition, there emerges a problem in Slovakia that new psychoactive substances are sold to consumers under the general name "Ecstasy" or as legal alternatives to cocaine and methamphetamine. These have become very popular,

[2] Global Organized Crime Index, 2023. Available at: https://ocindex.net/country/slovakia (accessed on 10.07.2024).
[3] Global Organized Crime Index, 2023. Available at: https://ocindex.net/country/slovakia (accessed on 10.07. 2024).

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as well as synthetic cannabinoids, which simulate the effects of marijuana, but with a significantly stronger effect.[4]

3. LEGAL DEFINITION OF ORGANISED CRIME

The definition of organised crime is a Sisyphean task. Since this is a heterogeneous phenomenon, involving many types of crime, the subsequent part of the work shall present a legal excursus of the organised crime concept both at the International and European level, and at the national level as well. After analysing the national legislation, we shall present to the reader how organised crime is defined in the legislation of the Italian Republic, and after its evaluation, we shall introduce whether the national legislation shows application problems and, in case of their identification, we shall propose solutions which shall result in *de lege ferenda* considerations.

3.1 Definition of Organised Crime at the International Level

We consider the classification of the concept of organised crime to be extremely purposeful and necessary, especially with regard to the spreading of this phenomenon. Although this phenomenon has been encountered for a considerable time, its international definition has occurred relatively recently. The need to highlight this phenomenon at the international level was enormous. The international legislative framework establishing the boundaries and limits of national cooperation was needed. In 1994, an international conference was convened in Naples, Italy, at which for the first time a strong voice was proclaimed to create a convention on the effective fight against organised crime. In 1998, an *ad hoc* committee was formed which was charged with preparation of comprehensive legislative framework of the UN Convention against Transnational Organised Crime. Since that moment, work has begun to create such treaty. Considering the fact that the final phase of the document was completed only in the year 2000, it can be concluded that the drafting of the convention itself was not easy at all, and throughout the period of its preparation, the group of experts preparing the treaty faced a number of problems. The most urgent problems included the necessity to overcome issues related to the principles of state sovereignty of individual UN states and the problems associated with the various legislative and judicial systems of the future signatory countries.

The signing[5] of the Convention was therefore accompanied by a ceremony, which, typically, took place in the capital city of Sicily. We remind that this period can be described as particularly turbulent, as *the Cosa Nostra* criminal organisation was gaining considerable influence in Sicily. Thus, it can be concluded that the organisers of the conference decided to sign the Convention against Transnational Organised Crime in Palermo[6] to declare to the local mafia that the times when organised crime flourished and grew in power are gone for good. After more than twenty years, ask a question whether this is so. To answer this partial question, we leave it to the consideration of each percipient.

[4] Global Organized Crime Index, 2023. Available at: https://ocindex.net/country/slovakia (accessed on 10.07. 2024).

[5] The Convention on combating organised crime was approved on 17 June 2003 without comments by the Legislative Council of the Government of the Slovak Republic and consequently on 16 September 2003 by the Resolution of the Government N° 870/2003. The Convention entered into force for Slovak Republic on 2 January 2004.

[6] Convention against Transnational Organised Crime was signed in Palermo, Italy, on 12-15 December 2000.

At this point, it can be noted that the **Convention on Transnational Organised Crime**[7] is to date the only and the most comprehensive treaty dealing with the **fight against organised crime.** After more than twenty years, it can be summarised that no other treaty or convention has exceeded the legal framework of the Convention in question and due to this reason, it is referred to as the most comprehensive document providing a legal basis to the international fight against organised crime.

However, on the other hand, it is required to take a very critical approach to the Convention in question, on the grounds that **it does not contain a legal definition of organised crime.** With respect to above-mentioned, we insist that the determination of organised crime is not easy and the phenomenon of organised crime itself cannot, in layman's terms, be categorised. As a result, no national or international document contains a legal definition of organised crime.

On the other hand, in its initial provisions, the Convention contains a legal definition of the concept of an **organised criminal group**, which is: *"Structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit."*[8] On the basis of the foregoing, it can be concluded that the Convention in question does not, *expressis verbis*, define a legal definition of an organised crime, but, on the contrary, it indicates the elements of an organised group, from which it can be concluded that it defines an organised crime indirectly, through the definition of a group of an organised crime. Further in the text we shall prove that the Slovak Republic has taken over this legal wording and transformed it into a lawful definition of a criminal group.

3.2 Definition of Organised Crime in the European Union

It is assumed that a key task of each state is to guarantee the security of its country. The security of the Slovak Republic is also based on the European security core, and from this point of view it was important to participate as an independent country in the integration processes of the European Union.

One of the primary problems both on the ground of international community as well as on the ground of the European Union was the issue of the very definition of organised crime. The first step towards solving this problem was the *Joint Action on making it a criminal offence to participate of criminal organisation in the Member States of the European Union – 98/233 JHA* (hereinafter referred to as the ***"Joint Action"***), an agreement on joint action, which aim was to unite the States of the European Union on the issue of criminal prosecution of members of criminal groups.

[7] Slovak Republic signed the Convention against Transnational Organised Crime in Palermo. The Convention also included three additional protocols.
Namely:
- *Protocol against the Smuggling of Migrants by Land, Sea and Air* – document was signed by Slovak Republic on 15 November 2001;
- *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* – document was signed by Slovak Republic on 15 November 2001;
- *Protocol against Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition* – document was signed by Slovak Republic on 26 August 2002.

The above protocols were signed and declared within the framework of our legal order within the meaning of Article 7 Par. 4 of the Constitution of the Slovak Republic, thus these do not take precedence over the laws of the Slovak Republic.

[8] Article 2 Letter a) Convention against Transnational Organised Crime.

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However, neither this document nor the Convention against Transnational Organised Crime legally defines organised crime or organised felony and defines "only" a **criminal group** by which it is: "*Structured association, established over a period of time, of more than two persons, acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, whether such offences are an end in themselves or a means of obtaining material benefits and, where appropriate, of improperly influencing the operation of public authorities."*[9] On the basis of the above, it may be concluded that organised crime is defined both at international and European level only **indirectly**, and that is through the definition of an organised group and/or criminal group.

It is true that said Joint Action was replaced due to insufficiency, and that is namely by Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime[10] (hereinafter referred to as only ***"Council Framework Decision")***. As in the previous document, even within this one, different terms were defined right at the beginning whose categorisation is important from the point of view of legal theory. One of these concepts is a **criminal organisation**, which is *"Structured group, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit."* On the basis of the previous definitions, it is possible to draw a considerable symbiosis of the definition of a criminal organisation in the framework of the Joint Action and the newly adopted Council Framework Decision. In spite of the fact, the more comprehensive processing of organised crime-related issues in the framework of the Council Framework Decision, specifically the recommendations on the approximation of organised crime-related offences, can be positively perceived. Thus, in the definition of crimes being committed by organised criminal groups, there is an obvious interest in capturing the widest possible spectrum of crime.

Withing the meaning of the said Council Framework Decision, each Member State shall take measures necessary to ensure that acting related to a criminal organisation is considered to constitute a criminal offence. It is the action of persons who:

- with intent and with knowledge of either the aim and general criminal activity of the organisation or the intention of the organisation to commit the offences in question, actively takes part including the provision of information and material means, the recruitment of new members and all kinds of financing of its activities, knowing that such participation will contribute to the execution of criminal activities of the organisation;
- consisting in an agreement with one or more persons that an activity should be pursued which, if carried out, would amount to the commission of offences falling within Article 1, even if that person does not take part in the actual execution of the activity.

Organised crime poses a significant threat to the European Union. Problematic is the growing dependence of individual states on a criminal way of life, on the perception

[9] Article 1 of Joint Action of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union (98/733/SVV). Published in the Official Journal of the European Union on 29 December 1998.

[10] Council Framework Decision 2008/841/SVV of 24 October 2008 on the fight against organised crime. Available at: https://eur-lex.europa.eu/legalcontent/SK/TXT/PDF/?uri=CELEX:32008F0841&from=SK (accessed on 14.04.2024).

of a criminal organisation as anti-riot forces or as a bearer of charity in some regions of the world. Last but not least, this fight is complicated by the still existing gaps in international cooperation to combat organised crime. Therefore, we view very positively the European Union's years lasting initiative for an effective and efficient fight against organised crime.

With regard to above-mentioned, the European Platform Against Organised Crime, ***the European Multidisciplinary Platform Against Criminal Threats (EMPACT)*** shall be presented on the following lines. This European platform introduces an integrated approach to the EU internal security, involving measures that range from external border controls, police, judicial and customs cooperation, prevention and other measures suitable for effective combating organised criminal groups. EMPACT is also represented within the EU as a European Union policy cycle for organised and serious international crime. It was first introduced between 2012 and 2013 and, following particularly successful results, it has been **included as one of the main instruments in the fight against organised crime at European Union level.** Its clear methodology and consistent way of dealing with the most important threats, strengthening cooperation among the relevant divisions of the Member States, make it one of the most effective tools of the European Union in the fight against organised crime. On the basis of the results achieved, the Council of the European Union decided on the permanent continuation of the EMPACT policy cycle and set out ten clear EU priorities in the fight against serious and organised crime.

EMPACT is the EU's permanent instrument for structured multidisciplinary cooperation in the fight against organised and serious international crime. It is managed by the Member States and supported by the EU institutions, bodies and agencies in accordance with their mandates. EMPACT has a four-year cycle and consists of four steps:

1. ***Serious and Organised Crime Threat Assessment in the European Union (EU SOCTA)*** – EU SOCTA provides a complete and thorough picture of criminal threats affecting the European Union to ensure that major criminal problems are addressed through an intelligence-based approach. EU SOCTA was prepared by Europol and at the same time identified a set of key threats based on a detailed analysis of the main problems the EU is dealing with. It is on this basis that the Council of the European Union defines priorities for the fight against organised crime. It is therefore appropriate to say that SOCTA has a key role in EMPACT.
2. ***Priorities of the European Union in the field of crime and MASP*** – the second step is the determination of policy and decision-making through the identification of the limited number of priorities by the Council. A general Multi-Annual Strategic Plan (G-MASP) with common strategic objectives is also elaborated in order to finally achieve an effective approach to addressing priority hazards.
3. ***Operational Action Plans (OAP)*** – the third step is the elaboration, implementation and monitoring of the annual operational action plans, which contain measures to combat crime in 10 areas, corresponding to the priorities of the EU in the area of crime for EMPACT and at the same time it is necessary to adjust them to the General Strategic Plan G-MASP. Each such operational action plan contains a set of operational activities that contribute to the accomplishment of the objectives. However, it should be noted that during the implementation of operational actions in the OAP, the exchange of information related to criminal investigations reaches Europol through its *Secure*

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Information Exchange Network (SIENA) application for analysis. The analysed information is integrated into the system and thus a review of the priorities and strategic objectives of new, evolving threats can be launched.

4. ***Independent Assessment*** – at the end of each EMPACT cycle, an independent assessment is carried out to review the implementation of EMPACT and its results. Such an assessment will be followed by an informed political decision that serves as guidance for the next cycle of EMPACT.[11]

Based on Serious and Organised Crime Threat Assessment in the EU of the year 2021, submitted by Europol, the Member States have identified **10 priorities in the fight against crime:**

1. ***Identify and disrupt high-risk criminal networks active in the EU***, such as mafia-type, ethnic and family-based organisations and other structured networks of individuals with a special emphasis on those criminal networks which undermine the rule of law by using corruption. Also, groups committing acts of violence including intimidation and use of firearms to enforce their criminal goals. Last but not least, to identify and disrupt groups which launder their criminal proceeds through a parallel financial system;
2. ***Target the criminal offenders orchestrating cyber-attacks***, particularly those offering specialised criminal services online;
3. ***Disrupt criminal networks engaged in trafficking in human beings*** and all forms of exploitation including labour and sexual exploitation, and with a special focus on those who exploit minors for forced criminality; those who use or threaten with violence against victims and their families, or mislead victims by simulating to officialise the exploitation;
4. ***Combat child abuse online and offline,*** including production and dissemination of child abuse material as well as online child sexual exploitation;
5. ***Fight against criminal networks involved in migrant smuggling***, in particular those providing facilitation services to irregular migrants along the main migratory routes crossing the external border of the EU and those involved in facilitation of secondary movements and legalisation of residence status within the EU, particularly focussing on those whose methods endanger people´s lives;
6. ***Identify and target criminal networks involved in the wholesale trafficking of***:
   a) cannabis, cocaine and heroin;
   b) synthetic drugs and new psychoactive substances (NPS);
7. ***Target individual criminals and criminal networks orchestrating large-scale fraud schemes online.*** These include excise fraud, intellectual property crime, counterfeiting of goods and currencies, money laundering and asset recovery;
8. ***Disrupt criminal networks involved in organised burglaries and thefts***, organised robberies, motor vehicle crime and illegal trade in cultural goods, with a special focus on those that are highly mobile and operating across the EU;
9. ***Disrupt criminal networks involved in all forms of environmental crime,*** with a specific focus on waste and wildlife trafficking, as well as on criminal networks and individual criminal entrepreneurs with a capability to infiltrate legal business structures at high level or set up own companies in order to facilitate their crimes;

[11] Empact, Fighting crime together, Available at: https://ec.europa.eu/home-affairs/policies/law-enforcement-cooperation/operational-cooperation/empact-fighting-crime-together_en (accessed on 14.04.2024).

10. *Target criminal networks and individual criminals involved in the illicit trafficking, distribution and used of firearms*.[12]

The importance of the platform in question and its considerable importance are clearly indicated by the latest available published data from 2022, in terms of which the following results were obtained:

- arrest of 9 922 persons;
- victims identified 4 019;
- arrest of 3 646 migrants´ smugglers;
- seizures more than € 180 000 000 cash;
- seizures more than 62 tonnes of drugs;
- investigation initiated 9 262.[13]

3.2.1 Definition of Organised Crime in the Legal Order of the Italian Republic

The focus on the legal order of the Italian Republic and its legislative definition of organised crime is mainly justified by the historical interconnection and its roots date back to the 19th century. Italy had to deal with the mafia very early on, so we assume that the legislative framework it offers could, *pro futuro*, also inspire national legislation.

The basis of the following text shall therefore be a motion to improve the legal order of the Slovak Republic on the basis of the Italian Republic. The fact is that Italy has been struggling with the problem of organised crime for many years, and that is what motivated us to take a closer look at its legal nature.

Gambetta in his monography poses a question why the south of Italy shows a persistent inability to develop socially and economically. In the south of Italy, in the regions of Campania, Calabria and Sicily, three unfortunate states of issues have coexisted for a long time:

- people often do not cooperate even if it would be convenient for them;
- people compete by using wrong methods and they never consider the violence to be too distant possibility to settle their disputes;
- they do not engage in such type of competition from which everyone could benefit from (Gambetta, 2011, pp. 1-2).

The evidence of the infamous phenomenon of the mafia[14] is the fact that already in the year 1963, a commission was established in Italy as an investigative body charged with clarifying the circumstances relating to the "phenomenon of the Sicilian Mafia." Over the years, the commissions have been expanded to be able to investigate other organised criminal groups, the so-called "mafia-type" (specifically the groups *Cosa Nostra, Camorra, 'Ndrangheta, Sacra Corona Unita*). The aim of the Antimafia Commission is to investigate the phenomenon of organised crime in all its forms and to focus on legislative, anti-corruption and administrative measures. Its importance can also be seen in the area that

[12] Europol. *European Union serious and organised crime threat assessment, A corrupting influence: the infiltration and undermining of Europe's economy and society by organised crime*. Luxembourg. 2021.

[13] EMPACT, Fighting crime together, EMPACT 2022 Results. Available at: https://www.consilium.europa.eu/media/65450/2023_225_empact-factsheets-2022_web-final.pdf (accessed on 10.06.2024).

[14] In case-law Italy, Supreme Court of Cassation of the Italian Republic, the word mafia appears only in the Decision of 12 November 1974, in which the mafia is defined as: *"Any group of persons intending by criminal means to take power or maintain control of sites, groups or production activities through systematic intimidation and infiltration of members in an effort to create a state of subjugation and secrecy (omerta) that makes it impossible or extremely difficult to use standard means of criminal intervention by the state."*

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enables the judicial police to order an investigation or require any form of cooperation, on the basis of which it can be concluded that it also has judicial powers.[15]

In 1984, the redoubtable Italian mafioso *Tomasso Buscetta* was included in the list of so-called *pentiti,*[16] thereby violating the rules of *Omerta*[17] and decided to cooperate with the justice. *Tommaso Buscetta* was the central figure of the so-called Maxi Trails in Sicily,[18] which are also known in legal circles, especially due to judges *Giovanni Falcone* and *Paolo Borsellino*. These two were leading judges of the entire Maxi Trial, a memento of the passionate struggle against the Mafia who subordinated their whole lives to it and in the end, they paid for it with their lives. Based on the testimony of witnesses *Tommaso Buscetta*[19] and *Salvatore Contorno,*[20] more than three hundred and fifty mafiosi were sentenced. This fact shook the organisation *Cosa Nostra*, and at the same time the Italian justice earned its respect for quite a few years of protracted struggle. An unforgettable proof of this process was also the fact that *Cosa Nostra*, a dreaded criminal organisation, operates and it is not just a figment of the imagination of writers and guides of the village of *Corleone* (Vrtíková, 2021, p. 129).

The recent convictions of up to 207 people on charges related to membership in an organised criminal group of mafia-type, the 'Ndrangheta, also speak in our favour. We consider this fact to be extremely positive and demonstrating that the legislative system of Italy is successfully fighting this undesirable phenomenon and trying to deal with it

Despite the considerable success of judges *Falcone* and *Borsellino*, the fight against octopus, organised crime, continued further. One of the next steps of the Italian legislature was the incorporation of a new crime, **a Mafia conspiracy**, into the legal order. Italian criminal code (*Codice penale*)[21] in its provisions, in the section *"Crimes against public order"* contains two articles about *"Criminal Association"* (Article 416), and *"Mafia-type Association"* (Article 416-bis), whereas each of mentioned groups is defined by its own specific elements.

[15] Antimafia Commission.
[16] Penitent, falsely remorseful.
[17] **Omerta**, which means /manhood/ in Sicilian, is a code of conduct that goes beyond the traditional way of silence with which Mafia members, their victims, and **witnesses to crime** face questions from investigators and lawyers. A true *mafioso* speaks a little, considers every word and behaves seriously all the time and with dignity, even during extraordinary provocations. It can be compared to the Mediterranean ideal of manhood, returning to the stoic tradition of ancient Greece and Rome. Last but not least, this code requires that even the least significant member or his/her family and friends, no matter how unimportant, were avenged. The status of a man depends on his readiness to use violence to defend his honour. A man who defends his honour this way acquires the most valuable thing – respect. Respect creates authority and authority means power. With power comes duties. The real *mafioso* takes care of his criminal family like a father, he is often the godfather of the children of his subordinates, takes part in their weddings and funerals and often organises almost ritual celebrations at which sitting order itself reflects position of persons in the family. Sicilian Mafia is known as *onorata societa* (The Honoured Society) and considers its members to be men of honour.
[18] The Maxi Trial (Italian *Maxiprocesso*) was a criminal trial against the Sicilian mafia that took place in Palermo, Sicily. The trial lasted from 10 February 1986 to 30 January 1992 at the Supreme Court of Cassation and was held in the Ucciardone prison. It is considered to be the most significant trial ever against the Sicilian Mafia, as well as the largest trial in the world history.
[19] *Tommaso Buscetta* disclosed to the judge *Falcone* internal functioning and structure of *Cosa Nostra*, process of recruiting new members to the organisation and functions within it. His testimony lasted for 45 days.
[20] He began to testify only after *Tommaso Buscetta*.
[21] Legge 19 ottobre 1930 n. 1398 (Act No.1398/1930 Criminal Code).

3.2.2 Elements of Criminal Association

From Article 416 of the Italian criminal code, the following elements can be deduced, which, at the level of substantive criminal law, are connected with the *"criminal association"*:

a) from the point of view of the basic characteristic, this is an association of three or more persons with the intention of committing more than one crime, while persons who promote, constitute or organise the association shall be liable to a term of imprisonment of three to seven years;
b) for the sole fact participating in the association, the offenders shall be liable to a term of imprisonment of one to five years;
c) leaders of the group and/or association shall be subject to the same punishment prescribed for the promoters;
d) if members organise campaigns or public gatherings with weapons, shall be liable to a term of imprisonment of five to fifteen years;
e) the imprisonment shall be increased if the number of associates is ten or more;
f) in the event that organised group commits any of other crimes such as production of child pornography or child prostitution, members of organisation shall be liable to a term of imprisonment of five to fifteen years.

A certain subcategory of the criminal group of *"ordinary type"* can be considered criminal groups aimed at drug trafficking and human trafficking, which are directly aimed at committing a specific activity characterised by the legislator as criminal.

From the aforesaid it follows that in the event that there is evidence that three or more persons have associated to form a group of a permanent nature with a hierarchical structure, the members of which agreed on an indefinite number of crimes, it can be concluded that this is the formation of an organised group of an ordinary type (Vrtíková, 2020, p. 240).

3.2.3 Elements of "Mafia-type association"

Article 416-bis of the Italian Criminal Code defines a criminal group of so-called *"Mafia -type"* which is characterised by organised structure, but in particular by mafia practices, such as intimidation, violence and benefiting thereof, especially the state of subjugation. Another example of the practices of this group is adhering to the rules of *"omertà"*, so-called law of silence.[22]

Article 416-bis *Codice penale* defines group of a ***Mafia type***, as an association in which:

a) any person belonging to a Mafia-type organisation of three or more persons shall be liable to a term of imprisonment of nine to fifteen years;
b) persons who further the activities of or manage the organisation shall be liable to a term of imprisonment of twelve to eighteen years;
c) members of a Mafia-type organisation benefit from intimidation, the state of subjugation and conspiracy by committing criminal activities, thereby they acquire direct or indirect control of economic activities, concessions, licenses, public procurement contracts and public services. They obtain unjust profits or advantages for themselves or others, prevent from free exercise of vote, or procure votes for themselves or others at elections;

[22] For more on this, see footnote No. 32.

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d) if the organisation under Article 1 is armed, imprisonment is increased between twelve to twenty years, if it refers to the cases described in the second section, the imprisonment is increased between fifteen to twenty-six years;
e) the organisation shall be deemed to be armed if its members have access to weapons or explosives for the purposes of furthering the aims of the organisation, even if hidden or stored;
f) if the economic activities which the members intend to acquire or maintain control over are financed in whole or in part by the proceeds of crime, the penalties set out above shall be increased by one-third to one-half;
g) in the event of a conviction, instruments or means which were used or intended to be used to commit the offence and the proceeds thereof shall be forfeited.[23]

As a specific example of groups to which provisions set out above apply, one can mention the criminal group *Camorra*, *'Ndrangheta* and any other organisation whose goals correspond to Mafia-type organisation.

Article 416-bis of the Italian criminal code was introduced by the legislator in the year 1982 as a new provision, considering the increasing danger in society caused by organisations with specific elements. Just defining the difference between a criminal group of the ordinary type and a mafia type is a significant milestone of Italian law by which the legislator pointed out the specifics of these concepts and through which it tries to react with stricter sanctions to the phenomenon of the mafia.

By Law Decree No. 21 GU, of 1st March 2018, were, *inter alia*, the provisions of the Italian *Codice penale* amended. In particular, the provision of the Article 416-bis 1 named *"Aggravating circumstances for offences related to the use of mafia methods or crimes for the purpose of terrorism"* was supplemented. Referring to above-mentioned, those criminal offences were punishable for which life imprisonment may be imposed and which were also committed under the conditions referred to in Article 416-bis or with the objective to facilitate the activity of the associations indicated in that same article. For such crimes, the imprisonment shall be increased from one third to one half.[24]

For the offences under Article 416-bis and those committed under the conditions indicated in that article or with the objective to facilitate the activity of mafia-type association, against the accused, who, after opting out of the associations, endeavours to avoid any further consequences of the criminal activity, including by effectively providing assistance to police or judicial authority in collecting conclusive evidence with a view to identify and arrest perpetrators, life imprisonment sentence shall be replaced by a term of imprisonment of twelve to twenty years and other penalties shall be reduced from one third to one half.[25]

By following provisions of Article 416-ter, a political mafia shall be punished, namely:

a) any person who accepts a promise to procure votes through procedures referred to in Article 416-bis, in exchange for money or the promise thereof or other reward, shall be liable to a term of imprisonment of six to twelve years;
b) the same punishment shall be imposed on those who promise to procure votes in the manner referred to in the first paragraph.[26]

[23] It was *Pio La Torre*, who initiated draft bill in 1980 introducing a new offence in the Italian legal system, mafia conspiracy and the possibility of courts to seize the goods of persons belonging to a mafia conspiracy.
[24] Law Decree No. 21 GU of 1 March 2018. Available at: https://www.altalex.com/documents/leggi/2017/10/04/riforma-penale-attuato-il-principio-di-riserva-di-codice (accessed on 20 April 2024)
[25] Italian Criminal Code, Article 416-bis.1.
[26] *Ibid.*, Article 416-ter.

