

REMOTE CRIMINAL TRIAL – FAIR TRIAL?

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Abstract. One of the most important procedural rights of the individual, without which it would be impossible to defend all other potentially violated individual rights, including those potentially violated during a pandemic, is the constitutional right to a court enshrined in Article 6 of the European Convention on Human Rights and Article 47 of the European Union Charter of Fundamental Rights. The health crisis has plagued many judicial systems in the absence of specific regulations that would provide a clear answer to the question of how to pursue justice in court, and especially to what extent it is possible to use the form of remote – working. This article, analyzes the question of whether the entire criminal trial can take place remotely and, if yes, whether remote criminal trial meets the requirements of due process: both substantive and procedural. The article analyzes the basic requirements of a fair trial, such as the right to be present and be heard, the right to defense; the right to trial within a reasonable time; the right to a public trial. However, even after all issues have been resolved, a more in-depth discussion on the compliance of entire remote criminal proceedings with the principles of a fair trial is needed. The practical analysis of the scientific problem is based mainly on the legal regulation of ECHR and relevant case law of the ECtHR, as well as the experience of two well-known to the authors jurisdictions - Lithuania and Ukraine - in the context of the pandemic.

Keywords: fair trial, remote criminal trial, e-evidence, publicity and openness of remote court proceedings.

Introduction

One of the most important procedural rights of the individual, without which it would be impossible to defend all other potentially violated individual rights, including those potentially violated during a pandemic, is the constitutional right to a court enshrined in Article 6 of the ECHR and Article 47 of the Charter of Fundamental Rights of European Union. In the procedural law, as in the case law of the ECtHR, this right is considered no absolute but its restriction is possible only in exceptional cases (*Deweert v. Belgium*, § 49; *Kart v. Turkey* [GC], § 67, *Peretyaka and Sheremetyev v. Ukraine*, § 33; *Volovik v. Ukraine*, § 55; *Melynyk v. Ukraine*, § 22). It is indicated that, fundamental legal principles such as freedom of expression, access to public information, freedom of the media and access to justice should be unrestricted during the Covid-19 crisis (ELI principles for the Covid-19 crisis, 2020). Because it is the courts that will and will continue to be the main counterweight to the executive, assessing the legality of often ad hoc regulations and the necessity and proportionality of restricting individual rights (Gajdošová, 2020), as well as the proportionality and "new" liability of special requirements for pandemic control cases, such as misinformation about the virus and its management tools, and so on (Sun & Zilli, 2020; Sun & Zilli, 2020a, Ažubalytė, 2020). It should be noted that during the health crisis in many European countries, including Lithuania and Ukraine, a situation was encountered in which the legislature did not address the issues of legal regulation or parliamentary control over the active functioning of the executive for some time (Gajdošová,

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2020; Teisė ir Covid 19 pandemija, 2022). The health crisis has plagued many judicial systems in the absence of specific regulations that would provide a clear answer to the question of how to pursue justice in court, and especially to what extent it is possible to use the form of teleworking (remote – working). Under the general anti-pandemic regulations, courts in some countries have been closed or closed down, or at least their oral proceedings have been restricted (Coronavirus Pandemic in the EU, 2020). Thus, depending on the legal tradition and the peculiarities of regulation, the judicial systems themselves had to take either soft law regulation (at the level of recommendations, guidelines, etc. provided by the judiciary) or ad hoc decisions in a specific case.

This article analyzes the scientific question of whether the entire criminal trial can take place remotely and, if yes, whether remote criminal trial meets the requirements of due process: both substantive and procedural. The article analyzes most important issues of these requirements: does such a process guarantee the right of defendant to a fair trial (procedural aspect of a fair trial): the right to be present and to be heard, the right to a defense; the right to a trial of a reasonable time; the right to a public trial, and whether such a process allows to examine the evidence and to determine whether the accused committed the act.

The practical analysis of the scientific problem is based mainly on the case law of the ECtHR, as well as the experience of two well-known to the authors jurisdictions - Lithuania and Ukraine - in the context of the pandemic. Due to the scope of the article, the regulation of the United Nation and other international organizations and relevant case law are not discussed here.

In Lithuania, on the basis of the Government Resolution on the Announcement of Quarantine (Resolution of the Government of the Republic of Lithuania on Quarantine, 2020), the recommendations of the Council of Judges were adopted, according to which the presidents of courts established the rules of organization of the work of a particular court - both in written and oral proceedings (Recommendations of the Council of Judges regarding the prevention of Covid-19 in the courts, 2020). Thus, in Lithuania, oral hearings were canceled in virtually all cases, including criminal cases, for the entire period of the first quarantine, except for cases that had to be dealt with immediately (from March to June 2020). This practice of Lithuania is not fundamentally different from the courts of other European countries, where oral proceedings were not conducted, with the exception of (Coronavirus Pandemic in the EU — Fundamental Rights Implications, 2020). In Ukraine, the hearings were not canceled, however, amendments to the Code of the Criminal Procedure (hereinafter referred to as the Ukrainian CCP) established the right of a court to restrict the access of persons who are not participants in the trial to the court session during quarantine, if participation in the court session would endanger the life or health of a person (Part 2 Article 27 of the Ukrainian CCP).

However, later in Lithuania some criminal cases were initiated remotely. It should be noted that the Lithuanian legislature did not intervene in procedural law in the context of the pandemic. Only in June 1 of 2021 Article 8² of the CCP and by-laws, which established the procedure for remote hearing of a criminal case in court, came into force (Law on the addition of Article 8-2 to the Code of Criminal Procedure of the Republic of Lithuania, 2021; Description of the procedure for the use of video conferencing technologies in the examination of criminal cases, 2021; Description of the procedure for the use of information and electronic communication technologies during pre-trial investigation, 2021, Recommendations of the Council of Judges regarding remote court hearings, 2021). Regarding Ukraine, the possibility of remote consideration of cases in courts was provided even before the pandemic. It has to be noted, that the law is silent regarding full or partial consideration. The practice is carried out by means of partial remote consideration (response of the Supreme Court (of Ukraine)). In fact, only individual procedural actions are possible. However, with the start of the pandemic the amendments were made to the Ukrainian CCP which extended the possibility of remote judicial proceedings also to judicial control activities at the stage of pre-trial investigation (paragraph 20-5 of the Transitional Provisions).

