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THE COORDINATION OF MAIN AND SECONDARY INSOLVENCY PROCEEDINGS IN EUROPEAN UNION INSOLVENCY LAW

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Abstract. This article focuses on the coordination of main and secondary insolvency proceedings in cross-border insolvency cases. The authors analyse how main and secondary insolvency proceedings should be coordinated in different aspects of these proceedings, namely: the opening of insolvency proceedings, the exercise of creditors' rights, and the treatment of the debtor's assets. The procedural peculiarities of the opening of secondary insolvency proceedings are also discussed. The article also examines how insolvency practitioners and courts in parallel cross-border insolvency proceedings should coordinate their actions to ensure proper response to the debtor's insolvency problems. Moreover, the authors assess the relevant case law of the Court of Justice of the European Union and whether is compatible with the goal of effective cross-border insolvency proceedings.

Keywords: cross-border insolvency, European Union law, main insolvency proceedings, secondary insolvency proceedings

Introduction

The cross-border insolvency proceedings established in Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (hereinafter – EIR) are based on the modified universalism approach, which includes main insolvency proceedings having a universal scope (Recital 22 of the EIR) and secondary insolvency proceedings which have a territorial scope (Recital 23 of the EIR). In private international law, modified universalism is regarded as the dominant approach to cross-border insolvency proceedings and is based on the centralisation of all insolvency procedures in one insolvency court (Mevorach, 2021, p. 286). However, there is the possibility for opening secondary insolvency proceedings which allow the decentralisation of insolvency proceedings in courts of different states. Though this decentralisation of insolvency procedures may impede the effectiveness of the administration of insolvency, there are various legal and economic factors which support the opening of secondary insolvency proceedings.

The differences in legal regulation, peculiarities of the domestic market, and business cultures lead to a significant diversity of approaches to insolvency proceedings in the member states of the European Union. These differences become sheer in cross-border insolvency proceedings in which the debtor may have assets and creditors in different jurisdictions. Thus, it is important to assess how main and secondary insolvency proceedings should be coordinated to provide the most effective solution to the debtor's insolvency problems despite defragmentation of regulation of insolvency proceedings in the member states.

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The aim of this article is to analyse coordination between main and secondary insolvency proceedings through the means of cooperation and how it should ensure effective solutions to debtors' insolvency problems. The article focuses on the hypothesis that secondary insolvency proceedings serve not only to protect the interests of local creditors where secondary insolvency proceedings should be established, but also may contribute to the effective administration of the debtor's assets and the rescue of business in case of the opening of restructuring proceedings. However, the opening of secondary insolvency proceedings and complex coordination between the main and secondary insolvency proceedings raise a number of questions. Unsurprisingly, some authors argue that secondary proceedings may unnecessarily complicate the administration, because they cause coordination and boundary problems, and also increase costs (INSOL Europe, 2012, p. 78).

This article deals mostly with the procedural aspects of cross-border insolvency proceedings and does not examine other questions related to them, such as undertaking to avoid the opening of secondary proceedings as established in Article 36 of the EIR, since this would require a separate study and thus would fall out of the scope of the chosen methodology of this article. The article consists of four parts: first, it deals with requirements for the coordinated approach towards debtors' insolvency problems; second, it analyses the process of opening secondary insolvency proceedings; third, it assesses some specific problems related to cooperation between main and secondary insolvency proceedings (exercise of creditors' rights and treatment of the debtor's assets); and, fourth, it deals with the problems related to the treatment of the debtor's assets.

1. A coordinated approach to the debtor's insolvency problems

The system of cross-border insolvency in the EU is based on the premise of effective main insolvency proceedings. The idea of one set of international insolvency proceedings of the debtor would correspond to the needs of the functioning of the domestic market and allow the defragmentation of insolvency proceedings to be avoided. However, the EIR also allows opening secondary insolvency proceedings in the member state of the establishment of the debtor. Thus, the EU insolvency regime "combines a universalist starting point with important territorial carve-outs and a possibility of opening secondary territorial proceedings" (Franken, 2014). Namely, the coordination of parallel main and secondary insolvency proceedings in different members states requires the search for the effective tools of coordination of different insolvency proceedings. However, the word "cooperation" is mentioned only four times in the EIR (Recital 3, 12, 20, 21), and the definition of this concept in cross-border insolvency proceedings remains unclear (Santen, 2015).

The first question related to coordination is the legal and economic needs of opening secondary insolvency proceedings. Recital 23 of the EIR establishes that the regulation permits the opening of secondary insolvency proceedings to *protect the diversity of interests*. The myriad of interests which can be protected by opening secondary insolvency proceedings is also reflected in Recital 40 of the EIR, pursuant to which secondary insolvency proceedings can serve different purposes, besides the protection of local interests. Thus, secondary insolvency proceedings relate not only to the protection of the local creditors of the member state in which they should be opened, but also other interests which are not specified in the EIR. The regulation does not specify which interests of the local creditors may be protected. This protection may be coupled with the need to ensure legal certainty and lawful expectations, which the local creditors are provided by the national law of the member state of establishment. The CJEU also rightly noted that the interests of the local creditors are "<…> the legitimate expectation of a creditor to be able to request the enforcement of a right in rem in respect of the assets of a debtor who is part of the establishment concerned, or to be granted other preferential rights, in accordance with the rules applicable in the Member State where that establishment is situated, since those rules were foreseeable for the creditor when the business relationship was established with the debtor" (*Burgo Group SpA v. Illochroma SA and Jérôme Theetten*, 2014, para. 37).

Protection of these creditors' interests aims to provide the necessary protection of specific rights which the creditors enjoy under the national law of the member state in which secondary insolvency proceedings should be opened and which would not be provided by the law of the member state in which main insolvency proceedings are opened. The interests of creditors in secondary insolvency proceedings relate to protection of the rights *in rem* to the assets which are located in the member state of establishment. This means that the insolvency law of such a member state is applicable to the debtor's assets located in this member state, and local creditors may maintain

all their rights and satisfy their claims. These creditors' interests in the proper exercise of the rights *in rem* are also reflected in the rules of the applicable law in cross-border cases, which establish the exception to the general rule of *lex concursus* since the opening of main insolvency proceedings shall not affect the exercise of rights *in rem* under *lex causae* (Article 8(1) of the EIR).

The CJEU also emphasized the protection of the preferential rights of the creditors. This is another reason for opening secondary insolvency proceedings, since the creditors which enjoy preferential treatment under the national law of the member state of establishment may lose their preferential rights under the law of the main insolvency proceedings. This preferential treatment is first important for the ranking of the creditors' claims and the order of their satisfaction. For instance, the creditor may enjoy preferential treatment by the law of the member state in which secondary insolvency proceedings should be opened and the claim would be satisfied in the first group of the creditors' ranking, but the law of the member state of the main insolvency proceedings may not recognize such creditors as preferential. In such a case, preferential creditors would seek the opening of secondary insolvency proceedings and satisfaction of the claims in the member state of establishment.

Furthermore, besides the protection of local creditors, secondary insolvency proceedings may serve other purposes. Some of the main justifications for opening secondary insolvency proceedings may be economic reasons, such as the need for the effective realization of the debtor's assets through administration. Though the EIR does not harmonize the material aspects of insolvency law, such as how the assets of the debtor should be treated, the treatment of the assets of the debtor is fundamental to effective insolvency proceedings. One the one hand, the EIR envisages the right to avoid the opening of secondary insolvency proceedings by giving the right to insolvency practitioners to provide a unilateral undertaking. According to Article 36(1) of the EIR, in order to avoid the opening of secondary insolvency proceedings, the insolvency practitioner in the main insolvency proceedings may give a unilateral undertaking in respect of the assets located in the member state in which secondary insolvency proceedings could be opened, such that when distributing those assets or the proceeds received as a result of their realisation, it will comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that member state. On the other hand, the opening of secondary insolvency proceedings also serves towards the effective protection of the assets of the debtor, especially considering the applicable national law and the nature of the assets.

Another question which arises when analysing the need for coordinated solutions to the debtor's insolvency problems is: Which national insolvency proceedings of the member states may fall under the scope of them? It is established that only the national insolvency proceedings which are listed in Annex A of the EIR fall under the scope of the EIR (Article 1(1) of the EIR). In contrast to the previous EU insolvency regulation, the EIR establishes that secondary proceedings can be any national insolvency proceeding; they are not limited to winding-up proceedings. This is a significant change regarding not only the goals of secondary insolvency proceedings, but also has implications on the domestic market, contributes to the rescue of business approach, and increases the chances of successful restructuring proceedings of viable businesses across the EU.

The problems of defragmentation of various types of main and secondary insolvency proceedings of the same debtor were analysed by the CJEU in the *Bank Handlowy* (2012) case, which revealed the shortcomings of the previous EU insolvency regulation proceedings and lack of coordinated solutions to the debtor's insolvency problems. The main question in this case was whether the opening of restructuring insolvency proceedings (*sauvegarde* proceedings in France, which aim to rescue a company) restricts the opening of liquidation (bankruptcy) proceedings of the establishment or of that company in another member state. In this case, the French court opened *sauvegarde* proceedings against the debtor on 1 October 2008. On 20 July 2009, the French court approved a rescue plan for the same debtor, under which debts would be paid off in instalments spread over 10 years and prohibiting the transfer of the undertaking situated in Poland and of certain defined assets belonging to the debtor. After opening insolvency proceedings in France, the Bank Handlowy (a creditor of the debtor) requested the court in Poland to open secondary insolvency proceedings against the debtor. The debtor contested that the opening of secondary proceedings in Poland should be dismissed, since such proceedings were contrary to the objectives and nature of the *sauvegarde* proceedings.

In this case, the CJEU found that "<…> the court having jurisdiction to open secondary proceedings, should consider the objectives of the main proceedings and to take account of the scheme of the Regulation, which, <…> aims to ensure efficient and effective cross-border insolvency proceedings through mandatory coordination of the main and secondary proceedings guaranteeing the priority of the main proceedings" (*Bank Handlowy*, 2012, para. 62). It also established that "it is for the court having jurisdiction to open secondary proceedings to have regard to the objectives of the main proceedings and to take account of the scheme of the Regulation, in keeping with the principle of sincere cooperation" (*Bank Handlowy*, 2012, para. 63). Thus, the CJEU relied heavily on the principle of cooperation between the courts dealing with the insolvency problems of the same debtor and did not in principle oppose the opening of secondary insolvency proceedings (liquidation proceedings), though the main insolvency proceedings aimed towards the opposite goals (restructuring proceedings).

The *Bank Handlowy* case reveals the problems of different approaches to insolvency problems and the effectiveness of these proceedings, which, to some extent, are addressed in the EIR. In a case such as *Bank Handlowy*, when the main insolvency proceedings are restructuring and the courts in the member state of establishment opens liquidation proceedings, this creates vivid divergences and a lack of coordinated solutions to the insolvency problems of the debtor. Particularly problematic in such cases is the proper implementation of a restructuring plan (a rescue plan) when it involves the realisation of the assets of the establishment and (or) changes in the business activities of the establishment. Such situations could significantly undermine the effectiveness of restructuring proceedings and should be avoided. However, in the absence of legal tools to deal with such situations under the previous version of the EIR, the CJEU emphasized the importance of sincere cooperation between the courts of the member states, which shall be based on the implementation of the insolvency regulation and sincere cooperation. The EIR indeed addresses some of the issues which were raised in the *Bank Handlowy* case. Since the EIR no longer couples secondary insolvency proceedings with winding-up, this means that main and secondary insolvency proceedings can in essence have the same character. This is particularly important in rescue (restructuring) proceedings aiming primarily to rescue viable business. Thus, part of the problem raised in the *Bank Handlowy* case has been partly solved in the EIR.

Furthermore, it may happen that the insolvency proceedings start at liquidation proceedings, but during the course of the proceedings, the assets appear, additional financing is provided, and other measures are taken to restore the viability of the debtor. There can also be the opposite situation when, during restructuring proceedings, the debtor becomes even more indebted (illiquid) and the rescue plan fails. In such cases, insolvency law should provide effective mechanisms to convert insolvency proceedings into other types of insolvency proceedings to ensure protection of the interests of the company, creditors and other interested parties.[3] The need for effective tools for conversion of insolvency proceedings is also recognized in the international insolvency standards (UNCITRAL, 2005). Flexible conversion of insolvency proceedings is also needed in cross-border cases when, for instance, the debtor restores viability in the member state in which the main insolvency proceedings are opened, and the liquidation proceedings are opened as secondary insolvency proceedings. In such cases, restored viability of the debtor in the state in which the main insolvency proceedings are opened may be hampered by liquidation proceedings. Thus, a flexible approach towards the conversion of insolvency proceedings in cross-border matters is relevant. The need for effective tools to address insolvency problems is also reflected in the possibility of the conversion of secondary insolvency proceedings into national insolvency proceedings which are different than the original.

The EIR proposes solutions to the conversion problem. Article 51(1) of the EIR establishes that, at the request of the insolvency practitioner in the main insolvency proceedings, the court of the member state in which secondary insolvency proceedings have been opened may order the conversion of the secondary insolvency proceedings into another type of insolvency proceedings listed in Annex A, provided that the conditions for opening that type of proceeding under national law are fulfilled, that that type of proceeding is the most appropriate as regards the interests of the local creditors, and that it maintains coherence between the main and secondary insolvency proceedings. Article 51(2) of the EIR establishes that when considering the request referred to in paragraph 1, the court may seek information from the insolvency practitioners involved in both proceedings.

[3] For instance, Article 81 of the Republic of Lithuania Law on Insolvency of Legal Persons allows termination of liquidation proceedings if the restructuring plan is confirmed, and the restructuring case is commenced.

The rationale of the rule laid down in Article 51(1) of the EIR is that when, for instance, liquidation proceedings are opened as secondary insolvency proceedings, they can be converted into rescue (restructuring) proceedings. There are cumulative conditions for such a conversion: i) the type of such proceedings should be listed in Annex A of the EIR; ii) the conditions for opening that type of proceedings under national law are fulfilled; and iii) that type of proceeding is the most appropriate as regards the interests of the local creditors and coherence between the main and secondary insolvency proceedings is maintained. The possibility to convert secondary insolvency proceedings is relevant and addresses the need for a flexible approach to deal with solvency problems in cross-border cases. However, such a conversion should not be automatic, and requires the coordination of main and secondary insolvency proceedings, which also requires cooperation between the courts and insolvency practitioners in both proceedings.

2. The procedure of opening secondary insolvency proceedings

Opening insolvency proceedings is a complex question which requires not only legal, but also economic analysis of the debtor and the assessment of which type of insolvency proceedings (liquidation or restructuring) would be the most suitable in each situation. Opening secondary insolvency proceedings shall be effective, meaning that the decision to open them should be prompt, considering the different interests of the relevant interested persons.

The first question related to the opening of secondary insolvency proceedings is the right to request opening them and how it should be exercised. The persons having the right to request the opening of main insolvency proceedings are established only in the national law (the EIR does not regulate this question). However, the right to request the opening of secondary insolvency proceedings is regulated primarily by EU law. The persons empowered to request the opening of secondary insolvency proceedings are listed in Article 37(1) of the EIR, according to which, the opening of secondary insolvency proceedings may be requested by: (a) the insolvency practitioner in the main insolvency proceedings; or (b) any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary insolvency proceedings is requested. This provision reveals that *locus standi* to request opening secondary insolvency proceedings is established by EU law (insolvency practitioner in the main insolvency proceedings) and the national law of the member state in which the secondary insolvency proceedings are sought to be opened (other persons). The question arises as to who should have *locus standi* to request the opening of secondary insolvency proceedings, since Article 37(1) of the EIR does not establish an exhaustive list of such persons.