Another related article in the Italian *Codice penale* is Article 418, which is dealing with help to members of criminal organisations. It clearly states that: *"Who, except in cases of complicity, assists in criminal activities by providing shelter, or by providing food, hospitality, means of transport, or means of communication to the persons involved in criminal activities or are members of a criminal group, shall be liable to a term of imprisonment of two to four years."*[27] In the event of continuous assistance, the penalty is doubled. At the last point of the article in question, the legislator also thought of persons who provide such assistance to their loved ones. In such event, the persons concerned are not prosecuted.

In other words, **the legislator does not punish persons who assist members of the group in case it concerns persons close to them, i.e. given case constitutes the ground of inadmissibility of criminal prosecution, which means that such persons will not be criminally punishable for their actions.**[28]

For the completeness of the above interpretation, it is still necessary to explain that the term mafia represents different types of groups that differ from each other by the place of execution of crime, as well as by other elements that characterise individual criminal organisations of *"mafia type"*. For example, *the Mafia* in Sicily is called the *´Ndrangheta* in Calabria, *Camorra* in Naples and in the region of Calabria and *Sacra Corona Unita* in Apulia. These criminal organisations known for decades have been controlling not only the regions in which they came into being but also other parts of the Italian peninsula. More specifically, they have already infiltrated almost into all parts of Italy and, unfortunately, extend beyond the borders of their state. Undisputed fact remains that they are always tied to their home country, or their region.

At this point, we consider it important to mention the recent Judgment of the Supreme Court of Cassation of Italy, which, taking into account the expansiveness of individual mafia groups, also draws attention to minor assimilations, the so-called non-traditional mafias. Thus, it opened the issue of all other organisations that in each case use methods and techniques of traditional, mafia groupings, however, they consist of small organisations with a small number of members. In this connection, the Supreme Court of Cassation of Italy stated that: *"The crime referred to in Art. 416-bis. of the Penal Code can be applied not only in relation to traditional mafias consisting of associations with a high number of members and huge funds, but also in relation to atypical mafias consisting of small organisations with a smaller number of members, subject to a limited territory or a certain branch of activity, while using mafia methods from which comes subjugation and secrecy."*[29]

On the basis of the aforementioned, it can be concluded that the Italian legislator does not distinguish whether the group has fewer members or whether it is classified among the non-traditional types of mafia. **The element of mafia grouping is met in any case, if mafia methods and practices are used.**

We consider the introduction of specific provisions in the Criminal Code to be a characteristic element of Italian legislation against organised crime. Article 416-bis defines very precisely the nature of a Mafia-type organisation in an effort of undistorted differentiation from "ordinary" criminal groups. Peculiarities of Mafia-type organisations, help to distinguish them from ordinary organised criminal group, *in concreto*:

- **hierarchical organisational structure** – this point of differentiation is, in principle, the same for both ordinary criminal organisation as well as for

[27] *Ibid.*, Article 418.
[28] *Ibid.*, Article 418.
[29] Cass. Pen., Section V, No.44156 of 13 June 2018, Rv. 274120.

criminal organisation of Mafia type. Thus, it can be concluded that the difference between an ordinary criminal organisation and a Mafia-type organisation lies neither in the number of members of such organisation nor in the existence of the structure. As a matter of fact, both types of organisations are established by a minimum number of three members and they are hierarchically organised. However, it can be stated that in terms of researches of Italian Mafia-type organisation, it is obvious, that these exist in a hierarchical model of organisation with clearly defined functions.

- **the use of power and intimidation**, i.e. the use of so-called mafia practices – this element is the most significant differentiating aspect between ordinary criminal organisation and a Mafia-type organisation. It is also reflected by the provision of the Italian Criminal Code, namely Article 416-bis. Members of Mafia-type organisations use the power of intimidation to reach their goals. Italian judge *Piero Leanza* expressly states, that: *"Common awareness that a specific organisation or family clan is powerful and ready to use violence to achieve its criminal goals is enough to create and spread the feeling of fear, intimidation and subjugation always being accompanied by the law of secrecy."* (Paoli, 2004). He considers for common practice that victims of crimes committed by Mafia-type organisations, e.g. protection money, are so afraid of possible repressions, that they refuse to testify during investigations and court proceedings, thereby strengthening an organisation that may feel untouchable in certain sense.[30]
- **criminal program of the group** – it includes activities of Mafia-type organisations and especially those which under the guise of lawfulness, e.g. by using nominated persons to carry out legal activities, gain power and control over economic activities, thereby making it difficult for investigators to arrest real offenders.

4. DEFINITION OF ORGANISED CRIME IN THE LEGAL ORDER OF THE SLOVAK REPUBLIC

According to Ivor, Klimek and Záhora, until the eighties of the last century, the organised criminal activity was considered to be a problem of a specific number of countries, in particular the United States and Italy (Ivor et al., 2013, p. 123).

The legal regulation of organised crime in our territory in that period was based on the Act No. 86/1950 Coll. of the Criminal Code, Act No. 87/1950 Coll. of the Criminal Procedure Code and also the Act No. 88/1950 Coll. of the Criminal Administrative Act, which meant for the then Czechoslovakia, codes of criminal law. At that time organised crime was not numerous and the criminal codes only partially regulated this issue.[31] More

[30] To this, see also the Italy, Supreme Court of Cassation, Section II, File No.11118, of 20 December 2022. Legal sentence: *"Considering associations of mafia-type, the silence, correlated in the relation of a cause-consequence with the power of intimidation of criminal group, must be sufficiently spread, even if it is not generalised in the reference territory and can follow not only from fear of personal injury but also from the threat of potentially serious harmful consequences, so there must exist persuasion that cooperation with a judicial authority shall not prevent from retaliatory measures against the complainant due to the branching of the organisation, its effectiveness and existence of subjects with power to hurt anyone who dared to oppose them."*

[31] Within the framework of the Criminal Code of 1950, the issue of organised crime was regulated in the Section 166 Par. 1 **"Association"**, with following meaning: *"Any person who associates with somebody to commit a criminal offense shall be liable to a term of temporary imprisonment of at least three years and maximum five years, or any person who supports such association or its members, shall be liable to a term of imprisonment of one year."*

specific legal regulation of the organised crime within our legal order was introduced by the amendment to the criminal codes, namely, amendment to the Act No. 140/1961 Coll., the Criminal Code and amendment to the Act No. 141/1961 Coll., Criminal Procedure Code. Despite this, said legal regulation did not contain a legal definition of an organised group, this was included in our legal order only by a subsequent amendment to the Act No. 183/1999 effective of 1 September 1999. From that moment on, our legal order contains the legal definition of an organised group and a criminal group, as well as the wording of the facts of the crime of Establishing, Masterminding and Supporting a criminal group, in the then provision of Section 185a, with special provisions of Section 185b and Section 185c of the Criminal Code.

Previous legal regulation of an organised crime has created difficulties in proving it. The disadvantage was also the fact that the legislation was adopted prior to the implementation of the UN Convention on Transnational Organised Crime. This shortcomming was modified by the Act No. 403/2004 Coll. on the European Arrest Warrant, as amended by later regulations through which a definition of a criminal group was amended, following the model of the UN Convention against Transnational Organised Crime. The fact that the commission of an organised form of crime required more adequate instruments for its disclosure was also confirmed by the adoption of the Amendment No. 457/2003 Coll., through which a new institute in the form of Cooperating Accused was supplemented into the Act No. 141/1961 Coll. Criminal Procedure Code (Mokrá, 2022, p. 173). We believe that in order to clarify this issue, it is appropriate to define the difference between commonly committed crime and organised crime.

We agree with Chmelík that there is no unified definition of an organised crime and our words are confirmed by a wide range of specialised literature (Chmelík, 2004, p. 94). The unravelling of the problem of non-existence of a unified definition of organised crime is a challenging discipline. We assert that organised crime is the most often derived from the legal system and criminal law of individual countries, that is, from this perspective one can perceive significant politico-economic and legal criminogenic factors,[32] that is, aspects such as politics, economics and law that fundamentally influence the entire social life.

Also, important criminogenic factors of organised crime are socio-cultural criminogenic factors, i.e. factors acting on the individual starting with educational activities in the family and at school, among which we subsume e.g., religion, education and mass media.

On the other hand, organised crime is the most often defined through its activities.

Considering the above-mentioned, we agree with the definition that describes organised crime as: *"A continuous and planned criminal activity committed by a hierarchically structured group of persons among whom there is a division of tasks. Its primary objective is to achieve maximum profit or gain influence on public life while minimising the risks of its disclosure from the Criminal Procedure Code."* (Polák, 2015, p. 85).

Organised crime as a notion is not explicitly defined in the Criminal Code, but its nature can be deduced from the title of an organised and criminal group. For this reason, just mentioned legal names shall be the subject of the analysis in the next part of the work.

[32] The criminogenic factors mentioned in the presented paper are risk factors which provoke, facilitate or support commission of criminal offences.

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For the purposes of the Criminal Code pursuant to Section 129, an organised group shall mean: *"Association of at least three persons grouped together with the objective of committing a criminal offence and using a certain division of tasks among individual members of the group; as a result, the activities of the group have a planned and coordinated character which increases the likelihood of a successful commission of the criminal offence."*

The basic element of organised group and/or group as such is the number of persons acting within it, specifically it relates to at least three persons. Qualified elements of this group which differentiate it from other less serious forms of cooperation of offenders, in particular, complicity and participation, are:

- a predetermined purpose which is to commit a crime;
- division of predetermined tasks among individual members of the group;
- activity planned and coordinated to such an extent which increases the likelihood of a successful commission of the criminal offence.

With the objective of sufficient understanding of examined concept, it is appropriate to give an explanation of another element, namely the concept of **association.** According to Professor Čentéš, an association shall mean: *"The mutual agreement of at least three persons concerning the determining, though only, the general features of future criminal activity. For this purpose, there is a certain division of tasks among its members in an organised group, their planning and coordination in the form of harmonisation and harmonisation of activities."* (Čentéš J. et al., 2015, p. 247). But it is necessary to point out that the coordination about which Professor Čentéš discusses in the commentary does not mean that the division of tasks and related activities create a more solid organisational scheme, and certainly not a structured group. It does not even require a longer duration of a group. Concerning the relations of superiority and subjugation, it can be said that the members of the organised group are not at a substantial implementation level and operate without a more specific determination of these relations. It is in this heterogeneity; the diversity of tasks and activities aimed at the successful commission of crime can be seen. Individual tasks within an organised group are first planned by the members of the group, then distributed, and finally coordinated.

To join an organised group, neither formal nor explicit acceptance for a member of the group is required. The act of incorporation itself, e.g. through the procurement of some of the activities of the group is satisfactory enough.

A typical example of an organised group is an association of manufacturers and distributors of drugs, precursors and other substances. Some produce them and others sell and distribute them. Examples can be the sexual exploitation of women for the purpose of prostitution, trafficking in weapons, trafficking in stolen cars, smuggling cigarettes and others.

The legislator within the provisions of Section 138 letter i) of the Criminal Code, as one of the alternative options for meeting **the qualifying element of the crime**, embodied its commission by an organised group. For the attribution of the qualifying element in question, as well as in connection with the qualifying element "as a member of a dangerous grouping", Section 18 of the Criminal Code shall have a decisive meaning from the point of view of the subjective side, as for another fact (while membership in an organised, criminal or terrorist group is such another fact) shall be taken into account as an aggravating circumstance *"...even if the offender was not aware of it although, considering the circumstance and his personal situation, he should and could have known it, unless this Act explicitly requires that the offender be aware of such a circumstance."* It means that in relation to a qualifying element, in general, the causation from unconscious negligence is sufficient, unless the Criminal Code provides otherwise (or, if the latter does

not require something else). In the event given, however, it is inadmissible by the nature of the matter that a person is a member of an organised group or a dangerous grouping only by negligence, therefore, for the attribution of the qualifying element, it shall always be necessary to prove at least an indirect intention (Blažo and Mihálik, 2021, p. 547).

Subsequently, the Criminal Code in Section 129 par. 4 defines criminal group as: *"Structured criminal association of at least three persons, existing for a certain period, acting in a co-ordinated manner with the objective of committing one or more felonies, the criminal offence of legalisation of proceeds of crime pursuant to Section § 233, or any of the corruption criminal offences referred to under the Chapter Eight, Title Three of the Special Part of this Act, for the purposes of obtaining, directly or indirectly, a financial benefit or other advantage."*

Just right after the preliminary definition of a criminal group within the meaning of the Criminal Code, the primary difference between an organised group and a criminal group can be observed, specifically that **a criminal group is a structured group** of at least three persons existing for a certain period of time, acting in a co-ordinated manner with the objective of committing one or more felonies. Thus, *a priori*, it can be purposefully defined that **a criminal group is a special form of an organised group.**

The basic defining element of a criminal group is the determination of the purpose, to obtain directly or indirectly, a financial benefit or other advantage (Čentéš J. et al., 2015, p. 248). Unlike an organised group, which is characterised by a certain division of tasks among its members, for a criminal group only such a division is not enough, but also a certain internal organisational **structure** is required. This structure is characterised by stably arranged relationships among individual components out of which a given group is formed.

Having learnt previous aspects, it is possible to determine that a criminal group is established in case of cumulative meeting the following elements:

- consists of at least three persons;
- exists for a certain period of time (as a rule multi-month);
- in committing criminal activity, members of the group act in co-ordinated manner;
- its objective is committing one or more criminal offences, in the event it demonstrates the elements of a felony, legalisation of the proceeds of crime under Section 233 or any of the crimes of corruption under Chapter Eight, Title Three, Special Part (example; Section 328 Passive Bribery, Section 332 Active Bribery, Section 336 Trading in Influence, Section 336a Election corruption, Section 336b Sport corruption, Acceptance and granting of undue benefit Sections 336c and 336d);
- the purpose of obtaining, directly or indirectly, a financial benefit or other advantage.

This statement is also confirmed by several resolutions of the Supreme Court of the Slovak Republic, which contributed to the improvement in the practical application of the concept and elements of an organised group in practice. One of them is the Resolution of the Supreme Court of the Slovak Republic, File No. R 51/2013 according to which a criminal group is a relatively stable group of at least three persons in terms of time and organisation and its objective is to commit crimes in a co-ordinated manner, in the form of felonies and criminal offences defined in Section 129 par. 4 of the Criminal Code. The criminal group is also limited by formal elements of superiority and subjugation, and last but not least, it is distinguished by a vertical organisational structure. These elements must be the subject of examination of evidence in criminal proceedings, with the burden of evidence to be proved by the prosecutor.

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Another example is the Judgment of the Criminal Division of the Supreme Court of the Slovak Republic,[33] in which both an organised group and a criminal group were defined by means of comparison. *"The fundamental difference between an organised group and a criminal group, as it follows from the designation itself and partly from their definitions, which, however, overlap in many aspects (division of tasks, planning, coordination in order to commit crimes), is (interpretatively) the circumstance that an organised group is established spontaneously, in order to facilitate and simplify the commission of a crime, which could be committed by one offender or two accomplices, but more complicated than a group of offenders who divide tasks among themselves and act in co-ordinated manner. However, an organised group, unlike a criminal group, is not established professionally and deliberately in advance at its formation for the purpose of committing the most serious crime, while a criminal group is even structured and managed, including the immanent attribute of such management – relationships of superiority and subjugation, the non-observance of which is sanctioned by the means of the group within its internal structure. The organised group uses and gradually involves in its activities the offenders or other persons who perform activities necessary to facilitate the commission of a crime, but without the above-described institutional expression. An organised group is an association of persons for the purpose of committing a crime - any. A criminal group is a structured group established in order to commit the most serious forms of crime. Whereas an association shall mean more or less randomly or event-shaped grouping of people suitable for a particular activity, e.g. because they occupy a certain position or have a certain job title, a structured group shall mean a group of people who are selected, prepared, predetermined for a certain mission and position, aware of their position at a certain level and tasks in the group."*

Following above-mentioned lawful defining elements, certain discrepancies come into existence, especially those concerning uncertain legal notions contained therein. In particular, it can be pointed out:

a) ***interpretation of the concept of structured group***,
b) ***the duration of the organised group***.

Ad a) primarily, it is important to say that the Criminal Code does not explicitly define what is meant by a structured group. Despite the fact that the meaning of structuredness has been searched for in several legally relevant sources, it must be concluded that the concept of structuredness derives both from the Council Framework Decision on the fight against organised crime and from an international legal document, namely the United Nations Convention Against Transnational Organised Crime.

Framework Decision in Article 1, *Definitions,* under **structured association** means: *"an association that is not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership, or a developed structure."* It was the Council Framework Decision which was adopted into the legal order of the Slovak Republic to the date of 11 November 2008. It is debatable whether this as an act of law does have or not direct effect in the national legal order of the Member States of the European Union. Associate professor Klimek comments on the effectiveness of this legal instrument, pointing out the fact that: *"The definition of organised crime in the Council Framework Decision is undefined and vague. In principle, it is a weak instrument in the fight against organised crime with little added value. Although the EU requirements resulting from the Council Framework Decision have been*

[33] Slovekia, Supreme Court of the Slovak Republic, 2Ndt/27/2015 (11. January 2016).

introduced in the EU Member States, but the legal regulation itself is not sufficient to achieve the objectives of the Council Framework Decision." (Klimek, 2017, p. 110).

The objective of the EU and its Member States within the politics in the field of judicial cooperation is an effort to cooperate in criminal matters through approximation of legislation. The scope of powers of this instrument includes crimes that are usually committed by criminal organisations. The main objective of the Council Framework Decision is the criminalisation of crimes related to participation in a criminal organisation.[34]

In relation to the above-mentioned, we consider it appropriate to introduce also a definition of the structured group stipulated in the UN Convention Against Transnational Organised Crime. This Convention defines in Article 2, *Use of Terms,* structured group as: *"a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure."*[35] Thus, in order to be able to say about any criminal group that it meets the attribute of structuredness, the following aspects must be cumulatively met:

- there is an objective behind formation of a group – group is not randomly formed;
- immediate commission of a crime – it is sufficient to commit only one crime;
- tasks of the members of such group do not have to be formally defined – thus, relations of superiority and subjugation do not have to be defined;
- the personnel apparatus of the group does not have to consist of only permanent members;
- it does not have to have a developed structure – it can be concluded that such a group must have a partial structure.

The Convention in question is a part of the legal order of the Slovak Republic, therefore the above definition is undoubtedly binding for the competent authorities concerned. On the other hand, its current wording in the context of the legal regulation of organised and criminal groups in the Slovak Criminal Code does not, in our opinion, reflect adequate legal regulation or the needs of application practice. Therefore, we cannot consider a possible unanimous adoption of the definition of a structured group from the UN Convention as appropriate and we take the liberty of proposing our own definition that reflects the needs of application practice. We believe that the legal regulation of the Slovak Republic, in the context of organised crime, requires a more consistent legal definition and strict definition of the differences between an organised and a criminal group. In this regard, we are of the opinion that it is necessary to add the feature of structuring to the Criminal Code for the sake of clarity of the legal regulation. The legal regulation *de lege lata* and the subsequent decisions of application practice, which are mentioned above in the text, define an organised group as a group established by an association of at least three persons, with a certain division of tasks, which is manifested in the planning and coordination of the actions of this group. At the same time, this group is considered to be a less serious form of organised crime in Slovakia, from which it is necessary to strictly separate the criminal group.

A criminal group, *de lege lata*, a structured group, we consider structure to be the basic distinguishing feature of this group, must, as a special form of an organised group, contain special features as an organised group. Therefore, we argue that a criminal group, as a more serious form of an organised group, must also meet the features of an

[34] Council Framework Decision 2008/841/SVV of 24 October 2008 on the fight against organised crime.
[35] UN Convention against Transnational Organised Crime.

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organised group, but these must be accompanied by additional criteria. In this regard, we propose the feature of superiority and subordination as the key distinguishing attributes between an organised and a criminal group. We consider this to be a cardinal distinguishing attribute between an organised group, whose members have divided tasks and a certain division of tasks, but the structuring of the group present within a criminal group is limited by clear formal features of superiority and subordination.

There is inconsistency of opinion in the legal community regarding the structure of a criminal group. According to Burda, the structuredness of a criminal group means division and arrangement of the group. Classical organisational structure of a criminal group is usually vertically hierarchical, i.e. consisting of two, more often three levels, which form executive and management branches, however, it can also have a different structure in which a horizontal division prevails (Burda et al., 2010, pp. 925-926). The team of authors under the guidance of Professor Záhora argues that the structure of a criminal group, as a rule, consists of: the highest centre, the middle level and the executive branch. *The highest centre* consists of a boss, advisers and bodyguards. At the same time, the highest centre determines the rules of organisation, hierarchy of individual ranks, selection of people, use of profits and more. *The middle level* includes the heads of individual groups with their guards and financial personnel. They manage relatively independently the actions of their group and control discipline within their group. However, they are obliged to respect the opinions of the big boss. *The executive branch* consists of persons who mostly arrange specific specialised activities, it can be couriers, counterfeiters, tipsters, etc. (Ivor et al., 2017, pp. 39-40).

We do agree with this division and add that also the case-law of the Supreme Court of the Slovak Republic proclaims the professional **internal division of a criminal group**. In one of its decisions, the Supreme Court of the Slovak Republic stated that: *"This internal organisational structure (meaning a criminal group - author´s note) is characterised by steadily arranged relationships among individual branches that form this group. Mutual relationships are defined, in particular, in terms of which branch is superior and represents the control centre, which branch is subordinate and represents the middle level ensuring compliance with the rules according to which individual branches cooperate with each other. It is this organisational structure, together with sophisticated management, that result in the criminal group being able to achieve its objectives more effectively."* [36] At this point, we therefore add that this well-thought-out organisational structure, together with stable ordered relationships that are in the relationship of superiority and subordination, define a criminal group, while it is true that such sophisticated management results in a more efficient achievement of the goal of the criminal group, and at the same time, this stable internal organisation of the group and the relationships between the individual components of the group are also the ideal distinguishing criterion between an organised group that does not achieve such a structure and a criminal group, the structure of which must also be understood in the context of the selection of people as members of the group, since they are selected and prepared for a certain activity and are aware of their position at a given level within the group. Failure to respect this position is punished within the internal structure of the group by the means designated for this. This fact does not apply at all within an organised group, to which persons are selected more or less randomly, or by the development of events in the group.

On the other hand, Associate Professor Deset claims that within the meaning of the interpretation of a structured group under the Convention against Transnational

[36] For more information, see Slovakia, Supreme Court of the Slovak Republic, 5Ndt 18/2012, (6 December 2012).

Organised Crime and even the Council Framework Decision on the fight against organised crime, a criminal group does not need to have an established organisational structure with defined relationships of superiority and subjugation, nor a fixed membership and the activities of its members can be divided even for the commission of a specific crime. This means that members of the group do not have to fulfil the assigned tasks or functions professionally (Deset, 2014, p. 41).

Following the legal definitions set out above, we claim that a criminal group requires a structure, but this structure is not defined in the legal framework *de lege lata*, it requires this definition, as we propose below, based on the in-depth analysis carried out in the text presented.

On the basis of the above-mentioned, it can be concluded that criminal groups have an established structure, and it is the structure that provides them with considerable protection. The truth is that the lowest executive branches often do not know who they work for (meaning the person or persons, within the highest centre) and know only the person in the direct level of superiority, but not the boss of the criminal group himself. Thus, we assume that the structuredness of a criminal group is its essential defining element and, at the same time, a concealing manoeuvre of the top representatives of such an organisation before the judicial authorities.

On this basis, we would like to conclude that, within the framework of our legal order, it would be purposeful to legally define a structured group within the Criminal Code, and that is for one simple reason, so as not to tighten the conditions for meeting the element of "structuredness" of a criminal group, in contrast to its legal definition in the Convention and the Council Framework Decision, because within the meaning of the Convection, it is possible to subsume a wider range of criminal groups under the term of structured group, than within a national legal regulation which exactly requires structuredness of a group.

Our words are clearly supported by the legislation of the Italian Republic, as per the above text, under Italian law the difference between an ordinary criminal group and a mafia-type criminal group does not lie in the number of members of the group, nor in the existence of a structure, as the Italian legislation requires both groups to be structured.

Also, in view of this fact, we believe that the definition of this elementary feature, which is one of the main distinguishing features between an organised group and a criminal group under domestic law, is a necessary step towards ensuring a higher standard of the legal certainty in the context of punishing members of organised and criminal groups.

We are also convinced that defining such an explicit distinction between an organised group and a criminal group will deepen the principle of legal certainty in our society, as it will no longer be possible to classify those criminal groups that do not achieve the structure of the proposed definition. We consider this step to be one of the key ones, since *de lege lata*. The Slovak legislator assumes that the structuring of the group in the case of criminal groups, of this defining feature, is not present in the case of organised groups. It follows explicitly from the above that one of the cardinal differences between an organised group and a criminal group is already in the current structure, which is absent in an organised group. For the sake of legal certainty, we propose that this definition be adopted into the legislation of the Criminal Code, as proposed, because of the strict separation between an organised group and a criminal group.