The idea that technology can increase the efficiency and transparency of the judicial process and facilitate access to justice for individuals, is not new. Discussions on e-Justice as well. “The term ‘e-justice’ covers a broad range of initiatives, including the use of email, the filing of online claims, the provision of online information (including case law), the use of video-hearings and conferencing, the online tracking of registration and case progress, and the capacity of judges or other decision-makers to access information electronically” (Handbook on European law relating to access to justice, 2016). However, this article raises a scientific issue as to whether remote hearing of whole criminal case can be considered a due (fair) criminal proceeding.

The article also builds on previous research by the authors of this article (Ažubalytė, 2022), as well as other research. To the extent necessary for this study, research published by international organizations, including non-governmental organizations, on the challenges of Covid-19 to judicial systems is being used (Coronavirus Pandemic in the EU — Fundamental Rights Implications, 2020; The Functioning of Courts in the Aftermath of the Covid-19 Pandemic, 2020; Beyond the Emergency of the Covid-19 pandemic, 2020; Safeguarding the Right to a Fair Trial during to Corona Virus Pandemic, 2020; Guidelines on videoconferencing in judicial proceedings, 2021). The article is also based on empirical data obtained from the Lithuanian Courts Activity Report (2020), as well as a survey of Lithuanian judges conducted by the National Courts Administration in 2021 (Survey of Lithuanian judges regarding the organization of remote hearings, 2021). Empirical data regarding the situation in Ukraine were obtained from the Unified State Register of Court Decisions, as well as in the procedure for contacting state bodies with requests for access to public information.

This study will address issues related to a fair trial, but due to the scope of the article and the more general issues raised, it is not possible to examine in depth the specifics of the rights of vulnerable participants, victims of deprivation of liberty (detainees) if their case is heard remotely (Byrom, 2020, Not remotely fair?, 2021; McBride, 2020). The technical, as well as the material, aspects of remote criminal proceedings - although undoubtedly creating the technical preconditions for organizing and conducting remote proceedings - will also not be analyzed in this article.

1. Remote Criminal Hearing: an Exception or a Rule?

During the Covid-19 outbreak, legislators and courts reconciled the right to a fair trial with the protection of public health and the absolute right to life (Gori & Pahladsingh, 2021, p. 567). Therefore, according to some European countries, relatively similar measures were taken in spring 2020. Written proceedings continued (providing opportunities for judges and other court staff to work remotely, as well as using other technologies), and oral proceedings were generally adjourned except in cases of urgency. Other legal services were provided mainly remotely (Digital tools in Member States, 2020).

However, after retrospective assessment of the experience of Lithuania, Ukraine and other European countries, it is considered that the temporary postponement of the proceedings did not significantly restrict the right of persons to court, taking into account the restrictions of the quarantine (or similar legal order) announced in the states. As already mentioned, the right to judicial protection is not absolute. It is therefore unlikely that measures taken in many States which have delayed proceedings would lead to a violation of Article 6 § 1 of the Convention if it were found that the State had taken steps to ensure that the proceedings were conducted without undue delay, but objective, external reasons would still lead to prolongation of the process (Khlebik v. Ukraine, 2017, Agga v. Greece (No. 1), 2000; McBride, 2020). However, violations of Articles 2 and 3 of the Convention, as well as Article 5, could lead to the postponement of urgent cases, such as those where important personal rights need to be protected, such as the rights of victims of domestic violence, detainees etc. (McBride, 2020).

However, this situation becomes a reason to further discuss both the development of written criminal proceedings, at least in the higher courts (because in the case of written proceedings there were essentially no legal dilemmas for the courts) and the remote court proceedings for the whole criminal case. In addition to the adjournment of oral proceedings and "live" urgent cases, courts of some states have in practice (sometimes in the absence of clear legal regulation) made extensive use of technologies that allow part or all of the proceedings to be conducted remotely (The EU Justice scoreboard, 2021, p. 36). The legitimate question therefore arises as to whether such remote criminal proceedings comply with the principles of due process.

Prior to the global pandemic, there were various possibilities in court proceedings, including criminal proceedings, to enforce certain elements of the trial using technology (Videoconference and remote interpreting in criminal proceedings, 2011). Here, EU law provides a number of e-Justice tools in the context of civil proceedings, EU Member States make active use of them. In the criminal procedure context, meanwhile, there are fewer e-justice tools, though the use of video conferencing for hearings is promoted by several EU instruments (Council Framework Decision 2009/829/JHA, 2009; Council Directive 2012/29/EU; 2012; Convention on Mutual Assistance in Criminal Matters, 2000; Council Directive 2004/80/EC, 2004; Council Framework Decision 2009/829/JHA, 2009).

“Under CoE law, the ECHR establishes no specific requirements in relation to e-Justice, but implementing e-Justice initiatives is subject to the rules on access to a court and the right to a fair trial under Article 6 of the ECHR” (Handbook on European law relating to access to justice, 2016, p. 177-178). “As regards the use of a video link in the proceedings, the Court has held that this form of participation in proceedings is not, as such, incompatible with the notion of a fair and public hearing. However, recourse to this measure in any given case must serve a legitimate aim and the arrangements for the giving of evidence must be compatible with the requirements of respect for due process, as laid down in Article 6. In particular, it must be ensured that the applicant is able to follow the proceedings and to be heard without technical impediments, and that effective and confidential communication with a lawyer is provided for” (Marcello Viola v. Italy, §§ 63-67; Ascitutto v. Italy, §§ 62-73; Sakhnovskiy v. Russia [GC], § 98). At EU level, it is also stated that e - Justice measures, including audiovisual means of distance transmission, must be subject to due process requirements in accordance with Article 6 of the Convention. But the CJEU has confirmed that procedures accessible solely by “electronic means” may make it impossible for some people to exercise their rights (CJEU, Joined cases, C-317/08, C-318/08, C-319/08 and C-320/08, 2010, § 58).