The question of *locus standi* to request opening secondary insolvency proceedings was addressed by the CJEU in the *Burgo Group SpA* case. The court confirmed that the person who is empowered to seek the opening of secondary proceedings must be determined on the basis of the national law of the member state within the territory of which the opening of such proceedings is sought. However, since the national law should ensure effective application of EU insolvency law, the court emphasized that *locus standi* to request the opening of secondary proceedings cannot be restricted to creditors who have their domicile or registered office within the member state in whose territory the relevant establishment is situated, or to creditors whose claims arise from the operation of that establishment (*Burgo Group SpA v. Illochroma SA and Jérôme Theetten*, 2014, para. 51). Therefore, the national law regulating insolvency proceedings should not bar other interested persons from opening secondary insolvency proceedings. The broad scope of Article 37(1)(b) of the EIR suggests that not only creditors, but also other interested third parties, such as directors, shareholders of the company and other parties, may have the right to request the opening of secondary insolvency proceedings. This rationale is supported since, particularly in rescue (restructuring) proceedings, the directors and shareholders of the company may have significant incentives for opening secondary insolvency proceedings. Thus, the national laws on insolvency proceedings should not limit the right to request the opening of insolvency proceedings only to the creditors.

Another question related to opening of secondary insolvency proceedings is: Under which conditions should they be opened? Generally, opening insolvency proceedings requires a demonstration that the debtor is insolvent (or is encountering insolvency problems in case of imminent insolvency), but this is different when considering the opening of main insolvency proceedings. Pursuant to Article 34 of the EIR, debtors' insolvency shall not be re-

examined in the Member State in which secondary insolvency proceedings may be opened. This rule codifies the previous case law of the CJEU, in which it was stated that the examination of the debtor's insolvency by the court having jurisdiction to open main proceedings is binding on any other courts before which an application to open secondary proceedings is submitted (*Bank Handlowy*, 2012, paras. 70, 74). This is an important procedural aspect of opening secondary insolvency proceedings since it does not require the establishment of the insolvency of the debtor because the debtor was already found insolvent in the member state where main insolvency proceedings were commenced.

The ground for opening secondary insolvency proceedings is establishment (Article 3(2) of the EIR), which is the economic and legal opposition of the centre of main interests, which in itself is the ground for opening main insolvency proceedings (Article 3(1) of the EIR). Pursuant to Article 2(1) of the EIR, establishment means any place of operations where a debtor carries out, or has carried out in the 3-month period prior to the request to open main insolvency proceedings, a non-transitory economic activity with human means and assets. The notion of establishment and the requirements for establishment are well defined in the case law of the CJEU (*Interedil*, 2011) and national case law (*Olympic Airlines SA*, 2015; Court of Appeal of Lithuania, 2021).

However, the question arises as to when the existence of establishment should be established. It may happen that after submission of a claim for opening secondary insolvency proceedings the establishment may be transferred to another member state, or may lose the necessary elements of being an establishment. Following the rationale of the *Staubitz* case, in which the CJEU found that the move of the debtor's centre of main interests after the lodgement of the request to open insolvency proceedings does not negate jurisdiction to open those proceedings (*Staubitz*, 2006, para. 29), one may argue that the later movement of establishment (loss of the elements of establishment) may not be relevant since the relevant date in such a case is the date of the filing for secondary insolvency proceedings.

To sum up, the opening of secondary insolvency proceedings may contribute to the effectiveness of insolvency proceedings since they may be not only liquidation, but also restructuring proceedings. The opening of secondary insolvency proceedings may also allow for the protection of the economic and legal interests of the local creditors, but may also contribute to the effective realization of the debtor's assets. This also means that the persons who have the right to apply for opening of secondary insolvency proceedings should not be limited to the insolvency administrator in the main insolvency proceedings and the local creditors, but should also include other persons who may have interests in such proceedings.

3. Coordination as the main element for effective insolvency proceedings

Coordination between main and secondary insolvency proceedings is achieved by cooperation between courts and insolvency practitioners in both proceedings. Article 41(1) of the EIR establishes the general duty of cooperation of insolvency practitioners in cross-border insolvency cases. It states that the insolvency practitioner in the main insolvency proceedings and the insolvency practitioner or practitioners in secondary insolvency proceedings concerning the same debtor shall cooperate with each other to the extent that such cooperation is not incompatible with the rules applicable to the respective proceedings. The wording of this provision ("shall cooperate") indicates that insolvency practitioners have a duty to cooperate which may be limited to the national regulation of insolvency proceedings. Thus, this duty requires maximum cooperation between insolvency practitioners.

Article 41(2) of the EIR provides more specific duties of cooperation between insolvency practitioners. First, insolvency practitioners shall as soon as possible communicate to each other any relevant insolvency of the proceedings (Article 41(2)(a) of the EIR). Second, insolvency practitioners shall consider the possibility of restructuring of the debtor and in case of such possibility, elaborate and implement a restructuring plan (Article 41(2)(b) of the EIR). Third, insolvency practitioners shall coordinate the administration of the realisation or use of the debtor's assets and affairs (Article 41(2)(c) of the EIR). The nature of these duties indicates that they have a continuous character and shall be exercised throughout the insolvency proceedings. Particularly important duties of cooperation which relate to the effectiveness of cross-border insolvency proceedings include analysis of the possibility of restructuring of the debtor, which allows a viable company to be rescued, and coordination of the realization of the debtor's assets.

The EIR also requires the courts hearing insolvency proceedings of the same debtor to cooperate. Article 42(1) of the EIR establishes the general duty of cooperation of courts in such cases. Similarly to the duty of cooperation of insolvency practitioners, this article also employs the imperative wording for cooperation ("shall cooperate"), and can also be limited only by national law. The duty of cooperation between courts has already been recognized in EU private international law and derives from primary EU law, namely Article 81 of the Treaty on the Functioning of the European Union. The rationale behind this rule is that the court which opened insolvency proceedings or before which the request to open insolvency proceedings is pending should cooperate with the courts from other member states which are in such a situation. Interestingly, in contrast to Article 41(1) of the EIR, Article 42(1) of the EIR establishes the purpose of such cooperation: facilitation of the coordination of main, territorial and secondary insolvency proceedings concerning the same debtor. However, the key word of this provision (cooperation) remains undefined. On the one hand, national courts always work as independent decision-making bodies; on the other, the EIR requires the courts to cooperate when making decisions in insolvency proceedings on the same debtor. Considering the importance of the independence of the courts, it seems that courts should not coordinate decisions. Instead, this requirement means that courts shall exchange information which may be relevant for other courts when making certain decisions.

The requirement to ensure efficient and effective cross-border insolvency proceedings is a clear indication that the national courts should cooperate in such cases and such cooperation aims to increase the overall efficiency of these proceedings. Some guidance as to how cooperation should take place was provided by the advocate general in the *Bank Handlowy* case, Kokkot, who noted that "<…> whether secondary proceedings are opened at all continues to be a matter for the decision of the court having jurisdiction. In making that decision too, it must take account of the objectives of the Regulation and the effects of the main proceedings, in particular whether the creditors who were involved in the main proceedings and who consented to a rescue plan would be able to evade their obligations under that plan by instituting secondary proceedings" (Opinion of Advocate General Kokkot, 2012, para. 68).

The answer to the question of the ways in which the courts should communicate is established in Article 42(3) of the EIR, which provides a non-exhaustive list of the possible ways of cooperation between the courts. Such ways could be: (a) coordination in the appointment of the insolvency practitioners; (b) communication of information by any means considered appropriate by the court; (c) coordination of the administration and supervision of the debtor's assets and affairs; (d) coordination of the conduct of hearings; and (e) coordination in the approval of protocols, where necessary. These examples of courts' cooperation indicate that the courts should coordinate resolution of one of the main actions in insolvency proceedings, such as the appointment of the insolvency practitioner and realization of the debtor's assets. All these actions may contribute to the search for the best solutions to tackle a debtor's insolvency problems.

Another novelty regarding the duty of cooperation in cross-border insolvency proceedings is the regulation of "protocols". Pursuant to Recital 49 of the EIR, such agreements and protocols may vary in form, in that they may be written or oral, and in scope, in that they may range from generic to specific, and may be entered into by different parties. Simple generic agreements may emphasize the need for close cooperation between the parties, without addressing specific issues, while more detailed, specific agreements may establish a framework of principles to govern multiple insolvency proceedings and may be approved by the courts involved, where the national law so requires. They may reflect an agreement between the parties to take, or to refrain from taking, certain steps or actions. Nevertheless, the legal nature of such agreements and protocols, the order of their conclusion and the consequences of not following them has already raised serious scepticism (CERIL Report, 2018). Though the courts have a duty to cooperate, it is doubtful that such agreements and protocols have a legal binding power or that sanctions may be applied for their violation. This is because, first, the EIR establishes that such cooperation may be carried out without the conclusion of agreements and conclusions. Second, such documents may reflect a common approach between the relevant stakeholders and may serve as a more concrete guidance as to how insolvency proceedings should be carried out, but it is unclear what actions can be taken if the courts fail to cooperate as established in the EIR. Should interested parties demand the courts to cooperate in insolvency proceedings? How should the independence of the court be guaranteed?

Since of one of the aims of secondary insolvency proceedings is the protection of the interests of local creditors, opening these proceedings provides the right to the local creditors to lodge their claims and participate in the insolvency proceedings. This issue is also addressed in the EIR. Lodgement of creditors' claims in secondary insolvency proceedings is regulated in Article 45 of the EIR, which, to some extent, amended Article 32 of the previous EIR. Pursuant to Article 45 (1) of the EIR, any creditor may lodge its claim in the main insolvency proceedings and in any secondary insolvency proceedings. This article establishes the general right of the creditors in main and secondary insolvency proceedings to lodge claims in secondary insolvency proceedings. Article 45(2) of the EIR deals with the right of insolvency practitioners to lodge creditors' claims. The insolvency practitioners in the main and any secondary insolvency proceedings shall lodge in other proceedings claims which have already been lodged in the proceedings for which they were appointed, provided that the interests of creditors in the latter proceedings are served by doing so, subject to the right of creditors to oppose such lodgement or to withdraw the lodgement of their claims where the law applicable so provides. Article 45(3) of the EIR provides the right to insolvency practitioners to participate in insolvency proceedings as a creditor, in particular to attend creditors' meetings.

The problems of submission of creditors' claims in secondary insolvency proceedings and the applicable law were analysed in the recent *Alpine BAU* (2021) case. In this case, the court in Austria opened the main insolvency proceedings of Alpine BAU and appointed NK as a liquidator in 2013. In the same year, the court in Slovenia opened the secondary insolvency proceedings of Alpine BAU and, in their notice, noted that the submission of creditors' claims to the court was limited. On 30 January 2018, NK applied to the court in Slovenia to lodge claims from the main proceedings in the secondary insolvency proceedings. The court rejected that lodging of claims as being out of time pursuant to the national law.

The main question in the *Alpine BAU* case was around when the lodging of claims in secondary insolvency proceedings – which were already submitted in the main insolvency proceedings by the liquidator in the secondary insolvency proceedings – is subject to the provisions relating to the time limits for lodging claims and to the consequences of lodging claims out of time, established by the law of the member state of the opening of the secondary proceedings. Thus, the problem arose as to which law should be applicable to deal with the procedural questions of lodgement of the creditors' claims submitted in secondary insolvency proceedings when they are already submitted in the main insolvency proceedings.

The previous EU insolvency regulation did not establish time limits governing the lodging of claims in insolvency proceedings or the consequences of any lodging of such claims out of time. Article 55(6) of the EIR establishes that claims shall be lodged within the period stipulated by the law of the State on the opening of proceedings. In the case of a foreign creditor, that period shall not be less than 30 days following the publication of the opening of insolvency proceedings in the insolvency register of the State on the opening of proceedings. However, said provision is intended to apply to the claims lodged by foreign creditors, not insolvency practitioners.

The CJEU found that the consequences of a failure to respect the law of the member state on the opening of proceedings concerning the lodging of claims and, in particular, the time limits laid down in that regard must also be assessed on the basis of that law (*Alpine Bau*, 2021, para. 31). Though the answers to this part of the question are based on the principle of *lex concursus*, the Court also had to address the more complex questions raised by the insolvency practitioners in this case, namely: Should the insolvency practitioner in the main proceedings enjoy a special right to lodge, in the secondary insolvency proceedings, claims already lodged in the main proceedings for which they were appointed, without being subject to the time limits prescribed by the law of the member state in which the secondary proceedings were opened? The insolvency practitioner argued that such special treatment should be provided since the insolvency practitioner first has to await the verification and admission of claims in the main insolvency proceedings before lodging them in secondary proceedings.

The CJEU found that the time limits for the lodging of claims laid down by the law of the member state on the opening of the secondary proceedings in which they lodge the claims already lodged in the main proceedings for which they have been appointed cannot be ignored (*Alpine Bau*, 2021, para. 37). The findings of the CJEU were based on the principle of equal treatment (*pari passu*) of creditors and the role of insolvency administrator. First, the Court affirmed the importance of the principle of equal treatment of creditors in EU insolvency law (*Alpine*

Bau, 2021, para. 38). It established that if, in contrast to the creditors, an insolvency practitioner acting in the name and on behalf of the creditors disregarded the law of the member state of the opening of proceedings governing the time limits for the lodging of those claims, the creditors would be placed at a disadvantage compared with those whose claims were lodged by the liquidator in other related proceedings (*Alpine Bau*, 2021, para. 39). It also found that, in such a case, the creditors "<…> would benefit from a total absence of limitation period and would avoid any consequence of lodging claims out of time, it would result in unequal treatment which could lead to an unjustified infringement of the rights of a category of creditors" (*Alpine Bau*, 2021, para. 40). Furthermore, the CJEU did not accept the argument that the insolvency practitioner in the main insolvency proceedings should enjoy a more favourable legal status in the secondary insolvency proceedings, and that the court which opened main insolvency proceedings should verify and admit the claims. The fact that the liquidator in the main proceedings verified the claims in the light of the law applicable to the main proceedings is not *a priori* relevant for the verification of the same claims lodged in the secondary proceedings (*Alpine Bau*, 2021, para. 41). Therefore, the CJEU in *Alpine BAU* affirmed the importance of cooperation in cross-border insolvency cases and how the proper exercise of this principle contributes to the effective exercise of the creditors' rights.

4. The need for effective of treatment of the debtor's assets

One of the aspects of the coordination of main and secondary insolvency proceedings is related to effective administration and realisation of the debtor's assets. Since insolvency proceedings deal with administration and the realisation of the debtor's assets, it is important to ensure that the maximum value of the debtor's assets is attained.

Since main and secondary insolvency proceedings can take place simultaneously, the question arises as to how the treatment of assets should be coordinated to achieve the most efficient treatment of them. Opening secondary insolvency proceedings triggers certain legal effects regarding the treatment of debtor's assets and applicable law (Article 35 of the EIR, Article 7 of the EIR). Pursuant to Article 20(1) of the EIR, the regulation isolates the assets which fall under the scope of secondary insolvency proceedings from the legal effect of the main proceedings (Bork, 2017, p. 223). Thus, the law of the main insolvency proceedings (*lex concursus*) is not applicable in secondary insolvency proceedings, and the treatment of the assets of the debtor located in that member state are regulated by the law of that member state. As was rightly pointed out in the Virgós & Schmit Report, "<…> once territorial proceedings have been opened, the direct powers of the liquidator in the main proceedings no longer apply to assets situated in the state of the opening of the territorial proceedings. The liquidator in the territorial proceedings has exclusive powers over those assets" (Virgós & Schmit, 1996, para. 163). Though the insolvency practitioner in main insolvency proceedings does not enjoy exclusive power over the treatment of assets in the member state in which secondary insolvency proceedings are opened, this still requires proper cooperation between insolvency practitioners appointed in both proceedings (Article 41 of the EIR).

Recital 23 of the EIR establishes that the effects of secondary insolvency proceedings are limited to the assets located in that member state. The same rule is reiterated in Article 2(2) and Article 34 of the EIR. This rule of effects of secondary insolvency proceedings is well recognized in cross-border insolvency law. For instance, the restriction of the effects of secondary insolvency proceedings only to assets of the state in which these proceedings are opened is also recognized in Article 28 of the UNCITRAL Model Law on Cross-Border Insolvency (1997).