After analysing the application problems, the solutions *pro future* can be proposed. As one of partial motion *de lege ferenda*, we would like to introduce the definition of a structured group within our Criminal Code, and that is on the basis of the analysis resulting from the analysis of the UN Convention against Transnational

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Organised Crime and the Council Framework Decision, but also based on the needs of application practice.

> *"A structured group is a group based on relationships of superiority and subordination, which has been created for the purpose of committing one or more criminal acts, has formally distributed tasks among its members and a developed structure."*

Ad b) Disputation in the definition of an organised group or criminal group is also stirred up by the time period of its action. The question as to the duration of an organised group is answered neither by the Criminal Code nor by the Council Framework Decision, not even by the Convention. None of the listed legal regulations defines what time period corresponds to the fulfilment of this requirement. The situation is slightly different in the case of a criminal group, since the duration, based on legal practice, must be a ***period of several months***. It can be added that the stabilisation of this defining element is left by the legislator to the decision-making practice of the courts. However, in respect of this, we also feel that more clarity and legal certainty is in order on the issue under review. It does not seem appropriate to us to leave the creation of the duration of an organised or criminal group to application practice. Therefore, we state the following, considering definition of an organised group under Section 129 of the Criminal Code: The legislator allows for association into an organised group, even for the purpose of committing a single criminal offence. It is implicit from the foregoing that the actual operation of an organised group doesn't need to last several months, but as well may be. We also consider the length of time the group has been in operation to be an appropriate distinguishing feature between an organised group and a criminal group, but only to the extent that the unlawful activities in which one or the other group engages are not completed. The fact remaining is that in the case of an organised group, its activities are planned and coordinated to such an extent as to increase the likelihood of the successful commission of a crime, whereas in the case of a criminal group, one of the distinguishing attributes is the criminal activity itself, since the legislature has limited this to crimes only, respectively. In contrast to the organised group, which is set more broadly, as it speaks of crimes, which include both misdemeanours and felonies in terms of seriousness. The criminal activity envisaged by the legislator, which is intertwined with the criminal groups defined in Section 129(4) of the Criminal Code, reflects a more time-consuming period. The existence of a criminal group is therefore tied to a certain period, but an organised group is not tied to any period of time envisaged by the legislator.

We are persuaded that we have unambiguously demonstrated the necessity to distinguish between a criminal group and an organised group. For the purposes of the Criminal Code, an organised group shall mean an association of at least three persons grouped together with the objective of committing a criminal offence and using a certain division of tasks among individual members of the group; as a result, the activities of the group have a planned and coordinated character which increases the likelihood of a successful commission of the criminal offence. Comparing both groups, it can be concluded that a criminal group is more serious than an organised one. While the activity of a criminal group is aimed at committing a crime enumeratively defined by scope of crimes, what concerns an organised group, it is the commission of a crime as such. In addition, while a criminal group is defined by its purpose, i.e. to obtain, directly or indirectly, a financial benefit or other advantage, for an organised group, the purpose is not defined and therefore it is not necessary to prove it for the fulfilment of criminal responsibility.

Last but not least, with regard to the temporal definition of the duration of the individual groups, we consider that a criminal group, based on the legal regulation, requires a longer period of time for its fulfilment, which the case law has set at several months, whereas an organised group does not contain such a definitional criterion, from which it can be implicitly concluded that it is not necessary to prove its longer duration for its fulfilment.

On the basis of the above-mentioned facts, it can be noted that **a criminal group is the highest form of criminal cooperation, the most important aspect of which is structuredness.** In the criminal group, the relationships of superiority and subjugation dominate, so it can be understood as a group with a solid organisational structure. The tasks are determined, and the functions are distributed from the highest organisational and managerial through the middle level of planning and coordination to the lowest level of execution of criminal activities within the meaning of the Criminal Code.

5. CONCLUSION

Solving the issue of fight against organised crime should be one of the long-term challenges of the society as a whole. The fight against organised crime must be developed by states through mutual assistance and cooperation. The paper presents a detailed specification of seriousness of the phenomenon in the form of organised crime, while in several parts, it was pointed out that the fight against it cannot be accomplished by standard means. The clear evidence is the fact that we perceive across society that organised crime is always one step ahead. Non-observance of the rules and principles of democracy in order to fulfil their objective, maximising proceeds, using illegal procedures and means. On the contrary, the state must always act within the limits of law, so as not to violate human rights, freedoms and democratic principles. These attributes can create the impression that the fight against organised crime is an unbeatable fight.

In our opinion, the Italian legislation, which is used in the present text as a comparator, can be inspiring for the Slovak legislator in many aspects. The Italian legislation on organised crime shows signs of sophistication, which is understandable since Italy has a long history with organised crime. We consider that the knowledge and understanding of the limits of the phenomenon of organised crime and the necessity of its innovation, taking into account the historical and cultural development of the country being compared and the investigation of the knowledge of foreign law for finding solutions to the problems of one's own law, can be considered as a sufficient reason for the choice of a given country for comparison. In this respect, we conclude that the Slovak legislator has considerable possibilities of inspiration *pro futuro* through the special features of a mafia-type criminal group in the Italian Criminal Code.

This academic paper has therefore defined as its general goal, the ambition of an unbiased assessment of the legal regulation of an organised crime *de lege lata*. In order to achieve this goal, the substantive attributes of an organised crime linked to the fight against organised crime were analysed. Identified application problems were analysed and subsequently, in individual parts of the work, *pro futuro* motions were drafted, which, we hope, shall bring more clarity to the examined issue.

Based on the above, it can be unambiguously stated that organised crime is present almost in all parts of the world. Thus, it is a huge challenge for all judicial branches within the country. Apart from international terrorism, no criminal group threatens internal security and stability to such extent as an organised crime. In principle, it does not matter how individual criminal organisations are called or what rules they create and respect. What matters is that proceeds obtained by criminal organisations

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from illegal business are invested in legal business thereby creating a shield of legality around themselves. The illegal assets of organised criminal groups constitute the core of organised crime, which is why the fight against money laundering and its legalisation should remain at the forefront of the interests of the judicial authorities.

There is any single definition of organised crime neither at international nor European level. The European legislation can represent the guiding tool that declares that it is possible to win fight against organised crime only through breaking down criminal networks and disrupting high-risk criminal organisations.

We consider the fact that the legal order of the Slovak Republic does not define the concept of **structuredness** of a criminal group to be a legal deficiency. Proceeding from legal definitions set out in the second chapter, it can be concluded that structuredness as a defining element is not present within an organised group. In this group, it is an association that is more or less random, and the grouping of people in the organisation is formed by the development necessary for a certain action, which is to be the activity of this group. On the contrary, structuredness is the defining element of a criminal group, which means that its members are chosen thoughtfully and have their own status and mission within the group. From the analysis of the opinions reigning in the national legal theory, it can be concluded that the structuredness of the group shall mean a formal understanding of the group with stable relationships within the group hierarchy. *Vice versa,* the Council Framework Decision, which is a part of the national legal order, the element of structuredness as a defining criterion **does not explicitly define.** Our words are also confirmed by the fact that neither the organisational structure for which the relations of superiority and subjugation are typical, nor the recruitment of group members according to their professions, both within the meaning of decision of the Council are not mandatory attributes for demonstrating the element of structuredness. In this regard, however, we must clearly state that the definition of a structured group in question, which is the defining criterion for a criminal group within the meaning of the Council Framework Decision, is insufficient and is not legally applicable to Slovak conditions. The Slovak legislator assumes that a group is structured only in relation to a criminal group, not also in relation to an organised group. If the definition of structuredness were unanimously adopted into domestic legislation (a group does not have to have formally divided roles for its members, continued membership or a developed structure), the above would cause, first of all, a discrepancy with the definition of an organised group in the legislation of the Slovak Republic, which would, secondly, create a collision in application practice between punishment for membership in an organised group or a criminal group. In this regard, we therefore clearly conclude that the Slovak legislator should define structuring, among other things, to ensure a higher standard of legal certainty in the context of punishing members of organised and criminal groups.

The above shows an apparent discrepancy in the legal regulation which we do not consider to be demonstrating legal certainty and predictability of decision-making. In order to avoid possible application problems, *pro futuro* we propose to define a structured group for two reasons. *The first* is the fact that the legal status *de lege lata* in the framework of national legal regulation causes tightening of the conditions for meeting the element of the structuredness of a criminal group, in contrast to the legal wording in the Convention, or the Council Framework Decision. *The second* reason is that it is just the structuredness as an element of a criminal group, that distinguishes it diametrically from an organised group and is an expression of considerable sophistication of the group, which, we are of the opinion, provides its concealment and makes it difficult for bodies involved in criminal proceedings to prove a person's connection to a criminal

group. The lowest executive branches often know only the person who is superior in the direct line, not the boss of the criminal group itself. Therefore, proving of a person's connection to a criminal group remains to be a still discussed problem. With respect to above-mentioned, as one of the partial motion *de lege ferenda,* we recommend a legislative definition of the concept of a structured group within our Criminal Code.

> *"A structured group is a group based on relationships of superiority and subordination, which has been created for the purpose of committing one or more criminal acts, has formally distributed tasks among its members and a developed structure."*

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UN Convention against Transnational Organised Crime.

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COMMENTARIES

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CJEU: INGSTEEL II (CASE C-547/22): Compensation for Lost Opportunity – A Pivotal Judgment That Changes Little

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Abstract: *The judgment of the Court of Justice of the European Union in INGSTEEL II (case C-547/22) appears, at first glance, to mark a significant step in the development of damages remedies for breaches of EU public procurement law, by precluding national legislation or practice that categorically excludes compensation for harm resulting from the loss of an opportunity to obtain a public contract. This commentary argues, however, that the judgment is less transformative than it initially seems. Although the Court confirmed that loss of opportunity cannot be excluded as a matter of principle from the scope of Article 2(1)(c) of the Remedies Directive, it neither recognised loss of opportunity as an autonomous head of damage under EU law nor clarified its content, conditions, or quantification.*

The paper situates INGSTEEL II within the broader context of the Remedies Directive's minimal harmonisation, the Court's fragmented case law on damages (including Commission v Portugal, Strabag, Spijker, and the Fosen-Linjen saga), and the tension between EU-level effectiveness requirements and Member States' procedural autonomy. Particular attention is paid to the Slovak legal context underlying the reference, revealing that the judgment does not substantially alter Slovak law, which already allows—at least in theory—compensation for loss of opportunity within the concept of lost profit.

The analysis demonstrates that INGSTEEL II employs a "double-negative" approach: rather than defining compensable harm, the Court merely prohibits its absolute exclusion. As a result, key issues—such as causation, evidentiary standards, and damages in the context of framework agreements—remain unresolved and are left to national law. The commentary concludes that judicial harmonisation through case law cannot provide a coherent or comprehensive system of compensation for unlawfully excluded tenderers and argues that meaningful clarification requires legislative reform of the Remedies Directive, potentially inspired by the structure of Directive 2014/104/EU on antitrust damages.

Key words: *EU Law; Public Procurement; Damages; Unlawful Exclusion; Remedies Directive; Loss of Opportunity; Loss of Profit*

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1. INTRODUCTION

In his 2019 paper, Caranta suggested that "*If legislative reform is shelved for the moment, the Fosen-Linjen saga can hardly be seen as the closing chapter for damages in EU procurement law*" (Caranta, 2019, p. 211). Although the European Commission

envisaged reform of public procurement law, reform of the Remedies Directive[1] still appears to be out of sight. The *INGSTEEL II* case adds another brick to the harmonisation-through-judgment approach to compensation for harm resulting from infringements of public procurement law. The Court of Justice (hereinafter "**the Court**" or "**CJEU**") addressed the question of whether harm suffered through the loss of opportunity by an economic operator unlawfully excluded from a public procurement procedure is covered by the obligation to award damages under Article 2(1)(c) of the Remedies Directive.

The conclusions of the judgment[2] are quite straightforward: "*Article 2(1)(c) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, must be interpreted as precluding national legislation or a national practice which excludes the possibility, as a matter of principle, for a tenderer excluded from a procedure for the award of a public contract because of an unlawful decision of the contracting authority, of being compensated for the damage suffered as a result of the loss of the opportunity to participate in that procedure with a view to obtaining the contract concerned.*" Hence, the Court confirmed the right to compensation for damage suffered as a result of the loss of opportunity in public procurement within the ambit the Public Procurement Directive,[3] a concept that has long been recognised in the context of the EU's non-contractual liability for infringements of public procurement law committed by EU institutions.

The operative part of the judgment in INGSTEEL II provides only a limited answer as to the applicability of the right to compensation for damage suffered as a result of the loss of opportunity; it does not, however, provide any details as to the content, scope, or conditions of this type of damages. Moreover, the Court's reasoning is relatively succinct, being set out in only 19 paragraphs on the substance. As a result, deeper insight into the arguments of the parties and the broader case-law context can be drawn from the Opinion of Advocate General Anthony Michael Collins.[4]

Although *INGSTEEL II* appears to be a seminal judgment in the context of damages claims in public procurement, the key question remains whether it has in fact resolved the underlying issue.

2. LEGAL REGULATION AND LEVEL OF HARMONISATION OF DAMAGES

In contrast to the detailed rules laid down in the Public Procurement Directive, the Remedies Directive provides only a framework and a minimal level of harmonisation of remedies for irregularities in public procurement procedures covered by the Public Procurement Directive. Harmonisation with respect to damages is even more limited.

[1] Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, pp. 33–35). Although Art. 2 of the original directive was replaced by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ L 335, 20.12.2007, pp. 31–46), the wording of Art. 2(1)(c) itself remained unchanged.

[2] CJEU, judgment of 6 June 2024, INGSTEEL, C-547/22, EU:C:2024:478 (hereinafter also "**Judgment *INGSTEEL II***").

[3] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, pp. 65–242).

[4] CJEU, opinion of Advocate General Collins of 7 December 2023, INGSTEEL, C-547/22, EU:C:2023:967 (hereinafter also "**Opinion *INGSTEEL II***").

Article 2(1)(c) provides that: "*1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to: (…) (c) award damages to persons harmed by an infringement.*" The Remedies Directive contains no further details regarding the scope or conditions for the award of such damages.

The sixth recital of the Remedies Directive states: "*Whereas it is necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement*." The Remedies Directive thus contains provisions typical of the definition of the procedural autonomy of the Member States. Under Article 2(7), "*(…) the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law*." From the wording of Article 1(1) and (2), the standards of effectiveness and equivalence are also apparent.

By contrast with the Remedies Directive applicable in the public sector, Directive 92/13/EEC[5] applicable in the utilities sector contains, in Article 2(7), additional details concerning damages claims: "*Where a claim is made for damages representing the costs of preparing a bid or of participating in an award procedure, the person making the claim shall be required only to prove an infringement of Community law in the field of procurement or national rules implementing that law and that he would have had a real chance of winning the contract and that, as a consequence of that infringement, that chance was adversely affected*." Since the Court analysed remedies solely from the perspective of the Remedies Directive applicable to the public sector, it made no comparison with, nor provided any explanation for, this discrepancy between the two directives.

In the context of damages for infringements of public procurement rules, it is useful to recall that the EU has provided harmonisation of damages rules in the field of competition law by defining the right to full compensation as follows:

> "*1. Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm.*
> *2. Full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest.*"[6]

As Directive 2014/104/EU does not expressly provide for compensation for loss of opportunity as a specific category of harm under EU law, while at the same time conceiving the scope of compensation as "full", loss of opportunity appears to be a concept specific to public procurement law. On the other hand, situations in which the infringer of EU law deprives the injured party of the benefits of a contract—whether in the context of competition law or public procurement law—seem, in principle, to be covered by damages for loss of profit.

[5] Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76, 23.3.1992, pp. 14–20) as amended.
[6] Article 3(1) and (2) of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349, 5.12.2014, pp. 1–19) (hereinafter also "**Directive 2014/104/EU**").

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Due to the extremely low standard of minimal harmonisation of damages in public procurement matters, the establishment of further conditions has been left to the case law of the Court.

3. CONTEXT OF THE *INGSTEEL II* CASE

The judgment in *INGSTEEL II* is one of currently two CJEU judgments[7] connected to the judicial saga concerning the reconstruction of football stadiums in Slovakia (the case dealing with the construction of the Bratislava football stadium[8] is unrelated to the *INGSTEEL* saga).

The saga began in 2013, when the Slovenský futbalový zväz (Slovak Football Federation), acting as a contracting authority, launched a public procurement procedure for a framework contract. Unsuccessful tenderers (Ingsteel spol. s r. o. and Metrostav a.s.) challenged the requirement that a loan or credit facility be available from a bank throughout the entire duration of the contract, arguing that it was contrary to public procurement rules.[9] The claim was initially rejected by the contracting authority, Úrad pre verejné obstarávanie (Slovak Public Procurement Regulatory Authority, hereinafter also "**ÚVO**"), and subsequently by the Regional Court in Bratislava, until the case reached the Supreme Court of the Slovak Republic, which referred it to the CJEU.

Following the judgment in *INGSTEEL I*, the Supreme Court annulled both the ÚVO Board's decision and the ÚVO decision and referred the case back to the ÚVO. In 2018, the ÚVO issued a new decision, ordering the annulment of the applicant's exclusion from the procurement procedure.

As the public procurement procedure had concluded and the contract was awarded to the only remaining tenderer, the wrongfully excluded tenderer, Ingsteel spol. s r. o., sought damages. The parties are incorrectly identified in both the judgment and the Opinion of the Advocate General in *INGSTEEL II*. In fact, the applicant sought damages against the Slovak Republic, not against the ÚVO. Under Slovak rules on State liability, actions must be directed against the Slovak Republic, with the responsible authority merely representing the State in the dispute.[10] The correct identification of the defendant is not merely a rhetorical matter but also determines the applicable liability regime under Slovak law.

The legal framework for compensation of harm has been subject to disputes due to a legal dichotomy between civil law *stricto sensu*, governed by liability rules enshrined in the Civil Code,[11] and commercial law, which includes corporate rules as well as contractual and non-contractual liability under the Commercial Code.[12] These two regimes differ with respect to conditions for culpability (civil liability may be based on fault or strict liability, depending on the type and grounds of liability, while commercial law liability is always strict) and limitation periods (Kováčiková, 2025, p. 366). For State liability, a separate regime applies under Act No 514/2003.[13]

[7] Together with Judgment of 13 July 2017, INGSTEEL and Metrostav, C-76/16, EU:C:2017:549 (hereinafter also "**Judgment *INGSTEEL I***").
[8] CJEU, judgment of 17 October 2024, NFŠ, C-28/23, EU:C:2024:893.
[9] CJEU, judgment of 13 July 2017, INGSTEEL and Metrostav, C-76/16, EU:C:2017:549, paras. 15-19.
[10] In the Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice (Case C-547/22), the defendant is correctly named as "the Slovak Republic represented by the Úrad pre verejné obstarávanie".
[11] Act No. 40/1964 Coll. Civil Code as amended.
[12] Act No. 513/1991 Coll. Commercial Code as amended.
[13] Act No. 514/2003 Coll. on Liability for Damage Caused in Performance of Public Authority as amended.

The applicant invokes State liability for the unlawful decision of the ÚVO and its Board, which confirmed the exclusion from the public procurement procedure, a decision later annulled by the Supreme Court. Although the ÚVO subsequently ordered the cancellation of the exclusion, this decision could not be enforced because the tender had closed and the contract had been concluded. Notwithstanding this legal trichotomy, none of the three regimes recognises loss of opportunity as a distinct head of harm for the purposes of damages claims. All three systems recognise only actual loss (*damnum emergens*) and loss of profit (*lucrum cessans*) as compensable harm;[14] non-pecuniary harm is not relevant in this case.

Regarding the substance of the dispute before the District Court Bratislava II, Ingsteel spol. s r. o. claimed damages amounting to EUR 819,498.10, excluding VAT. This sum was calculated on the basis of an expert opinion and represented lost profit arising from the fact that the contract was not awarded to the applicant—despite its tender being more economically advantageous—due to an infringement of public procurement rules. In addition, the applicant sought reimbursement of the costs incurred in obtaining the expert opinion.

In its action, the applicant expressly sought compensation for lost profit, which the defendant contested on the grounds that such damage was too hypothetical. One of the arguments against establishing liability was that, because the applicant had been excluded from the procurement procedure, the selection committee did not assess its tender in full, leaving it uncertain whether the applicant would actually have succeeded. Moreover, even if a framework contract had been concluded, the contracting authority would not have been obliged to order services under that contract or to utilise the full budget allocated thereto.[15]

During the proceedings, however, the applicant amended its claim, framing it as based on a frustrated opportunity (or chance). The applicant regarded the concept of loss of profit as the closest existing category to a claim for compensation for harm resulting from a frustrated opportunity. According to the applicant, this constitutes a form of *loss of profit sui generis*, arising from the frustration of the chance to compete for a public contract. Under Slovak law, individual heads of damage—such as damage caused by the frustration of a chance or opportunity—are not generally distinguished as separate categories; such harm is typically subsumed under loss of profit. The main rationale for invoking this argument appears to relate to differing evidentiary and causation standards, as, according to the applicant, compensation for loss of opportunity requires establishing the actual lost profit itself.[16]

4. PRELIMINARY QUESTIONS AND THEIR REPHRASING

The question referred by the District Court Bratislava II was adjusted during the proceedings and ultimately modified in translation. In its letter of 22 July 2022, the District Court Bratislava II posed the following questions:

> *"1) Is it possible to consider, as compatible with Article 2(1)(c) in conjunction with paragraphs (6) and (7) of Directive 2007/66/EC […], the approach taken by a national court, when adjudicating a claim for compensation for harm suffered by a tenderer unlawfully excluded from a public procurement procedure, which*

[14] In Act No. 514/2003, the types of coverable harm are provided in § 17 thereof.
[15] Letter of the District Court Bratislava II of 22 July 2022, Case No 12C/5/2019, "Návrh na začatie prejudiciálneho konania" [Request for preliminary ruling], part II, para. 4.
[16] *Ibid.,* part II, para. 4.

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refuses to award damages on the basis of a frustrated chance (loss of opportunity)?

2) *Is it possible to consider, as compatible with Article 2(1)(c) in conjunction with paragraphs (6) and (7) of Directive 2007/66/EC […], the approach taken by a national court in a specific case, when adjudicating a claim for compensation for harm suffered by a tenderer unlawfully excluded from a public procurement procedure, which does not treat as part of the claim for damages a claim for loss of profit resulting from the frustration of the chance to participate in the public procurement procedure?*"[17]

While both the Advocate General and the Court understood the questions as concerning "*the practice of a national court*," the Slovak version of the preliminary question, as included in the letter from the District Court Bratislava II, referred instead to "*the approach of the court deciding the case*". The national court was, in reality, asking whether EU law would be infringed if it were to reject a claim for damages based on harm resulting from a loss of opportunity and, at the same time, decline to subsume such harm under the concept of loss of profit. Although this nuance does not affect the outcome of the case itself, it is noteworthy because there was no established practice of the Slovak courts on the matter, and the district court was essentially seeking guidance on the compatibility of its prospective decision with EU law.

The referring court framed its questions based on the presumption that CJEU case law distinguishes between lost profit and lost opportunity as separate categories of harm for the purposes of damages. In practical terms, the referring court was asking whether § 17 of Act No 514/2003 is compatible with Article 2(1)(c) of the Remedies Directive.

AG Collins proposed that the Court rephrase the question in two respects. First, to focus on the interpretation of EU law rather than directly assessing the conformity of a prospective national court decision, he suggested framing the question negatively, thereby delimiting national procedural autonomy by reference to the requirements of EU law. The Advocate General also recommended omitting references to paragraphs 6 and 7, as they were irrelevant to the substance and it was unclear which options provided by the Directive in these provisions had actually been applied by the Slovak Republic.

On this basis, AG Collins proposed the following consolidated version of the question: "*[…] whether it is contrary to Article 2(1)(c) of Directive 89/665 for a national court to adopt a practice whereby a tenderer unlawfully excluded from a procedure for the award of a public contract governed by that directive is precluded from claiming damages for a loss of opportunity to obtain that contract.*" The Court addressed this single rephrased question. The referring court apparently did not distinguish between the concepts of national law and EU law, despite using the same terminology for both. Whether concepts related to damages constitute autonomous concepts of EU law or fall within the procedural autonomy of the Member States was analysed in detail in the Opinion of the Advocate General, but this discussion was not treated as relevant in the *INGSTEEL II* judgment itself.

5. DAMAGES AS AN AUTONOMOUS CONCEPT OF EU LAW?

The Court had an opportunity to dispel the uncertainty generated by the *Fosen-Linjen* saga before the EFTA Court. The central issue is whether liability for damages under Article 2(1)(c) of the Remedies Directive constitutes a special form of liability that

[17] *Ibid.,* part II, para. 6.

is not subject to additional conditions, or whether it is instead governed by the conditions established by the CJEU for Member State liability for breaches of EU law in *Francovich*[18] and *Brasserie du pêcheur*.[19]

The Judgment *INGSTEEL II*, however, neither addressed these questions in detail nor engaged with the arguments developed in *Fosen-Linjen II*.[20] A more comprehensive account of the parties' positions can be found in the Opinion of Advocate General Collins.