Prior to the pandemic, the Code of Criminal Procedure of the Republic of Lithuania (hereinafter referred to as the Lithuanian CCP) provided quite wide possibilities for conducting pre-trial investigation actions, as well as some actions in court using audio and video remote transmission means. In order to ensure the safety of witnesses and victims, as well as opportunities to testify to persons who, for important reasons, are unable to attend the court, the interrogation of witnesses (victims), experts and, in some cases, suspects and accused persons during the pre-trial investigation (Articles 127, 179, 183, 186, 188, 189 of the CCP etc.) and in court proceedings (Articles 246; 279; 282; 285 of the CCP etc.) may be carried out remotely. However, until the new regulation entered into force on 1 June 2021 (Law on the addition of Article 8-2 to the Code of Criminal Procedure of the Republic of Lithuania, 2021), the CCP *expressis verbis* did not provide for the remote or partial remote criminal trial.

The situation in Ukraine is quite similar. Thus, since 2012 a separate article of the CPC has been in force, devoted to conducting some procedural actions by videoconference during court proceedings (Article 336 of the CCP of Ukraine). According to the law, court proceedings can be conducted by videoconference during a broadcast from another room in the case of: 1) the impossibility of direct participation of a participant in criminal proceedings in court proceedings due to health reasons or other valid reasons; 2) the need to ensure the safety of persons; 3) interrogation of a minor or juvenile witness, victim; 4) the need to take such measures to ensure the efficiency of court proceedings; 5) the existence of other grounds determined by the court sufficient. That is, as we can see, the list of cases is not exhaustive. At the same time, the law stipulates that “the technical means and technologies used in remote court proceedings must ensure the proper quality of image and sound, compliance with the principle of publicity and openness of court proceedings, as well as information security”. Participants in criminal proceedings must be able to hear and see the progress of the proceedings, ask questions and receive answers, exercise other procedural rights granted to them and perform procedural duties under the CCP. According to the criminal procedure legislation of Ukraine, remote court proceedings may be conducted in courts of first, appellate and cassation instances during court proceedings on any issues, the consideration of which is within the competence of the court. Thus, according to the response of the Supreme Court of Ukraine, in 2020, at the court sessions of the Cassation Court, 1,323 videoconferences were held with courtrooms, places of preliminary detention and places of execution of sentences. In the first half of 2021, this figure was 786 videoconferences. However, there was not a single case when the criminal proceedings in the the Supreme Court of Ukraine from beginning to end took place without a single court hearing in the usual non-distant format (the Supreme Court’s response to Ivan Titko’s request of September 21, 2021).

Subsequently, in connection with the COVID-19 pandemic, the possibility of remote court proceedings was extended to court proceedings at the pre-trial stage (consideration by the investigating judge of permits to restrict human rights and freedoms at the pre-trial stage). At the same time, it should be noted that this norm was introduced with the note “temporarily, for the period of quarantine established by the Cabinet of Ministers of Ukraine to prevent the spread of coronavirus disease (COVID-19)” (paragraphs 20-5 of the Transitional Provisions of the CPC).

Various advantages and disadvantages of remote trial have been discussed in the scientific literature, also. However, the idea that a full criminal trial could only be conducted remotely was not seriously discussed before the pandemic. The exceptional measures adopted in March 2020 in the Europe to govern the health crisis introduced for the first time the idea of a possible full legal procedure being carried out through videoconferencing instead of by the parties being physically present in court. “Such a new approach raises a number of questions, regarding its compatibility with key fundamental rights - the right to be heard in court, the right of defence, the right to effective judicial remedies and the right to a fair trial” (Gori & Pahladsingh, 2021, p. 563).

As far as the authors have been able to establish, the predominant view of international institutions, as well as scholars, is that remote hearing (trial) of all or part of a criminal case should be an exceptional form of oral proceedings that may result from extraordinary circumstances (Beyond the Emergency of the Covid-19 pandemic: Lessons for Defence Rights in Europe, 2020, p. 7) such as a serious health crisis. This position is determined by the analysis of the principles of criminal procedure. Article 6, read as a whole, guarantees the right of an accused to participate effectively in a criminal trial (*Murtazaliyeva v. Russia* [GC], § 91). In general, this includes, inter alia, not only his or her right to be present, but also to hear and follow the proceedings. The presumption of innocence, the right to a defense, including the right to a lawyer, adversarial proceedings, direct examination of evidence and other principles of the criminal procedure suggest that the accused's right to participate in remote criminal proceedings cannot yet be guaranteed as effectively as the right to appear in person (Beyond the Emergency of the Covid-19 pandemic: Lessons for Defence Rights in Europe, 2020; Safeguarding the Right to a Fair Trial during to Corona Virus Pandemic: remote criminal justice proceedings, 2020). The remote involvement of vulnerable defendants in court, such as those in need of an interpreter, people with mental disabilities etc (Tatsiy & Tyshchenko & Titko, 2020, p. 2737-2742) would be even more worrying (Safeguarding the Right to a Fair Trial during to Corona Virus Pandemic: remote criminal justice proceedings, 2020, p. 8).

Thus, the recommendations of international organizations state, in particular, that in the context of “decision to hold a remote hearing, states should ensure that the legal framework provides the courts with sufficient grounds to decide whether a remote hearing can or should be held in a particular case; based on the legal framework provided by the state, the court should determine whether holding a remote hearing is reasonable and appropriate under the specific circumstances of the case and reason its decision”. It’s important, that the “parties should have the opportunity to consult with the court: i) on whether a remote hearing can or should be held in the case, ii) on the specific arrangements for such a remote hearing, iii) to address any security concerns of the parties, and iv) to request the court to hold a hearing in person, stating their reasons”. And finally, the “decision should be open to possible review before a competent authority in accordance with national law” (Guidelines on videoconferencing in judicial proceedings, 2021, § 1-4). It is also emphasized that when a court decides on a remote hearing of criminal case “if legislation does not require the free and informed consent of the defendant, the court’s decision for his or her participation in the remote hearing should serve a legitimate aim. The legitimate aim of remote hearing in criminal proceedings should be based on such values as the protection of public order, public health, the prevention of offences, and the protection of the right to life, liberty, and security of witnesses and victims of crimes. Compliance with the right to a trial within a reasonable time can be considered by the court in particular at stages in the proceedings subsequent to the first instance” (Guidelines on videoconferencing in judicial proceedings, 2021, § 21-22).