Nevertheless, the EIR establishes a few peculiarities to this rule. First, upon request from the insolvency practitioner in the main insolvency proceedings, the court which opened the secondary insolvency proceedings shall stay the process of realisation of assets in whole or in part. In addition, the court of secondary insolvency proceedings may require the insolvency practitioner to take any suitable measure to guarantee the interests of the creditors in the secondary insolvency proceedings and of individual classes of creditors. Such a stay of the process of realisation of assets may be ordered for up to 3 months, and may be continued or renewed for similar periods (Article 46(1) of the EIR). Thus, the temporal stay of realisation of the debtor's assets located in the territory of the member state in which secondary insolvency proceedings are opened may be applied. Second, in case secondary proceedings involve liquidation, the insolvency practitioner shall immediately transfer any assets remaining to the insolvency practitioner in the main insolvency proceedings (Article 49 of the EIR). This rule means that in case all local creditors' claims are satisfied, the debtor's assets should be used in main insolvency

proceedings to satisfy the claims of other creditors, and the insolvency practitioner does not have the right to use the remaining assets for other purposes, such as to give them to the shareholders of the company. The exercise of this duty also requires effective cooperation between the insolvency practitioners and both insolvency proceedings.

Another problematic question exists regarding the treatment of assets and the allocation of international jurisdiction between the court hearing main and secondary insolvency proceedings when the actions to determine the legal status and (or) ownership of the assets are submitted to the courts in different member states. In the *Nortel Networks SA* (2015) case, an action seeking a declaration that specified assets fall within secondary insolvency proceedings was submitted. The question arose as to whether such an action is a related action, and whether it falls under the jurisdiction of the court of the member state in which secondary insolvency proceedings have been opened.

First, the CJEU found that the courts of the member state in which the secondary insolvency proceedings were opened also have the right to hear actions related to insolvency proceedings. Considering the peculiarities of secondary insolvency proceedings, the court found that the courts of the member state within the territory of which secondary insolvency proceedings have been opened enjoy the jurisdiction to hear related actions *in so far as those actions relate to the debtor's assets that are situated within the territory of that State* (*Nortel Networks SA*, 2015, paras. 32–33). Thus, the court confirmed the territorial limits of the secondary insolvency proceedings over the assets.

Second, the Court supported the view that such an action to determine whether the specific assets fall within the scope of secondary insolvency proceedings relates to protection of the interests which are protected in secondary insolvency proceedings (*Nortel Networks SA*, 2015, paras. 32–37). Therefore, the CJEU found that "<…> the courts of the member state in which secondary insolvency proceedings have been opened have jurisdiction to rule on the determination of the debtor's assets falling within the scope of the effects of those proceedings" (*Nortel Networks SA*, 2015, para. 38).

Third, the question of exclusive or concurrent jurisdiction to hear such an action should have been answered. On the one hand, the court of the member state in which the main insolvency proceedings have been opened has jurisdiction to hear all claims (related actions) related to the treatment of the assets of the debtor. On the other, this is also logically the case for the courts of the member state in which secondary insolvency proceedings have been opened since they directly deal with the questions which relate to the assets in the territory of that member state. The CJEU found that the courts which opened main and secondary insolvency proceedings share jurisdiction to determine the assets of the debtor by stating that "<…> the courts of the Member State in which secondary insolvency proceedings have been opened have jurisdiction, **concurrently** with the courts of the Member State in which the main proceedings have been opened, to rule on the determination of the debtor's assets falling within the scope of the effects of those secondary proceedings" (*Nortel Networks SA*, 2015, para. 46, emphasis added).

Thus, the rationale of the Court is that such related action can be submitted to the courts of the member state in which the main insolvency proceedings have been opened or the court of the member state in which secondary insolvency proceedings have been opened. Such a conclusion leads to further procedural ambiguities and problems of coordination. Though the CJEU was right to conclude that, as in the *Nortel Networks SA* case, courts of the member states in which main and secondary insolvency proceedings have been opened may have jurisdiction to hear such actions according to the goals of both proceedings, this triggers problems in determining how to deal with the hearing of the same claim before the courts of these member states and enforcement of judgments. This may happen, for instance, when the insolvency practitioners of both proceedings institute such hearings in different member states. Since the EIR lacks any rules on *lis pendens* of similar claims, such concurrent litigation may result in different judgments on the same subject matter and the problems of irreconcilability of judgments. Such a situation may jeopardize the effectiveness of cross-border insolvency proceedings.

The CJEU, though acknowledging these problems, failed to provide a more concrete solution to avoid concurrent litigation and instead opened the doors for procedural ineffectiveness and the defragmentation of disputes. One solution to such a problem could be the application of the *lis pendens* rule (first-in-time approach), which is firmly

established in EU private international law (Articles 29–34 of the Brussels Ibis Regulation) and allows only the court first seized to rule on the action to avoid concurrent jurisdiction.

Conclusions

1. Coordination in opening main and secondary insolvency proceedings may contribute to the effective solution of a debtor's insolvency problems. The courts in both proceedings should cooperate and coordinate to decide what type of insolvency proceedings (liquidation or restructuring) should be commenced. The opening of secondary insolvency proceedings primarily serves to protect the interests of local creditors. However, when considering opening these proceedings, other economic arguments, such as administration and the nature of the debtor's assets, should be assessed. The EIR also allows secondary insolvency proceedings to be converted, considering the nature of main insolvency proceedings. In case of opening liquidation or restructuring insolvency proceedings in the main insolvency proceedings, secondary insolvency proceedings should serve the same goals as the main proceedings.
2. The broad scope of Article 37(1)(b) of the EIR suggests that not only creditors, but also other interested third parties, such as directors, shareholders of the company and other interested parties, may have the right to request the opening of secondary insolvency proceedings, and that national laws on insolvency proceedings should not limit the right to request the opening of insolvency proceedings only to creditors.
3. Though the EIR allows creditors to lodge claims in main and secondary insolvency proceedings, it may create problems regarding how creditors should exercise this right and what law is applicable to the procedural aspects of the claim. The rationale in the *Alpine BAU* case suggests that exercising the right to lodge a claim (Article 45(1) of the EIR) in secondary insolvency proceedings follows the procedural aspects and time limits for the lodgement of such claims as established under the national law of the member state in which secondary insolvency proceedings are opened.
4. Shortcomings in the lack of coordination regarding related actions concerning the treatment of the debtor's assets are also found in the case law of the CJEU. The solution proposed in the *Nortel Networks SA* case for the concurrent jurisdiction may lead to irreconcilability of judgments and a lack of legal certainty. The solution to this problem could be the application of the general *lis pendens* rule.

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CONCERTED PRACTICES: CONCEPT AND EVOLUTION

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Abstract. The doctrine of concerted practices has been developed over several decades of jurisprudence. To grasp this doctrine in a coherent and structured manner is essential for understanding cartel enforcement under Article 101 TFEU. This article shows that the evolution of concerted practices could be divided analytically into six distinct stages. Some important precedents have been adopted at each stage. We capture them by the succinct formulation of "rules". The entire set of "rules" concisely represents the doctrine of concerted practices. We then turn to their critical reflection. A fuller picture of concerted practices emerges, revealing important weaknesses in the doctrine: (i) an apparent lack of new conceptual developments, which could be partially explained by the rule that enabled imprecise qualification of cartel infringements as agreements "and/or" concerted practices; and (ii) rebuttable presumptions and notions of passive participation or tacit acceptance of collusion gradually turned into a sui generis prohibition of exchange of information, which is hardly compatible with the definition of concerted practices or even violates the presumption of innocence. The doctrine of concerted practices was shaped before the age of the internet and virtual competition, which makes it fairly outdated for addressing emerging issues of algorithmic collusion. We could expect a resurgence of interest in the fundamentals of the concept and forthcoming new conceptual developments.

Keywords: concerted practices, tacit acceptance of collusion, exchange of information, rebuttable presumptions, cartel enforcement, the EU competition law.

Introduction

The concept of concerted practices is at the forefront of cartel enforcement under Article 101 TFEU. It catches the most sophisticated cartels that cannot be qualified as cartel agreements. However, despite more than 50 years of development of jurisprudence, the doctrine of concerted practices has not seen major new improvements for quite a while: (i) the concept itself is defined rather vaguely, which results in legal uncertainty (Odudu, 2006, ch. 4); (ii) the distinction between concerted practices and conscious parallelism remains the classic puzzle in antitrust law (oligopoly problem) (Petit, 2013); and (iii) in the ever sophisticated and diversified business world and digital economy, antitrust scholars face a challenge to offer workable solutions on how to deal with collusion by algorithms (Gebicka & Heinemann, 2016). Meanwhile, courts, especially national ones, apply the precepts of concerted practices formulated decades ago without much critical reflection.[2]

The existing competition law literature covers various aspects of concerted practices, but usually in a fragmented manner (e.g., Whish & Bailey, 2015). The purpose of this article, then, is to provide a more coherent analysis of the Court of Justice of the European Union's (CJEU's) case law, with some critical reflections. Understanding how the concept evolved is crucial for practical purposes when courts have to apply it. The analysis in this article

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[2] The concept of concerted practices is an exclusive and autonomous concept of the EU competition law. Thus, national courts or competition laws cannot apply it more stringently than is allowed under Article 101. To that effect, see Regulation 1/2003 (2003, Article 3(2)).

should also be useful for further research on concerted practices due to the orderly presentation of jurisprudence and the ensuing discussion.

The article begins with the exposition of concerted practices, discussing their origins, purpose, definition, and constitutive elements. Then, it shows how the concept evolved in the CJEU's case law. Thus, the primary method is an analysis of case law. It appears that the whole evolution of concerted practices could be divided into six distinct stages. At each stage, some important precedents have been adopted that shaped the current meaning of concerted practices. Each precedent is followed by the formulation of a "rule" that helps to quickly grasp what a particular case has contributed.

1. The concept of concerted practices

1.1. Legal origins

The legal origins of concerted practices trace back to the U.S. antitrust law notion of "concerted actions". The Supreme Court of the United States early on interpreted that "concerted actions" prove the violation of §1 of Sherman's Act, which prohibits any "contract", "combination", or "conspiracy" that restrains trade or commerce. Kaplow (2013, pp. 77–92) provides a review of early case law in the U.S., showing that the term "concerted actions" was first used in the Interstate Circuit (1939). Despite the linguistic difference, concerted practices and concerted actions refer to the same idea – that competition can be restrained by actual conduct, rather than by a formal contract.

Under the competing theory, concerted practices primarily emerged due to French law ("actions concertées"). The 1953 executive decree in France prohibited concerted conduct under national law for the first time in Europe, and the French delegation participated in the drafting of the 1957 Treaty of Rome (Ducourneau, 2013). On this ground, it is claimed that U.S. antitrust law must have played only an indirect role in the adoption of concerted practices.

The competing theory is seriously flawed and cannot be accepted. As pointed out by AG Mayras (1972, p. 669), in France there had been no relevant case law on the subject. It is also based on incorrect facts: the term concerted practices firstly appeared in Article 65 of the Paris Treaty (1951) rather than in French law. Hence, U.S. antitrust law must have instigated the adoption and formation of concerted practices in EU competition law.

It is worth mentioning that the concept of "abstraktes Gefährsdungsdelikt" from German criminal law helped to characterize concerted practices, which is "[…] an offence consisting in the creation of a state of affairs which is dangerous, where no specific danger need be statutorily defined" (AC-Treuhand, §107). We can only speculate whether initial legislation was modelled upon this concept, but concerted practices could certainly be understood as a species of "abstraktes Gefährsdungsdelikt", because cartels as such pose in abstracto danger for competition, as maintained by the EC (AC-Treuhand, §107).

1.2. Legal purpose

The purpose of concerted practices depends on the model of cartel enforcement. There are two of these. The American model is based on a unifying concept of "agreement" that covers all forms and shapes of collusion (Shapiro & Kaplow, 2007, p. 25). The European model is based on the bifurcation of a conceptual scheme into cartel agreements and concerted practices. Both concepts are distinct and autonomous, although they may serve the same underlying goal. Insofar as all legal concepts must have their purpose or reason for existence (*raison d'être*), we must first understand the specific legal purposes of having concerted practices in Article 101.

Purpose 1: cartel agreements did not exhaust all possible cases that prevent, restrict or distort competition. One purpose of concerted practices, therefore, is to catch the remaining cartels ("Plan B"). In particular, concerted practices should catch collusion with the least direct incriminating evidence.

Purpose 2: concerted practices could be understood as the boundary concept which defines the scope of Article 101. The exact scope of Article 101, however, remains unclear, causing trouble for effective cartel enforcement (Odudu, 2006, ch. 1).

1.3. Legal definition

The classic legal definition of concerted practices is the following: "[…] a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition". Furthermore: "By its very nature, then, a concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behavior of the participants" (*ICI v. Commission*, 1972, §64).

In comparison with cartel agreements, concerted practices are a less formal form of practical coordination; concerted practices refer to and should be inferred from actual conduct, but the definition is silent on the "meeting of the minds" criterion,[3] suggesting that concerted practices are somewhat more tangible than agreements. Insofar as the difference between agreements and concerted practices lies in the "degree" or "intensity" of collusion, we could conceive concerted practices as the more basic concept: any concerted practice may potentially turn into a cartel agreement, but not the reverse.

The contrast between agreement and concerted practices in the definition is not sharp. Agreements may be oral and informal ("gentleman's agreement"), so it is unclear how concerted practices differ from them. AG Mayras observes that the "dividing line between agreements and concerted practices cannot be easily determined", and the concept needs to be "built up from the first principles" (AG Mayras, 1972, p. 669). This difficulty reinforces the position that a single unifying concept would perhaps be sufficient (note: from an economic point of view, harm to welfare does not necessarily depend on a form of collusion – cartel agreements, concerted practices, and even lawful conscious parallelism could approach monopoly prices).

1.4. Constitutive elements

By constitutive elements, we mean intrinsic properties that characterize concerted practices and must be present in every case (*T-Mobile*, 2009, §48). They are: (i) common will (mental consensus); (ii) common conduct; and (iii) causality between common will and conduct.[4] Both agreements and concerted practices employ subjective and objective elements. This contributes to a conceptual difficulty in making a distinction between the two. Abstract constitutive elements of concerted practices alone do not provide sufficient clarity. We must turn to the analysis of actual cases to understand what concerted practices entail.

2. The evolution of concerted practices

For expository purposes, I distinguish six distinct stages of evolution. I begin with a formulation of a legal rule, which emphasizes the importance of that particular case. The collection of these rules represents the doctrine of concerted practices. The selected set of cases is comprehensive insofar as it contains the major precedents to date.

2.1. Stage 1: Distinct types of Article 101 infringements

Decision: *Consten and Grundig* (1966)

Rule: *Both horizontal and vertical cartel agreements, concerted practices, or decisions of associations are prohibited under Article 101 insofar as they prevent, restrict, or distort competition either by object and/or by effect.*

[3] The phrase "knowingly substitutes" in the definition does not necessarily imply "with mutual consent".

[4] Some commentators, such as Lorenz (2013, p. 86), alternatively distinguish constitutive elements into: (1) mental consensus; (2) contact between undertakings; (3) substitution of cooperation by competition; and (4) causal link between (1) and (3). The difference, however, is merely in preferences for analysis.

In *Consten and Grundig*, the CJEU established the typology of cartel infringements. Each substantive category under Article 101 – decisions by associations, agreements, and concerted practices – may refer to either horizontal or vertical relationships that could violate competition law either by object and/or by effect (*Consten and Grundig*, 1966, p. 342.). The court also clarified a necessary condition that Article 101 infringement presupposes at least two separate undertakings, ruling out the possibility of applying Article 101 to unilateral conduct (p. 340); and that national intellectual property laws, arguably any national laws, cannot justify Article 101 infringement (p. 346).

The case concerned a vertical agreement between Grundig (supplier) and Consten (distributor), whereby the distributor undertook (i) not to purchase competing goods from any other suppliers, and (ii) to refrain from deliveries outside its exclusively designated territory. Market sharing violates Article 101 "by object".