From the submissions of the Member States in the proceedings, several positions emerge:

- it is for the internal legal order of each Member State to determine the criteria for assessing damages resulting from an infringement of EU law in procedures leading to the award of a public contract;[21] these fall within the scope of Member States' procedural autonomy (ÚVO, Austrian, Czech, French and Slovak Governments; Commission).[22]
- The Remedies Directive does not require Member States to provide a damages remedy for the loss of an opportunity to obtain a public contract (ÚVO; Austrian, Czech, French and Slovak Governments).[23]
- The concept of damage under the Remedies Directive is not an autonomous concept of EU law (Czech and French Governments).[24]
- Loss of opportunity and loss of profit constitute distinct categories of harm (ÚVO).[25]
- Loss of opportunity is a subcategory of loss of profit; the distinction lies in the standard of proof required to establish the existence of damage (Czech and Slovak Governments).[26]
- The rules governing the EU's non-contractual liability for infringements of public procurement rules are not applicable within the scope of the Remedies Directive, which is addressed to the Member States (Austrian, Czech and Slovak Governments).[27]

The classification of damages for harm caused by infringements of procurement rules is therefore not merely of theoretical importance.

If damage under Article 2(1)(c) of the Remedies Directive constitutes an autonomous concept of EU law and the general rules on liability for infringement of EU law apply, the conditions for compensation are those laid down in *Francovich* and *Brasserie du pêcheur*. While the existence of an infringement, the occurrence of damage, and a causal link are rarely disputed in the context of public procurement, the requirement that the breach be "sufficiently serious" may operate as a significant limitation, enabling Member States or contracting authorities to avoid liability. By contrast, the wording of Article 2(1)(c) appears closer to the principles of effectiveness and equivalence governing the relationship between EU law and national procedural rules.

[18] CJEU, judgment of 19 November 1991, Francovich and Bonifaci v Italy, C-6/90, EU:C:1991:428.
[19] CJEU, judgment of 5 March 1996, Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Others, C-46/93, EU:C:1996:79.
[20] EFTA, judgment of the EFTA Court of 1 August 2019, Fosen-Linjen v AtB (E 7/18, EFTA Court Report 2019).
[21] CJEU, opinion of Advocate General Collins of 7 December 2023, INGSTEEL, C-547/22, EU:C:2023:967, para. 21.
[22] *Ibid.*, para. 21 and 25.
[23] *Ibid.*, para. 21.
[24] *Ibid.*, para. 22.
[25] *Ibid.*, para. 23.
[26] *Ibid.*, para. 23.
[27] *Ibid.*, para. 24.

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If, however, damage under Article 2(1)(c) falls within the procedural autonomy of the Member States, EU law imposes only the limits inherent in the principles of effectiveness and equivalence. On this view, the conditions for liability, including the types of compensable harm, are not harmonised at EU level.

Finally, if the concept of damage under Article 2(1)(c) is aligned with the principles governing the EU's non-contractual liability in public procurement procedures, it follows that loss of opportunity constitutes a compensable head of damage.

6. PREVIOUS CASE LAW ON DAMAGES WITHIN THE SCOPE OF THE REMEDIES DIRECTIVE

In *Commission v Portugal*, the Court did not engage in any explicit "categorisation" of the nature of liability for damages under Article 2(1)(c) of the Remedies Directive. The Portuguese Government argued that that provision does not impose strict liability. On a contrary, the Court held that a requirement to prove fraud or fault in order to claim damages "*cannot be considered an adequate system of legal protection*", because "*…a bidder harmed by an unlawful decision of the contracting authorities risks being deprived of the right to claim damages for the harm caused by that decision, or at least of obtaining them belatedly, on the grounds that they cannot establish proof of fraud or fault.*"[28] The Court in that case referred neither to the principle of effectiveness nor to the more precise position of damages under Article 2(1)(c) of the Remedies Directive within the system of non-contractual liability under EU law in general.

A similar issue arose in *Strabag and Others*. In that case, the Court expressly held that the concept of damage under Article 2(1)(c) of the Remedies Directive falls within the procedural autonomy of the Member States and that any limits or conditions imposed must therefore be assessed in the light of the principles of effectiveness and equivalence.[29] The Court identified no additional conditions for establishing liability, stating: "*In that regard, it should first be noted that the wording of Article 1(1), Article 2(1), (5) and (6), and the sixth recital in the preamble to Directive 89/665 in no way indicates that the infringement of the public procurement legislation liable to give rise to a right to damages in favour of the person harmed should have specific features, such as being connected to fault – proved or presumed – on the part of the contracting authority, or not being covered by any ground for exemption from liability.*"[30] The principle of *effet utile* was also relied upon in *Strabag and Others*: "*the aim of Directive 89/665, set out in Article 1(1) thereof and in the third recital in the preamble thereto, which is to guarantee judicial remedies which are effective and as rapid as possible against decisions taken by contracting authorities in infringement of the law on public contracts*."[31] In conclusion, the Court held that "*Directive 89/665 must be interpreted as precluding national legislation which makes the right to damages for an infringement of public procurement law by a contracting authority conditional on that infringement being culpable, including where the application of that legislation rests on a presumption that the contracting authority is at fault and on the fact that the latter cannot rely on a lack of individual abilities, hence on the defence that it cannot be held accountable for the alleged infringement.*"[32]

Unlike in *Commission v Portugal* and *Strabag and Others*, however, in *Spijker* the CJEU rather built on the *Francovich - Brasserie du Pêcheur* line of cases (Caranta, 2019,

[28] CJEU, judgment of 14 October 2004, Commission v Portugal, C-275/03, EU:C:2004:632, para. 31.
[29] CJEU, judgment of 30 September 2010, Strabag and Others, C-314/09, EU:C:2010:567, para. 34.
[30] *Ibid.*, para. 35.
[31] *Ibid.*, para. 43.
[32] *Ibid.*, para. 45, operative part.

p. 218). The Court identified Art. 2(1)(c) of the Remedies Directive as giving "*concrete expression to the principle of State liability for loss and damage caused to individuals as a result of breaches of EU law for which the State can be held responsible. According to case-law developed since the adoption of Directive 89/665, but which is now consistent, that principle is inherent in the legal order of the Union. The Court has held that individuals harmed have a right to reparation where three conditions are met: the rule of EU law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between the breach and the loss or damage sustained by the individuals (…)*".[33] Thus, comparing to the previous case law, the *Spijker* case added condition of "serious breach of EU law" as another condition for application of Art. 2(1)(c) of the Remedies Directive which was not present that case law.[34]

These different approaches lead the referring court in *Fosen-Linjen I* case to preliminary question to the EFTA Court. Thus, the EFTA Court had to reconcile case law of the CJEU. The EFTA Court decided to disapply the condition of serious breach of EEA law as a condition for damages in public procurement cases: "*Therefore, the gravity of a breach of the EEA rules on public contracts is irrelevant for the award of damages. Moreover, it is not decisive for the award of damages pursuant to Article 2(1)(c) of the Remedies Directive, whether the breach of a provision of public procurement law was due to culpability and conduct deviating markedly from a justifiable course of action, or whether it occurred on basis of a material error, or whether it is attributable to the existence of a material, gross and obvious error.*"[35] This deviation from the previous case law, rather than its consolidation was subject to criticism from not only academia (e.g., Sanchez-Graells, 2018), but also lead to further request for opinion in *Fosen-Linjen II*.

Contrary to *Fosen-Linjen I*, in *Fosen-Linjen II*, the EFTA court found that "*Article 2(1)(c) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts does not require that any breach of the rules governing public procurement in itself is sufficient to award damages for the loss of profit to persons harmed by an infringement.*"[36] Hence, the EFTA Court rather more controversy than reconciliation to case law in issue.

The question of loss of opportunity was raised also in *Fosen-Linjen II*: "*Fosen-Linjen submits that if the system only makes available the recovery of bid costs, this would clearly not be sufficient to comply with the requirements of Article 1(1) and 2(1)(c) of the Remedies Directive. In the EU, it is considered necessary to allow access to a claim of damages for the loss of opportunity and the result must be the same under the EEA Agreement, whether the result is based on the Remedies Directive or fundamental principles of effective judicial protection*".[37] The EFTA Court, however, did not address this specific type of harm provided the answer regarding loss of profit, only.

In the ambit of non-contractual liability of the EU in the field of public procurement, the General Cour in *Vakakis Kai Synergates* accepted "*claim for damages in so far as it seeks compensation for the loss of an opportunity to be awarded the contract*

[33] CJEU, judgment of 9 December 2010, Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others, C-568/08, EU:C:2010:751, para. 87.
[34] *Ibid.*, operative part.
[35] EFTA, Judgment of the EFTA Court of 31 October 2017, Fosen-Linjen v AtB (E 16/16, EFTA Court Report 2017), para. 80.
[36] EFTA, Judgment of the EFTA Court of 1 August 2019, Fosen-Linjen v AtB (E 7/18, EFTA Court Report 2019), operative part.
[37] *Ibid.*, para. 61.

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at issue and compensation for the costs and expenses relating to the participation in the tendering procedure…"[38] The General Court distinguishes loss of profit and loss of opportunity: "*The loss of profit concerns compensation for the loss of the contract itself, whereas the loss of opportunity concerns compensation for the loss of the opportunity to conclude that contract…"*.[39]

7. DAMAGES AS A QUEST FOR PROCEDURAL AUTONOMY

AG Collins concluded that the award of damages under the Remedies Directive "*is not intended as an independent and uniform concept of EU law, but rather one that the laws of the Member States define.*"[40] Consequently, the criteria and rules for awarding damages fall within the procedural autonomy of the Member States, subject to the principles of effectiveness and equivalence.[41]

He supported his conclusion with two arguments. First, he emphasised the well-established understanding of the procedural autonomy of the Member States as an expression of Articles 5 and 19(1), second paragraph, TEU.[42] Second, he referred to the plurality of legal traditions, procedures, and remedies across Member States. In his view, "*at the present stage of the development of EU law, it is difficult to envisage a homogeneous regime of remedies that would function equally effectively in all Member States in the field of public procurement law.*"[43]

The judgment in *INGSTEEL II*, however, did not undertake such a theoretical examination and did not even mention the concept of procedural autonomy. This can be inferred only from the Court's observations regarding the level of harmonisation provided by the Remedies Directive: "*… although Directive 89/665 cannot be regarded as providing for complete harmonisation and, therefore, as envisaging all possible remedies in public procurement matters (…), the fact remains that, as stated in the sixth recital of that directive, the directive stems from the intention of the EU legislature to ensure that, in all Member States, adequate procedures permit not only the annulment of decisions taken unlawfully but also the compensation of persons harmed by an infringement of EU law.*"[44]

At the same time, the Court continued in the Spijker line of reasoning, aligning liability under Article 2(1)(c) of the Remedies Directive with the conditions for Member State liability for infringements of EU law.[45] The Court further concluded that "*No possibility of limiting that access is established by that directive.*"[46]

The Court summarised its reasoning as follows: "*As the Court has held with regard to loss of profit, the total exclusion, in respect of the damage for which compensation may be granted, of the loss of the opportunity to participate in a procedure for the award of a public contract in order to obtain that contract, cannot be accepted in the event of an infringement of EU law since, especially in the case of economic or commercial disputes, such total exclusion of that loss of opportunity would be such as to make it practically*

[38] CJEU, judgment of 28 February 2018, Vakakis kai Synergates v Commission, T-292/15, EU:T:2018:103, para. 202.
[39] *Ibid.*, para. 188.
[40] CJEU, opinion of Advocate General Collins of 7 December 2023, INGSTEEL, C-547/22, EU:C:2023:967, para. 33.
[41] *Ibid.,* para. 34.
[42] *Ibid.,* para. 35.
[43] *Ibid.*
[44] CJEU, judgment of 6 June 2024, INGSTEEL, C-547/22, EU:C:2024:478, para. 41.
[45] *Ibid.,* para. 35.
[46] *Ibid.,* para. 37.

impossible to make good the damage suffered…"[47] By these statements, the Court effectively embedded compensation for lost opportunity within the requirement of effective remedies, emphasising that a "*total exclusion of that loss of opportunity*" would frustrate the principle of effectiveness in the application of EU law.

However, the Court referred *per analogiam* to its earlier case law, which makes the concepts somewhat confusing: *Brasserie du Pêcheur*, *Manfredi and Others*,[48] and *AGM-COS.MET*.[49] While *Brasserie du Pêcheur* concerns State liability for breaches of EU law, *Manfredi and Others* addresses damages in antitrust matters, subsequently harmonised by Directive 2014/104/EU, which recognises only actual loss and lost profit as compensable harm. Similarly, *AGM-COS.MET* concerned claims for lost profit. It is therefore unconvincing how these judgments meaningfully contribute to the Court's reasoning, which would remain sufficiently robust even in the absence of such references.

8. PROCEDURAL AUTONOMY AND DOUBLE NEGATIVE

The practice of "harmonising through judgments" encounters several limitations when operating within the procedural autonomy of the Member States. First, such fine-tuning of the system is inherently fragmented and largely contingent, occurring only when a case is referred to the CJEU. Second, the CJEU can provide answers only to the specific questions actually referred for a preliminary ruling. Consequently, the guidance provided to the District Court Bratislava II by the judgment in *INGSTEEL II* is insufficient to resolve the dispute in its entirety; in particular, the scope of compensable damage in the context of framework contracts remains unresolved. Third, the Court's interpretation of EU law has *ex tunc* effects, which may undermine legal certainty in closed cases or even lead to the reopening of proceedings already finally decided, where national law permits such reopening.

Fourth, the principles of equivalence and effectiveness do not generally require Member States to create new remedies or legal rules. Rather, they require the adaptation, streamlining, or effective application of existing remedies and the removal of obstacles to their use.[50] As the Court has stated: "*… although EU law does not, in principle, require Member States to establish before their national courts, in order to ensure the safeguarding of the rights which individuals derive from EU law, remedies other than those established by national law (…), the position is otherwise if it is apparent from the overall scheme of the national legal system in question that no legal remedy exists that would make it possible to ensure, even indirectly, respect for the rights that individuals derive from EU law, or again if the sole means whereby individuals can obtain access to a court is by breaking the law …*".[51]

In *INGSTEEL II*, the Court could not directly establish a rule requiring that compensation for loss of opportunity be included within the concept of "damages" under Article 2(1)(c) of the Remedies Directive for two reasons. First, by placing the concept of damages within the sphere of Member States' procedural autonomy, the Court deprived

[47] *Ibid.,* para. 43.
[48] CJEU, judgment of 13 July 2006, Manfredi and Others, C-295/04 to C-298/04, EU:C:2006:461.
[49] CJEU, judgment of 17 April 2007, AGM-COS.MET, C-470/03, EU:C:2007:213.
[50] CJEU, judgment of the Court of 19 June 1990, The Queen v Secretary of State for Transport, ex parte Factortame, C-213/89, EU:C:1990:257, para. 14 and 19 et seq.; CJEU, judgment of 17 December 2015, Arjona Camacho, C-407/14, EU:C:2015:831, para. 42 et seq.; CJEU, judgment of 21 December 2021, Randstad Italia, C-497/20, EU:C:2021:1037, para. 78.
[51] CJEU, judgment of 14 May 2020, Országos Idegenrendeszeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, C-924/19 PPU, EU:C:2020:367, para. 143.

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it of an autonomous interpretation under EU law. Second, in the absence of EU secondary legislation, the Court cannot substitute its own interpretation for the legislative activity of the European Parliament and the Council. However, AG Collins noted that "*the scope of the Member States' procedural autonomy is not limitless since the Court may lay down specific obligations to ensure that individuals harmed by an infringement of EU law obtain a minimum standard of protection*."[52]

Nevertheless, as demonstrated in *INGSTEEL II*, the Court may adopt a "*double-negative*" approach, namely by precluding national legislation or practice that categorically excludes the application of certain legal concepts, such as compensation for loss of opportunity. It is therefore for national courts, in their interpretative and applicative practice, to ensure that national law is applied in a manner that avoids an absolute exclusion of the possibility of compensation for loss of opportunity: "*…in order to ensure the effectiveness of all provisions of EU law, the principle of primacy requires, inter alia, national courts to interpret, to the fullest extent possible, their national law in conformity with EU law (…) and that that obligation to interpret national law in conformity with EU law requires national courts to change established, and even settled, case-law if it is based on an interpretation of domestic law that is incompatible with the objectives of a directive* (…)."[53]

9. SEPARATE OR NOT? LOSS OF PROFIT AND LOSS OF OPPORTUNITY

In the judgment in *INGSTEEL II*, the Court considered the application of damages for loss of opportunity; however, the precise content of that notion was left undecided. It also did not address the arguments of the parties and intervenients asserting that a distinction must be drawn between damages compensating lost profit and those for lost opportunity. The Court simply concluded that no type of harm shall be excluded from the scope of Article 2(1)(c) of the Remedies Directive.

The concept of damages for lost opportunity is a term that requires further interpretation, because without a clear understanding of its content, the answer provided by *INGSTEEL II* is not fully meaningful. From a theoretical perspective, the concept of "lost opportunity/lost chance" can take one of three diverging forms: (1) relaxation of the burden of proof for establishing full compensation, (2) proportional or relational liability, and (3) an autonomous type of loss (Schebesta, 2016, p. 206). The loss-of-opportunity theory can affect not only the existence of the right to damages but also its quantum (Caranta, 2011, p. 179).

Legislative approaches to different types of compensable harm vary across Member States. In Germany, § 181 of the *Gesetz gegen Wettbewerbsbeschränkungen (*GWB) provides a specific remedy for cases where an economic operator would have had "a genuine chance" of being awarded the contract had the violation not occurred; damages for the costs of preparing the bid or participating in the procurement procedure may also be claimed (Burgi, 2011, p. 24; Schebesta, 2016, p. 214).[54] Similarly, Swedish legislation provides both a general right to compensation for harm and specific rules for "*compensation to a supplier that has participated in a procurement and has incurred costs for preparing a tender and otherwise participating in the procurement, provided the infringement of the provisions of this Act has had a detrimental effect on the supplier's*

[52] CJEU, opinion of Advocate General Collins of 7 December 2023, INGSTEEL, C-547/22, EU:C:2023:967, para. 39.
[53] CJEU, judgment of 6 June 2024, INGSTEEL, C-547/22, EU:C:2024:478, para. 47.
[54] The referred papers address the previous numbering of the provision of the GWB - § 126.

chances of being awarded the contract."[55] French legislation enables compensation for lost profit for an unsuccessful tenderer as well as for the costs of preparing the tender (Gabayet, 2011, pp. 12–13). In Latvia, long-standing practice recognises lost profit claims of unduly excluded claimants (Danovskis, 2024), and a similar approach has emerged in Slovenia, where the court confirmed compensation corresponding to the profit that would have been generated under the contract after deduction of performance costs (Štemberger Brizani, 2025, p. 357). It is not the purpose of this commentary to provide a comprehensive overview of practice across all Member States; however, these examples illustrate that both legislation and practice are divergent.

The statements of the Slovak Government in the *INGSTEEL II* case added further ambiguity to the issue: "*At the hearing, the Slovak Government stated that, according to the settled case-law of the Slovak courts, a 'loss of profit' must be made good where it is highly probable, or even close to certain, that, having regard to the existing circumstances of the case, the person concerned would have made a profit. However, referring to the European Commission's position that the Slovak courts should use all national means to enable a tenderer unlawfully excluded from a public contract to effectively claim damages for a lost opportunity, that government stated at the hearing that there is nothing to prevent a claimant from making use of the remedies available to it to assert its right and from adducing evidence to prove it*."[56] These statements create a somewhat paradoxical situation. On the one hand, the ÚVO, representing the Slovak Republic, denied the possibility of compensation for loss of opportunity on the ground that it constituted a separate head of damage unknown to Slovak law. On the other hand, the Slovak Government ultimately acknowledged that damages for loss of opportunity could, at least in theory, be subsumed under the category of lost profit. Although the General Court has established that loss of profit and loss of opportunity are conceptually distinct,[57] the Court appears to be satisfied with that assertion that loss of opportunity can be addressed under Slovak law.

10. CONCLUSION OR WHAT REMAINED UNTOLD?

At first sight, the conclusion reached in *INGSTEEL II* appears to be seminal and potentially game-changing, as the Court requires that loss of opportunity be capable of compensation as part of damages for infringements of public procurement rules. In reality, however, the judgment is not transformative for Slovak law, since the Slovak Government confirmed during the hearing that this head of harm is, at least in principle, compensable under Slovak legislation. This position casts the preliminary questions in a particular light. The District Court Bratislava II asked whether EU law would be infringed if damages for loss of opportunity were not awarded. Yet, according to the arguments advanced by the Slovak Government, as recorded both in the judgment and in the Opinion of the Advocate General, a refusal to award such damages would not only raise issues under EU law, but would also be difficult to reconcile with the existing framework of Slovak law itself.

The Court did not address the question of damages in situations where a tenderer was unlawfully excluded from a public procurement procedure for the award of a framework agreement (perhaps an issue for INGSTEEL III, should the Slovak courts

[55] Sweden, The Public Procurement Act(2016:1145), Chapter 20, Section 20.
[56] CJEU, judgment of 6 June 2024, INGSTEEL, C-547/22, EU:C:2024:478, para. 46.
[57] CJEU, judgment of 28 February 2018, Vakakis kai Synergates v Commission, T-292/15, EU:T:2018:103, para. 188.

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pursue the case further). The calculation of compensation in such circumstances can be extremely difficult and may lead to hypothetical assessments, given the unpredictability of the actual performance of the contract and the profits that might have been generated.

"A rose by any other name would smell as sweet…?", Juliet asks Romeo in Shakespeare's well-known drama. This prompts the question of what, in substantive terms, is meant by damages for loss of opportunity.

Directive 92/13/EEC expressly provides, in Article 2(7), for compensation of the costs incurred in preparing tender documents – a form of damage comparable to that recognised in *Vakakis kai Synergates*, as well as in, for example, German and Swedish legislation. In other contexts, loss of opportunity may overlap with lost profit, even though the General Court has maintained that these categories of harm are conceptually distinct.

A closer reading of the operative part of the judgment in *INGSTEEL II* reveals that the Court does not employ "loss of opportunity" as an autonomous legal concept. Instead, it refers to the right to compensation "*for the damage suffered as a result of the loss of the opportunity to participate in that procedure with a view to obtaining the contract concerned*." Ultimately, therefore, the Court did not create a new, distinct head of compensable harm. Rather, it concluded that it cannot, as a matter of principle, be impossible to compensate an economic operator for harm resulting from its unlawful exclusion from a public procurement procedure. Beyond this negative clarification, the Court provided no guidance on the conditions for such claims, the assessment of causation, or the quantification of damages, leaving these matters to the Member States.

There is thus a clear opportunity for further harmonisation through legislative reform of the Remedies Directive. First, the substance of Article 2(7) of Directive 92/13/EEC should be extended to the public sector. Moreover, the structure of Directive 2014/104/EU may serve as a useful model. A reformed instrument could lay down common standards, including the right to full compensation, possible limitations on damages, the identification of the liable entity, minimum limitation periods and rules on their interruption, strict liability, recognised heads of compensable harm, and specific conditions governing damages in particular situations, such as framework agreements.

While judgments such as *INGSTEEL II* may become increasingly frequent, they are not capable, on their own, of establishing a comprehensive and coherent system of compensation for economic operators unlawfully excluded from public procurement procedures.

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ECtHR: BĂDESCU AND OTHERS v. ROMANIA (Application No. 22198/18, 15 April 2025): Criminal Liability of Judges for the Interpretation of the Law in the Exercise of Judicial Functions

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Abstract: *The criminal liability of judges is significantly limited by judicial independence, of which the criminal immunity of judges constitutes one of its facets. The judicial reform introduced by the 2020 amendment to the Constitution of the Slovak Republic created a framework for criminal prosecution of judges for so-called "bending of the law". Given the lack of practical experience with its application, it is important to examine the decision of the European Court of Human Rights in Bădescu and Others v. Romania. In this case, an analysis was made of what constitutes judicial decision-making and what constitutes preparation for it. Preparation for the issuance of a judicial decision enjoys a lower level of criminal immunity than the actual judicial decision-making itself.*

Key words: *Judicial Independence; Exercise of Judiciary; Criminal Immunity of Judges; Criminal Prosecution of Judges; ECtHR*

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1. INTRODUCTION

When judicial reform was introduced through the 2020 amendment of the Constitution of the Slovak Republic by Constitutional Act No. 422/2020 Coll. as part of the government's program declaration in the section entitled "*Restoring trust in the rule of law and ensuring that the law and justice apply to everyone*", it was the judges themselves who expressed the strongest dissatisfaction. Among other things, the reform affected their decisional immunity, because, as the explanatory report stated, it „*began to be perceived not as a necessary institutional safeguard of judicial independence, but as an abused privilege of individual judges who, invoking independence, render decisions based on an arbitrary interpretation of the law bordering on the abuse of power.*" These harsh words triggered a negative reaction, especially within the judicial community, which was further intensified by the introduction of a new criminal offense of bending the law under Section 326a of the Criminal Code, the application of which also met with negative reactions stemming from the fear of misapplication of the law precisely under this criminal provision (Šamko, 2022; Šamko, 2021). Slovakia thus joined the group of states that have tightened the accountability of judges; however, such tightening is not without limits under international law. The criminal liability of judges is addressed in international

forums[1] by both professional literature[2] and international organisations, with the decisions of the European Court of Human Rights (hereinafter also referred to as "**ECtHR**") being particularly influenced by the advisory *Venice Commission* (European Commission for Democracy through Law)[3] and the independently operating *Consultative Council of European Judges* (hereinafter also referred to as "**CCJE**"), which recently submitted a summary Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality.[4]

2. ECTHR CASE-LAW ON JUDICIAL CRIMINAL LIABILITY: THE *BĂDESCU AND OTHERS V. ROMANIA* CASE IN CONTEXT

To date, the ECtHR has not addressed the criminal liability of judges for specific judicial decisions, which does not mean that judges have not been subjected to vexatious criminal prosecutions, often used as retaliatory measures for their political activities and frequently described as "professional" in nature, with delays in court proceedings most often serving as the stated reason (pretext).[5] Disciplinary liability was mainly imposed on the incriminated judges.