The Lithuanian legislature also opted for the discussed concept of remote oral criminal proceedings. Article 8² of the CCP provides that “in exceptional cases where it is not possible to ensure the hearing of cases in accordance with the ordinary procedure established by the CCP, the hearing of cases and the participation of participants, witnesses, experts, interpreters and other persons in court may be ensured through the use of information and electronic communication technologies (via video conferencing) where it is reasonably believed that the case will be dealt with more expeditiously, will not interfere with a thorough and objective examination of all the circumstances of the case and will guarantee the rights of the participants” (Article 8² (2) of the CCP). The fact that this form of oral proceedings is of an exceptional nature is evident from the regulation: the consent of not only the accused but also the other participants in the proceedings interested in the outcome of the proceedings is required (Article 8² (2) of the CCP). Such a right, unlike persons involved in civil and administrative proceedings, is reserved exclusively for participants in criminal proceedings. Lithuanian regulation in this sense is stricter than international standards, according to which only the position of an informed accused is usually assessed - in this

case due to the waiver of the right to physically participate in court (Beyond the Emergency of the Covid-19 pandemic: Lessons for Defence Rights in Europe, 2020, p. 20).

According to Ukrainian law, the court decides on remote court proceedings on its own initiative or at the request of a party or other participants in criminal proceedings. If the parties of the criminal proceedings (including the victim) object to the conduct of remote court proceedings, the court may decide on its implementation only by a reasoned decision. The court has no right to decide on the conduct of remote court proceedings in which the accused is outside the court, if he/she objects (Part 2 of Article 336 of the CCP of Ukraine). In addition, the issue of choosing a measure of restraint in the form of detention, as well as the issue of extending the term of such measure of restraint may not be considered in the regime of remote trial if the accused is outside the courtroom and objects to remote trial (paragraphs 20-5 of Transitional Provisions). In Ukraine, despite the existence of a certain legal framework for remote litigation, regulations were (and remain) imperfect in some areas. At the same time, legislative shortcomings are sometimes correlated with judicial practice. For example, if for civil, administrative, commercial litigation in Ukraine today there is a possibility of remote trial, where participants can be in any room outside the court, use their own technical means and carry out remotely all procedural communication, then certain restrictions remain for criminal proceedings. In particular, the CCP of Ukraine provides for the possibility of a participant in a remote trial in another room outside the court, but the secretary or court administrator is obliged to hand such a person a memo about his/her procedural rights, check his/her identity documents, and be with him/her until the end of the hearing (Part 4 of Article 336 of the CCP of Ukraine). At the same time, modern judicial practice is increasingly using by analogy in criminal proceedings procedures provided for other types of proceedings (civil, administrative, commercial) (Mihajlenko, 2021).

So far, there are no clear criteria that should lead to a decision to go to court remotely. However, the criteria for urgent cases can be used as an analogy. They were used during the health crisis (pandemic) to decide which cases still needed to be heard in live, although oral proceedings in other criminal cases were usually postponed. Different countries have chosen different ways of identifying urgent cases in the event of an emergency or other important reason: have either enacted the new legislation, f. e. Italy, Portugal (Coronavirus Pandemic in the EU — Fundamental Rights Implications, 2020, p. 28), or left the matter to the courts to decide on a case-by-case basis, f. e. Albania (The Functioning of Courts in the Covid-19 Pandemic, 2020, p. 17). A court decision made in accordance with the guidelines provided by the judiciary in a specific case (thus forming certain criteria case-by-case) is recognized as a way of identifying urgent cases that integrates both of the above methods. Such an approach to the selection of urgent cases is considered to be an appropriate compromise (The Functioning of Courts in the Covid-19 Pandemic, 2020, p. 17).

In Lithuania, as already mentioned, no laws on the organization of court proceedings in the context of Covid - 19 have been adopted, except for the Recommendations of the Council of Judges. However, the courts, having assessed the importance and complexity of the case or the procedural issue to be resolved, the negative consequences of its adjournment and other important circumstances, decided on an ad hoc basis on the necessity of an oral hearing with the parties. Prior to the entry into force of Article 8² of the CCP, the courts also ruled on an ad hoc basis on remote criminal proceedings. 3,865 remote court hearings were organized in Lithuanian courts in 2020 (2,612 in 2019 and 1,500 in 2018) (Lithuanian courts. Results of the activity, 2020, p. 87).

It should be noted that this granting of discretion to the courts during the pandemic was generally considered appropriate by international organizations, including non-governmental organizations. It was pointed out that, given the independence of the judiciary and the importance of its discretion, as well as the fact that the situation is constantly evolving, it is the practice of dealing with a case promptly that it allows for an adequate response. It is, of course, emphasized that the criteria for an immediate hearing should be as clear, transparent, fair and non-discriminatory as possible (The Functioning of Courts in the Aftermath of the Covid-19 Pandemic, 2020, p. 8-9; The Functioning of Courts in the Covid-19 Pandemic, 2020, p. 15-19). The importance of high-quality and clear regulation of litigation, as well as the remote conduct of criminal proceedings during a pandemic, is emphasized in the context of both legitimate expectations and legitimacy (Parodi & Locurto & Bardelle, 2020; Guidelines on videoconferencing in judicial proceedings, 2021, p. 2). It should be noted that “the failure to lay down rules of criminal procedure in legislation may breach equality of arms, since their purpose is to protect the defendant against any abuse of authority and it is therefore the defence which is the most likely to suffer from omissions and lack of clarity in such rules” (Coëme and Others v. Belgium, § 102).