2.2. Stage 2: Characterization of concerted practices

Decision: *Dyestuffs* (1972)

Rule: *Cartel agreements and concerted practices are two distinct forms of collusion. Concerted practices, in comparison with cartel agreements, are a less intense form of collusion, which manifests itself as practical cooperation by which undertakings intend to substitute the risk of competition. Concerted practices imply intent or awareness.*

The direct application of concerted practices begins with the *Dyestuffs* case. The CJEU found a violation of Article 101 in a market where the 10 largest European producers made three successive, almost simultaneous price increases between the years of 1964–1967 in five European markets. Cartel participants used advance announcements on prices, which made the market artificially transparent and facilitated price-fixing.

(1) The CJEU formulated the current definition of concerted practices. To recap, the most salient features of concerted practices are: first, concerted practices are a distinct and *the least intense form of collusion* that do not amount to a cartel agreement; second, *the concept refers to conduct* – it is defined as *practical cooperation* that could be inferred from observable market conduct (*Dyestuffs*, 1972, §65).

(2) The CJEU also invoked that legal analysis of concerted practices should be complemented by economic analysis: an *overall assessment* implies a consideration of *legal and economic* context, which takes into account the nature of a product, market volume, size, the number of undertakings operating in a particular market, etc.

(3) The CJEU finally sent a clear message that the concept of concerted practices is a working tool for catching illegal collusion: simultaneous price increases and advance announcements will not be tolerated, even though competitors refrained from establishing a cartel agreement properly.

Decision: *Sugar Cartel* (1975)

Rule: *Concerted practices do not require proof that undertakings worked out an actual plan of collusion. Every undertaking must determine its market policy independently. Neither direct nor indirect contact is allowed between them insofar as it reduces market uncertainty or discloses actual or intended conduct in that market. Undertakings have a right to adapt themselves intelligently by taking into consideration legal and economic context.*

Shortly after *Dyestuffs*, the CJEU had a second opportunity to clarify the concept of concerted practices in the *Sugar Cartel* case. Based on written evidence of communication, the CJEU found that some sugar producers from Belgium and the Netherlands engaged in concerted practices. In Belgium, at the time, there was an oversupply of sugar and prices were lower than in the Netherlands, which, by contrast, faced a shortage of sugar and prices were relatively high. Thus, the concerted practices were such that Belgian producers would export sugar only to designated producers from the Netherlands. In that way, the producers in the Netherlands gained control over prices in the Netherlands, and the risk of uncontrolled import from Belgium was significantly mitigated. The

Sugar Cartel is a classic example of market partitioning. A strict stance on any form of contact between competitors on strategic matters provided an impulse for later developments qualifying exchanges of information as "by object" infringements.

2.3. Stage 3: Boundaries of concerted practices

Decision: *Rolled Zink* (1984)

Rule: *Concerted practices cannot be inferred, provided there are one or more alternative explanations of observed, allegedly collusive, conduct. Concerted practices should be the sole explanation if Article 101 infringement is to be found on this ground.*

The case involved concerted practices related to parallel imports of rolled zinc. Two zinc producers located in Germany and France were among the largest in Europe. Prices of rolled zinc were substantially higher in Germany than elsewhere in Europe, therefore it was profitable for other undertakings to re-export zinc from cheaper jurisdictions (Belgium) back to Germany (parallel imports). This was exactly what one Belgian undertaking did: it purchased rolled zinc at a significantly lower price from the aforementioned suppliers on the promise that it would resell it exclusively in Egypt or elsewhere in the Middle East. However, instead of upholding its promises, the Belgian producer stored rolled zinc in Belgium and then re-exported it back to Germany to maximize profits. Once parallel imports were detected by the German and French producers, they almost simultaneously ceased deliveries to the Belgian producer.

The EC alleged that the German and French producers engaged in concerted practices to protect the German market from parallel imports. The nearly simultaneous cessation of zinc sales to the Belgian producer was not the only evidence. Specifically, the EC proved that the producers of rolled zinc concluded a contract, whereby each undertook an obligation of reciprocal assistance in case of shortage of zinc. However, the court rejected both leading arguments by the EC and vitiated its decision. This case is important for understanding the limits of concerted practices.

(1) The court introduced a new legal defence that concerted practices could be constituted only if there are no other plausible explanations of the facts at hand (*Rolled Zinc*, 1984, §16). The undertakings adduced evidence that the nearly simultaneous cessation of deliveries of zinc was motivated not by the aim to protect the German market from parallel imports, but rather by the Belgian producer's failure to pay in time for the deliveries. The court found this a sufficient alternative explanation, which helped undertakings to avoid the inference of concerted practices.

The legal defence of "no competing" explanations relates to a burden of proof. Based on the court's reasoning, given there is at least one plausible alternative explanation, concerted practices cannot be inferred. However, this is closer to a standard of proof "beyond reasonable doubt" rather than "on the balance of probabilities". The actual standard of proof for concerted practices likely lies somewhere in between. It would be inappropriate to require proving concerted practices beyond a reasonable doubt – not only because EU competition law does not belong to criminal law, but also because competition cases importantly depend on economic analysis, which, depending on assumptions, may cause economists to provide incompatible, or even conflicting, expert opinions.[5] It is not the mere existence of alternative plausible explanations that should invalidate legal inference of concerted practices, but rather, the most plausible explanation should always prevail.

(2) The court confirmed that there is no absolute ban on cooperation between competitors. The clause of reciprocal assistance between competitors in cases of serious disruptions of production was considered legitimate, and the EC's central argument that it "institutionalizes mutual aid in lieu of competition" was rejected. The court considered the clause so wide and vague that it was insufficient to restrict competition (*Rolled Zinc*, 1984, §35). The allowance of contractual relationships between direct competitors outside Article 101(3) justification or

[5] Later, in *Wood Pulp* (1993), for instance, at least two economists provided radically different opinions and explanations of given facts.

research and development arrangements is dangerous because the nature and contents of cooperative contracts depend on self-assessment and cannot be known or controlled before their implementation by antitrust authorities; this is why similar mutual aid setups between competitors should be an exception rather than a rule. Nevertheless, the judgment clarifies that the principle of independent conduct, as developed in previous case law, is not absolute. The court did not engage in a more detailed analysis of the contract; thus, the criteria of "wideness" or "vagueness" were fairly arbitrary. The *Rolled Zinc* case is the first example where undertakings successfully rebutted allegations of concerted practices in oligopoly.

Decision: *Wood Pulp* (1993)

Rule: *Concerted practices cannot be inferred given parallel conduct could be explained by oligopolistic tendencies within a sufficiently transparent market (conscious parallelism). Pricing similarity does not suffice for proving collusion.*

The *Wood Pulp* case concerned the distinction between concerted practices and conscious parallelism. The case is peculiar in that the judgment addressed a large part of the entire industry, comprising forty-three undertakings (40 firms and 3 associations). The central issue was whether a price similarity and advance quarterly price announcements of wood pulp in a trade press during the years 1975–1981 constitute concerted practices. These allegations were rejected. The court relied on the previous rule formulated in the *Rolled Zinc* case that there are no concerted practices unless it is the sole explanation of seemingly collusive conduct. Several points deserve a separate discussion.

The legality of advance price announcements. The practice of publicly announcing future prices may be considered an exchange of information, yet the court found this practice legitimate insofar as price announcements were addressed not so much to other competitors but to customers, who wanted to know prices far in advance because wood pulp formed an essential part of the costs of their final product (paper) (*Wood Pulp*, 1993, §64). Advance price announcements therefore in themselves do not constitute concerted practices. Simultaneous conduct could evidence concerted practices, but: "In determining the probative value of those different factors, it must be noted that parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct" (*Wood Pulp*, 1993, §71).

Here we see the first clear expression of the *conscious parallelism defence*, which is central against allegations of tacit collusion (concerted practices) in oligopolies. The court did not elaborate on what exactly constitutes an alternative plausible explanation, but taking into consideration the subsequent reasoning by the court, it should rely on sound economic rationale. The underlying logic by the court is consistent with the idea that "by object" infringements depend more on a legal assessment rather than economic analysis, and *vice versa* – inferences of "by effect" infringements primarily require sufficient economic evidence.

The role of economic analysis. The court used at least two economic expert opinions (1990, 1991) and, based on them, concluded that, considering market transparency, oligopolistic tendencies, the similarity of wood pulp prices, and parallel advance price announcements could be explained alternatively to the EC's proposition that they were due to concerted practices (*Wood Pulp*, 1993, §75-–126). The *Wood Pulp* case embodies the "more economic approach" in EU competition law (Motta, 2004, pp. 211–219).

2.4. Stage 4: Agreements and/or concerted practices

Decision: *Polypropylene Cartel* (1991)

Rule: *The EC is entitled to qualify infringement of Article 101 as cartel agreement and/or concerted practices. This constitutes the notion of a single and complex infringement.*

The EC found a cartel in the petrochemical industry, which lasted during the years of 1977–1983. The cartel operated based on secret meetings, allocation of markets, a series of price initiatives, and setting production quotas and minimum prices. Rhône-Poulenc was a relatively small producer, which was sold in 1980 and therefore was

fined for the period of 1977–1980. Based on written evidence – the minutes of a meeting – and proven regular participation, the CJEU concluded that Rhône-Poulenc, in the presence of other cartelists, supported a price increase (*Polypropylene Cartel*, 1991, §44, 57). The cartel was complex and involved many undertakings and many episodes with different levels of participation, so the EC decided to qualify the whole infringement as agreement and/or concerted practices. This imprecise qualification had never been invoked before. The most important legal issue was whether such a qualification should be allowed. The court confirmed the qualification and established the notion of a single and complex infringement (*Polypropylene Cartel*, 1991, §127). Its implications for Article 101 enforcement are profound.

The possibility to use a dual and less precise qualification greatly reduces the EC's burden of proof. Data shows that almost all cartel cases are now qualified in such a way (Jablonskis, 2021). On further occasions, the EC elaborated that the concepts of cartel agreements and concerted practices are fluid and may overlap (*CRT Glass Bulbs*, 2011, §37). The dual qualification contains some problems:

(1) The dual qualification is entirely a judicial invention. The concept of a complex infringement is not established in the Treaty and was adopted primarily on practical considerations. Besides such legitimacy issues, it shows how little understanding there is on the conceptual matter of delimiting agreements from concerted practices. Up until now, the CJEU did not articulate a workable distinction. The problem has been avoided altogether by resorting to a "convenient" solution, making the distinction unimportant for practical purposes.

(2) We should recognize the merits of complex infringement in that it (i) alleviates the EC's burden of proof and (ii) eliminates potential errors in the qualification of collusive episodes; but it also has some practical drawbacks. Perhaps the most important is the increased difficulty for suspected undertakings in defending themselves. Specifically, undertakings have to reject all possible allegations of agreement and concerted practice. Additionally, the court must now engage in an extensive analysis of both agreement and concerted practice. The point is that a principal justification of procedural efficiency does not necessarily apply when one includes consideration of private undertakings and courts. This shortcoming is slightly mitigated by the requirement for the EC to state reasons clearly, but the clarity and sufficiency of a statement of objections are frequently contested. The more precise qualification would reduce this trouble (recently, antitrust lawyers have observed an increased length of decisions [Odudu, 2022]), which could be explained by the necessity for undertakings to invoke all defences: "when it is not entirely clear what the EC alleges, then it is safer to invoke all defense arguments". The more precise qualification of cases would also facilitate narrowing down the scope of disputes.

(3) The dual qualification is inherently superfluous. To find Article 101 infringement, it is sufficient to prove either cartel agreement or concerted practices. The EC, having investigatory powers at its disposal and especially the rights to ask for information and make down raids, is in a position to choose whether to proceed with a case and how to qualify it. Considering weighty cartel fines, should not the standard of the EC's decision be higher than the current "safe approach"? The reason for the use of dual qualification is straightforward: if the EC fails to prove an agreement, at least it could prove concerted practices. Ultimately, we notice a curious practice, when in the vast majority of cases the EC tries to prove both agreement and concerted practices.

(4) The imprecise qualification arguably interferes with the proper development of both agreements and concerted practices. The court enforces the doctrine of single and complex infringement, which is a judicial creation, instead of providing legal guidance on agreements and concerted practices as two fundamental concepts in Article 101. Focusing on a single concept per case, rather than on an unclear admixture of both, would arguably allow us to expect doctrinal improvements and higher quality decisions. On a more speculative level, one could also wonder whether dual qualification did not contribute to the emerging legal issues of applying Article 101 to algorithmic collusion, where clearly the agreement requirement is not satisfied, while the doctrine of concerted practices to this day heavily relies on the "old" definition and underlying propositions, starting from the pre-internet *Dyestuffs* (1972) and *Sugar Cartel* (1975) cases. The argument here is that in the absence of dual qualification, the EC would have been compelled to think more seriously about the scope and contents of concerted practices.

Prediction

The following prediction seems likely: *concerted practices should eventually become a leading concept to tackle cartels*. To see this clearly, recall that cartel enforcement under Article 101 TFEU started with an understanding that concerted practices and agreements are distinct concepts (*Dyestuffs*, 1972). From the focus on cartel agreements, case law gradually converged into "and/or" dual qualification, and the third evolutionary step, one could anticipate, should be just concerted practices. The main reason for this prediction is the following: given the current explanation that concerted practices are a less intense form of collusion, why bother proving cartel agreement, which must have a higher standard of proof? The burden of proof for cartel agreement must be higher since by definition concerted practices do not reach the stage of an agreement. Given this reasoning, concerted practices are a more fundamental concept than agreements, with the broadest scope in Article 101.

2.5. Stage 5: Strict prohibition of contact

Decision: *John Deere* (1998)

Rule: *The system of exchange of information in a highly concentrated market (oligopoly), which excludes consumers, and enables market participants to observe each other's market positions or strategies, constitutes a violation of Article 101. The EC is not obliged to prove actual anticompetitive effects when it demonstrates potential anticompetitive effects.*

The UK tractor market consisted of 8 suppliers, holding a market share of over 80%. They agreed to use the information exchange system to share information on tractor sales. The CJEU found that such a system could potentially harm competition: it could improve transparency in a closed oligopoly and enable firms to identify strategies, including individual sales; therefore, the agreement violated Article 101. The case is interesting for several reasons.

First, it clarified that the term "oligopoly", in the context of competition law, should be understood fairly broadly; the finding of "oligopoly" depends on particular market characteristics rather than on sheer number of undertakings. *Second*, the legality of an exchange of information could also depend on whether it is open to consumers; the court made a crucial distinction between the *Wood Pulp* (1993) case, where no violation was found since exchanged information was available both for suppliers and consumers, and the present case, where it was available only among suppliers. *Third*, the court clarified the "by effect" class of infringements by saying that anticompetitive effects could be either *actual or potential*. Accordingly, in both "by object" and "by effect" infringements, it is not necessary to demonstrate actual harm to competition.

Decision: *Anic* (1999)

Rule: *The causality between illegal exchange of information and market conduct must be presumed, given: (1) an undertaking actively or passively participating in an illegal exchange of information; (2) and it remains active in that market. Such an undertaking is liable for Article 101 infringement unless the presumption is rebutted (Anic presumption).*

In the petrochemical industry with four major incumbents ("big four"), several undertakings systematically met to discuss production quotas and prices of polypropylene. Anic was a relatively small firm and participated less intensively in these meetings. There was also no evidence whatsoever that Anic had implemented the collusive policy. However, the CJEU held Anic fully liable for Article 101 infringement and came up with an important rule – Anic presumption (see the rule above and original wording in *Anic* [1999, §121]).