[1] Suffice to say
- The UN's „Basic Principles on the Independence of the Judiciary" (1985),
- Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe on the Independence, Efficiency and Role of Judges,
- European Charter on the statute for Judges (1998) (DAJ/DOC(98)23),
- Code of Judicial Conduct (Bangalore draft).

[2] Most recently Aravena et al. (2025).

[3] A compilation concerning the status of judges, including their immunities and responsibilities, was published by the Venice Commission on 7 January 2025 under no. CDL-PI(2025)003: *Compilation of Venice Commission opinions and reports concerning judges*.

[4] Regarding the criminal liability of judges, it stated: *„Judges who in the conduct of their office commit what would in any circumstances be regarded as crimes (e.g. accept bribes) cannot claim immunity from ordinary criminal process. The answers to questionnaire show that in some countries even well-intentioned judicial failings could constitute crimes. Thus, in Sweden and Austria judges (being assimilated to other public functionaries) can be punished (e.g. by fine) in some cases of gross negligence (e.g. involving putting or keeping someone in prison for too long). Nevertheless, while current practice does not therefore entirely exclude criminal liability on the part of judges for unintentional failings in the exercise of their functions, the CCJE does not regard the introduction of such liability as either generally acceptable or to be encouraged. A judge should not have to operate under the threat of a financial penalty, still less imprisonment, the presence of which may, however sub-consciously, affect his judgment.*
The vexatious pursuit of criminal proceedings against a judge whom a litigant dislikes has became common in some European states. The CCJE considers that in countries where a criminal investigation or proceedings can be started at the instigation of a private individual, there should be a mechanism for preventing or stopping such investigation or proceedings against a judge relating to the purported performance of his or her office where there is no proper case for suggesting that any criminal liability exists on the part of the judge." Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, Strasbourg, 19 November 2002, paras. 52-54.

[5] In this regard, a relevant precedent is the decision in *Miroslava Todorova v. Bulgaria (19 October 2021, no. 40072/13)*, in which the applicant was held accountable for delays identified following targeted reviews of her judicial decision-making. According to the ECtHR, the predominant purpose of the disciplinary proceedings was not to ensure compliance with deadlines in criminal proceedings but rather to sanction and intimidate the applicant, as vice-president of a professional association of judges, for her active public criticism of executive interference in the judiciary. Consequently, there was a violation of Article 18 of the Convention in conjunction with Article 10.

The ECtHR was given a relatively rare opportunity to express its opinion on the criminal liability of judges in the case of ***Bădescu and Others v. Romania (15 April 2025, No. 22198/18 and others),*** in which three judges challenged the alleged lack of foreseeability of the legal basis for their conviction for abuse of power in the exercise of judicial functions, thereby violating the principle of *nullum crimen sine lege* protected by Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter also referred to as "**the Convention**"). The exceptional status of this principle is further highlighted by Article 15 of the Convention, which prohibits its derogation even in times of war or other public emergencies threatening the life of the nation.

2.1 Facts and Procedural Background of the Bădescu Case

From a simplified journalistic perspective, the case of the three convicted Romanian judges can be summarised as follows. A person lawfully convicted of an economic offence met with Judge C. and agreed with him that, if he gave him EUR 630,000, the judge would arrange for his extraordinary appeal to be heard by his chamber at the Supreme Court and would find a way, together with his colleagues, to have the extraordinary appeal granted. This is how Romanian media presented the case, monitoring it closely after the suspicious decision of the Supreme Court regarding the extraordinary appeal. For them, the case was simple and clear from the outset, reinforcing the public's belief in the corruption of judges.

Everything (?) pointed to this. On April 4, 2011, the convicted Mr. SD filed two extraordinary appeals against the final judgment. The first was formally invalid, and the second was withdrawn by SD. Only the third appeal reached the competent judge, namely the chamber composed of Judge C. and two other judges, A. and B. The story then unfolded on three levels.

The first level occurred within the framework of disciplinary proceedings. Following a series of media articles published after the decision on SD's extraordinary appeal, disciplinary proceedings were initiated against Judges C., A., and B. (all three of whom are also the applicants in this case). The competent judicial inspectorate filed a proposal for disciplinary proceedings, stating that it was not targeting the applicants for their interpretation of the law but rather for the manner in which the extraordinary appeal had been reviewed. The Romanian Superior Council of Magistracy (hereinafter referred to as "**CSM**"), acting as the disciplinary authority, dismissed the proposal, reasoning that it concerned sanctions for interpretation of procedural legal rules and that the applicants (Judges C., B., and A.) had not demonstrated "*serious negligence*", let alone arbitrariness in their legal interpretation. This decision was subsequently upheld by the Supreme Court of Cassation.

At the second level, the National Anti-Corruption Directorate initiated criminal proceedings against the applicants on 28 February 2012 in connection with the judgment on SD's extraordinary appeal, on the grounds that they had knowingly exceeded their powers in the proceedings leading to this decision. After a few months, on 7 August 2012, these criminal proceedings were discontinued. The reason was that judges cannot be held criminally liable for abuse of power in the exercise of their judicial functions for decisions adopted in the course of performing judicial duties.

The third level, unfolding several years after the previous two, concerned the criminal prosecution of Judge C., who had been under investigation for corruption offences since 2013 and was sentenced by the Court of Appeal in Constanța on 2 June

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2016 to seven years' imprisonment. Judge C. served this sentence until 17 October 2017, when he was released on parole.

A new phase in the case of the extraordinary appeal was initiated by the Attorney General, who on 29 January 2014 ordered the reopening of criminal proceedings against all three applicants. The testimony of witnesses and other evidence confirmed the journalists' initial view of the case. The three applicants were charged with abuse of power for issuing a decision allegedly influenced by an external factor, namely the bribe received by Judge C. from SD. By the judgment of 19 May 2016, all three applicants were acquitted of the charges. In the same judgment, the legal action against Judge C. was referred to a separate proceeding.

After the prosecutor's appeal, the Supreme Court, in its final judgment of 14 June 2017, sentenced judges A. and B. to four years and four months of imprisonment. In its very extensive 180-page judgment, it drew a distinction between the court decision itself and the conduct leading to its adoption. It explicitly emphasised that it did not assess the content of the decision or the manner in which the judges interpreted the law, but rather the way in which they deliberately altered the factual circumstances of the case so that the principle of *ne bis in idem* could be applied, thereby ensuring the success of SD's extraordinary appeal. According to the Romanian Supreme Court, the applicants modified certain existing or easily identifiable facts relating to the factual situation without any objective justification, thereby deliberately ignoring the relevant and substantial arguments presented by the prosecution. This was demonstrated in particular by the questions they asked the parties to the proceedings at the public hearing and by the manner in which Judge A., as presiding judge of the chamber, conducted the proceedings in question. Judges A. and B. lodged an extraordinary appeal against this judgment, which, however, was dismissed by the Romanian Supreme Court on 7 November 2019.

From this story of the criminal prosecution of the three Romanian judges, in my opinion, three interesting questions arise, namely

- ***a)*** the manipulability of case assignment to a "lawful" judge;
- ***b)*** the foreseeability of the criminality of conduct as an element of the principle of *nullum crimen sine lege*;
- ***c)*** what is and what is not the exercise of judicial functions from the perspective of a judge's criminal liability.

2.1.1 Manipulability of Case Assignment

The manipulation of case assignment in this instance appeared primarily to demonstrate the fact that, without it, achieving the desired decisions would be difficult. The fact that the ECtHR did not notice it in this case does not mean that it will not be confronted with this issue in other similar cases in the future. On the contrary, it constitutes the first and necessary precondition for later "bending the law" to obtain a desired judicial decision. It serves as a "gateway" mechanism granting access to the court, as well as an instrument for influencing the exercise of judicial power, particularly from the vantage point of the executive, which is responsible for the effective functioning of the judiciary and, consequently, for the balanced allocation of cases to individual judges. At the same time, it is also a dividing criterion for distinguishing between two state regimes, namely democratic and totalitarian. In the former, the right to an independent and lawfully established court is respected, whereas in the latter, such a right is unheard of.

By a way of a comparative illustration drawn from the Slovak context, shortly after the establishment of the democratic Slovak state in 1993, I stated with regard to this right that it belongs to the principles which

a) "*form the foundation of the independent exercise of the judiciary,*
b) *were absent from our legal system for a long period,*
c) *now occupy a firmly established place within the judicial system*" (Svák, 1993, p. 22).

At that time, I still had "vivid" memories of how the presiding judge would assign "sensitive" cases to reliable judges. This practice was particularly prevalent in the context of criminal liability proceedings (the main purpose of which was the confiscation of property) against those who irreversibly fled from the "fortunate socialism" to the bourgeois world. I would not have imagined back then that Slovakia, still accustomed to this system, would later become a member state of the Council of Europe, that would enable the ECtHR to deliver a precedent-setting decision criticising the manipulation of the allocation of court cases, including even situations of the presiding judge assigning cases to himself.

The same was done by the presiding judge of the district court, Mr. C., who in 1998 prepared the work schedule of this court for 1999. However, in 1999, Judge D. was appointed as the presiding judge of the court and drew up an addendum to the work schedule in a very general form, which he then frequently changed. This enabled him, in June 1999, to assign to himself a case concerning the enforcement of a claim (in the amount of EUR 2,500,000). The matter gave rise to a complaint in the case of *DMD GROUP, a. s. v. Slovak Republic (of 5 October 2010, No. 19334/03)*, which enabled the ECtHR to set an important transnational precedent on the right to a court established by law. The applicant company argued that Judge D., acting as a presiding judge, had arbitrarily removed the case from the judge who was supposed to handle it according to the schedule and assigned it to himself in order to rule on it expeditiously on the same day.[6] Furthermore, the applicant company also argued that "*the relevant period was marked by a substantial number of chaotic and confusing changes*" to the court's work schedule.

My historical memory allows me to share the response of the Ministry of Justice to this ECtHR judgment leading to the introduction of a modular case-allocation system called "*Súdny Manažment" <Court Management>*, still in operation today. An integral part of this system is the so-called random generator, representing Slovakia's response to the ECtHR decision in *DMD GROUP*, with the purpose of "randomly" allocating each case to the competent judge. This system is based on the use of a general algorithm using a combined multiple recursive pseudo-random generator with a long repetition period, with specific requirements entered into it for each court individually on the basis of an approved work schedule. The system has repeatedly withstood a constitutional review carried out by the Constitutional Court of the Slovak Republic. From today's optimistic perspective, this modular system could be subsumed under the term "AI system". However, this does not affect its validity but, on the contrary, it raises new questions, such as why precisely judge *XY* or judicial chamber *Z* is assigned to decide cases that attract public attention.

[6] It is further interesting about the case that the Slovak Constitutional Court concluded that the contested reassignment occurred in the context of the district court's caseload schedule for 1999, and that the speed with which the judge decided had no particular legal significance. Therefore, there was no violation of the right to a lawful judge.

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For the time being, a sufficient warning may be the reference for a preliminary ruling lodged in the case *Rowicz*, pending before the Court of Justice of the European Union under No. C-159/25. The issue arose when, following the transfer of a judge, one hundred of her unfinished cases were to be reassigned among the other judges. This task fell to an AI system similar to the one in Slovakia, which assigned 56 cases to one judge and none or only two or three to the others. Of particular interest is the opinion of the Advocate General, who stated, among other things, in his opinion: „*The complexity of the RNG system, combined with the potential for human error, makes the system vulnerable to manipulation, and the ambiguity of the applicable laws creates the risk that legal regulations may be incorrectly translated into the automatic operation of the program. System errors, in turn, may result in violations of the right to a court established by law. The parameters of the system remain unknown, and actions such as increasing or decreasing a specific judge's caseload on a one-off basis leave no trace in the generated reports, while some parameters established by law are not taken into account at all.*"

Apart from the potential manipulability by those with access to the "source codes" of this "random number generator", other negative aspects also arise. This system does not ensure compliance with the principle of an even distribution of the court's caseload, thereby violating both the principle of efficiency of proceedings and the requirement of hearing cases without undue delay under Article 47(1) of the Charter, as well as the principle of equality before the law. There is no doubt that the guarantee of an even distribution of caseload is as important as the guarantee of random case allocation, since it affects the length of proceedings without undue delay and thus the Union citizen's right to a fair trial and effective judicial protection. In the present case, the technical tool assigns 56 cases to one judge in a single night, while in the same draw, other judges received none or only a few cases. Such case allocation is discriminatory in effect as it leads to significant delays in the judge's agenda, which is reflected in the waiting time for a case to be heard. As a result, the waiting time for the hearing of a case before the court depends on random factors, which, although they may simulate the "lottery" of judges deciding specific cases, at the same time create new risks, including the possibility that the draw is carried out within one and the same judge/chamber. With the passage of time since the introduction of the electronic filing system, we may now be approaching another precedent-setting decision, this time of the Court of Justice of the European Union.

2.1.2 Foreseeability and *the Nullum Crimen Sine Lege* Principle

The principle of *nullum crimen sine lege* contains two intertwined fundamental rights in the form of

- the prohibition of retroactivity in criminal law, and
- the foreseeability of criminal liability.

In the case of *Bădescu*, the ECtHR was confronted with the applicants' arguments that their criminal conviction violated the right to foreseeability of criminal liability for acts performed in the exercise of judicial functions. They saw nothing wrong in developing their legal reasoning during deliberations following the hearing, while assessing the evidence. Judicial practice existing at the time of their decision-making excluded the possibility of prosecuting judges for the manner in which they assessed a case. The threshold beyond which judges may be held liable for acts performed in the exercise of judicial functions is set at a very high level.

The Government pointed out that, at that time, the case-law of the Romanian courts was stable, and according to it, a judge could not be prosecuted for the manner in

which he or she applied the law unless it was proven that those judicial functions had been exercised in bad faith. The Government emphasised that judges, as professionals, were aware of this judicial practice.

Having set out the arguments of both parties, it is important, for the purpose of understanding the ECtHR's reasoning, to recap the fundamental principles which the Court has developed in its case-law when assessing the applicability of Article 7 of the Convention from the perspective of the foreseeability of criminal liability. The basis for the foreseeability of criminal liability is the state's obligation to ensure that criminal law clearly and comprehensibly defines criminal offences and the penalties for them. This principle was already articulated by the ECtHR in the landmark judgment in *Kokkinakis v. Greece (25 May 1993, no. 14307/88)*, which concerned the interpretation of the term "proselytism" in connection with the criminalisation of "missionary" activities affecting the *forum internum* of another believer or non-believer. But where is the line between permissible missionary activity and violent (albeit not of a physical but of a psychological) conversion of a person to a faith or rather other religion? Similarly to the case in question, the issue lies in determining the line between the exercise of justice and preparation for it. When it remains a permissible form of religious conversation combined with moral support, and when does it constitute an "indirect" interference with the religious freedom of another that is criminalised? When does it constitute "genuine evangelism" and when does it amount to "religious corruption"? Such corruption may "*take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need*",[7] which can even take on a violent character or amount to "brainwashing".[8] In this regard, the interpretation of criminal law is necessary, as the ECtHR held in paragraph 52 of the *Kokkinakis* judgment that, when interpreting criminal law concepts,

- it must not be extensively construed to an accused's detriment, for instance by analogy,
- the individual must be able to know "*from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable.*"

In this case, however, the Greek courts merely reproduced the wording of the relevant provision of the criminal code and "*did not sufficiently specify in what way the accused had attempted to convince his neighbor by improper means.*"[9]

What is important in the context of the *Bădescu* case is that the ECtHR expressly emphasised the significance of judicial interpretation of the law, which it justified in paragraph 125 of that judgment by stating that „ *it is firmly established in the legal tradition of the States parties to the Convention that case-law necessarily contributes to the progressive development of criminal law.*"

The Court later emphasised this principle in rather complex cases concerning the prosecution of criminal offences related to the shooting of East German citizens attempting to flee to the Federal Republic of Germany. In paragraph 50 of the judgment in *Streletz, Kessler and Krenz v. Germany (22 March 2001, no. 34044/96 and others)*, the ECtHR stated that Article 7 of the Convention cannot be interpreted as prohibiting the gradual clarification of the rules on criminal liability through judicial interpretation from case to case, provided that the outcome is consistent with the essence of the offence and is reasonably foreseeable.

[7] ECtHR, Kokkinakis v. Greece, app. no. 14307/88, 25 May 1993, para. 48.
[8] For more on this judgment, see Svák (2021).
[9] ECtHR, Kokkinakis v. Greece, app. no. 14307/88, 25 May 1993, para. 49.

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The significance of judicial interpretation of criminal codes is further reinforced by two additional fundamental principles important for the assessment of the *Bădescu* case, namely that

- the interpretation and application of domestic law is primarily the task of domestic authorities, in particular, the courts,
- the concept of foreseeability largely depends on the content of the relevant text, the area which it concerns, as well as the number and "quality" of its addressees, whereby in regard to this "quality" the ECtHR specifically emphasises lawyers, and in particular judges, who are "*accustomed to exercising great caution in the performance of their duties*".[10]

The first fundamental principle can be illustrated by the interpretation of the term "genocide," which, like the concept of judicial independence in the exercise of judicial functions, has a close connection with international law. In the case of *Jorgic v. Germany (12 July 2007, no. 74613/01)*, the applicant argued that the German courts did not have the authority to convict him of genocide by broadly interpreting the term without support in either German or international law. In 1992, the applicant established a paramilitary group and participated in ethnic cleansing ordered by Bosnian-Serb political leaders in the Doboj region. After analysing the case-law of German and international courts, the ECtHR concluded that „*while many authorities had favoured a narrow interpretation of the crime of genocide, there had already been several authorities at the material time which had construed the offence of genocide in the same wider way as the German courts*".[11] Therefore, according to the ECtHR, the applicant could reasonably have foreseen, even with the assistance of a lawyer, that he risked being convicted of genocide for his actions. In paragraph 114, the Court further emphasised that "*the interpretation of the crime of genocide could reasonably be regarded as consistent with the essence of that offence and could reasonably be foreseen by the applicant at the material time*."

However, a situation may arise where, at the relevant time, case-law is lacking. The ECtHR had to address this question in the case of *Soros v. France (6 October 2011, no. 50425/06)*, which concerned the uncertainty of the factual elements of the criminal offence of insider trading. The problem was that the applicant was convicted for purchasing shares of a company with which he was not directly professionally or contractually connected, and he had obtained the information for the purchase "second-hand". Ultimately, what was important for the ECtHR was that he was "a professional investor" who was „*familiar with the business world and accustomed to being contacted to participate in large-scale financial projects. Given his status and experience, he could not have been unaware that his decision to invest in the securities of Bank S. could make him liable to the offence of insider trading provided for in the aforementioned Article 10-1*.[12] *Thus, knowing that there was no comparable precedent, he should have exercised greater caution when he decided to invest in the securities of Bank S.*"[13]

[10] ECtHR, Bădescu and Others v. Romania, app. no. 22198/18 and others, 15 April 2025, para. 124. (Original French wording: "*…habitués à devoir faire preuve d'une grande prudence dans l'exercice de leur métier.*").
[11] ECtHR, Jorgic v. Germany, app. no. 74613/01, 12 July 2007, para. 113.
[12] It is a provision of the French Monetary and Financial Code that allows for the imposition of sanctions (by a way of a fine or imprisonment for two months) on anyone who uses information relating to financial transactions for personal gain before such information becomes available to the public.
[13] ECtHR, Soros v. France, app. no. 50425/06, 6 October 2011, para. 59. (Original French wording: "*…un « investisseur institutionnel », familier du monde des affaires et habitué à être contacté pour participer à des projets financiers de grande envergure. Compte tenu de son statut et de son expérience, il ne pouvait ignorer que*

The case in question also gives rise to a second basic principle based on the condition of predictability of the law, namely that professional experts in a particular field are less protected by this requirement than others. From the perspective of the *Bădescu* case, it follows that judges exercising judicial functions are considered "professional experts" even when determining the conditions for criminal prosecution, such as statutes of limitation[14] or the application of the principle of *ne bis in idem*, including in cases where relevant case-law does not exist.

2.1.3 What is the Exercise of Judicial Functions?

In the course of judicial activity and the hearing of cases, a judge is compelled to interpret the law in order to apply it to the facts of the case even before issuing a judicial decision. It is evident that, when issuing judgments, judicial immunity is broader than in other judicial activities due to both international and constitutional guarantees of judicial independence. In such cases, lifting a judge's immunity requires proof of bad faith on the part of the judge and an intentional interpretation of the law *contra legem*, whereby *lex* also encompasses the case-law of the courts.

When interpreting the constitutional immunities of constitutional officials, which include judges, the ECtHR decision in *Haarde v. Iceland (23 November 2017, no. 66847/12)* may serve as a precedent, where the Icelandic Prime Minister was criminally prosecuted for failing to fulfil his constitutional duties. Specifically, the case concerned the failure to prevent the financial collapse of Icelandic banks in 2008 and the accusation that the former prime minister had failed to convene the government to address "important government matters" under Article 17 of the Icelandic Constitution. The applicant argued that the government is obliged to discuss only those "important matters" which, under Article 16(2) of the Icelandic Constitution, must be submitted to the President, based on "a century-long practice". However, the Icelandic courts took a different view, and the ECtHR essentially held that what constitutes an "important matter" had been sufficiently determined by the domestic courts and, therefore, that "*the offence for which the applicant was convicted was sufficiently defined* ". Thus, in the light of the *Bădescu* case, it follows that what constitutes the exercise of judicial functions is, in principle, for the domestic court to decide.[15]

sa décision d'investir dans les titres de la banque S. pouvait le faire tomber sous le coup du délit d'initié prévu par l'article 10-1 précité. Ainsi, sachant qu'il n'existait aucun précédent comparable, il aurait dû faire preuve d'une prudence accrue lorsqu'il a décidé d'investir sur les titres de la banque S.").

[14] In this context, it is worth recalling one of the first Advisory Opinions of the Grand Chamber of the ECtHR under Article 16 of the Convention, issued at the request of the Armenian Court of Cassation, no. P16-2021-001, dated 26 April 2022. Regarding the application of Article 7 of the Convention, the Grand Chamber stated that „*where criminal responsibility has been revived after the expiry of a limitation period, it would be deemed incompatible with the overarching principles of legality (nullum crimen, nulla poena sine lege) and foreseeability enshrined in Article 7…It follows that where a criminal offence under domestic law is subject to a statute of limitation, and becomes time-barred so as to exclude criminal responsibility, Article 7 would preclude the revival of a prosecution in respect of such an offence on account of the absence of a valid legal basis. To hold otherwise would be tantamount to accepting "the retrospective application of the criminal law to an accused's disadvantage*".

[15] In the majority vote of the ECtHR, it is also necessary to highlight the dissenting opinion of Judge *Wojtyczek*, who pointed out that the case involved a very complex constitutional issue where the rule of law was at stake. He aligned himself with the opinion of five judges of the Court for Impeachment, who, although aware of the public pressure and anger directed against the government, remained faithful to the principle of the rule of law and the separation of powers within it.

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3. CONCLUSION

On the basis of these considerations, the ECtHR ruled that in the *Baděscu* case there had been no violation of Article 7 of the Convention in terms of

- the distinction between the exercise of judicial power and other judicial activities,
- the foreseeability of the law, and
- the professional expertise of judges.