When considering which criteria should be used to decide which cases are urgent or, in other words, how to prioritize cases, courts are invited to take into account aspects such as the vulnerability of the participants in the proceedings (eg children, persons with disabilities, the issue of the rights of victims of domestic violence, etc.); when there is an urgent need to prevent a danger to a person; in the case of a person whose rights have been restricted (in particular the right to liberty), where the courts are considering the legality of new rules on the control of the virus, the proportionality of liability for non-compliance with restrictions and others (The Functioning of Courts in the Aftermath of the Covid-19 Pandemic, 2020, p. 9; The Functioning of Courts in the Covid-19 Pandemic, 2020, p. 15-19). It is assumed that even in the situation under analysis similar circumstances could be considered in deciding whether a case should be dealt with remotely. They would allow the court to decide that there is a legitimate aim of remote hearing and the remote criminal procedure per se will be fair.

2. Remote Criminal Trial: the Requirements of Due Process

Before examining the compatibility of remote criminal proceedings with the requirements of due process, it should be noted that it is necessary to assess more than just the legal effectiveness of such proceedings. It is organizational and technical barriers that are one of the biggest practical problems in organizing remote trial.

Adequate technical and organizational provision of the proceedings is a prerequisite for the effective participation of a person in legal proceedings: here, technical barriers may lead to the recognition that a person has not been able to participate effectively in the proceedings (Sakhnovskiy v. Russia, 2010, § 98). The literature also points to lower involvement of litigants - although this is not in itself a violation of human rights, it can lead to less trust in the judiciary and the justice system (Fielding & Braun & Hieke, 2020). As can be seen from surveys of judges in Lithuania and other countries, as well as scientific sources, the main problems with remote hearing are technical problems - slow internet connection, poor audio and video, as well as difficulties related to individuals' technological literacy and access to relevant technology (Survey of Lithuanian judges regarding the organization of remote hearings, 2021; Beyond the Emergency of the Covid-19 pandemic: Lessons for Defence Rights in Europe, 2020, p. 17; Guidelines on videoconferencing in judicial proceedings, 2021, p. 5-7).

However, the key question in this article is whether remote trial meets the requirements of due process: both substantive and procedural. This issue is further addressed in two sections. First, does such a process guarantee the right of defendant to a fair trial (procedural aspect of a fair trial): the right to be present and to be heard, the right to a defense; the right to a trial of a reasonable time; the right to a public trial. Secondly, whether such a process allows to examine the evidence and to determine whether the accused committed the act.

The impact of remote litigation on the implementation of the principles of criminal proceedings is assessed differently, as evidenced by the Ukrainian law and law enforcement practice. At one time, a draft was submitted to the Parliament of Ukraine to amend the CCP of Ukraine to abolish videoconferencing (February 15, 2013), the need for which the authors justified the fact that the videoconferencing regime in Ukraine contradicts the general principles of criminal proceedings, such as equality before the law and the court, secrecy of communication, ensuring the right to defense, adversarial parties and freedom to present their evidence to the court and to prove their persuasiveness before the court, direct examination of testimony, things and documents, openness of court proceedings, etc. (Article 7 CCP of Ukraine) (Explanatory note to the draft, 2013). The opposite position of the legislator is demonstrated by the current bill amending the Code of the Criminal Procedure of Ukraine to improve citizens' access to justice (2021), the authors of which recognize the use of participants' own technical means for remote communication that „cannot negatively affect the observance of due process of law and the outcome of a court hearing in the context of protecting the rights and interests of participants in criminal proceedings“ (Explanatory note to the draft, 2021). Support for the idea reflected in the latest draft law is also expressed by domestic judicial authorities, whose practice considers it appropriate to use remote proceedings in criminal proceedings in the manner prescribed for other types of proceedings (administrative, civil and commercial) and designed to prevent the spread of COVID-19 (Procedure for working with technical means of videoconferencing during a court hearing, 2020; Decision of the Kremenchuk District Court of Poltava Region, 2021; Judgment of the Supreme Anti-Corruption Court, 2021, Decision of the Supreme Anti-Corruption Court, 2021). The court of cassation in Ukraine also recognizes the compliance of the videoconferencing regime with human rights standards and the admissibility of testimony obtained as a result of remote interrogation of a witness, noting the following: “in itself, the conduct of procedural actions by videoconference during court proceedings does not contradict the

requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms, the norms of national legislation (Article 336 of the CCP of Ukraine), and is an acceptable form of participation in court proceedings on violation of the principles of his justice and publicity” (Resolution of the Criminal Court of Cassation of the Supreme Court, 2020).

2.1. *The right to be present and to be heard during the trial, the right to a trial within a reasonable time*

The question of the appropriateness of using videoconferencing for trials is unequivocally answered when viewed in the context of such procedural human rights as the right to be present and heard at trial and the right to a reasonable time. Ensuring the exercise of these rights is perhaps the main argument "for" the application of the procedure of remote litigation. With regard to the right to be present and to be heard during the trial, then, provided the proper quality of communication, this right is exercised without any procedural and legal restrictions and information losses. In this context, the ECHR was absolutely clear in the case: “As regards the use of the video link, the Court reiterates that this form of participation in proceedings is not as such incompatible with the notion of a fair and public hearing, but it must be ensured that the applicant is able to follow the proceedings and to be heard without technical impediments” (Grigoryevskikh v. Russia, 2009, § 83).

The reason for the violation of reasonable time limits in many cases are the problems of territorial remoteness of individual participants in the proceedings, the involvement of lawyers in proceedings in other cities, problems related to transporting defendants from pre-trial detention to court, etc. All this is even more relevant in a pandemic: court participants may be in isolation, refuse to come to court for fear of infection, have problems using public transport without vaccination, etc. In fact, all these problems are solved by holding a remote court hearing using video communication, which in turn certainly increases the efficiency of the proceedings. At the same time, additional advantages of conducting a remote trial are the reduction of a number of risks, such as the risk of escape of the accused during transportation to court, the risk of infection of participants in the trial during a pandemic, etc.