The critique of Anic presumption

The presumption is hardly possible to rebut. Consider that once an undertaking becomes aware of any information, it becomes permanently or almost permanently aware of it. One cannot simply expect amnesia, especially if the information is useful for optimal market conduct. The recipient of information, in principle, cannot control what

the other party communicates. Thus, any legitimate meeting in an association may end in presumed liability for all participants, even for those that had no anticompetitive intentions. Apart from public distancing or reporting collusion to an antitrust authority, it seems impossible to truly dissociate from exchanged information. Although this rule is regarded as a presumption, in practice, it decisively incurs liability based on contact. The presumption has been also contested as incompatible with the presumption of innocence (Abenhaïm, 2016).

The presumption assumes more than it should. The subjective elements of intent and awareness are necessary for finding a violation of Article 101 (*Anic*, 1999, §83, §87, §88, §89, §94, §98, §100, §130, §206). However, intent is difficult to establish, especially when an undertaking does not implement collusion. Anic did not adhere to collusion, yet it was not sufficient to disprove an intent to collude. It follows that Anic presumption not only assumes that an undertaking took into consideration exchanged information but also that it intended to collude. Ultimately, Anic presumption assumes all 3 constitutive elements of concerted practices (see the previous section) rather than a single element of causality.

We should note, however, that the judgment did go so far as to establish that concerted practices, taken as a whole, could be entirely without collusive conduct. A particular undertaking could not follow a collusive scheme and yet still be liable for Article 101 infringement given that other undertakings put concerted practices into effect. Put differently, *Anic* judgment does not fully answer a more fundamental question of whether concerted practices could be entirely of an intellectual nature.[6]

In essence, *Anic* judgment reinforced the doctrine of single and complex infringement developed in the *Polypropylene Cartel* (1991) case: it is sufficient to participate, even passively, in at least one episode of collusion to bear full responsibility for a whole infringement.

Decision: *T-Mobile* (2009)

Rule: *The causality between illegal exchange of information and market conduct must be presumed, given: (1) an undertaking actively or passively participating in an illegal exchange of information; and that (2) it remains active in that market. Such an undertaking is liable for Article 101 infringement, even if the exchange of information took place on a single occasion (meeting), unless the presumption is rebutted (T-Mobile presumption).*

The mobile telecommunications market in the Netherlands was an oligopoly of 5 undertakings, who discussed in a single meeting standard dealer remuneration for phone subscriptions. The central legal issue was whether a *single meeting* between rivals could constitute a concerted practice. The court thoroughly summarized previous jurisprudence on concerted practices and improved on Anic presumption, which is referred to as the T-Mobile presumption (the rule above and original wording in *T-Mobile* [2009, §62]).

The CJEU initially conceived concerted practices as concerted actions (conduct). That is, concerted practices imply conduct that could potentially be realized in a market: such as price-fixing, market partitioning, etc. Yet exchanges of information (meetings, contacts) by definition are not conduct that could potentially be realized in a market. Following the argument, they should not, by themselves, constitute concerted practices.

Contact between rivals is an important *preliminary step* before putting what has been discussed into practice. That is, exchanges of information should be considered *a part of* concerted practices, but *not the whole* concerted practices. It would be reasonable to require at least some manifestation of concerted practices in actual market conduct by at least one cartel member to justify an inference of legal liability for passive cartel participants. This refers back to our previous problem: could concerted practices be of a purely intellectual nature? This exact question has not been directly considered in the CJEU's case law. I would argue that it would be too wide an

[6] Consider, for instance, an imaginary meeting of incumbents A, B, C; they all discuss future pricing policy, but when it comes to putting that policy into practice, nobody actually does what it promised. The question *Anic* judgment does not solve is whether such "cheap talks" or purely intellectual collusion still counts as Article 101 infringement, or, alternatively, if it requires that at least one of incumbents somehow actually benefits from putting collusion into practice.

interpretation, which would be neither linguistically nor conceptually consistent with the current CJEU definition of concerted practices.

Importantly, Anic and T-Mobile presumptions are used in practise as if they are *sui generis* substantive norms. Cartel enforcement depends critically on them and is modelled around the underlying principle that undertakings should act independently, rather than on the concepts of agreements or concerted practices. The presumptions, in terms of importance, are comparable to that of a single and complex infringement.

The opposing view should be also considered. Against the proposition that Anic and T-Mobile presumptions became *sui generis* substantive concepts besides agreements, decisions of associations, and concerted practices, are their status as *rebuttable presumptions*. To the best of my knowledge, I am not aware of a single case where firms contested them successfully. Even if there are some, they must be exceedingly rare. Abenhaïm (2016, p. 414) reports that "Since the inception of the requirement, public distancing has been mentioned in 46 cases, actually invoked in 10 of these cases, and ultimately accepted in none". To extend the reasoning that a successful rebuttal is hardly possible, consider:

(1) If a company claimed that it did not follow what has been discussed in a single meeting between competitors, the court would maintain that it does not matter since under Article 101 actual harm is not required in the category of infringements, which by object prevents, restricts, or distorts competition. Therefore, this defence would not suffice.

(2) If a company, alternatively, adduces some evidence that it publicly distanced itself and was against exchanges of information in a meeting, this is equal to saying that an infringement still has been made but legal liability should not be applied thanks to public distancing. Put differently, an infringement is still presumed, only a company is released from paying fines. Clearly, there is a difference between the statements "there was no infringement" and "an undertaking is not liable for an infringement". Consequently, a single meeting would still constitute an infringement (concerted practice).

(3) The proposition that the presumptions are comparable to substantive, rather than procedural rules, could be confirmed by the fact that national competition authorities and courts cannot disregard them, since they follow directly from Article 101 itself (*E-turas*, 2016, §33). The EU Member States have a procedural autonomy to freely regulate procedural matters unregulated by the EU competition law, given they respect the principles of equivalence and effectiveness (*E-turas*, 2016, §32). We should deduce that the presumptions are inherent properties of concerted practices, rather than procedural rules.

(4) Public distancing is a problematic notion on its own. Consider that if one undertaking could public distance itself, then all of them could, but it would lead to an absurd situation (*reductio ad absurdum)* where nobody is liable and strategic information has still been exchanged. There must therefore be some structure for who is released from liability and who is not. This is achieved, for example, through leniency rules, but this would bring us to our previous point that an infringement is still constituted since in leniency submissions competitors confess that they made an infringement. Therefore, public distancing, without reporting to an antitrust authority, is a complicated matter – it remains a grey area with little guidance from the CJEU.

Concluding remarks on the strict prohibition of contact

The *T-Mobile* case provides the strictest legal stance towards an exchange of information to date. Although the CJEU speaks of a rebuttable presumption on causality between a single exchange of information and subsequent market conduct, the presumption, more realistically, is as a substantive *sui generis* prohibition in addition to agreements and concerted practices. The CJEU deduced the presumption not so much from a concept of concerted practices, but rather from an underlying general principle of independent conduct under Article 101.

The presumption that undertakings will take into consideration exchanged information is a natural fact, rather than something that could be rebutted. The difficulty or even the impossibility to rebut the presumption is the

main critique against the merits of the judgment. Ultimately, it paved the way to a current enforcement paradigm, where an exchange of information, in almost all cases, operates as smoking-gun evidence of Article 101 violation.

2.6. Stage 6: Most recent developments

Decision: *E-Turas* (2016)

Rule: *Passive participation in, or tacit acceptance of collusion, is a sufficient ground for liability under Article 101. Presumption of innocence prohibits attribution of liability under Article 101 unless it is proven that an undertaking was aware of collusion and failed to publicly distance itself (assumed consent). A determination of whether an undertaking was aware of collusion is a matter of fact.*

Many travel agencies in Lithuania were selling travel offers through an online booking platform administered by E-turas. The platform had an integrated email system. In response to competition concerns from travel agencies, E-turas sent a global email to all travel agencies with a message stating that discount offers will be capped automatically at a maximum of 3% to "normalize" competition and preserve commissions. The national competition authority alleged that travel agencies engaged in concerted practices by tacit acceptance of discount caps that eliminated discount competition. The case reached the CJEU for a preliminary decision.

(1) The court invoked the presumption of innocence (*E-turas*, 2016, §38–41). *First*, it cannot be automatically inferred, from the mere participation in the platform, that all travel agencies became aware of the message to cap discounts (factual question). *Second*, undertakings must have a realistic opportunity to rebut the presumption that they became aware of the message. We see the similarity between the *E-turas* and *T-Mobile* cases, as they both relate to a single episode of exchange of information: in *T-Mobile*, a single meeting; in *E-turas*, a single message. However, *E-turas* is a far more lenient judgment: due to the presumption of innocence, it cannot be automatically inferred that all platform participants became aware of the message. In this respect, the *E-turas* ruling mitigates the strict *T-Mobile* stance on an exchange of information. The presumption of innocence is a valid defence for passive undertakings that could show their unawareness of collusion.

(2) However, the court also invoked *passive participation* (tacit acceptance) in collusion as a sufficient ground for legal liability. To escape fines, passive participants must publicly distance themselves from anticompetitive initiatives or report them to an antitrust authority. Otherwise, they encourage collusion and therefore are liable for Article 101 violation (*E-turas*, 2016, §28 and the references therein).

The notion of passive participation calls into question the behavioural nature of concerted practices: is cause and effect between concertation and subsequent conduct necessary for concerted practices? Recall that the CJEU initially developed concerted practices as "concerted conduct"; and concerted practices imply causality between concertation and subsequent conduct (*Dole*, 2015, §125 and the references therein). Although the Anic and T-Mobile presumptions enable infringements to be proved without evidence of harmful effect, they still *expressis verbis* speak of cause and effect between concertation and subsequent conduct.

Passive participation is not directly related to any active conduct – it is all about encouragement or assurance for others (assumed consent). If the *Anic* and *T-Mobile* cases presumed that an undertaking *itself* must have taken into account strategic information obtained in an anticompetitive meeting for determination of *its own* conduct, then in *E-turas* passive participation goes a step further by imputing legal liability even in the absence of cause and effect between concertation and subsequent market conduct. Simply stated, liability for passive participation does not assume putting into effect concerted practices. This leads us to the notion of *indirect causality*, which complements the Anic and T-Mobile presumptions on *direct causality*. Undertakings cannot remain passive in the face of a collusive initiative, even though they have evidence of the absence of a direct link between cause and effect (between their concertation and their own market conduct).

Conclusions

1. The CJEU rejected a literal reading of concerted practices as "concerted actions" or "practical conduct" that must manifest themselves in factual market behaviour. Specifically, concerted practices do not presuppose concrete anticompetitive effects (*Anic,* 1999, §124). Although the CJEU defines concerted practices as intentional "practical cooperation that substitutes for the risks of competition", such a characterization does not correspond to the actual application of the concept, leading to legal uncertainty and discrepancy between the legal definition and its application.

2. The discrepancy between the current definition and its application indicates that a workable definition of concerted practices is missing. This issue has been bypassed with the judicial invention of "single and complex infringement", relieving the EC from a legal burden of qualifying specific collusive episodes as either cartel agreements or concerted practices; the imprecise qualification of collusion as a cartel agreement and/or concerted practices suffices. I proposed that allowing such an imprecise qualification reduced legal certainty and affected, if not forestalled, the proper development of concerted practices.

3. The "single and complex infringement" has been deduced from the assumption that Article 101 covers all types of collusion, supposing that all technical differences between cartel agreements and concerted practices, for practical purposes, are immaterial. This deduction is somewhat problematic. It leaves unexplained why Article 101, by original design, does not use a single general term for collusion. It also contradicts the principle that each concept in Article 101 has a distinct and autonomous function.

4. The CJEU gradually established a strict "by object" prohibition of contact between competitors. It became, arguably, the new sui generis type of infringement, standing on equal footing with agreements and concerted practices. However, this approach faces serious legitimacy issues associated with *Anic* (1999) and *T-Mobile's* (2009) "rebuttable" presumptions, which seem to have never been successfully challenged in practice. This difficulty could be explained by the intellectual (informational) nature of contact-based prohibition – once competitors become aware of exchanged information, they cannot become unaware of it, leaving only two options: (i) to publicly distance themselves; or (ii) to report illegal contacts to antitrust authorities. These are, however, not specific rebuttals of the presumptions, but separate legal defences available for any type of cartel agreement or concerted practices. These points reinforce legal concern as to whether these presumptions are compatible with the presumption of innocence.

5. The CJEU considered the presumption of innocence in the *E-Turas* case (2016), but the judgment did not bring much improvement: the court required only to additionally check whether firms become factually aware of contemplated concerted practices. Thus, if an undertaking (i) becomes factually aware of contemplated concerted practices and (ii) does not publicly distance itself or report to an antitrust authority, then it commits Article 101 violation regardless of whether concerted practices have been implemented. We end up with the same legal result as before – mere perception of contemplated concerted practices equals liability.

6. The doctrine of concerted practices was primarily formed before the internet era. The major academic concern now is that concerted practices, as expounded here, might be inadequate to address algorithmic collusion in digital markets, especially where algorithms replace inter-firm contact (exchange of information). The concept stands at the boundary of Article 101 and has the broadest scope. Thus, we could anticipate new conceptual developments (revisions) shortly.

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TOWARDS THE HARMONISATION OF THE INITIAL COIN OFFERING RULES: COMPARATIVE ANALYSES OF THE INITIAL COIN OFFERING LEGAL REGULATION IN THE USA AND THE EU

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Abstract. This article consists of a comparative study of approaches to crypto-assets in the USA and EU, as well as an exploration of the reasons behind such differences. These two jurisdictions vary dramatically in their history, economy and legal systems. Therefore, differences in legal regulation regarding the Initial Coin Offering are to be expected. Doctrinal comparisons of legal regulation rarely shed light on the way that law actually operates, but are necessary to answer the question of why countries do not enact similar approaches to the regulation of the Initial Coin Offering. This leads to the conclusion that, in both jurisdictions, there exists no legal certainty. Meanwhile, the failure of either the United States or the European Union to regulate the crypto-assets market effectively will have spill over effects for other jurisdictions. There is, therefore, an urgent need for strengthening international standards in the regulation of crypto assets. Therefore, this article intends to contribute to the search for a necessary, appropriate, and transnational way to chart the contemporary legal landscape of Initial Coin Offerings. The most favourable form of legal convergence regarding the Initial Coin Offering should provide increased legal certainty while protecting consumers and fostering substantial investment in innovation.

Keywords: crypto-assets, blockchain, harmonisation, token, ICO.

Introduction

At present, the topic of the legal regulation of Initial Coin Offerings (ICO) is the subject of ongoing academic interest. Being a global cross border phenomenon, ICOs provide a way for entrepreneurs to fund their new projects by pre-selling their tokens or coins to interested investors across the globe. Broadly speaking, the crypto market has grown tremendously over the past years and continues to flourish during the COVID-19 pandemic. The whole world has benefited from this growth, as e-commerce platforms provide unique benefits concerning services or alternative payment instruments for companies. At the same time, the blockchain economy is seen as a catalyst for social issues on topics ranging across privacy, product liability, consumer rights and tax law (Zetzsche et al., 2020, p. 309). This raises many concerns in the context of a regulatory framework. The arguments in favour of regulating digital platforms flow from the following main established rationales: market efficiency, financial stability, national security, monetary sovereignty and investor protection. Even though numerous studies have been published, the subject remains difficult to grasp and contextualise due to legal uncertainty and a lack of a unified approach to this phenomenon. In this regard, it is interesting to compare the regulatory approach to ICOs in the USA and the EU, clearly the top global players in the blockchain field in many respects.

The determination of differences in the legal regulation of ICO and the explanation of such distinctions is important in the process of the convergence of such jurisdictions and the effective interaction between them concerning ICO. Eventually, the key to designing a universal approach for the regulation of ICO is understanding the peculiarities regarding ICO in different jurisdictions.

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Meanwhile, the absence of a clear regulatory approach at a national level could complicate the effectiveness of regulatory actions and could give rise to regulatory arbitrage. Therefore, a coordinated and agreed international approach is vital, which will contribute to the formation of a comfortable environment for the blockchain community. In particular, the lack of a global universal approach to blockchain could cause a lack of user confidence in digital assets, which would challenge the development of an innovative digital business. On the contrary, harmonised clear legal regulation should support innovation and ensure a high level of consumer protection in this area. In turn, it should help crypto-asset service providers to scale up their activity on a cross-border basis, simplify their access to the banking sector and provide financial stability and increase consumer protection (Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937, 2020).