The domestic courts examined in considerable detail the manner in which the applicants prepared the judicial proceedings so that, by subsequently exercising their judicial functions, they could decide in favour of the convicted SD. In other words, the courts sought a specific legal outcome that could not have been achieved without their manipulation of the facts of the case. According to the domestic courts, the applicants deliberately altered the factual basis established by the lower courts in order to develop a legal argument aimed at invoking the principle of *ne bis in idem.* The applicants modified certain already existing or easily identifiable facts relating to the case without any objective justification and deliberately ignored relevant and significant arguments presented by the prosecution, as evidenced by the questions they asked the parties during the public hearing and the manner in which the first applicant, as presiding judge, conducted the proceedings. According to the ECtHR, the aim of the criminal proceedings against the applicants was not to examine the legality and validity of the judicial decision itself, but to "*identify, beyond that decision, conduct contrary to the duties of the office and corresponding to the material element of the offence, as well as the motive for the act in question, such conduct being sometimes able to influence the outcome to be reached*".[16] Therefore, they were prosecuted for abuse of public office, not for "bending" the law in the exercise of judicial functions, which is specifically constitutionally protected by judicial independence. Even though "*the factual context in which the acts alleged against the applicants took place overlapped to a certain extent with the main activity of a judge's duties, namely that of rendering judicial decisions… the legal provisions prohibiting abuse of office at the time of the events, together with the interpretative case-law, were worded in a sufficiently precise manner to enable the applicants, themselves judges, to discern, to a reasonable extent in the light of the circumstances, that their actions risked leading to a criminal conviction, without calling into question the guarantee of judicial independence*".[17]

The final part of the *Bădescu* judgment concentrates on the main message of the precedent, which can also be considered as relevant case-law in the Slovak context. Manipulation of case allocation, the subsequent purposeful handling of evidence, and distortion of the facts of the case result in a judgment that is formally lawful, yet…

[16] ECtHR, Bădescu and Others v. Romania, app. no. 22198/18 and others, 15 April 2025, para. 140. (Original French wording: "*…mais d'identifier, au-delà de cette décision, un comportement contraire aux devoirs relevant de la fonction et correspondant à l'élément matériel de l'infraction, ainsi que le mobile de l'acte en question, pareil comportement pouvant, parfois, exercer une influence sur la solution à retenir…*").

[17] ECtHR, Bădescu and Others v. Romania, app. no. 22198/18 and others, 15 April 2025, para. 148. (Original French wording: "*…le contexte factuel dans lequel s'inscrivaient les faits reprochés aux intéressées se superposait dans une certaine mesure à l'activité principale des fonctions d'un juge, à savoir celle de rendre des décisions de justice. Toutefois, les considérations qui précèdent suffisent à la Cour pour conclure que les articles de loi réprimant l'abus de fonctions au moment des faits accompagnés de la jurisprudence interprétative étaient formulés de manière suffisamment précise pour permettre aux requérantes, elles-mêmes juges, de discerner dans une mesure raisonnable au regard des circonstances que leurs actes risquaient de leur valoir une condamnation pénale, sans que la garantie d'indépendance de la justice soit remise en cause.*").

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REVIEWS

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TURAY, LUKÁŠ – TURAYOVÁ, YVETTA: PRAKTICKÁ UČEBNICA TRESTNÉHO PRÁVA HMOTNÉHO [PRACTICAL TEXTBOOK OF SUBSTANTIVE CRIMINAL LAW]. C. H. BECK, 2025

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1. INTRODUCTION

A practical textbook of substantive criminal law by the author duo JUDr. Lukáš Turay, PhD. and doc. Yvetta Turayová, CSc. represents an exemplary breakthrough in the methodology of university teaching of legal branches in Slovakia and goes beyond the boundaries of ordinary textbook literature. This publication, published by the renowned author's publishing house C. H. Beck in 2025 as an output of the VEGA 1/0722/24 project focused on the Principles of the Rule of Law in Criminal Law, achieves an exceptional space within the Slovak legal literature with its innovative pedagogical model, detailed interpretation and practical-theoretical anchoring.

The publication is primarily intended for students of law faculties, for whom it is an ideal tool for mastering the subject of substantive criminal law. However, its content will also be appreciated by novice lawyers from the ranks of lawyers, judges or police officers.

The entire textbook is prepared in accordance with the legal status as of March 1, 2025. This is particularly important in criminal law, where legislation is regularly evolving and legal interpretations may change. The textbook thus provides very up-to-date information, regardless of whether it is a matter of changes to the Criminal Code No. 300/2005 Coll. itself or changes in application practice. The model cases are original and set in the present, which makes them significantly different from traditional examples in other classrooms. Case studies reflect the real problems of the time. For example, the case of "*Gastro and COVID"* reflects the problems with economic crimes in the context of the pandemic. Or the case of *the "Newspaper Article*", which may reflect the problem of disinformation or misinterpretation in the media space in relation to changes in criminal law.

At the time of writing the contribution entitled Quo Vadis Criminal Policy (2023), the authors found that Act No. 300/2005 Coll., the Criminal Code, as amended, had already been affected by fifty interventions into the basic codex of criminal policy, in the form of direct or indirect amendments as well as decisions of the Constitutional Court. By comparison, the preceding Act No. 140/1961 Coll., the Criminal Code, as amended, was amended only forty-five times during its period of effectiveness (Kurilovská and Turay, 2023, p. 27). This practical textbook also responds to these amendments and provides a clear and comprehensible current interpretation, even in a period of legislative turbulence.

The publication was subjected to a thorough editorial process with editors JUDr. Jana Amorová and Mgr. Ľuba Nitrová from the C. H. Beck publishing house. The publication also underwent a professional review process by two leading Slovak experts in criminal law, namely a reviewer from the academic environment doc. Martin Štrkolec, PhD. (Faculty of Law, UPJŠ) and the reviewer from the application environment JUDr. Matúš Kováč, PhD. (Regional Prosecutor's Office in Bratislava), which once again underlines the combination of theory and application practice.

2. AUTHOR'S EXPERIENCE AND QUALIFICATION OF THE AUTHORS' TEAM

The creation of this publication is directly based on generational academic experience and deep scientific foundations. Assoc. Prof. Yvetta Turayová, CSc., as the author of this textbook, was a significant figure in Slovak legal science and pedagogy. During her work at the Institute of Law of the Ministry of Justice of the Slovak Republic and later at the Department of Criminal Law at the Faculty of Law of Comenius University, she deeply dealt with the issue of the causes and conditions of crime from the perspective of criminological and legal research. Her works were oriented towards an interdisciplinary approach to criminal law problems, thus bringing a perspective to Slovak criminal law theory that integrates criminological knowledge with legal regulation. The undeniable significance of the scientific conclusions of Assoc. Prof. Turayová lies in the fact that they have fundamentally influenced several areas of knowledge, whether in criminology or criminal law, including, for example, the field of causes and conditions (Mihálik and Vincent, 2024, p. 111).

Dr. Lukáš Turay presents a dynamic generation of Slovak criminal law doctrine. As Vice-Dean of the Faculty of Law of Comenius University and since 2025 Director of the Institute of Restorative Justice and Criminology, he symbolises the interconnection of traditional legal science with modern trends such as restorative justice and applied criminology. His research activities are focused on criminal policy, substantive criminal law and the phenomenon of white-collar crime, bringing to the textbook a contemporary and innovative perspective on the challenges faced by modern criminal law.

It is the combination of the experience of the older generation and the innovative approach of the new generation that becomes the fundamental character feature of this publication. What cannot be overlooked, and what truly makes this work exceptional, are the co-authors themselves – representatives of two generations of distinguished legal scholars, in this case, a mother and son.

3. PEDAGOGICAL PHILOSOPHY, INNOVATIVE AND TRADITIONAL MODELS OF HIGHER EDUCATION TEACHING

The authors decided on a progressive change in the pedagogical model, which is reflected in the conceptual change that their textbook represents. The basic philosophical

principle that permeates all chapters is the principle that "*great practice must be based on excellent theory*". However, this maxim is applied with attention to the fact that a theory without practical application remains abstract and inaccessible.

The most significant and valuable innovation of the textbook is the case-based *learning approach*. Each chapter follows a uniform, symmetrical, well-defined format that allows the student to quickly orient themselves and create a system while reviewing the material.

Each chapter begins with a case study that is set in the current context and reflects real legal problems in application practice. Examples are varied:

1. Chapter 1 entitled "*The Flawed Legislator*". This is the case of a young MP Milan, who decides to change laws and makes mistakes that expose the shortcomings of Slovak criminal law. Specifically, Milan wants to introduce the crime of "*non-payment of an invoice*", but he does not localise it correctly in the legal system – he wants to place it in the Commercial Code instead of the Criminal Code. At the same time, the case illustrates the problem when a deputy decides on the basis of statistics on the number of crimes regarding the issue of deleting the facts of premeditation and murder from the Criminal Code, which would lead to a violation of several basic principles of substantive criminal law.
2. Chapter 2 entitled "*Ambush*". This is a case on the Main Square in Bratislava, where Peter S. assaults Irena M. with a gun, specifically a knife and with the intention of getting her money. The case is deliberately constructed in such a way that the victim does not suffer any material damage, which raises complex legal questions about how the proceedings qualify if there has been no successful theft and what all the elements of the facts are or are not met.
3. Chapter 3 entitled "*Newspaper article*". The case of Pavel, who reads that "*stealing up to 700 euros is unpunished*" and decides to repeatedly steal things, each individual worth less than 700 euros. The case exemplarily illustrates the problem of continuing crimes. Pavol thinks that if he steals individual items worth less than 700 euros, none of them will represent minor damage and therefore will not be a criminal offense. In this chapter, the authors pay attention to the problem of how individual partial attacks are counted in the case of continuing crimes and the determination of small damage.

These case studies have several basic pedagogical advantages that set them apart from traditional textbooks:

1. Reality and relevance – case studies are not abstract scenarios, but reflect real legal problems and dilemmas faced by modern legal practice and criminal justice.
2. Narrative structure – case studies have a natural, logical structure with a clear beginning and end, indicated problem and questions, which resonates better with human observation and memory.
3. Generating critical questions – Case studies naturally lead to the formulation of questions that students ask themselves, which stimulates their critical thinking, deeper understanding, and ideas for discussion.

The case study is followed by systematically ranked questions in two categories, namely theoretical and practical questions. Theoretical questions are oriented towards definitional and conceptual understanding. Examples are questions such as: "*Define the concept of the offence*" and "*Specify the types of offences*" or "*What are the basic principles of substantive criminal law?*". These questions are formulated in such a way that the

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student first understands fundamental theoretical concepts and principles before attempting to apply them to a specific case.

Practical issues require the application of theory to a specific case. For example, these are questions such as: "*Try to qualify the actions of Peter S*". These questions guide the student step by step to the practical application of their theoretical knowledge to a specific scenario from a case study.

This dual structure of questions greatly facilitates progressive learning, from general theoretical concepts to specific applications to specific cases.

The key and most valuable element of the teaching methodology of this textbook is the comprehensive and detailed solutions to each individual question. These are not short answers in the format "*the correct answer is A*", but they are extensive interpretations of the answer, with the authors directly quoting relevant parts of the legislation when addressing legal issues. The authors' approach is also very valuable, which does not use case-law as a peripheral footnote, but as a central element of legal reasoning. In this context, we appreciate the so-called box-like excerpts from case law, which are immediately in front of the reader's eyes. At the same time, in many cases, the authors do not end up with a single "*correct*" answer to a legal issue, but commendably discuss various possible interpretations and justifications.

One of the most valuable features of the textbook is the rich graphic elements and diagrams, which are also created through ChatGPT and the authors of the textbook. In an academic context and in an educational environment, this represents a pragmatic, innovative and effective approach to teaching. For example, Figure 1 entitled "*Sub-principles of the principle of legality*" clearly illustrates the relationships between the four sub-principles of legality. Or Diagram No. 2 entitled "*Functions of Criminal Law*" illustrates the five basic functions of substantive criminal law. These schemes have a major pedagogical impact. In an academic environment where students often get lost in swarms of plain text, these visual aids are extremely valuable. The visual representation of complex concepts makes it much easier to understand and remember the material.

Furthermore, for example, the author also correctly incorporated the principle of *ne bis in idem* into this textbook as a principle of substantive criminal law, having previously noted that it is typically associated primarily with procedural criminal law. However, if we examine university textbooks on substantive criminal law, we find that the principle of ne bis in idem is not included among its fundamental principles, even though its significance is confirmed by everyday practical application (Dražová, Mihálik and Turay, 2022, p. 26).

The criticism that can be made of the textbook relates to the failure to cover all the problems of substantive criminal law, especially those arising from a special part of the Criminal Code. However, this lack of content is ultimately more of a challenge and an incentive to write a second updated and supplemented edition of this successful and innovative textbook.

In the reviewed work, it may be pointed out, that despite all its erudition and methodological innovativeness, it remains in a certain respect incomplete in its presentation of the system of criminal-law responses to an offence, particularly as regards sanctions in substantive criminal law. Even though the authors very inspiringly develop the theoretical foundations of criminal liability, the principles of criminal law and a detailed analysis of the constituent elements of offences, the specific issue of the types of sanctions, their purposes, the criteria for their imposition and their mutual relationships (for example, the relationship between punishments and protective measures) remains an underdeveloped part of the textbook. Given that this is a "practical" textbook intended primarily for students and novice legal practitioners, it would be extremely beneficial if a

separate chapter or subchapter were devoted specifically to a practical grasp of the system of sanctions – from the general principles of the individualisation of sanctions, through an overview of the individual types of punishments, up to their illustration on concrete case studies. Such an addition would naturally build on the existing casuistic and case-law-oriented approach adopted by the authors, without disturbing the textbook's current structure. At the same time, the incorporation of a section on sanctions could also reflect the most recent major amendment (Act No. 40/2024 Coll. – part of sanctions) prepared under Minister of Justice Susko, which, *inter alia*, has expanded judicial individualisation in sentencing (Kiko, 2024, p. 295). It may therefore be framed more as a constructive suggestion than a fundamental objection that any future edition of this successful textbook should elaborate in greater detail a systematic exposition of sanctions in substantive criminal law, including their application dilemmas in judicial decision-making practice.

4. CONCLUSION

The Practical Textbook of Substantive Criminal Law is a publication that goes far beyond the boundaries of a regular university textbook. Its case-oriented model, meticulous and precise interpretation of basic institutes, consistent work with case law, original and contemporary model cases, rich graphic elements and an explicit goal to encourage critical thinking make this publication one of the best study aids available in the Slovak legal market.

Through this textbook, the authors implement their idea that "great practice must be based on excellent theory". Working with cases, rich case law and its anchoring in modern criminological and legal discourses make this textbook a work that deserves a place in the libraries of every lawyer, in the study materials of every law school.

The publication is contribution that moves higher legal education to a qualitatively higher level. At a time when legal practice places increasing demands on graduates of law faculties in terms of practical skills and the ability to quickly orient themselves in complex legal problems, this publication represents an underrated tool not only for students, but also for novice representatives of legal practice.

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PRITYI, MAREK: HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION. ROUTLEDGE, 2024

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1. INTRODUCTION

Marek Prityi's *Human Rights and Environmental Protection: Environmental Procedural Rights in the EU, India and China* is an ambitious and timely contribution to the growing body of scholarship at the intersection of environmental law and human rights. Situated within Routledge's Transnational Law and Governance series, the book not only seeks to clarify the conceptual and normative links between environmental protection and human rights, but also examines how procedural rights function in practice in three markedly different legal and political contexts. The author's choice of jurisdictions (the European Union, India and China) is not incidental. In contrast, it allows for a nuanced exploration of environmental procedural rights in settings that range from supranational governance structures to federal democratic systems and authoritarian frameworks.

Prityi's academic trajectory, combining doctrinal expertise with comparative methodology and field insights, is evident throughout. The book's declared aim is to "give voice" to those applying environmental procedural rights daily, be they judges, lawyers, policymakers, or civil society actors, and to ground the analysis in real-world challenges and experiences. In this regard, it succeeds admirably, offering both theoretical depth and empirical texture.

2. CONTENT OVERVIEW

The opening chapter, Connecting the Dots, provides the conceptual foundation by tracing the historical evolution and philosophical underpinnings of environmental human rights. Prityi critically engages with competing paradigms, anthropocentric, ecocentric, and rights-of-nature approaches, and situates the "right to a healthy environment" within broader human rights discourse. The discussion reflects awareness of the global legal pluralism that shapes environmental rights claims, acknowledging the

influence of international law, regional jurisprudence, and domestic constitutional traditions.

Chapter 2, The Research Approach, sets out the methodological framework. Here, the author blends functional comparative law with hermeneutic interpretation, enriched by socio-legal and cultural perspectives. The approach is not purely doctrinal, empirical elements are drawn from interviews, case analyses, and institutional observations, providing a multi-layered understanding of how procedural rights are enacted (or obstructed) in practice.

Chapter 3, Greening Existing Rights, examines the "environmentalisation" of established human rights such as the right to life, privacy, property, fair trial, and the rights of indigenous peoples. Through an impressive survey of case law, ranging from the European Court of Human Rights to the Indian Supreme Court and domestic Chinese courts, Prityi shows how judicial bodies have progressively integrated environmental concerns into traditional rights frameworks. The comparative dimension is particularly effective here, revealing convergences (e.g., recognition of environmental harm as a breach of the right to life) alongside stark divergences in judicial activism and enforcement.

The subsequent chapters form the empirical and comparative heart of the book. Environmental Procedural Rights in the European Union maps the transposition and implementation of the Aarhus Convention within the EU legal order, highlighting both supranational instruments and the practice in selected Member States. The treatment of access to information, public participation, and access to justice is meticulous, with due attention given to CJEU jurisprudence and Commission enforcement actions.

In India and China, the analysis is tailored to the distinct legal, cultural, and political realities of each country. The Indian section explores the constitutional right to a healthy environment as interpreted by an activist judiciary, the institutional role of the National Green Tribunal, and the practical barriers posed by administrative inertia and resource constraints. In the Chinese section, Prityi addresses the evolving statutory framework, the role of public interest litigation, and the complex interplay between central directives and local enforcement. Particularly noteworthy is the discussion of how civil society organisations operate under restrictive political conditions, shedding light on the limits of procedural rights in non-democratic contexts.

The book culminates in a comparative Case Study that juxtaposes the three jurisdictions' approaches to environmental procedural rights. This synthesis distils cross-cutting themes (such as the importance of judicial independence, the impact of administrative capacity, and the role of legal culture) and identifies transferable lessons. The final chapter articulates "lessons learned" and policy recommendations, underscoring that procedural rights are not self-executing and require robust institutional, legal, and cultural support to deliver meaningful environmental protection.

3. ANALYTICAL ASSESSMENT

The book's strengths are manifold. First, its comparative breadth is exceptional. By selecting jurisdictions that differ not only in legal traditions but also in political systems and socio-economic conditions, Prityi offers insights that transcend purely regional debates. The comparative framework is well-structured, avoiding the common pitfall of parallel monologues; instead, the jurisdictions are continually placed in conversation with one another.

Second, the integration of theory and practice is exemplary. The author navigates seamlessly from conceptual debates about environmental human rights to granular

discussions of statutory provisions, institutional arrangements, and case law. This dual focus ensures the book's relevance to both academic and practitioner audiences.

Third, the methodological transparency is commendable. By explicitly outlining the research approach and its limitations, Prityi enables readers to appreciate the interpretative choices made and to assess the validity of the comparative conclusions.

That said, there are areas where the analysis could be extended. While procedural rights are examined in great detail, the substantive dimensions of the right to a healthy environment receive relatively less attention. This is, of course, a deliberate choice aligned with the book's focus, but it leaves open questions about how procedural guarantees interact with substantive environmental standards in practice. Additionally, while the role of emerging technologies and digital participation tools is touched upon, a fuller exploration of their potential to transform access to information and public engagement would have enriched the discussion.

From a structural perspective, the chapters are logically ordered and internally coherent, but the density of the legal analysis in certain sections — particularly in the EU part — may challenge readers less familiar with the specific legislative instruments. Occasional summarising tables or visual aids could have enhanced accessibility without compromising analytical rigour.

4. CONCLUSION

Human Rights and Environmental Protection: Environmental Procedural Rights in the EU, India and China is a significant scholarly achievement that advances the understanding of environmental human rights through a rigorous and nuanced comparative lens. By situating procedural rights at the centre of its analysis and examining them across three markedly different legal and political contexts, the book delivers insights that are both academically robust and practically relevant. Its capacity to bridge theoretical discourse with lived realities of legal actors in diverse jurisdictions makes it a valuable resource not only for academic circles but also for practitioners engaged in cross-border environmental litigation and governance. The careful balance between theoretical framing and practical case analysis, combined with methodological transparency and the breadth of comparative perspective, ensures that it will remain a valuable reference for years to come.

That said, certain elements could be developed further in the next edition. While the focus on procedural rights is clear and consistent, integrating a more substantive discussion of the right to a healthy environment (and, e.g. examining more explicitly how procedural guarantees influence substantive outcomes) would enrich the conceptual framework. In addition, a fuller exploration of the role of technological innovation in enabling access to information and public participation could give the book an even greater contemporary relevance, especially in the context of digitalisation of environmental governance. Structurally, the inclusion of comparative tables or visual aids in the more dense legislative sections, particularly within the EU analysis, could also improve accessibility for readers less familiar with the specific instruments.

Overall, it is an impressive, timely, and well-executed contribution that will be of interest to scholars, practitioners, and policymakers alike. It also sets a benchmark for future comparative studies in this area, demonstrating how procedural rights can be analysed with both conceptual sophistication and empirical grounding. With the modest enhancements suggested, a second edition would be well placed to not only consolidate the book's strengths but also expand its influence in the evolving field of environmental human rights.

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DÉMUTH, ANDREJ (ED.): COGNITIVE, SEMANTIC AND EVOLUTIONARY ASPECTS OF AESTHETIC AND MORAL EMOTIONS. PETER LANG, 2024.

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The collective of authors - Démuthová, Kišoňová, Démuth, Batka, and Meteňkanyč - has produced a stimulating monograph that explores selected aspects of aesthetic and moral emotions. The authors examine these emotions primarily from cognitive, semantic, and evolutionary perspectives, analysing, for example, their dictionary definitions, antonyms and synonyms, as well as their evolutionary and neurobiological underpinnings. The monograph aims to advance research on aesthetic and moral emotions by addressing themes such as beauty, admiration, disgust, anger, guilt, and (in)justice. A unifying feature of the work is its attempt to develop an integrated concept that accounts for both the subjective experience of emotions and their objective understanding, highlighting important connections and similarities among individual aesthetic and moral emotions. From these perspectives, this book offers a valuable source of inspiration for future legal research, as it ventures into interdisciplinary perspectives that are not typically considered in standard legal scholarship.

In the first chapter titled "*Beauty: Historical Context and Contemporary Perspectives*", Slávka Démuthová undertakes a challenging exploration of the concept of beauty. She begins by stating that beauty lacks a single definition and is considered subjective, suggesting that a unified concept of beauty does not exist (Démuthová, 2024, p. 17). Historically, she outlines key understandings of beauty across major epochs, limiting her discussion to their most representative views. From an evolutionary standpoint, she examines perceptions of bodily, facial, and object-related beauty, offering explanations for why certain features are consistently evaluated as attractive. The chapter further incorporates a linguistic analysis of the concept of beauty and considers contextual variables such as age, gender, and education. Although beauty is framed as subjective, the study shows that, from an evolutionary perspective, there is a relatively uniform understanding of what is perceived as beautiful. The chapter's principal strength lies in its interdisciplinary breadth, which illuminates the complexity of aesthetic

judgment without reducing beauty to a single explanatory framework (Démuthová, 2024, pp. 51, 52).

The emotions of admiration and disgust are explored by Renáta Kišoňová, who sets out to "*show the colourful shades of emotions and disgust and admiration*" (Kišoňová, 2024, p. 68), which she does by first presenting significant philosophical approaches to these emotions, drawing namely on the works of Aristotle, Descartes, Charles Darwin, and Jonathan Haidt. This is followed by a concise discussion of the concept of "emotion," "feeling," and "affect." The central focus of the study lies in examining how admiration and disgust function in everyday language and in the public sphere, thereby enriching the multidimensional understanding of these emotions. In this context, Kišoňová also includes an empirical study conducted among students of her own institution, inquiring about words they attribute with disgust. Surprisingly, admiration as the opposite of disgust (as defined by the author) was mentioned by several students, but to a lesser extent than expected (Kišoňová, 2024, p. 81). The article concludes with a detailed analysis of admiration and acknowledges potential social consequences of uncritical admiration of individuals or authorities.

Andrej Démuth focuses on the emotion of anger, as one of the most extensively discussed emotions due to its complex nature. He begins by addressing the question of whether anger has opposite emotions, ultimately arguing that any such determination depends on the dimension under consideration and that identifying a single, unequivocal opposite would therefore be misleading (Démuth, 2024, p. 101).The chapter then traces historical conceptions of anger and is followed by an etymological analysis of the term *anger*, as well as an examination of related concepts and expressions. In exploring the relationship of anger and hatred, Démuth concludes with saying that anger is a feeling and an emotion „*...that needs to be expressed for others to see*" (Démuth, 2024, p. 109). As the title "*Anger: The Awareness of Evil and the Defiant Decision to Take Justice into One's Own Hands*" suggests, the author emphasises the social and moral dimensions of anger. He develops this argument by portraying anger as a response to perceived unacceptability that simultaneously serves to mobilise the individual toward change (Démuth, 2024, pp. 118, 119). In this way, the chapter situates anger not only as a disruptive emotion, but as one with significant motivational and normative functions within social life.