2.2. *Ensuring the right to defense*

Ensuring the right to defense is an integral part of a fair trial. Violation of the right to defense leads to the annulment of court decisions at the national level and to the ECHR’s finding that the state violates fundamental human rights and freedoms. In the context of remote litigation, ensuring the right to defense is relevant primarily in its “technical” context – ensuring the possibility of confidential communication between the accused and their lawyer during the hearing in videoconference.

The right of the accused to the confidentiality of a conversation with a lawyer is part of the right to access legal aid (Beyond the Emergency of the Covid-19 Pandemic: Lessons for Defence Rights in Europe, 2020, p. 28) and is one of the basic requirements of a fair trial in a democratic society and follows from Article 6 § 3 (c) of the Convention. The ECHR in the case of *Marcello Viola v. Italy* indicated, that “specifically, an accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6 § 3 (c) of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness (*S. v. Switzerland*, 1991, § 48). The importance to the rights of the defence of ensuring confidentiality in meetings between the accused and his lawyers has been affirmed in various international instruments, including European instruments” (see *Brennan v. the United Kingdom*, §§ 38-40). However, restrictions may be imposed on an accused's access to his lawyer if good cause exists. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing (see *Öcalan v. Turkey [GC]*, § 133)“ (*Marcello Viola v. Italy*, 2006, § 61). The Strasbourg Court's admissibility of the application of the videoconference regime during the trial in the context of the right to a fair trial is linked to the possibility of effective exercise of the described powers (*Grigoryevskikh v. Russia*, 2009, § 83). However, if the accused and the defense counsel are physically located in different places, the question of the sufficient confidentiality of their conversation by video link is open (*Sakhnovskiy v. Russia*, 2010, § 104). The problematic nature of the implementation of this aspect of the right to protection is also recognized in scientific thought (*Shul'ga*, 2019, p.150; *Bezhanova*, 2021, p. 121-122; *Beyond the Emergency of the Covid-19 Pandemic: Lessons for Defence Rights in Europe*, p. 17), possible ways to overcome which it is proposed to consider, in particular,

ensuring a confidential conversation before the trial (Beyond the Emergency of the Covid-19 Pandemic: Lessons for Defence Rights in Europe, 2020, p. 31) or the use of platforms that allow individual participants in a video conference to communicate confidentially (Turner, 2021, p. 206). Communication between a party and their lawyer may be facilitated in various ways during remote hearings. It is necessary to identify software platforms for hearings that can provide appropriate mechanisms and functions to facilitate such private and privileged communication: 'Break-out rooms'; 'Private Chat' option; 'Leave a party alone'; use of other private channels. The court should allow participants to communicate via other applications, or phone, as long as there are no restrictions by law (for example, the participant might communicate with her attorney via WhatsApp, while the hearing itself is conducted on Zoom)" (Practical Guidelines for Remote Judging in Central and Eastern Europe, 2021, p. 50.). Fully agreeing with the possibility of using the second option as a remote form of exercising the right to confidential communication with counsel, it is difficult to accept the first of the proposed solutions, as information obtained during a dynamic trial may require a coordinated and prompt response from the defense (Sahana Manjesh & Madhurima Dhanuka, 2020, p. 19), which cannot be provided only by the use of procedural "blanks".

As the survey of Lithuanian judges has shown, the confidentiality of the conversations of a lawyer and his / her representative during a remote court hearing is ensured in several ways, most often - the court allows the lawyer and his / her representative to remove from video or conference equipment (50,8 percent respondents), as well as the lawyer and his / her representative are "transferred" to a virtual private room during the court hearing (18,5 percent respondents). It is considered that such a practice of ensuring confidential communication with the defense counsel in the context of remote litigation is quite acceptable.

At the same time, it is seen that the fundamental aspect is to provide such communication channels, the confidentiality of which is beyond doubt, especially in the case of private virtual rooms for communication within the general video conference. In this context, the position of the ECtHR in the case of *Sakhnovskiy v. Russia* is quite indicative, where the court noted: "Moreover, it is questionable whether communication by video link offered sufficient privacy. The Court notes that in the *Marcello Viola* case (*Marcello Viola v. Italy*, 2006, §§ 41, 75) the applicant was able to speak to his lawyer via a telephone line secured against any attempt at interception. In the case at hand the applicant had to use the video-conferencing system installed and operated by the State. The Court considers that the applicant might legitimately have felt ill at ease when he discussed his case with Ms A." (*Sakhnovskiy v. Russia*, 2010, § 104). Therefore, the main requirement for the state is to ensure secure, confidential communication.

Therefore, summing up this issue, we should note that ensuring the right to defense (in particular, in the context of confidential communication between the accused and the defense counsel) is currently technically possible. Therefore, there are no grounds for refusing to conduct remote litigation due to the restriction of the right to defense. Moreover, according to the legislation of a number of states (in particular, Lithuania and Ukraine), the position of the defense (the accused) is decisive in deciding on the possibility of holding a hearing remotely.

2.3. *Publicity and openness of court proceedings*

This principle embodies the mechanism of prevention of possible violations by the judiciary (Turner, 2021, p. 209), as well as the realization of the private interest of the participants (public hearing) and the public interest (public information request). On the one hand, the use of the remote mode of proceedings greatly facilitates publicity and openness by broadcasting the court proceedings in open Internet access, as remote audio activation of technical means of audio and video communication takes place within the framework of remote proceedings. On the other hand, there is a growing need for information security - protection against destruction, distortion, blocking of information, its unauthorized leakage or violation of the established procedure for its routing (Bezhanova, 2021, p.78). In addition to the technical aspect of information security emphasized in the definition, compliance with the procedural aspect is equally important. Its essence, according to the authors, is to prevent the dissemination of information, the dissemination of which may harm the interests of individual participants in court proceedings (ensuring the safety of persons) or justice in general (preventing witnesses from reading the testimony of others). In this perspective, we are talking about the traditional mechanism of limiting the principle of publicity, which during remote proceedings acquires a new content. For example, if the prevention of communication between already interrogated witnesses and witnesses whose interrogation is planned in the traditional format of court proceedings is provided by the separation of persons in space, the law does not provide mechanisms to

prevent access to the content of testimonies. Therefore, it seems quite expedient to introduce the possibility of suspending the broadcast of a particular procedural action or the entire court proceedings on the grounds provided for the traditional regime of its conduct.