The main purposes of this article are: (i) to conduct a comparative study of the legal landscape for ICOs in the EU and the USA; and (ii) to produce an overview of different forms of harmonisation and propose the optimal path, with an emphasis on the scope of future harmonisation of ICO rules as well as the fundamental principles which should be common across the globe.

Cross-cultural experiences should help to establish optimal international standards in the sphere of ICO, contributing to the further development of this way of collecting money and sourcing financing. In this light, the comparative law method will be of use, the essence of which is the act of comparing the law of one country to that of another (Eberle, 2009, p. 452). Comparative law is used to explain why there are different answers to (functionally) equivalent legal questions and what the argumentation is behind those answers (Gestel & Micklitz, 2011, p. 21). Clearly, this comparative research is not only within the realm of comparative law, with the primary goal of examining other legal systems of different countries and determining their similarities and differences; it is comparative mostly in the sense that comparative analysis of the existing national rules in the USA and EU is a necessary step in order to move on to attempts at possible international harmonisation. In other words, my intention is to understand how much the international community can learn from the USA and EU to further develop a uniform approach towards ICO regulation

For practical reasons, this research is limited in several ways. First, it examines only the legal aspects of ICO in commercial and consumer settings. Second, this paper does not tackle any aspects of money laundering, criminal law, financial regulation, antitrust and tax law (corporate income tax, personal income tax, value added tax), or accounting.

1. Divergences between US and EU Laws

The following section illustrates the relevant differences between American and European approaches to crypto assets.

1.1. Different applications of securities laws to ICOs

The compared jurisdictions are based on completely different approaches to the term *token*. The USA uses the investment-based approach; the pivotal term here is ‘investment contract’, under Section 2(a)(1) of the US Securities Act of 1933 and 3(a)(10) of the Securities Exchange Act of 1934. Analysis of the application of the Howey test to token sales reveals that tokens with any form of investment component are classified as securities under US law. The US Howey test does not take into account transferability as a requirement for investment contracts; as such, the strict application of US security legislation is required.

Meanwhile, the EU focuses on the tradability of tokens on the capital (secondary) market under Art. 4(1)(44) of MIFiD II. Thus, EU law focuses on transferable securities. For EU purposes, case by case analysis of tokens is also the rule, based on whether a token can be qualified as a transferable security under the definition of MiFID II Art. 4(1)(44). Due to the freedom granted to Member States in transposing the definition of transferable securities into national law, substantial differences exist in terms of the interpretation of what constitutes a transferable security under the EU securities regime. In general, the token’s ability to be transferable, negotiable and standardized, depends on the certain position of each Member State.

As such, despite European efforts in terms of harmonisation, a country-by-country analysis into the legal classification of the majority of tokens is required.

In the US, analysis of the application of the Howey test to token sales reveals that nearly all tokens will pass the Howey test, with the exception of (pure) payment tokens, resulting in the classification of the token as an investment contract, and therefore a security. As such, the majority of all ICOs to date have run afoul of US securities laws by issuing and offering unregistered securities to US investors. While strict application of the Howey test will result in the protection of investors, it also results in: (i) a decrease in the amount of token offerings based in the US (relative to the total global amount of token issuances); (ii) the exclusion of US investors from participating in token offerings based in other jurisdictions; and (iii) increasing amounts of issuers opting to self-classify their tokens as securities.

Generally speaking, in contrast to the US, pure utility tokens might not be deemed transferable securities under the EU securities regime. Therefore, the EU securities regime seems to be more lenient for token issuers than the US regime (Maas, 2019, pp. 69–70). At the same time, EU legislators should consider implementing or enforcing a single definition (and interpretation) of transferable securities.

1.2. Different levels of legal fragmentation

Both the US and the EU share legal authority over blockchain policy with their constituent states. In the case of the US, however, the federal government and States have the ability to negotiate, adopt, and implement legal regulation regarding ICOs. Such States as Arizona, California, Delaware, Illinois, Vermont, New York, and Wyoming have already developed legislative regulation in the field of blockchain technologies.

By contrast, in the EU this power is shared horizontally among the institutions of the EU as well as vertically with Member State governments. The Council, Commission, Parliament, and Court share legal authority over decision-making at the regional level. In this regard, blockchain policymaking authority is shared horizontally and vertically, creating numerous access points for policy formation concerning the legal regulation of blockchain. The EU relies more on central regulation in the form of Directives that create overarching objectives within which Member States retain substantial implementation and enforcement authority. In particular, the European Securities Market Supervision Authority (ESMA, n.d.) in 2017 defined the requirements for ICOs in the EU Member States. ESMA does not prohibit ICO in EU countries, but emphasizes that ICO projects should not contradict EU legislation; for instance, the EU Prospectus Directive, according to which, if the ICO project meets the criteria of an IPO (public offering of securities), it is necessary to publish a prospectus that is pre-approved by the regulator. Moreover, EU securities regulation is applicable to ICOs with security tokens. In this respect, the Prospectus Directive, the new Prospectus Regulation, the Market Abuse Regulation and the MIFID II form the core of financial legislation across the EU.

In the US, the federal government is vested with more expansive blockchain law-making, implementation, and enforcement powers and is not constrained by questions of subsidiarity. However, at present it does not take advantage of these powers to elaborate the federal legislation regarding ICOs. In the meantime, the European Union is striving to unify the Fintech legal regulation of its Member States by, in particular, adopting the Digital finance package.

1.3. Consumer protection in the light of ICO regulation

Broadly speaking, the consumer is reasonably protected in both the US and the EU, but there exist certain differences in the peculiarities of consumer protection. In fact, consumerism is entrenched in Americans almost from birth, and determines most of the country's economic policy ("U.S. economy shrinks", 2001). The history of consumer protection in the United States concerns certain formal legal responses to crises that generate great public outrage and require a public response. This pattern began against the background of 19th century common law, which emphasized freedom of contract and caveat emptor (let the buyer beware). Over time, specific crises and political events led to both the creation of government bureaucracies with jurisdiction over specific products and practices affecting consumers and a broad array of private rights of actions where consumers can sue for

damages, injunctions, attorney fees, and litigation costs if they can show harm from illegal practice (Waller et al., 2011).

The rights of consumers are now enshrined in a plethora of formal statutory and regulatory protections at the federal, state, and local level. US consumer protection policy is mainly based on the idea that consumers should have the right to protect their own interests. This has led to an emphasis on ensuring that sellers provide complete information about their products in order to allow consumers to make informed choices and ensure access to justice (Corones et al., 2016). The main goal of consumer protection laws is to place consumers, who are average citizens engaging in business deals such as buying goods or borrowing money, on an even par with companies or citizens who regularly engage in business (Waller et al., 2011). Thus, the emphasis is on the formal nature of legal consumer rights (Waller et al., 2011). In other words, human capital is used to motivate economic growth.

However, consumer protection in the EU is considered as one of the official policies of the Union. This policy is a horizontal policy of the Union, which takes account of consumer interests in the implementation of the other official policies.[2] The EU has set up many directives on consumer law – e.g., Directive 2011/83/EU of 2011, the essential point of which is aimed at consumer information for contracts other than distance or off-premises contracts, consumer information and the right to withdrawal for distance and off-premises contracts, and other consumer rights.

To sum up, the EU and the USA represent two visions and models of consumer law. According to the American approach, consumer law is limited to responding to information failures in markets; the state plays little role in shaping standards in the market. On the contrary, the EU takes more care of consumers, considering consumer law as recognizing norms of fairness, risk spreading and protection of the vulnerable (Ramsay, 2007, pp. 39–50).

Without a doubt, regulatory dynamics are driven by context-specific social norms, including attitudes to blockchain development, which are causing a change in response from both regulators and regulated communities.

Americans 'have a different relationship with money than most other people. The American emphasis on economic conditions, consumerism, and material things makes money one of the strongest forces in society. Money is power in American society. It defines Americans' worth and status in a way unmatched elsewhere. If Americans lose money, they fear that they will lose themselves' (Gross, 1999, pp. 263–271). Conversely, material things appear to play a smaller role in the EU. Americans are encouraged by society to buy things, and also need material things in order to be valued in society. They also need a safety net if they are ultimately unable to pay for all these necessities (Hannig, 1996, pp. 175, 178).

All in all, the EU countries rely less on consumer spending to develop their economies. As societies, they focus less on money and their priority is to strengthen the rights of consumers in the EU, improve their well-being, and protect them within the framework of the main risks and threats. In this regard, the EU is less inclined to establish friendly legislation in relation to issuers. However, the United States economy is more competitive and much more capitalistic. This country is striving to develop its economy, including using the mechanisms of digitalization, and the legislation in the field of blockchain, compared to in Europe, tends to be more favourable for investors.

1.4. The number of ICOs

Figure 1 represents the percentage of ICOs in the USA and the EU based on the number of ICOs and not how much capital was raised through these ICO projects. The author used data generated by the ICO Watch List (2020), which ranks countries by the number of ICOs launched and provides information as to how much was raised through these ICO projects.

[2] In 1993, the Maastricht Treaty added a new chapter on consumer protection to be developed as a separate policy. However, four years later, the Treaty of Amsterdam allowed the adoption of measures to support, supplement and supervise the policies implemented by Member States. These measures do not have to directly and explicitly concern the internal market.

Country	% of Projects	Total Raised
United States	16.13%	$811,282,744
Estonia	4.03%	$34,717,899
Lithuania	2.35%	$54,050,000
Germany	2.18%	$6,350,000
France	2.18%	$78,050,000
Spain	1.18%	$26,660,000
Poland	0.84%	$8,600,000
Slovenia	0.67%	$896,240
Liechtenstein	0.50%	$24,990,000
Luxembourg	0.34%	$5,160,000
Austria	0.34%	$5,400,000
Slovakia	0.17%	$9,410,000
Sweden	0.17%	$14,800,000

Figure 1. The number of ICOs

The USA led the world in total ICO projects with 16.3%, compared to 14.95% for the combined EU total. Moreover, the USA heads the ranking with respect to ICO funds.

1.5. Different prospects for the development of international ICO regulation

At a very basic level, the US is a more reluctant player in multilateral law and policymaking than the EU. The continuing trend within the US to repudiate and undermine multilateral agreements and negotiations has been characterized as a pattern of 'lawlessness' (Sands, 2005). The corollary of this is widespread scepticism towards international law and, more importantly, a possible passive US position on the harmonisation of ICO rules at the global level.

In contrast to the US, the EU has adopted a more active role on the international scene, engaging more widely with international institutions generally and participating in various international agreements. The EU system requires more extensive and time-consuming domestic negotiation and compromise, and creates rigidity in international negotiations. Conversely, it also gives opportunities to minimize the influence of special interest groups at the negotiation and implementation stages.

In the USA, on the other hand, the President, as the Head of State, is vested with primary authority in entering into international agreements. The Senate maintains sole authority to ratify treaties, while the judiciary retains powers of oversight and enforcement.

More generally, it seems hard to deny that the extent to which the EU and the US engage with international law and policymaking reflects important differences and ultimately will be significant for shaping global ICO legal regulation.

1.6. Different approaches to the interpretation of contract terms and the concept of good faith

Other points which have been emphasized as important regard approaches to the interpretation of the terms of the contract. In Civil law, the central point is the literal interpretation of the contract, while in Common law systems the focus is on the literal meaning of the expression of the party's will. To be more specific, English law states

that when interpreting a contract, the expression of a person's will must be identified from the true will of the party to the contract, and must not adhere to the literal meaning of the expression of will. Alternatively: neither what the parties intended nor the logical implications of their underlying agreement are considered, but rather what is customary, fair and reasonable in such a relation; and this may very well not coincide with the actual intent of the parties in the given case (Craig, 1951, p. 59).

The main priority in Civil law is literal interpretation, and therefore it is assumed that the words and expressions used in the contract clearly and unambiguously express the will of its parties. Thus, according to the Roman view: 'When words do not arouse any disagreement, the question of the will should not be allowed to be raised'. However, this omits that there is no interpretation of the will where there is no dispute between the parties regarding the words, expressions, phrases and conditions contained in the contract (*Digests of Justinian*, 2004, p. 240). Civil legislation does not take into account the true intention of the parties, but only attaches importance to what they reflected in the contract.

Another divergence between the Common and Civil legal systems lies in the approaches to the concept of good faith. In Civil law systems the negotiation, conclusion, and enforcement of contracts are subject to the principle of good faith. The application of this principle cannot be excluded.[3]

In the Common law system, good faith plays a different role. Good faith is only required in particular situations, rather than as a general requirement for the conduct of the parties. In English law, the importance of legal certainty takes precedence over the harshness a particular rule may cause in individual circumstances (Goode, 1992). The application of this principle, as set out in the case *MSC Mediterranean Shipping Co v. Cottonex Anstalt* (2015), requires specific contractual instruments. Only in the sphere of restricting the use of rights in cases where the discretion of one of the parties is provided does the High Court of Justice proceed from the directly applicable legal norm. According to the traditional view, the recognition of the general principle of good faith poses a threat to the freedom of contract, which is a basic principle of English contract law (Korde, 2000, pp. 142, 159).

Thus, another difference between the two legal traditions concerns the concept of good faith and the intent of the parties to create legal consequences. For the purpose of ICO legal regulation, the analysis of these differences is extremely important; it is a relevant and necessary tool that can be used both in legislative and law enforcement activities in solving legal problems regarding the legal regulation of ICOs. It should be noted that applying the principle of good faith to the relations related to ICOs has not been covered in detail in academic literature.

Some authors even believe that when using a smart contract, the principle of good faith is not completely necessary. This is justified by the fact that a smart contract, providing automatic fulfilment of contractual terms, excludes the possible unfair behaviour of the parties. Thus, one author noted that the blockchain manages integrity for the purposes of online business exchange (Ryan, 2017, p. 10).

'I believe that the automation of the fulfilment of obligations should not create obstacles for the implementation of the fundamental principles of good faith' and for assessing the fair allocation of the parties' rights and obligations (Bogdanova, 2019, p. 108).

The practices of using blockchain technology and smart contracts have already shown that computer programs cannot neutralize the unfair behaviour of participants in civil relations. Rather, on the contrary: they can act as an additional means of unfair behaviour. There is also the fact that the relations of the parties can develop even before the application of a smart contract (pre-contractual relations, a preliminary contract, the conclusion of a contract in the 'traditional' form, the decision on the additional application of a smart contract to it, etc.). At such stages of the development of relations between the parties, the principle of good faith cannot be ignored.

[3] A corresponding rule is also established for the obligation to act in good faith provided for in the UNIDROIT Principles. In accordance with Article 1.7 of the UNIDROIT Rules: '(1) Each party is obliged to act in accordance with good faith and fair business practices in international trade. (2) The parties may not exclude or limit this obligation'.

It is interesting to note that the application of the principle of good faith is relevant in relation to a special subject – a specialist who ensures the operation of smart contract technology. The person who provides technical support for the contract has the opportunity to make errors in the program code, which will further affect the rights and obligations of the parties to the contractual relationship to which the smart contract is applied.

The problem of using technical means is especially important at the stage of drawing up the contract and forming its terms. Parties (especially if they do not often use such technologies and are not familiar with them) will rely on technical support, in particular data mining and counting methods, to help in finding a suitable contract offer (Woebbeking, 2018, p. 110). In this case, the risks increase in at least two directions: first, the deliberate failure of a technical specialist to provide information for their own personal purposes; second, the specialist not paying attention to moments that, in their opinion, are insignificant, but that are important for the occurrence of legal consequences in the future.

The principles of Civil law, in particular good faith, remain an actual and necessary tool that can be used both in legislative and law enforcement activities when solving problems regarding the legal regulation of relations related to the use of smart contracts. However, the principle of good faith in connection with ICOs should be filled with special content.