A theological perspective in the emotion of guilt is offered by Ľubomír Batka who frames his contribution with a thought experiment imagining what would the world look and feel like in the absence of guilt.[1] His opening leads to a broader question of whether guilt continues to serve a meaningful function in contemporary society (Batka, 2024, p. 130). Batka begins by explaining that guilt can be understood from multiple points of view and notes that Christian teachings on sin and guilt have been widely shaped by Greek and Jewish thinking. Christian thinking on sin, guilt and related concepts is then explored by etymological and semantic analysis in the historic evolution of thought. This analysis is complemented by Schleiermacher's, Nietzsche's, Heidegger's and Ricœur's views on guilt and their „*net of interpretations*". Ľubomír Batka comes to the conclusion that „*The feeling of guilt effects a change of perception, attitude, behaviour, and brings about a new start*," (Batka, 2024, p. 162), a conclusion that resonates with the volume's broader treatment of emotions such as anger, understood not only as affective states but also as catalysts for moral reflection and transformation.

[1] The author says that without guilt, „*...punishment would be just another act of violence without the framework of justice.*" See Batka (2024, p. 130).

The multidimensional nature of the concepts of justice and injustice is explored by Olexij M. Meteňkanyč in his study titled "*(In)justice: On the Indeterminacy of the Concept of (In)justice*." Through etymological, semantic and conceptual analysis of these terms, the author highlights the importance of engaging with the concepts of justice and injustice themselves, rather than focusing solely on the subjective human experience of (in)justice. By examining the various contexts in which these concepts are employed, Meteňkanyč demonstrates that their meanings are not always consistent or interchangeable (Meteňkanyč, 2024, p. 193). To gain a more nuanced understanding of these concepts, the author proposes examining the notions that give substance to justice and injustice across different cultural and linguistic contexts, a step that may help remove some of the ambiguity associated with these terms. Importantly, Meteňkanyč does not interpret this indeterminacy as evidence of a lack of objectivity; instead, he presents vagueness as a constitutive feature of the concepts themselves, one that need not be understood in purely negative terms (Meteňkanyč, 2024, p. 200).

As anticipated by the authors, the collective volume represents a multifaceted contribution to contemporary knowledge. Although emotions might seem to belong primarily to the domain of psychology, the authors have managed to approach them from a multitude of perspectives. The work thus transcends a purely psychological view of emotions and provides the reader with a well-founded and comprehensive view of selected moral emotions through philosophy, psychology, theology, law, and their intersections. We consider the interdisciplinary perspective to be a fundamental strength of this publication, as it enables engagement from readers from diverse academic backgrounds.

A particularly important role in achieving the internal coherence of the volume is played by the concluding chapter authored by Andrej Démuth. The summary represents a crucial part of the monograph, because it allowed the articles themselves to communicate with each other and interconnected their core ideas. By drawing attention to shared themes and conceptual overlaps, the conclusion underscores the importance of linking seemingly distinct topics within interdisciplinary research. At the same time, it clearly articulates the main findings of the collective work and openly acknowledges that not all investigations could be fully completed, emphasising instead the monograph's aim to contribute meaningfully to the ongoing research on aesthetic and moral emotions (Démuth, 2024b, pp. 217, 218).

The publication is necessarily selective in its choice of emotions, focusing on beauty, admiration, disgust, anger, guilt, and (in)justice. While these do not constitute an exhaustive list of aesthetic and moral emotions, this selectivity should not be viewed as a shortcoming. Rather, it allows the authors to engage in a deeper and more focused analysis of their respective topics. The editor implicitly acknowledges the partial nature of this selection, which may be interpreted as an invitation for future research to extend the scope of inquiry to additional emotions and thereby further develop the interdisciplinary framework established in this volume. A significant advantage is the agreement on the key issues that the authors addressed in their studies. Although each author approaches these questions from their own disciplinary background and methodological perspective, a clear thematic coherence emerges throughout the volume. This diversity of approaches enriches the discussion and reflects the authors' varied academic orientations. At the same time, a greater degree of structural uniformity among the individual contributions might have further strengthened the internal consistency of the work.

Overall, the edited monograph represents a valuable and genuinely distinctive contribution to research on aesthetic and moral emotions. Its interdisciplinary approach

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offers particular inspiration for future legal scholarship, encouraging engagement with perspectives that extend beyond traditional doctrinal frameworks. The volume may thus serve as an important point of departure for further interdisciplinary research and is likely to stimulate continued scholarly interest across multiple fields. We are already looking forward to the new insights that future research in this field may bring.

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REPORTS

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1ST EVALUATION SEMINAR OF THE NATIONAL PROJECT 'CHANCE FOR RETURN 2' (BRATISLAVA, 9 SEPTEMBER 2025)

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On September 9, 2025, the 1st Evaluation Seminar of the national project *Chance for Return 2* was held in Moyzes Hall, organised by the Corps of Prison and Court Guard (hereinafter "CPCG") in cooperation with the Faculty of Law of Comenius University Bratislava (hereinafter "FL CU"). The aim of the evaluation seminar, held under the auspices of the Ministry of Justice of the Slovak Republic, was to present and evaluate, within the framework of the project's sub-activities (*1. Professional coordination of the steering committee, 2. Creation and provision of information and counselling services for clients, 3. Introduction and modification of standardised educational programs, 4. Digitalisation of services, programs and electronic tools, 5. Evaluation, and 6. Training of professional staff*), in particular the implemented partial, and innovative elements of linking separate penitentiary and post-penitentiary care policies.

The seminar was attended by several distinguished guests, including a representative of the European Commission in Slovakia, representatives of the Prison Service of the Czech Republic and the Probation and Mediation Service of the Czech Republic, the Academy of Applied Sciences in Poland, and various representatives of state administration authorities, including officials from the Ministry of Justice of the Slovak Republic, the Ministry of Interior of the Slovak Republic, the Ministry of Labour, Social Affairs and Family of the Slovak Republic, and the General Directorate of the CPCG. The event opened with a ceremonial introduction and speeches by distinguished guests.

The opening address was delivered by the State Secretary of the Ministry of Justice of the Slovak Republic, **Mgr. Michal Sedliak**, who welcomed all participants. He was followed by **Col. Ing. Jozef Lančarič**, Deputy Director General for Economic Affairs of the CPCG, who emphasised the importance of the project and stated that it is demonstrably changing the lives of prisoners. Next, **Gabriela Šaturová**, the representative of the European Commission in Slovakia, addressed the participants, describing the project as a living example of European solidarity. She praised the project team and expressed her belief that *Chance for Return 2* will serve as an inspiration for other European countries. The ceremonial speeches continued with **Mgr. Michal Krivošík**, Deputy Director of the Social Affairs and Family Section of the Central Office of Labour, Social Affairs and Family (hereinafter "**COLSAF**"), who thanked the CPCG and all colleagues for their joint efforts that enabled the project's progress. The ceremonial part was concluded by the Dean of FL CU, **Prof. JUDr. Eduard Burda, PhD.**, who appreciated that the principles of restorative justice and alternative punishments are entering public discussion as part of the European trend, while also stressing the importance of working with prisoners to ensure their reintegration into society. He also expressed gratitude to the State Secretary and the entire team of experts working on the *Chance for Return 2* project.

Participants were then introduced in detail to the project itself and its individual activities. In the professional part of the programme, presentations were devoted both to the overall framework of the project and to specific activities, highlighting their practical application and importance for the resocialisation process of prisoners. The first speaker, **Capt. JUDr. Jakub Ľorko, PhD.**, Project Manager of *Chance for Return 2*, clarified the project's main goal: systemic support for persons in adverse social situations, with a focus on reducing the risk of their social exclusion. He also informed participants about planned activities within the project, such as the digitalisation of information and counselling services, the introduction and modification of standardised educational programs, and the strengthening of professional competencies of staff, while highlighting the importance of institutional cooperation and the linking of penitentiary and post-penitentiary care. Further expert presentations were given by project specialists and guarantors. **PhDr. Zuzana Valentovičová, PhD., LL.M.,** presented selected activities and outputs of the project, focusing on the steering committee's coordination activities, information and counselling services, and professional staff training. She provided details on the pilot testing of resocialisation and educational programs, admission and pre-release units, as well as the creation of practical manuals and information materials for prisoners and released persons. **PhDr. Lenka Kleskeň, PhD., LL.M.,** followed with a presentation on strengthening cooperation between penitentiary and post-penitentiary care through the *BRIDGES* project. She explained the importance of connecting prisons with employers, NGOs, and healthcare institutions, presented details on the pilot testing of educational and diagnostic programs, and emphasised the role of professional training, methodological support, and sustainability of project outcomes. Special attention was given to the use of modern IT tools as an innovative element in penitentiary care and resocialisation activities, presented by **Mgr. Martin Ludwig**, a project specialist.

Additionally, **JUDr. Bronislav Pongrác**, Director of the Department of Penitentiary Intervention at the Ministry of Justice of the Slovak Republic, delivered a lecture on selected activities of the Ministry, with a key focus on the Multifactorial Resocialisation and Educational Program—a new educational program in the field of probation. He also highlighted the link between the Individual Social Inclusion Action Plan, managed by the CPCG, and the work of social curators as well as probation and mediation officers.

Another contribution was made by **Mgr. Mária Marcinová**, Director of the Department of Child Protection and Social Curatorship at the COLSAF, who presented selected COLSAF activities. She emphasised their role as a partner in *Chance for Return 2*, focusing on comprehensive support for persons serving prison sentences and after release, aimed at reducing the risk of social exclusion. She also explained interventions provided by methodologists to prisoners in pre-release units and covered the areas of these interventions, including relevant statistical data.

The afternoon session was dedicated to a panel discussion on current issues of penitentiary and post-penitentiary care, involving both academics and practitioners. This session was opened by **Prof. JUDr. Jozef Čentéš, DrSc.**, Head of the Department of Criminal Law, Criminology and Criminalistics at FL CU, who stated that penitentiary and post-penitentiary care are among the most pressing issues of criminal policy and punishment in modern democracies. While imprisonment is traditionally seen primarily as a repressive measure, professional experience and criminological research clearly show that its purpose cannot be achieved without systematic care for the prisoner, not only during imprisonment, but especially after release. He then chaired the panel discussion, whose guests included: **PhDr. Gabriela Slováková, PhD.**, Director of the Probation and Mediation Service of the Czech Republic; **Mgr. Mária Marcinová**, Director of the Department of Child Protection and Social Curatorship at the COLSAF; **Mgr. Krysztof Jasiński, PhD.**, rehabilitation pedagogue and former children's home educator from Poland, who also worked for more than twelve years as a probation officer; **JUDr. Daniel Petričko, PhD.**, Director General of the Section of Restorative and Alternative Justice at the Ministry of Justice of the Slovak Republic; and finally, **Capt. JUDr. Jakub Ľorko, PhD.**, Project Manager of *Chance for Return 2*.

The panel discussion addressed several key topics reflecting the current state and challenges of penitentiary and post-penitentiary care in Slovakia and the V4 countries. Three main thematic areas emerged: the interconnection of penitentiary and post-penitentiary services, the effectiveness of sanctions, and proposals for necessary future changes. Panellists from diverse professional backgrounds shared experiences with continuous care, the role of probation and mediation services, social curatorship, and institutional partners, while also discussing the benefits and limits of alternative punishments. In conclusion, the panellists formulated specific recommendations for system improvement, as well as proposals for legislative and organisational measures that could help reduce recidivism and strengthen the integration of different sectors involved in the care of prisoners and released persons.

Panel participants emphasised the need for stronger connections between penitentiary and post-penitentiary care, highlighted the necessity of strengthening the institution of conditional release, and underlined the importance of systematic funding for NGOs, which can significantly contribute to resocialisation processes. The discussion provided space for exchanging professional opinions, analysing the current situation, and searching for solutions for further development in this field. The audience was also given the opportunity to ask questions at the end of the discussion.

The seminar confirmed the importance of *Chance for Return 2* as a tool for strengthening the system of resocialisation and reintegration of prisoners, emphasising the need for innovative approaches, systematic cooperation among judicial, social, and non-governmental institutions, and the sustainability of outputs in order to reduce recidivism and enhance social inclusion.

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2ND CZECHO-SLOVAK SYMPOSIUM ON THE CHALLENGES OF AI FOR ADMINISTRATIVE LAW: "THE ROBOT: A GOOD SERVANT, A LORD MALEVIL" (VEĽKÁ TŔŇA, TOKAJ REGION, 2–3 OCTOBER 2025)

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In recent years, the deployment of artificial intelligence (AI) has become a central topic of discussion among scholars of administrative law in Europe. In the scholarship of administrative law, a shift towards an automated (Engstron, 2024), or self-driven state (Butler, 2025) is being thematised. While some authors consider this tendency *a radical change in the DNA of public administration* (Demková, 2023), others are more restrained in their evaluation of current developments (Mir, 2024). Undeniably, this scholarly interest has been triggered by the fact that, in several jurisdictions, legislation has already paved the way for AI deployment in public administration. In Spain, the possibility of deploying AI by administrative authorities is provided by the very broadly formulated Art. 41 of Act No. 40/2015 (*Ley 40/2015, de 1 de octubre, de Régimen Jurídico del Sector Público*). In the Federal Republic of Germany, the deployment of AI in administrative decision-making is regulated by the Federal Administrative Procedure Act (*Verwaltungsverfahrensgesetz*), the German Fiscal Code (*Abgabeordnung*), and the Social Code Book X (*Sozialgesetzbuch X*). In several other jurisdictions, the deployment of AI has been enabled by law in specific proceedings. This is currently the case, for example, in Estonia and Latvia, where AI deployment has been enabled by the legislation governing tax proceedings. Also, the legislation governing tax proceedings in the Czech Republic allows the use of AI in the

processing of personal data. The fact is, however, that the reflection of AI deployment has not been limited to national legislation. On 5 September 2024, the first-ever international legally binding treaty in this field was adopted - the Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law.

These developments have not only attracted the attention of scholars abroad, but also that of Czech and Slovak administrative law scholars. To reflect these developments, the first Czecho-Slovak symposium on challenges of AI for administrative law was organised by the Department of Administrative Law at the Law Faculty, Charles University in Prague, in March 2025. The readers of this review had already had the chance to read the report on this symposium in issue 1/2025 (Serhiichuk, 2025).[1] The academicians from the Department of Constitutional and Administrative Law at the Law Faculty, University of Košice, decided to continue this endeavour and organised the second Czecho-Slovak symposium on the challenges of AI for administrative law on 2 – 3 October 2025. The 2nd symposium was organised under the umbrella of the project awarded to Košice scholars by the Scientific Grant Agency of the Slovak Ministry of Education. It took place in the very picturesque Tokaj Region. The 2nd Czecho-Slovak symposium on challenges of AI for administrative law was organised under the subtitle "The Robot: A Good Servant but a Bad Master".[2]

The symposium was divided into four panels. The first of them was chaired by Professor Radomír Jakab (*University of Košice*) and opened with a presentation by the authors of this report (together with Lucie Vonásková, *Charles University*). The presentation addressed the newly adopted Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law, and its implications for administrative law. The speakers highlighted that the European Union signed this Framework Convention on behalf of its member states and that it will, consequently, also be binding in the future for the Czech and Slovak Republics. Further, the speakers also pointed out that the Framework Convention contains a binding obligation to "*enable, as appropriate, the establishment of controlled environments for developing, experimenting and testing artificial intelligence systems under the supervision of its competent authorities*" (Article 13). In the following presentation, Lukáš Jančát (*University of Košice*) outlined the dynamic developments in national legislation, adopted very recently to allow AI deployment in administrative proceedings in Europe. His presentation was further elaborated by Eliška Klimentová, Vladimír Sharp and Jan Nešpor (*Charles University*), who presented a rather critical outline of the newly proposed Article 15a of the Czech Code of Administrative Procedure. They argued that while specific foreign models inspired this proposal, its wording could create myriad practical problems. In this respect, the presenters argued that in the future, another wording of the provision must be prepared. The last speaker in this panel was Associate Professor Zuzana Hamuľáková (*Comenius University*), who thematised the draft of the new Slovak Act on AI.

The second panel of the symposium was chaired by Professor Jakub Handrlica (*Charles University*) and opened with a presentation by Professor Radomír Jakab (*University of Košice*), on transparency in AI deployment in public administration. In his speech, Prof. Jakab also addressed the very sensitive issue of AI deployment in administrative discretion. In the following presentation, Professor Marianna Novotná and

[1] The written and more expanded versions of the presentations held at this symposium will be published in Acta Universitatis Carolinae Iuridica (Charles University Law Review) 1/2026.
[2] „Robot: Dobrý sluha, zlý pán."

Zuzana Adamová (*University of Trnava*) addressed potential liability issues arising from AI deployment in public administration. Further, Rastislav Král (*University of Košice*) discussed AI deployment in chatbots and the potential to eliminate disputable decisions in public administration.

The third panel was chaired by Associate Professor Tibor Seman (*University of Košice*). This panel was opened by a very inspiring presentation by Associate Professor Peter Molitoris (*University of Košice*), who discussed the potential of AI for alternative dispute resolution in public administration. The next speaker was Associate Professor Olga Pouperová (*University of Olomouc*), who discussed the potential of AI deployment in legal analysis. Lastly, Diana Repiščáková (*University of Košice*) gave a presentation on the potential use of AI to combat illegal online content. The auditorium appreciated the transdisciplinary nature of her approach to this topical issue.

The very last panel of the symposium was chaired by Associate Professor Peter Molitoris (*University of Košice*). A presentation was given by Associate Professor Tibor Seman (*University of Košice*). In his presentation, he addressed the issue of risks arising from the prospective deployment of AI in selected administrative proceedings. Further, Miroslava Franc Kupcová (*University of Košice*) addressed another issue, potentially arising from future AI deployment—the possibility of nullity of an administrative act issued by AI. She also presented several potential approaches to this problem. Lastly, Tomáš Šefčík (*University of Košice*) addressed the very topical issue of information protection in the AI deployment in public administration.

In the very east of the former Czecho-Slovakia, the 2nd Czecho-Slovak symposium on the challenges of AI for administrative law brought together academicians from almost all law faculties of the former state. The event clearly demonstrated that despite the dissolution of the common state, the scholars still share common interests and are eager to discuss together. The symposium clearly showed that the deployment of AI represents a fertile ground for scholarly discussions in the field of administrative law. For readers interested in these issues, the research team led by Professor Radomír Jakab will prepare a proceedings volume of written contributions to be published by *ŠafárikPress* in 2026. Also, some of the written contributions will appear in English in a special issue of *Studia iuridica cassoviensia*, 3/2025 devoted to the law of new technologies.

On behalf of the participants from *Charles University,* we would like to thank the research team led by Professor Radomír Jakab for organising this enjoyable event in the inspiring atmosphere of the Tokaj Region.

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TECHNOLOGY, AI AND SUSTAINABILITY IN LABOUR LAW (PRAGUE, 11 SEPTEMBER 2025)

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On September 11, 2025, the Faculty of Law at Charles University in Prague hosted a scientific conference entitled "Technology, AI, and Sustainability in Labour Law." The event was organised by the Department of Labour Law and Social Security Law as part of the deliverables of the Specific University Research project no. 260748, titled "Challenges of Private Law: Sustainability and Technology." The main objective of the conference was to offer young legal researchers a platform to present the findings of their work on this highly relevant topic. The conference centred on examining the effects of technological progress and the growing integration of artificial intelligence on the evolution of labour law, with particular attention to the accompanying legal, ethical, and social challenges. The discussions primarily focused on emerging digital tools and automation, which introduce not only new opportunities but also significant legal and ethical issues, ranging from employee monitoring and algorithmic decision-making to questions of liability and transparency.

At the opening of the conference, JUDr. Lucie Matějka Řehořová, Ph.D., welcomed the participants and noted that the conference was held as an output of the project. She expressed her pleasure at the attendance, emphasising that there are few platforms dedicated to addressing current issues in labour law. She then handed over the opening remarks to Prof. JUDr. Jan Pichrt, Ph.D., who officially opened the conference. In his opening speech, Professor Pichrt highlighted that we are entering the era of artificial intelligence, describing it as a unique generational experience. He pointed out that the group most affected by this technological shift will be young people, for whom AI will have the most significant impact. He characterised artificial intelligence as a major challenge for labour law while also emphasising that the technology remains prone to errors. Therefore, he stressed the necessity of thoroughly analysing its effects on labour law relations.

The first session was opened by JUDr. Jáchym Stolička from the Faculty of Law at Charles University, who presented his paper titled *"AI Literacy – A Key Competency for the Employees of the Future."* In his presentation, he argued that artificial intelligence is driving the transformation of traditional job roles while simultaneously creating new

positions related to its use. He emphasised that the ability to work effectively with AI, referred to as AI literacy, is becoming an increasingly sought-after skill among employees. Furthermore, he focused on the impact of artificial intelligence as a factor influencing the competitiveness of not only employers in the labour market but also employees themselves. He also cautioned that AI is a phenomenon to which society will need to adapt and that it should be perceived not as a threat, but rather as a tool and a potential collaborator.

The second presenter was JUDr. Andrej Poruban, Ph.D., from Alexander Dubček University of Trenčín, who delivered a presentation titled "*Artificial Intelligence and the Prohibition of Discrimination in Labour Relations*." His contribution focused on the issue of the burden of proof in anti-discrimination disputes, particularly in relation to employees' limited access to information regarding the functioning of artificial intelligence systems. He emphasised that the lack of transparency in algorithmic systems can severely hinder an employee's ability to effectively defend themselves in cases of discrimination. Additionally, he addressed the question of the effectiveness of legal protection for employees, highlighting linguistic variations and differences in the translations of the directive and the wording of the equal treatment laws in the Czech Republic and Slovakia.

The third presenter was Mgr. Juraj Plaza from the Faculty of Law at Comenius University in Bratislava, who delivered a presentation titled "*AI, Occupational Health and Safety, and the Boundary of (Ir)responsibility for Workplace Injuries*." In his contribution, he addressed the question of whether communication leading to suicide could be classified as a workplace injury. He focused particularly on interactions with language models, specifically ChatGPT, Gemini, and Grok 4. In this context, he analysed the current labour law framework and highlighted forms of liability that might arise if such a situation were to occur within the work environment.

The fourth presenter was Mgr. Bc. Kateřina Randalová from the Faculty of Law at Charles University, who delivered a presentation titled "*Algorithmization and Artificial Intelligence in Agency Work: Challenges and Opportunities from the Perspective of Labour Law and Sustainability*." Her presentation focused on the increasing use of artificial intelligence in the recruitment and management of employees. She highlighted the potential risks associated with its implementation and the possible adverse effects on workers. Additionally, she analysed the currently applicable legal regulations at the European level governing labour law in the context of artificial intelligence usage.

The fifth presenter was JUDr. Kristýna Harník Menzelová from the Faculty of Law at Charles University, who presented on "*Algorithmic Management in the Context of Digital Platforms as a Means of Employee Supervision and Control*." Her presentation focused on the Platform Work Directive and its application within the framework of labour relations for individuals performing work via digital platforms. She particularly addressed the risks associated with the use of artificial intelligence in this type of work, considering both the perspective of employers and, importantly, the protection of employees' rights.

After the break, JUDr. Lucie Matějka Řehořová, Ph.D., opened the second panel of the conference. The first presenter in this panel was Mgr. Soňa Kašická from the Faculty of Law at Comenius University Bratislava, who delivered a presentation titled "*Protection of Employee Privacy in the Era of Digitalization*." Her contribution focused on analysing infringements of the right to privacy in the context of digitalisation and the development of artificial intelligence, with particular attention to the extensive collection and processing of employees' personal data in the course of their work through AI tools. The presentation examined and evaluated relevant legal mechanisms at the international, European, and national levels to assess the effectiveness of current instruments for protecting employees' rights in the workplace.

The second presenter was JUDr. Lucie Přenosilová from the Faculty of Law at Charles University, who presented on "*Reporting on Equal Pay, or Twice About the Same*." Her presentation focused on the analysis of reporting requirements imposed on employers by the Corporate Sustainability Reporting Directive (CSRD) and the Pay Transparency Directive. The analysis centred on the content of individual reports, with particular attention to identifying potential overlaps and duplications of certain data. In conclusion, the presentation proposed potential solutions to address the identified shortcomings and overlapping obligations.

The third presenter was Mgr. Bc. Veronika Rožnovská from the Faculty of Law at Charles University, who delivered a presentation titled "*Implementation of the Platform Work Directive and Possible Forms of Cooperation with Platform Workers in the Czech Republic*." Her presentation focused on the analysis of the Platform Work Directive and the possibilities of its transposition into the legal framework of the Czech Republic. The author also highlighted the ambiguous legal status of individuals working through digital labour platforms within the context of Czech legislation, as well as potential risks arising from incorrect or incomplete implementation of the directive.

The fourth presenter was Mgr. Petr Pohl from the Faculty of Law at Charles University, who delivered a presentation titled "*Electronic Signatures and Delivery in Labour Law: Practical Challenges of Digitalization*." In his presentation, the author analysed the possibilities of using electronic signatures within labour law relationships, with particular focus on practical issues arising from application in practice, illustrated by relevant case law from courts in the Czech Republic. The presentation also included an analysis of the functioning and archiving of electronic mailboxes, concluding with several de lege ferenda proposals.

The final presenter was Mgr. Miroslav Nerad from the Faculty of Law at Charles University, who delivered a presentation titled "*The Electronic Signature as a Key to Modern Labour Law*." In his presentation, the author addressed the definition of the electronic signature and the possibilities of document delivery within labour law relationships. He analysed the relevant European legal framework, particularly the eIDAS Regulation, as well as related case law from Czech courts, focusing on its impact on practical application in the field of labour law.