The jurisprudence of the ECHR in this matter is very stable. In particular, the ECHR has repeatedly noted that the holding of court hearings in public constitutes a fundamental principle enshrined in Article 6 § 1. In the case of *Pichugin v. Russia* the ECHR noticed that “this public character of proceedings protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. The administration of justice, including trials, derives legitimacy from being conducted in public. By rendering the administration of justice transparent, publicity contributes to fulfilling the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention (*Gautrin and Others v. France*, 1998, § 42; *Pretto and Others v. Italy*, 1983, § 21). There is a high expectation of publicity in ordinary criminal proceedings, which may well concern dangerous individuals, notwithstanding the attendant security problems (*Campbell and Fell v. the United Kingdom*, 1984, § 87). The requirement to hold a public hearing is subject to exceptions. This is apparent from the text of Article 6 § 1 itself, which contains the provision that “the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, ... or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”. Thus, it may on occasion be necessary under Article 6 to limit the open and public nature of proceedings in order, for example, to protect the safety or privacy of witnesses, or to promote the free exchange of information and opinion in the pursuit of justice (*Martinie v. France [GC]*, 2006, § 40; *B. and P. v. the United Kingdom*, 2001, § 37)” (*Pichugin v. Russia*, 2012).

To address this issue, it is also advisable to use a 4-element test developed by the American precedent system (also known as the *Waller's test*): 1) the party initiating the closed proceedings must prove the existence of an overriding interest that may be harmed; 2) the amount of closure must correspond to the duration of protection of this interest; 3) the court should consider reasonable alternatives to closing the proceedings; 4) the court must present arguments that are convincing and sufficient to decide on a closed hearing (*Waller v. Georgia*, 1984).

2.4. *Judicial evidence*

The direct examination of evidence by the court (e.g. Article 242 of the CCP of Lithuania, Article 23 of the CCP of Ukraine) has traditionally been considered a kind of guarantee of correct assessment by the court of evidence provided by the parties, and thus a guarantee of a lawful and reasonable decision. At the same time, remote proceedings impose peculiarities on the implementation of this requirement, because all procedural actions in court in remote proceedings are mediated by the use of technical means of video communication. Nevertheless, the right of individuals, including an accused, to participate effectively in the process must be guaranteed (*Murtazaliyeva v. Russia [GC]*, § 91). According to the ECHR, this includes, inter alia, not only his or her right to be present, but also to hear and follow the proceedings. Such rights are implicit in the very notion of an adversarial procedure and can also be derived from the guarantees contained in sub-paragraphs (c), (d) and (e) of paragraph 3 of Article 6 (*Stanford v. the United Kingdom*, § 26). Accordingly, poor acoustics in the courtroom and hearing difficulties could give rise to an issue under Article 6 (§ 29) (*Guide on Article 6 of the European Convention on Human Rights*, 2021, § 154). Similarly, as regards the use of a video link in the proceedings, it must be ensured that the applicant is able to follow the proceedings and to be heard without technical impediments, and, as mentioned before, that effective and confidential communication with a lawyer is provided for (*Marcello Viola v. Italy*, §§ 63-67; *Asciutto v. Italy*, §§ 62-73; *Sakhnovskiy v. Russia [GC]*, § 98, as cited in *Guide on Article 6 of the European Convention on Human Rights*, 2021, § 155). In determining whether the proceedings as a whole were fair, it also must be examined whether the applicant was given an opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, as must the circumstances in which it was obtained and whether these circumstances cast doubt on its reliability or accuracy (*Guide on Article 6 of the European Convention on Human Rights*, 2021, § 217).

In terms of the court's perception of the results of remote evidence, the scientific opinion shows different opinions: some scholars see in some remote procedural actions objective limitation of the principle of immediacy of evidence (*Smirnov*, 2004, p. 85-87), while others emphasize consistency with the principle of immediacy of

evidence (Bezhanova, 2021, p. 60; Sklizkov, 2007, p. 21), because the interrogations themselves allow to hear (or see and hear) the testimony of the interrogated persons directly, ask them questions, hear the answers to them, clarify them, etc. (Kriminal'nij procesual'nij kodeks Ukraïni. Naukovo-praktichnij komentar, 2012, p. 88), and therefore the court, receiving testimony in videoconferencing, can take into account almost all the nuances of behavior that are manifested in personal communication (Shul'ga, 2019, p. 123).

According to the authors, the study of verbal information (testimony) during a remote trial is the least difficult. More complicated in this context is the study of physical evidence (Embley, 2020, p. 2) and documents (Legg & Song, 2021, p. 149; Bannon & Douglas, 2021, p. 1894-1895). In order to ensure the proper realization of the accused's right to effective defense, it is necessary to display the external parameters of the investigated materials as efficiently and fully as possible through video communication in order to at least partially compensate for their lack of direct perception by the criminal proceedings. The problem with documents today is partially solved due to the possibility of converting documents into digital form. For example, according to Lithuanian CCP, defence can have all the files from the case in e-form after the pre-trial investigation is completed (after scanning). And the courts "sharing" the documents, video files etc during the remote trial. In Ukraine, at the end of 2021, the system of "electronic" pre-trial investigation also began to work (it involves the conversion of all possible documentation into digital form). At the same time, the lack of a legally regulated procedure for remote submission of material objects (material evidence) both in Lithuania and in Ukraine actually limits this aspect of the procedural competence of the party to criminal proceedings. According to the authors, the proposal made in science to use scanners, printers or fax (Шульга, 2019, p. 78, 109), cannot be considered a panacea: if the documents can still be discussed in such a way as to ensure the translation of their information component, then in the context of physical evidence it is unlikely.