To sum up, I believe that for the purposes of legal regulation of relations related to ICO, the Anglo-American model of good faith could be promising. The principle of good faith in relation to ICO can be limited to cases that are directly specified within the law and that are associated with a deliberate violation of the rights of the counterparty (physical coercion, misleading when concluding a contract, interpretation of the terms of the agreement of the parties, etc.). However, from the perspective of approaches to the interpretation of the terms of the contract, the Civil law approach seems more appropriate, because within the framework of the blockchain, including ICOs, only a literal understanding of the terms of the contract is possible.

1.7. Digital tokens and property rights

Various legal issues arise in the context of digital assets and crypto-assets. Regarding crypto-assets, it is usually assumed that the token can be considered as an object of property rights, even if it does not represent rights in a physical asset or rights in relation to a counterparty. However, in many EU countries purely intangible objects are not recognized as befitting of all property rights.

In the case of digital assets, many EU countries regard certain rights as intangible objects of property rights (i.e. *res incorporales*). However, very often the emphasis on the physical representation of the *res incorporales* – the paper certificate – provides a tangible, movable *res* that is a fitting object of property rights. Thus, in many EU countries, a paper document is needed to make the pre-DLT system of dematerialised company shares work. Otherwise, the property problem concerns all kinds of digital assets. On the contrary, in the USA, a more flexible approach has been formed to the definition of an object of property rights. According to it, digital assets are better suited into their general law of property.

In the light of property law, the two most important concepts should be noted, namely ownership and possession. However, the traditional understanding of these concepts is challenged by digital assets, and it is not always straightforward that these concepts can be applied to digital assets.

In some EU countries, such as Germany, intangible objects are recognised as fitting for limited property rights, but not ownership. Other EU countries have less stringent definitions of what may be the subject of ownership: they recognize property rights in resale rights. There, digital assets, representing rights to other assets or claims against a person, can be entered into the legal system without much difficulty. On the other hand, crypto-assets can still pose problems.

In general, the USA tends to adhere to the open approach, focusing more on the remedies available to the owner of the property than conceptually defining the type of thing in which property rights can be enshrined. However, here, too, innovation may be required if it is necessary to cover the entire spectrum of digital assets and crypto-

assets. As far as possession is concerned, it has to be noted that possession is defined differently in the EU and the USA. The EU countries distinguish whether possession should be a purely factual or also a legal state of affairs, and in this regard questions will arise as to the extent to which the concepts of ownership and possession can apply to digital assets and crypto-assets. Conversely, in the USA there exists a less developed concept of possession, which may therefore be more flexible (Tay, 1964, p. 476).

1.8. Tokens and their types

The technical basis of the ICO is a token: this cannot be ignored when studying this technological phenomenon. Tokens along with cryptocurrencies are the two most common blockchain-based digital assets, but it is necessary to distinguish between them. Firstly, cryptocurrencies have their own blockchains, whereas tokens are built on an existing blockchain (Ethereum, Waves, etc.). A token is a means of payment in a specific blockchain, which is based on the underlying cryptocurrency. A token without a cryptocurrency cannot exist, whilst a cryptocurrency without a token can. Secondly, unlike cryptocurrencies, the issue of tokens is carried out by a person (an individual or legal entity) – the initiator of their issue. As a rule, the issue of tokens occurs during an ICO, and their issue is limited. Thirdly, the ICO token has a wider range of applications: in addition to being used as a payment unit, they can certify various rights. In practice, they can simultaneously: (a) have purchasing power and perform the function of a means of payment in the ecosystem of a particular project or even outside it (cryptocurrency); (b) perform the role of a financial asset (as a rule, an analogue of a stock, bond, deposit or warrant) and be the object of free purchase/sale on the relevant trading platforms and exchange services; (c) certify the ownership or loan of an investor in a project/enterprise (i.e., perform the role of loans and bonds); (d) certify the rights to purchase a certain amount of services, goods, or property (so-called app coins or app tokens); or (e) be a form of reward for certain actions, etc.

According to some researchers, ‘a token personalized by its owner for future use may represent an investment, a share in the capital, a copyright, or a restaurant voucher... any amount and any asset in digital form... A token can represent anything. It can be a value, such as bitcoin, or a title of ownership’ (O’Rorke, 2018). Broadly speaking, tokens can symbolize any property right, absolute or relative: they can act as a representation of any object of law. As is pointed out in the doctrine (Novoselova, 2017, pp. 37–38), they resemble undocumented securities. The token in its essence represents a legal symbol that certifies the rights to civil rights objects by recording them in a decentralized information system, and blockchain provides the storage and accounting of tokens.

It should be noted that, at the present time, there is no unified system for classifying tokens. In the legal literature, several classifications of tokens are proposed depending on the types of functions that they perform. For example, Genkin and Mikheev (2018, pp. 223–224) provide the following classification of tokens:

- application tokens;
- share tokens;
- custom tokens;
- credit tokens.

In their *Guide pratique pour les questions d’assujettissement concernant les initial coin offerings*, FINMA (n.d.) used an approach based on the economic nature of tokens, distinguishing between such tokens as:

- **Payment tokens**, or *les jetons de paiement* (a synonym for the concept of *genuine cryptocurrencies*), which include tokens that are accepted as a means of payment for the purchase of goods or services through the intermediary, who must ensure the transfer of these property values.

- **Service tokens**, or *les jetons*, which are any tokens that provide access to digital content or a service.

- **Investment tokens**, or *les jetons d’investissement*, which are tokens that prove capital investment. In particular, tokens of this category can provide the investor with a right of obligation (claim) to the issuer or the right of membership in the corporation. In some cases, the issue of investment tokens is qualified by FINMA as accepting deposits from an indefinite circle of persons. This entails the application of the Federal Law on Banks and Savings

Banks of November 8, 1934 (Lois sur les banques et caisses, or LB), and leads to the obligation for the issuer to obtain a banking license.

Blandin et al. (2018) believe that there exist three main types of tokens: first, payment tokens, i.e., digital means of payment or exchange, known as cryptocurrencies; second, utility tokens providing digital access to certain digital platforms and services; and third, security tokens, i.e., asset-backed tokens representing ownership interests in property. This taxonomy seems to be functionally oriented and technologically neutral.

It transpires that ICO tokens represent a kind of obligation to the token owner to provide them with something in return for the invested fiat money or cryptocurrencies. Therefore, in ICOs, we are discussing security and utility tokens.

When speaking about the differences between the USA and the EU approaches to the classification of tokens, it should be noted that in the USA the main value of classification is manifested in the necessity of passing a Howey Test that allows security tokens to be identified, whereas in the EU there exists special legislation dedicated to special types of tokens (e.g. Malta's Virtual Financial Assets Act, 2018).

To conclude, the token represents a conditional virtual symbol of an object of law in cyberspace, which could exist in the real world in different forms, including a thing, a right of claim, a copyright, etc. In truth, the token is a new mechanism for confirming property rights, their transfer, and their termination, and not the essence of the rights fixed in the distributed registry system. The token is individualized by assigning this token (an object of Civil law) to the appropriate person in a way that is determined by the protocol used on the blockchain platform. As a result, the right to the object is fixed for a specific person. The identification of the copyright holder is carried out not by designating their first and last name, as in usual civil turnover, but by specifying their pseudonym/nickname or wallet number. As a result, it seems more correct at the moment to regulate tokens as special accounting systems that allow the rights to objects and the results of their transfer to be recorded.

2. Determinants of differences between US and EU ICO legal regimes

After exploring the fundamental divergences between US and EU ICO legal regulation, it is important to examine the question of why they differ. Differences between common law and Civil law legal systems and the nuances of how these systems interact can lead to profoundly different legal responses. It is impossible to comparatively analyse ICO legal regulation without examining the socio-legal context within which it arises. The EU and the US are both supreme allies and supreme competitors: they often support each other in matters of international relations, while at the same time contradicting others. The questions of which socio-legal factors drive these choices remains underexplored.

To better understand these reasons, this paragraph examines six categories of factors that influence the ICO legal regimes in Europe and America, including: (1) the correlation of legal regulation; (2) the philosophy of ICO regulation; (3) a general overview of approaches concerning ICO regulation; (4) the correlation between national and international law; (5) the types of legal systems; and the (6) peculiarities of legal technique.

2.1. The correlation of legal regulation

2.1.1. The relationship between federal and State law in the USA

The United States is a federal State in which the main question concerns the relationship between federal and State laws. The Tenth Amendment to the US Constitution, adopted in 1791, clearly resolved this issue, according to which 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively'. In other words, any power that is not explicitly granted by the U.S. Constitution to the federal government is reserved to the States and not available to the federal government.

This principle has always been in effect: legislation falls within the competence of the States; the competence of the federal authorities is an exception, which should always be based on a specific article of the Constitution.

Consequently, States have a large degree of freedom, which indicates a significant decentralization of public administration. Moreover, even on the issues on which Congress legislates, States are given a certain competence, termed residual competency. States are allowed to legislate on these issues, but are prohibited from adopting provisions that are contrary to federal law; however, it is not forbidden for them to supplement federal law or fill existing gaps in it. The principle of the residual competence of States has certain boundaries: namely, even in the absence of federal laws, States cannot legislate contrary to the spirit of the Constitution (René, 1996). Thus, it seems that in the most general terms, the mechanism of this interaction is as follows: federal laws regulate a relatively narrow range of issues, and most of the rules are contained in State legislation.

2.1.2. The relationship between EU law and Member States law

The European Union is an integrative supranational organisation with sovereign States as its Members. Therefore, the question of the relationship between European (communitarian) and national law deserves particular attention. Over several decades of the EU's existence, special legal mechanisms have been developed for interaction between these systems, including resolving conflicts between the norms of different levels.

EU legal regulation is based on the principle of supremacy of communitarian law and its direct effect and uniform application in the Member States. However, even in this organisation, characterized by perhaps the highest degree of integration among all supranational systems, the question of the correlation of such norms is not so clear. At present, the doctrine still raises the question of the appropriateness of the EU's Rule of Law principle (Ritleng, 2009, pp. 677–696). As such, the relationship between the EU and national legal systems is based on the rule of law of the European Union (Kwiecień, 2005). As a rule, the principle of supremacy is proclaimed in national legislation, while in European law it is directly enshrined in acts of the European Union and is supplemented by the principle of direct action (Jacqué, 2007, p. 10). Thus, EU law combines both classic and specific features of international law, establishing the principle of supremacy in acts of the supranational organisation itself.

At the national level and at the level of the European Union, there exist different approaches to resolving legal conflicts. For the European Court of Justice, the EU's Rule of Law principle applies to any national rule, including constitutional ones – otherwise, the very essence of this principle simply loses its meaning. At the same time, it is difficult for a national constitutional judge to abandon the application of the Constitution in the event of its conflict with EU law. In this regard, in the literature one can find reference to the dual perception of this principle by national courts: the emergence of the doctrine of counter-limits (*controlimiti*). This doctrine originates from Italy, where it initially denoted restrictions on the application of the principle of the supremacy of communitarian law (Salmoni, 2003, p. 289). According to it, the EU's Rule of Law principle is limited by two factors: the constitutional provisions that form the constitutional core or constitutional identity of the state, and the limits of competence of the European Union itself. The constitutional courts of the participating countries adhering to this doctrine (first of all, the German Federal Constitutional Court) declare their right to exercise constitutional control of those EU acts upon the adoption of which the European Union acts beyond its competence (Jacqué, 2007). Therefore, according to the doctrine of counter-limits, the EU's Rule of Law principle, by its very nature, assumes that Communal law has priority over all national norms, including constitutional ones. As a general rule, this provision is not disputed by States as it stems from the consent (common will) of the Member States to participate in European Union. At the same time, such an agreement does not mean a rejection of the key elements of national constitutional identity (Ritleng, 2009, pp. 677–696).

Hence, the courts today remain the main tool for resolving conflicts between national and supranational norms. In this regard, the linkages between the European Court of Justice (ECJ) and national courts are vital to the enforcement of EU regulation.

2.2. The philosophy of ICO regulation

The United States is the largest economy in the world – a developed country with a steady demand for innovation in the middle class. The United States has always been considered a generator of original innovations with a technologically advanced high-tech sector, a developed service sector, and a powerful internet segment. Thus, for the USA, the formation of the digital economy and associated markets was organic and, in a certain sense,

evolutionary in nature. The growth of the digital economy was based on the accumulated institutional, technological and competence potential, and followed pre-planned market trends, which ensured its success (Danilin, 2019).

First, many American platforms and other digital companies are developing approaches that appeared during the internet revolution of the 1990s. In this sense, the high values of the digital development of the United States – a pioneer country of new technologies – are understandable. Equally important for success is the fact that new technologies and solutions often follow long-established market trends or even serve specific, already existing markets, implementing traditional services on a fundamentally new technological basis and with business models of the digital era.

These statements are fully applied to blockchain technologies, which, despite being a new phenomenon, are fully consistent with the trends in the development of the financial sector (the growth and acceleration of electronic transactions, their higher security, etc.). Interestingly, back in 1999, Nobel laureate Milton Friedman, in one of his resonant interviews, predicted the rise of new financial technologies: 'One thing that we lack, but which will soon be developed is reliable electronic money, a method by which it will be possible to transfer funds from A to B on the internet, even if A and B are unfamiliar' (Friedman, 2013).

Now, the United States is one of the world leaders in the digital economy. Taking a leading role in its development, Washington proceeds from the fact that the digital economy plays an important role in ensuring the future success of the entire American economy, is a source of economic growth, and is a key element in improving the competitiveness of the United States. According to American experts, the introduction of blockchain technologies into production and everyday life provides huge opportunities, allowing businesses to improve technological processes, reduce product release times, reduce production costs, and improve interaction with consumers. Those consumers, in turn, receive access to a wider range of commercial offers (US Department of Commerce, 2016).

The EU is also concerned about remaining behind technologically and is making a concerted effort to craft new regulations that will affect Big Tech. Naturally, Europe wants to reassert its power in a competitive economic market. At the same time, it wants to humanise the digital world by putting strict limits on the use of data, setting clear boundaries on how people and machines work together.

The current task of the European authorities is to create a single digital market in the European space (Digital Single Market). One of the steps to achieve this goal was the creation of a pan-European advisory platform at the beginning of 2018 – The EU Blockchain Observatory and Forum. The Forum consolidates different participants in the market of innovative technologies: state governments, financial institutions, developers, start-ups, as well as large businesses investing in innovations. The main idea of The EU Blockchain Observatory and Forum is to develop a unified position on blockchain technologies in Europe based on the platform. To do this, participants are given the opportunity to share their experience, hold debates, and put forward initiatives, but the main direction of the Forum is the development of ways to harmonise innovative technologies in the conditions of traditional social, legal and commercial systems. Meanwhile, the participation of civil society is crucial to ensure and maintain the democratic potential of decentralized technology. This indicates the need for coordinated regulation within the EU for the sector, given the introduction of technology without regard to national borders.

The EU's approach to tech regulation was also defined in 2020 with the establishment of the Digital finance strategy (*Digital Finance*, 2020). It is noted that consumers must be protected against risks stemming from increased reliance on digital finance. The introduction of digital finance will help the overall digital transformation of economy as well as society. This will bring significant benefits to both consumers and businesses. The two main objectives of promoting digital finance are to create opportunities to develop better financial products for consumers as well as to support Europe's economic recovery after the COVID-19 crisis.

In addition, it is worth mentioning the position of European institutions regarding digital innovation. For instance, in the report on digital finance from the European Parliament, it is pointed out that in Europe, digital finance will have a key role to play in terms of innovation and breaking down cross-border barriers. Bearing in mind the current COVID-19 outbreak and the associated growth of the use of digital means for consumers, investors, and

financial institutions in dealing with finance, FinTech will continue to grow in both size and importance to the EU economy.

According to the recommendations of the Capital Markets Union High-Level Forum, working towards a well-functioning Capital Markets Union is one of the top priorities in Europe. Without it, and strong support from the highest political level, Europe and the Member States will not be able to tackle the huge challenges of sustainable transition and ageing of our societies. To achieve this, markets need to be highly integrated for capital to flow freely, both domestically and cross-border, without distorting competition to the benefit of both citizens and businesses (Financial Stability, Financial Services and Capital Markets Union, 2019).