At the conclusion of the discussion, Prof. JUDr. Jan Pichrt, Ph.D., and JUDr. Lucie Matějka Řehořová, Ph.D., expressed their gratitude to all participants for their valuable contributions and conveyed their hope for a renewed gathering at a future scientific conference. They emphasised that the topics of technology, artificial intelligence, and sustainability represent highly topical fields which, due to their growing significance, continue to require systematic and in-depth scholarly investigation.

The conference entitled *"Technology, AI, and Sustainability in Labour Law"*, organised by the Faculty of Law at Charles University in Prague, offered several valuable insights and analytical perspectives on the current challenges faced by labour law in the context of technological development. Contributions from young researchers emphasised that despite the growing importance of artificial intelligence and automation, employees continue to hold an irreplaceable position in labour law relations; at the same time, it is essential for them to learn to work with technologies and perceive them as key skills for the future. Furthermore, the assumptions and possibilities of applying AI and technologies were examined, along with the identification of potential legal and ethical risks arising from their use. The discussion highlighted the need to explore the effective coexistence of humans and technologies within evolving forms of work.

Of note is the fact that the topic was addressed exclusively from the perspective of labour law, a rare yet highly necessary approach, as this legal field is often overlooked

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in broader discussions about artificial intelligence. The conference thus made a significant contribution to the enrichment of academic discourse and opened space for further research in this dynamically evolving area.

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CONFERENCE ON THE CONTEMPORARY ISSUES OF INTERNATIONAL ENVIRONMENTAL LAW (BRATISLAVA, 30 MAY 2025)

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Under the auspices of the Department of International Law and International Relations of the Faculty of Law of Comenius University Bratislava, an international scientific conference on "*Contemporary Issues of International Environmental Law*" was held on 30 April 2025. The conference was held within the framework of VEGA project No. 1/0713/23 titled: *"International Legal Protection of Environmental Rights - Quo Vadis?"*. The conference opened with the current topic of environmental protection and focused on the latest challenges and solutions in this area not only from the perspective of public international law but also from the perspective of private international law. It was also

held as an online webcast, which ensured access not only for domestic participants but especially for foreign participants.

This conference report provides an overview of the individual papers presented and builds on the findings presented and discussed at the recent international scientific conference. The scientific part of the conference was divided into four panels, each of which was followed by a separate discussion. JUDr. Lukáš Mareček, PhD. opened the conference with an introductory speech on behalf of the organisers, in which he welcomed all participants, highlighted the main objectives of the conference, and provided an overview of the programme. In his address, he emphasised the growing importance of international environmental law in addressing ecological challenges, stressing its relevance to policy-making and global issues, highlighting the ongoing research of the VEGA project, which provided the foundation for the conference.

The first panel was opened by **Professor JUDr. Pavel Šturma, DrSc.**, from the Faculty of Law at Charles University, with his presentation titled *Transboundary Environmental Harm and State Responsibility: Contribution of the International Law Commission*. In his contribution, Professor Šturma revisited the work of the International Law Commission (ILC) on the issue of transboundary environmental damage, particularly from the perspective of State responsibility. While the ILC has dealt with this topic in several areas, most notably in relation to preventive obligations, where a breach constitutes an internationally wrongful act, the greatest expectations were associated with the topic of international liability for the injurious consequences of activities not prohibited by international law. As Professor Šturma noted, these expectations have only been partially met. The concept of "strict liability," in particular, was addressed only modestly in the final outcome of the ILC's work concluded in 2006. He emphasised that it remains secondary whether a State responds to environmental harm through responsibility for unlawful acts, liability for lawful but harmful consequences, or alternative mechanisms - what matters most is the effectiveness of these responses in addressing the actual damage.

The second speaker, **Professor JUDr. Juraj Jankuv, PhD.**, from the Institute of International and European Law at the Faculty of Law of Pavol Jozef Šafárik University, followed with a presentation titled *Historical Development and Current Form of the Principles of International Environmental Law*. In his talk, Professor Jankuv focused on the foundational principles that shape international environmental law, which he described as general rules of conduct embedded in various sources of international law. These principles, although often formulated in non-binding soft law instruments, also appear in international treaties and in customary law. Professor Jankuv emphasised the essential role these principles play in navigating the otherwise vast and fragmented field of international environmental law, serving as interpretative tools and normative anchors. His presentation provided a comprehensive overview of their historical development, current status, and offered insights into how these principles may evolve in the future, highlighting their growing relevance in addressing global environmental challenges.

Another participant in the first panel was **Professor Viktor Bazov, Doctor of Legal Sciences**, from the Department of International Law and Jurisprudence at the National University of Life and Environmental Sciences of Ukraine. His presentation, titled *Compensation for Environmental Damage and Loss in the Activities of the Special Tribunal for the Crime of Aggression Against Ukraine*, focused on the legal foundations and future mechanisms for holding states accountable for environmental harm resulting from armed conflict. Professor Bazov discussed the general principle of international responsibility for wrongful acts, including environmental violations, and emphasised its relevance in the context of Russia's aggression against Ukraine. He introduced the

recently signed Lviv Declaration as a key step toward establishing a Special Tribunal, which is expected to be located in The Hague and to complement the International Criminal Court. A central element of his contribution was the issue of compensation for environmental damage, with particular attention to the procedural and legal instruments being developed by a Ukrainian working group tasked with addressing these complex claims.

The final speaker in the first panel was **Dr. Olexandr Bazov, Doctor of Juridical Science and judge** from Ukraine, with a presentation titled *Current Issues of Prosecution of International Crimes Against the Environment in the Context of Armed Aggression Against Ukraine*. In his contribution, Dr. Bazov addressed the challenges related to the prosecution of environmental war crimes, particularly in light of Ukraine's recent ratification of the Rome Statute of the International Criminal Court. He outlined the ICC's jurisdiction over attacks causing serious environmental damage, and noted that Ukraine, as of January 2025, has officially become a State Party to the Statute with a temporary reservation under Article 124 of the Rome Statute. Dr. Bazov emphasised that, given this transitional legal framework, the primary responsibility for prosecuting such crimes currently lies with Ukraine's national courts. This, he argued, necessitates the development of consistent judicial practice to ensure effective enforcement and accountability for environmental harm during armed conflict.

The first panel concluded with a discussion involving the speakers, offering an opportunity for participants to reflect on the presented contributions and share their perspectives.

After a short break, the conference continued with the second panel. The panel opened with a presentation by **Professor Mgr. Yuliia Vashchenko, PhD.**, from the Faculty of Law at Comenius University Bratislava, Department of Administrative Law and Environmental Law, titled *The Right to Clean Energy: The International Law Dimensions*. In her contribution, Professor Vashchenko explored the growing significance of international legal frameworks in the field of energy, particularly in connection with environmental protection and climate change. While the regulation of energy resources has traditionally been the domain of national states, she emphasised that international law has increasingly played a role, especially considering Sustainable Development Goal 7, which promotes access to affordable, reliable, and sustainable energy for all by 2030. Highlighting the 2023 UN General Assembly resolution that established the International Day of Clean Energy, Professor Vashchenko argued for the recognition of access to modern energy services as a human right. Her presentation examined how energy law and environmental law intersect and stressed the need for integrated legal mechanisms at all levels to effectively protect and promote the right to clean energy.

The second presentation was delivered by **Professor Olena Hulak, Doctor of Law**, from the National University of Life and Environmental Sciences of Ukraine. Her talk, titled *International Legal Aspects of Forest Protection from Fires on Radiation-Hazardous Lands under Martial Law in Ukraine*, addressed the escalating risks and legal challenges related to forest fires in radioactively contaminated areas, particularly in the Chernobyl Exclusion Zone. Professor Hulak highlighted how recent large-scale fires, especially those in 2015 and 2020, have had severe environmental consequences, including the transboundary spread of radioactive aerosols. These risks have been significantly exacerbated by the ongoing war and occupation of certain forested territories. She emphasised the lack of adequate regulatory frameworks, resources, and inter-agency coordination for effective fire prevention and response under current martial law conditions. Her presentation called for the development of international legal mechanisms and cooperative approaches to strengthen fire protection in such high-risk, radiation-affected zones.

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The next presentation was given by **Associate Professor JUDr. Katarína Chovancová, PhD., LL.M., Univ. Prof., MCIArb**, Senior Research Fellow at the Institute of State and Law of the Slovak Academy of Sciences. Her talk, titled *Striking the Right Balance between Property Rights and the Public Interest in the Preservation of Natural Resources in International Law*, examined the often-tense relationship between private property rights, especially those of foreign investors, and the public interest in environmental protection and the sustainable use of natural resources. Drawing on prominent investor-state dispute settlement cases such as *Eco Oro v. Colombia* and *Union Fenosa v. Egypt*, she highlighted the recurring legal and ethical dilemma between commercial interests and ecological preservation. Professor Chovancová critically reviewed prevailing assumptions about private ownership, proposing instead models of semi-public and collective ownership as more balanced approaches under international law. Her presentation emphasised the principle of permanent sovereignty over natural resources as a guiding norm and concluded with a cautious reminder that achieving a just equilibrium between property rights and environmental responsibility remains a long-term challenge.

The presentation that followed was given by **Associate Professor JUDr. PhDr. Lilla Garayová, PhD. LL.M.** from Pan-European University, titled *The Child's Right to a Healthy Environment in International Law - From Soft Law to Justiciable Rights*, addressed the urgent issue of environmental degradation as a human rights concern, particularly in relation to children. The speaker underscored that the environmental crisis is no longer a future concern but a present-day emergency that disproportionately endangers children's health, development, and overall well-being. Despite the gravity of these impacts, the presentation emphasised that international law has yet to clearly recognise the justiciable right of the child to a healthy environment. Article 24 of the Convention on the Rights of the Child was critically examined for its limited framing of environmental risks strictly through the perspective of health, which leaves interpretative, normative, and enforcement gaps. The speaker argued that this right must be understood not only as implicit within the broader framework of the child's best interests, but also as foundational to the full realisation of other rights under the Convention on the Rights of the Child. The talk concluded by calling for a shift to ensure that the environmental rights of children are protected not only in principle but in practice.

The next presentation given by **Associate Professor Antonina Sabovchyk, PhD.** From the State Higher Educational Institution "Uzhhorod National University", Department of Civil Law and Procedure, was titled *International legal standards for conducting Environmental Impact Assessment in a transboundary context: problems of implementation in national legal system* addressed Ukraine's efforts to align its environmental legislation with EU standards following the Association Agreement. The speaker focused on the 2017 Law *On Environmental Impact Assessment*, which significantly reformed national procedures. Emphasis was placed on the importance of ecological assessments in preventing environmental harm and the challenges of implementing international EIA standards.

The next speaker was **JUDr. Ľudmila Elbert, PhD., univ.doc.** from Pavol Jozef Šafárik University, Faculty of Law Institute of International law and European law, who gave the presentation titled *Principle of intergenerational equity: the bodyguard to the environment.* She aimed to assess how regional and national court decisions, through the application of the principle of intergenerational equity, can help bridge the gap in the implementation and enforcement of international environmental obligations, particularly by invoking legal standards from other areas of international law, most notably human rights law. The speaker examined how the principle of intergenerational equity can serve

as a legal tool to address the weak enforcement of environmental obligations under international law. She argued that while states often commit to environmental goals, effective implementation and enforcement remain limited. As environmental degradation increasingly impacts human rights, courts have begun applying intergenerational equity which has its roots in the ideas of Rawls and Kant and is reaffirmed in key international instruments, as a means of reinforcing state accountability. The speaker also highlighted the recent case law, including the European Court of Human Rights judgment in *Verein KlimaSeniorinnen Schweiz v. Switzerland* and the South Korean Constitutional Court decision in *D.H. Kim et al v Korea*, both of which invoked the principle in assessing the adequacy of climate policies.

The third panel opened with a presentation by **Dr. Vikram Singh** from the Department of Law at Shivalik University in India, titled *Reconciling Trade and Ecology: India's Legal and Policy Dilemmas in the Era of Global Environmental Governance*. In his contribution, Dr. Singh examined the complex legal and policy challenges faced by India as it attempts to balance its economic development with growing environmental obligations under international frameworks such as the Paris Agreement and the UN Sustainable Development Goals. He discussed the tension between global trade rules, particularly those under the WTO and domestic environmental regulations, as well as the potential implications of new international instruments such as the EU's Carbon Border Adjustment Mechanism. Drawing on landmark cases such as *Vellore Citizens' Welfare Forum v. Union of India* and national policies such as the National Green Tribunal Act, Dr. Singh illustrated India's evolving approach to environmental governance. He advocated for a form of "green diplomacy" that includes technology transfer, fair climate financing, and more equitable global trade reforms to ensure sustainability is pursued without undermining economic equity.

The second speaker of the third panel was **Karim Yemelianenko, PhD.** from the Research Service of the Parliament of Ukraine, who presented a paper titled *International and National Mechanisms for Judicial Protection of the Right of Communities to Environmental Safety*. In his presentation, Dr. Yemelianenko explored both domestic and international legal frameworks that safeguard the community's right to a safe environment. He focused on the constitutional guarantees provided in Ukrainian law, as well as relevant provisions of international legislation, including mechanisms for seeking compensation through judicial protection. Drawing on the perspectives of Ukrainian and foreign scholars, he assessed the role of local and national authorities in ensuring environmental safety and highlighted best practices from other Eastern European countries. A key aspect of his contribution was the argument that communities, as legal entities, should be recognised as having standing to pursue claims before national and international courts, not merely through representatives but directly on behalf of their residents when environmental rights are threatened or violated.

The third presentation was delivered by the Associate Professor at the Department of Environmental Law at Yaroslav Mudryi National Law University, **Dr. Olha Donets, PhD.** Her paper, titled *Legal Regulation of Humanitarian Demining as a Tool for Environmental Security: The Case of Ukraine in the Context of International Law*, addressed the environmental consequences of landmine contamination caused by Russia's full-scale military aggression against Ukraine. Dr. Donets emphasised that humanitarian demining is not only a matter of physical safety but also a critical step toward ecological restoration, sustainable land use, and socio-economic recovery. She analysed the integration of international legal standards, such as the Ottawa Convention, the Convention on Cluster Munitions, and the UN's PERAC principles into Ukrainian legislation and practice. Drawing on official reports, legal norms, and procurement data

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from the Prozorro system, her presentation identified key regulatory gaps and proposed targeted legal reforms to enhance environmentally sound demining strategies within Ukraine's broader post-conflict recovery efforts.

The next presentation was delivered by **Mgr. Ivan Gabani, PhD.** from the Department of International Law at the Faculty of Law, Uzhhorod National University, and bore the title *Ukraine's Cooperation with International Organizations in the Development of Environmental Law* while focusing on the environmental and socio-economic impact of pollution spreading beyond Ukraine's borders. The speaker analysed the causes of transboundary pollution and assessed Ukraine's compliance with EU and UN environmental obligations. Particular attention was given to legal liability, gaps in national legislation, and environmental risks stemming from inadequate regulation of industrial pollution and biodiversity protection. The presentation highlighted the role of international cooperation programmes such as Interreg NEXT Romania-Ukraine and stressed the need for legislative harmonisation, improved monitoring systems, and institutional strengthening to mitigate cross-border threats and enhance Ukraine's integration into global environmental governance.

The next contribution titled *The Role of Financial Institutions in Advancing International Environmental Protection Standards* featured three speakers **Associate Professor Liudmyla Huliaieva, PhD.** and **Associate Professor Ianina Tkachenko, PhD.**, both from the Department of Finance, Academy of Labour, Social Relations and Tourism in Kyiv, Ukraine as well as **Associate Professor Andrii Oliinyk, PhD.** from the Department of International Management, State University of Trade and Economics in Kyiv, Ukraine. They focused on the intersection of global financial governance and international environmental law. The presentation examined how public and private financial institutions, such as multilateral development banks, central banks, and private lenders, contribute to implementing environmental obligations through instruments such as the Equator Principles, the UNEP Finance Initiative, the OECD Guidelines, and the EU Taxonomy. The speakers addressed the growing influence of financial actors in operationalising environmental due diligence and climate-related disclosures, while also highlighting the soft-law nature of many relevant frameworks and the evolving legal status of financial institutions under international law. The panel concluded that finance now plays a normative role in global environmental governance and called for stronger legal frameworks to ensure enforceability and cross-border cooperation in support of sustainability and climate goals.

The following couple of speakers, **Associate Professor Serhii Kidalov, PhD.**, who is an independent researcher and advocate **Associate Professor Nataliia Kidalova, PhD.**, had their presentation of the topic of *Legal Regulation of the Activities of International Organizations in the Field of Environmental Security* within which they focused on the evolving role of international organisations in addressing global environmental challenges such as climate change, pollution, and biodiversity loss. The speakers provided a detailed analysis of the legal frameworks guiding the work of key actors including UNEP, WHO, and the EU, highlighting binding instruments such as the Paris Agreement, the Rio Declaration, and the Basel Convention. The presentation emphasised the institutional mandates, cooperation mechanisms, and enforcement tools used by these organisations, while also addressing persistent challenges related to state sovereignty and fragmented implementation.

After the last and short coffee break, the last block of the conference consisted also of contributions by the researchers of the project under the auspices of which the conference was held, as well as contributions by other members of the department who participated in the conference.

The panel started with the presentation by **Associate Professor dr hab. Tomasz Srogosz** from the University of the National Education Commission in Krakow topically titled *Nature as a Subject of Public International Law*. The speaker explored the theoretical shift from anthropocentric legal norms to posthuman and new materialist approaches within environmental law. He argued that international environmental law remains largely human-centered and called for rethinking Nature as a subject of law through the emerging Rights of Nature framework. The presentation examined the influence of indigenous legal traditions, particularly in countries such as Ecuador, New Zealand, and Bolivia, on the growing recognition of Rights of Nature in national systems, while also noting the anthropocentric limitations of these approaches. It introduced posthumanist feminism as a conceptual path beyond these limits, emphasising a nature-culture continuum and interdependence between humans and the environment.

The second presentation of this panel was delivered by **Mgr. Denisa Hlušičková**, from the Faculty of Law, Palacký University in Olomouc, Department of International and European Law. Her talk, titled *The Energy Charter Treaty and International Environmental Law: Systemic Integration as a Tool for Treaty Reconciliation* addressed the normative tensions between international investment law and environmental commitments, particularly in light of climate change. The speaker focused on the Energy Charter Treaty, which has faced criticism for its perceived conflict with the Paris Agreement and other environmental obligations. The presentation explored the principle of systemic integration under Article 31(3)(c) of the Vienna Convention on the Law of Treaties as a doctrinal tool for harmonising these competing regimes. Through an analysis of arbitral jurisprudence, including cases such as *RWE v. Netherlands*, *Rockhopper v. Italy*, and *Greentech v. Italy*, the speaker argued that integrating environmental norms into investment treaty interpretation is both legally feasible and necessary to align international investment law with evolving climate obligations.

The next presentation titled *Human Rights in the Blue Lagoon: Environmental Rights Protection in Pacific Island State Frameworks* was delivered by **Mgr. Laura Gazdagová** from Pavol Jozef Šafárik University, Faculty of Law, Institute of International Law and European Law and examined the growing intersection of human rights and environmental protection in the legal systems of Pacific Island nations. Faced with acute environmental threats such as sea-level rise and biodiversity loss, these states are increasingly framing environmental rights within national and regional legal frameworks. The speaker provided a comparative analysis of how these rights align with international human rights standards, highlighting both legal gaps and promising developments. Selected case studies illustrated evolving approaches to safeguarding ecosystems while protecting the dignity and well-being of affected populations.

In her presentation, **doc. Mgr. Liudmyla Golovko, PhD.**, from the Department of International Law and International Relations of the Faculty of Law, Comenius University Bratislava, addressed the urgent need for stronger international legal protection of the environment during armed conflicts. She emphasised that military operations not only cause human casualties and infrastructure destruction, but also result in severe environmental damage, including pollution, destruction of natural reserves, and technogenic disasters, such as the destruction of the Kakhovka Dam, which she cited as the largest European disaster since Chernobyl. Golovko argued for the adoption of a new international treaty, possibly a Fifth Geneva Convention, that would focus on protecting environmental human rights, defining key legal terms, and applying to both international and non-international conflicts. She also highlighted the absence of standardised international methodologies for assessing environmental damage caused by military actions. Drawing on Ukraine's experience in developing a national methodology for

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environmental damage assessment following Russian aggression, she suggested this could serve as a model for future international standards, helping to improve the implementation of existing norms and ensure greater legal clarity and accountability.

The presentation that followed was given by **JUDr. Lukáš Mareček, PhD.**, from the Department of International Law and International Relations of the Faculty of Law, Comenius University Bratislava, in which the speaker addressed the issue of international criminal responsibility for large-scale environmental destruction. His contribution examined the limitations of current international environmental law, emphasising that while states are obligated not to cause significant environmental harm, there remains a lack of effective enforcement mechanisms. He pointed out that environmental destruction is currently recognised as a war crime only in the context of international armed conflict, and in other cases, the environment is merely a secondary legal interest, protected indirectly. Mareček also highlighted the inability of international law to impose criminal liability on legal entities, despite the major role of corporate actors in environmental damage. He criticised the reliance on national implementation of treaty-based obligations, warning that this can lead to impunity. Finally, he discussed growing calls for the recognition of ecocide as a new international crime to strengthen environmental protection.

The next speaker was **Mgr. Ondrej Ružička, PhD.**, from the Department of International Law and International Relations of the Faculty of Law, Comenius University Bratislava, who focused on how non-European institutions address environmental rights through their case law. He analysed decisions from the Inter-American Court of Human Rights, the African Court on Human and Peoples' Rights, and the International Tribunal for the Law of the Sea. His paper showed how these bodies increasingly treat environmental protection as part of individual human rights. Ružička argued that this trend reflects a growing universal recognition of environmental rights as a stable component of international law, transcending regional boundaries and reinforcing a global human-centred approach to environmental protection.

Mgr. Petra Paľuchová from the Department of International Law and International Relations of the Faculty of Law, Comenius University Bratislava, delivered the presentation titled *The Right to Food in the Context of Climate Change.* The speaker addressed the profound impact of climate change on the enjoyment of the right to adequate food, a right recognised in Article 11 of the International Covenant on Economic, Social, and Cultural Rights. The speaker analysed how environmental degradation, driven by extreme weather, droughts, and soil loss, threatens food security and undermines human rights. The presentation critically assessed current international legal frameworks, highlighting significant enforcement gaps that hinder effective protection. Her talk was concluded by emphasising the urgent need to strengthen the integration of environmental and human rights law in the era of accelerating climate change.

JUDr. Lea Mezeiová, PhD. from the Department of International Law and International Relations of the Faculty of Law, Comenius University Bratislava and **Mgr. Regina Šťastová, PhD.** from the Institute of State and Law of the Slovak Academy of Sciences focused their contribution on the complex but still developing topic of corporate environmental responsibility with a special emphasis on the responsibility arising from the activities of entities in supply chains, especially if these activities are directly linked to third countries. The analysis relied on a key legislative instrument, namely the recently adopted 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. This Directive explicitly sets out the obligation for European companies to carry out due diligence to ensure the protection of

human rights and the environment, with their contribution primarily focusing on environmental issues. The adoption of the Directive would thus provide a specific mechanism for European companies to be held accountable for their supply chain, even if the supplying company in question is located outside of the European Union. Until the adoption of the Directive, European companies were subject only to fragmented legislation, and it was not possible, in many cases, to define their liability in cases where it was directly proven that their business activities and those of their business partners in a third country were causing environmental damage.

Following each panel, the conference sparked an engaging discussion among participants, reflecting on the relevance and complexity of the presented topics. As a result of the fruitful discussion, it is not possible to summarise every single question, answer, or opinion that was raised. Among all the discussions, one of the most interesting discussions took place after the presentation by Associate Professor dr hab. Tomasz Srogosz. The idea of reconceptualising nature as a subject of law captured the attention of participants and generated significant debate. As a controversial and evolving area of international environmental law, it specifically raised practical and theoretical questions among participants, including how such a shift would interact with existing legal systems.

After all the presentations, in the Closing remarks part of the conference, JUDr. Lukáš Mareček, PhD., in addition to thanking individual participants for their participation, summarised the conclusions that emerged not only from the presented papers, but especially from the joint discussions that did not only take place formally during the individual sessions, but also included informal debates during the breaks. Therefore, the conference was able to contribute to the identification of gaps and directions in which the issue should be addressed in the future due to the feedback that confirmed the complex nature of the topic. The event brought together academic researchers from several countries, whose diverse disciplinary backgrounds and legal perspectives enriched the discussion and contributed to a deeper understanding of the subject matter. This diversity of participants also enabled the identification of areas where current legal frameworks fall short and where innovative approaches may be required. As a result, the conference can be described as beneficial not only for the solution of the ongoing project in question, but also for the individual participants, who took away new knowledge as well as questions arising from the presented topics in the field of international environmental issues.

In conclusion, it can thus be assessed that the common goal of the event was not only to provoke a broader discussion among academics but also to find common solutions to the problem of the protection of environmental law in different areas of international law.

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