Today, when considering issues of evidentiary law in different states, one cannot help but recall electronic evidence (Skrypnyk & Titko, 2019, p. 8–23). “Electronic evidence can be defined as any data that can serve as evidence, regardless of whether it is stored on or generated, processed or transmitted by an electronic device. It includes both 'content data', such as e-mails, text messages or photographs, and 'non-content data', such as subscriber and traffic data (e.g. the routing or timing of a message). Such data are held by a variety of service providers, including providers of electronic communications and internet services. Whilst criminal investigations (both cross-border and domestic) tend to rely increasingly on this form of evidence (According to the Commission, e-evidence is relevant in around 85 % of all criminal investigations, and in almost two thirds (65 %) of the investigations where it is relevant, a request to service providers across borders (based in another jurisdiction) is needed” (Commission Impact Assessment, 2018, p. 13; Sirius EU Digital Evidence Situation Report, 2020). A look at the issue of electronic evidence through a remote trial requires the following. Remote litigation does not complicate the examination of electronic evidence. The fact is that electronic content that is available for visual perception (video, audio, photos, web content, etc.) can be explored by broadcasting from one computer to another in remote litigation. If it is a question of research of the content inaccessible for visual perception (characteristics of files, electronic operations, etc.), such data are fixed in the conclusions of computer examinations which can be investigated in the mode of research of documents. Remote litigation does not complicate the examination of electronic evidence. The fact is that electronic content that is available for visual perception (video, audio, photos, web content, etc.) can be explored by broadcasting from one computer to another in remote litigation. If it is a question of research of the content inaccessible for visual perception (characteristics of files, electronic operations, etc.), such data are fixed in the conclusions of computer examinations which can be investigated in the mode of research of documents.

More stricter approach is reflected in the work of other, usually common law systems', researchers, where the use of videoconferencing is recognized as one that may prevent the parties from effectively questioning witnesses and presenting evidence, thereby distorting the court's perception of the accused and witnesses: “The use of video may also hinder the parties from effectively confronting witnesses and presenting evidence, and it can prejudice the court's perceptions of the defendant and witnesses” (Turner, 2021, p. 199). In this context, the logic underlying the US precedent system is based on the position of the inadmissibility of, as a general rule, the interrogation of witnesses by videoconference in court (Maryland v. Craig, 1990, Coy v. Iowa, 1988): The Constitution provides for the interrogation of prosecution witnesses face-to-face in order to reduce the likelihood of giving false testimony (United States v. Bordeaux, 2005); it's always more difficult to tell a lie about a person “to his face” than “behind his back” (Coy v. Iowa, 1988).

Online technology can be used safely for hearings on questions of law, when the factual circumstances and evidence are not examined in court.

In spite of all that has been said that based on the legal framework provided by the state, decisions on entire or partial remote criminal trial must be taken by a court (ad hoc), taking into account all relevant circumstances: the length of the possible adjournment, the potential harm to the parties (especially the accused, including the deprived person), the substance of the case, its complexity, the need for translation, the technical and organizational capacity of the court and the parties to the proceedings, the provision of confidential communication between the defendant and his lawyer, and others. Similar criteria for ad hoc adjudication of remote trial proceedings are set out internationally (The Functioning of Courts in the Aftermath of the Covid-19 Pandemic, 2020, p. 13).

A similar regulation has been established in Lithuania. Article 8² of the CCP stipulates that a criminal case may be heard remotely only if it is reasonably believed that the case will be dealt with more expeditiously in that way, this will not preclude a thorough examination of all the circumstances of the case and will guarantee the rights of the parties (Article 8² (2) of the Lithuanian CCP). The legislator of Lithuania also stated that if it becomes clear during the remote trial that the direct participation of persons is necessary (in order to exercise their procedural rights or to thoroughly investigate the circumstances of the case), they are summoned to court (Article 8² (4) of the CCP). A court that decides to hear a case remotely is obliged to ensure reliable identification of the participants, objective presentation of evidence, access to procedural rights and publicity of the court proceedings (Article 8² (5) of the CCP). In a similar way, the issue is regulated by the legislator of Ukraine (Art. 336 of the CPC). As mentioned earlier, the Ukrainian legislature does not yet detail the possibility of conducting the entire criminal proceedings remotely. In practice, only some actions in the courts are carried out at a distance.

However, even after all these issues have been resolved, a more in-depth discussion on the compliance of entire remote criminal proceedings with the principles of a fair trial is needed.

Conclusions

Summarizing the above and returning to the main issue of this article - whether remote criminal trial meets the requirements of due process: both substantive and procedural, it can be stated that the answer to this question should be more affirmative.

The remote hearing of all or part of a criminal case should be an exceptional form of oral proceedings that may result from extraordinary circumstances. States should ensure that the legal framework provides the courts with sufficient grounds to decide whether a remote hearing can or should be held in a particular case and the court should determine whether holding a remote hearing is reasonable and appropriate under the specific circumstances of the case and reason its decision.

Decisions on entire or partial remote criminal trial must be taken by a court (ad hoc), taking into account all relevant circumstances: the length of the possible adjournment, the potential harm to the parties (especially the accused, including the deprived person), the substance of the case, its complexity, the need for translation, the technical and organizational capacity of the court and the parties to the proceedings, the provision of confidential communication between the defendant and his lawyer, and others.

The remote criminal trial procedure in general could ensure the basic requirements of a fair trial, such as the right to be present and be heard, the right to defense; the right to trial within a reasonable time; the right to a public trial, however, their implementation has peculiarities.

The right to present and be heard during a remote trial can be exercised without violating the accused's right to a fair trial, ensuring the appropriate quality of communication that allows to follow the process and be heard without technical impediments.

Ensuring the right to defense remotely is currently technically possible. The defendant's right to a defense lawyer during a remote trial can be exercised if his confidential communication with the defense lawyer is effectively

ensured: the state should provide such remote communication channels, the confidentiality of which is beyond doubt. Ensuring this right is strengthened by the fact that the position of the defense (the accused) usually is decisive in deciding on the possibility of holding a hearing remotely.

The proceedings as a whole is fair, when the defendant is given an opportunity to challenge the authenticity of the evidence and to oppose its use. A remote trial allows the court and the trial participants to effectively examine some types of evidence - testimony, electronic evidence. The absence of legal regulation of the remote presentation of material objects and certain objective difficulties in their investigation may lead to a violation of the accused's right to a fair trial.

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