In addition, in the SME strategy for a sustainable and digital Europe, it is pointed out that the goal is that Europe becomes the most attractive place to start a small business, make it grow, and scale up in the single market.

To sum up, the EU has historically taken a firmer approach to tech power, using the concept of the enlargement of the application of blockchain technology whilst at the same time considering the challenges which FinTech entails, and risks in such fields as financial stability, financial crime, and consumer protection. Therefore, among European countries and at the EU level, a particular focus is on developing a legislative framework that could combine appropriate oversight and equal treatment of investors and consumers, mitigating financial stability risks. Meanwhile, the development of the digital economy in the US is primarily closely connected with the importance of maintaining and strengthening the country's dominance in the world economy market.

2.3. A general overview of approaches concerning ICO regulation

Not all EU Member States and USA States view the phenomenon of ICO from the same perspective. A general analysis of the situation in the United States and the EU reveals that legal uncertainty continues to prevail.

In the USA, a clear division between States with strong blockchain regulation and states with friendly attitudes to blockchain can be observed. The majority of US States want to profit from the business stimulus created by blockchain technology. Moreover, these States compete with each other to attract business from the point of view of developing the most favourable legislation for ICOs. On the contrary, some States stand for compulsory licensing in order to protect investors. Both strategies have a logical rationale, but both exhibit different points of view.

In general, the European Union has a positive attitude towards blockchain. Unlike the United States, in the European Union, the positions of States are divided into the following:

- States which conduct a very blockchain-friendly policy and adopt special laws;
- States which limit themselves to a lack of regulation, warning of the risks or encouraging activities using blockchain based on the recommendations of regulators.

In the latter, the leading role is played by local regulators who, in the absence of special legislative norms, issue guidelines on ICOs and crypto-assets based on the applicable norms of current legislation. Such explanations are published by the regulator, which is responsible for the activities of financial markets, as well as investment and banking.

2.4. The correlation between national and international law

Historically, even when directly engaged in international conflicts, US citizens have retained a primary focus on matters of domestic politics. As a consequence, international issues have traditionally received less popular attention and critique than domestic issues, leaving the politics of international affairs vulnerable to excessive influence by special interest groups (Nye, 2002, p. 349). As a result, in the wider field of international law, the US has refused to participate in many international treaties.

The role of the EU in the international arena has expanded exponentially in recent decades. Drawing upon the underlying objective of 'assert[ing] its identity on the international scene', as articulated in Article 2 of the Treaty on European Union, the EU has made a concerted effort to strengthen the Community's role in international law and policy since the early 1990s (European Union, 2006). Much of the EU's success in this regard is attributable to greater intermingling of domestic, regional, and international politics. The geographic positioning, historical interdependency, and political configuration of the EU predispositions European citizens and politicians to be more attuned to issues beyond domestic politics. It should also be emphasized that European politics, whether at State or supranational level, reflect a more complex conjunction of local, regional, and international issues including ICO regulation.

2.5. Civil and Common law legal systems

Common and Civil law systems are the two main governing systems, with conceptual differences. In this context, the USA legal system will be considered as an example of a Common law system and the EU legal system as an example of a Civil law system. Both systems have different roots regarding the sources of law, their use and relative importance. The Common law developed in England as a system where the body of law derives from judicial decisions, whereas the Civil law system is based on Roman law and, therefore, on statutes (Kaske, 2002, p. 395).

Experts in the field of comparative law, emphasizing the peculiarity of Romano-Germanic law, point out that it is by its nature a statutory law. The statute in this case is considered in two meanings: in a narrow sense, as a synonym for the term *law*; and in a broad sense, as a generally binding act adopted by any law-making bodies, which include the legislative and executive-administrative bodies of the State. According to David and Joffre-Spinosi (1999, pp. 74–75), 'the law is, apparently, the primary, almost the only source of law in the countries of the Romano-German legal family. All these countries are countries of written law. Lawyers here, first of all, refer to legislative and regulatory acts adopted by the parliament or government and administrative bodies. ... Other sources of law occupy a subordinate and insignificant place…'. In this context, the terms *law* and *normative legal act* are synonymous.

It has to be noted that in countries with a Romano-Germanic legal system, the role of judicial precedent as a source of law is insignificant in comparison with a normative legal act. Judicial precedent, as a rule, has been recognized and is recognized in the continental legal family, but as a secondary, not a primary, source of law. In this case, it is possible and necessary to talk about the priority of the law over the precedent – in this regard, the main role in the formation of the law belongs to the legislator.

This is contrary to the reliance on case law (judge-made law) in Common law jurisdictions. Common law is defined as the unwritten body of law derived from judicial decisions, rather than from statutes and from local customs (Morrison, 2001, pp. 63–64). Therefore, Common law is 'judge-made' by applying legal principles developed in past cases to similar situations, and by creating precedents via cases or through the interpretation of statutes in accordance with the intention of parliament (McDowell & Webb, 1998, pp. 60, 69).

All in all, it has to be noted that differences between Common and Civil Law jurisdictions are apparent. The legal system of a country strongly influences the current regulatory environment, especially on controversial issues. The Civil law legal system is dominated by 'written law', and the provisions of statutes try to cover every area of law. Common law, on the other hand, provides a system of *stare decisis*, where judges should decide their cases having regard to prior decisions – monistic law. Moreover, they are different in respect of the relative importance of case law and statute law as sources of positive law, the role of judges in the law-making process, and the methods and approaches used by both judges and attorneys to the solution of problems (Bailey, 1978, pp. 130–133).

In the American legal system, due to a traditional principle called case law, courts have not only the right to apply the law, but also the right to interpret and make binding decisions. In this sense, courts adopt case law to the extent that their decisions are cited as precedents in future cases. This makes it easy for courts and judges to guide the law in the relevant area.

2.6. The peculiarities of legal technique

In the United States Code (General Provisions, 2012), there is the consolidation of certain legal and technical rules concerning legislative techniques, as well as definitions that extend their effect to all laws. In relation to this, we can say that the consolidation of definitions and rules for the use of terms that apply to all legislation makes it possible to achieve qualitative uniformity in the implementation of legal norms. The importance of choosing the right place for placing definitions in the text of a regulatory legal act is obvious. In this regard, it is necessary to note a certain trend in law-making, which allows us to speak with confidence about the possibility of codifying subordinate normative acts.

3. Prospects of legal harmonisation

Harmonisation, being a broad concept, could be understood as 'a process aspiring to unification or maximal approximation of two or more different elements' (Fox, 1992, p. 594). Otherwise, the process of harmonisation has the purpose of combining different parts and elements of subjects. Eventually, this creates the feeling of a serial unity (Boodman, 1991, p. 699). Therefore, harmonisation is interpreted as a union of several objects, not interfering with the individuality of separate components.

The practical result of harmonisation is connected with the structure of separate constituent parts (Leebron, 1996, p. 65). The main feature of harmonisation is unification in one entity of a variety of elements. Regarding ICO regulation, harmonisation should be interpreted as a form of seeking the optimal rules and principles which would enable a balance between different legal systems in terms of crypto-assets and blockchain technology to be provided.

The co-existence of several legal systems can trigger processes of harmonisation. In connection with this, the author has previously analysed the approaches of the United States and the European Union to ICOs, as representatives of Common and Civil law countries. The author concluded that the framework of the compared jurisdictions regarding the issue of legal regulation of ICOs is substantially different, identifying the root causes and differences between them. In this regard, it is important to consider existing (and potential) intersects in crypto-asset regulation.

Actual sources of differences could be classified into one of the following categories:

- Incoherent terminology and lack of a common approach in the EU and the US regarding the term token and the possibility of recognizing the token as an object of property rights.
- The conceptual background underlying the ICO framework. The USA adheres to the consumerist approach, while the EU takes account of consumer interests, protecting and strengthening their rights.
- Different legal systems in terms of approaches to the interpretation of the terms of the contract (the binding nature of offers, the concept of good faith, etc.).
- Overlapping requirements in local and federal (or national and supranational) legislation. For instance, a division between those Member States that adopt an equivalence-based approach and those Member States adopting a characteristics-based approach towards the implementation of the definition of transferable securities in their respective legal systems. Some States in the USA stand for the compulsory licensing of crypto-asset activities (New York State), while Wyoming's state legislature has passed a bill that would exempt certain types of crypto-assets from some of the State's securities and money transmission laws.

Given a lot of differences between countries, some scholars are critical of the possibility of global regulation as the solution for the ICO marketplace. According to Musheer and Watt (2018) it is difficult to envisage how these diametrically opposed regulatory standards are capable of reconciliation. However, it is difficult to agree with such a statement. According to the author, harmonisation can ensure useful assistance for regulators in unifying their approaches to ICO regulation. Norms which would be elaborated on the global level would serve as the framework for national legislation and the application thereof. The priority of international legal regulators is now becoming generally recognized in national legal systems, and 'globalization strengthens the internationalization of national norms and the role of new international and integration acts' (Tikhomirov, 2013, p. 92). As David and

Brierley (1985, p. 25) noted, '... the formulation of the legal rule tends more and more to be conceived in Common law countries as it is in the countries of the Romano-Germanic family. As to the substance of the law, a shared vision of justice has often produced very similar answers to common problems in both sets of countries'.

However, in order to make global regulation work in practice, elaborating rules and principles should become a process of mutual integration – a natural convergence (Skakun, 2015). Countries should accept each other's peculiarities and find compromises, relying on that which best suits the blockchain environment and the interests of the participants (Vranken, 2010, para. 1002). At the same time, international cooperation should not generate negative externalities for domestic legal systems. Before discussing the solutions to the above-mentioned problems of possible harmonisation, let us first examine the toolset available to legislators, i.e.: By which methods should legal convergence be pursued?

3.1. Available international models for the ICO legal regime

Having examined the reasons for harmonisation in the fields of crypto-assets, we now move to consider the methods through which such harmonisation ought to be pursued. In essence, the purpose of harmonising ICO legislation is to replace current diverse laws in different jurisdictions with a unifying legal regime. This can be done in several ways and with different types of tools. We can broadly distinguish several forms of harmonisation of law, namely soft law (informal guidance, recommendations, summaries of practices) or hard law (supranational regulation, international conventions). Multilateral international conventions have the goal of introducing a single legal solution within the different jurisdictions of the Member States that that have decided to accept the convention. Model laws are used to provide a guide which may be used by different states, but there is no legal obligation to apply it. The harmonising effect of model laws depends on the degree to which states change their laws to fit the model. In the European Union, the binding Directive, as a supranational regulation instrument, is also possible, and requires Member States to amend their laws according to the basic principles of the Directive.

Our focus is on international conventions and model laws, with the final aim of searching for the most optional instrument. In finding solutions, states face a compromise between them, as each have advantages and disadvantages.

3.1.1. Achieving international harmonisation through soft law

The subject of soft law has always been a difficult one for the global regulatory community. On the one hand, it does not represent a law in the fullest sense of the word. Prosper Weil stated that these obligations 'are neither soft law nor hard law: they are simply not law at all' (Guzman & Meyer, 2010, p. 171). The rules of soft law represent a consensual exchange of promises on a certain issue, declaring at the same time that these promises are nonbinding. Soft law is a set of guidelines for the international legal community, operating in line with consensus.

On the other hand, undoubtedly, the soft law approach has several benefits. For example, it allows States to use a more efficient method of amending the law as circumstances change. Soft law can ensure negotiation, comparisons, and learning (Goldsmith, 1998, p. 1199). Legislators have flexibility in managing their own affairs because they do not assume any legal obligations, and parties can learn about the impact of certain policy decisions over time (Abbott & Snidal, 2000, p. 423). Soft law offers a degree of flexibility and adaptability in accordance with the needs of each State that facilitates negotiation. This can especially be the case with respect to blockchain technology, as it allows actors to learn about the technology and the impact of any particular rule gradually.

The regulation of ICO markets is complicated because blockchain technologies are constantly changing, either due to innovations or the technological capabilities of participants. By avoiding formal legality, parties to arrangements could observe the influence of rules in practice so as to better evaluate their advantages, retaining the flexibility to avoid any unpleasant consequences that these rules may retain. In the blockchain context, soft law makes it possible to experiment, and, if necessary, change path when new circumstances arise.

Moreover, the rules of soft law are to a greater extent combined with the concept of blockchain, assuming

anonymity of the participants and no state interference. Finally, soft law ensures a cheaper way of consensus reaching (Gersen & Posner, 2008, pp. 573, 589) – it does not need lengthy participation by heads of state or ratification procedures. Instead, agreements can be reached between administrative agencies. Therefore, the process of negotiation becomes relatively easily (Lipson, 1991, p. 500).

It has to be mentioned that the effectiveness of soft law options in reaching the ultimate aim of harmonisation of ICO regulation is limited. Sometimes commitments can be weak, because soft law represents a set of observations made by members at international forums and can serve as an intermediary for a more complex regime. These agreements are not legally binding compared with international treaties and conventions. Additionally, it is difficult to foresee how completely different regulatory ICO standards could be harmonised through soft law mechanisms. Meanwhile, crypto-asset-related businesses have important consequences for the participants and the State, and this makes them intrinsically important. These observations suggest that in the long term, despite the advantages of soft law, global harmonisation of ICO rules will likely have to be achieved via hard law as the ICO market becomes vital for global industry.

3.1.2. Achieving international harmonisation through conventions

Bilateral and multilateral treaties or conventions are the primary hard harmonising mechanisms for solving issues between States in different fields. Hardness of law is explained by taking the law as it is by the parties without any modification (Mistelis, 2001).

The following major shortcomings of the harmonisation of ICO by international conventions could be mentioned:

(i) the long and expensive process of negotiating and preparing the convention;
(ii) the degree of unification may be limited and the differences may be irreconcilable;
(iii) the possible breaks in ratification of a convention, lasting for many years before the convention comes into force;
(iv) statutory law is subject to interpretation by the courts, and there is no guarantee that harmonised law will be interpreted identically;
(v) crypto-assets may not be described as a stable object of regulation;
(vi) difficulties related to the ubiquitous ratification of a convention; there exists the possibility of resistance, especially for smaller countries like Panama or Gibraltar, similarly to the field of international tax harmonisation.

Despite the number of drawbacks, conventions still play a major role as harmonising mechanisms. Proponents of harmonisation suggest a number of benefits of harmonisation through hard law. Firstly, conventions create certainty of law as opposed to the flexibility and adaptability of soft law. Secondly, hard law is suitable for solving issues on which individual States have completely opposite positions. For example, the applicability of securities laws to crypto-assets. Finally, hard law helps to make the obligations between States more reliable. Since treaties require a substantial level of government involvement, and, as a rule, ratification by legislative bodies, States can face reputational costs if they do not comply with their contractual obligations. In other words, States that are inclined to fulfil their obligations earn a solid reputation that helps them coordinate their actions with the parties when they need to promote their national interests (Guzman, 2007, pp. 71–111).

Generally speaking, blockchain technology would significantly benefit from an international convention. However, this brings us to the next point of this paper that will focus on how they could be improved upon to ensure their success. Their continuing success will depend on formulating the optimal scope of future harmonisation of ICO rules as well as finding the most balanced approach to the underlying principles which meet the interests of different States on the controversial issues.

Certainly, soft law instruments have their advantages for the unification of ICO approaches (easiness to accept and implement, flexibility). However, it can be said that the principal benefits of conventions, which are expressed in providing certainty of law, remain vital, especially where consumers or public interests are at stake. Only hard instruments enable a high level of legal certainty, consumer protection, market integrity, and financial stability to be provided, reducing legal fragmentation worldwide. Soft law instruments are not able to resolve

these issues, and, therefore, conventions remain vital. Meanwhile, certain steps must be taken so as to make conventions more successful instruments.

3.2. The scope of legal harmonisation

This section focuses on the scope of future harmonisation of ICO rules in the light of two main issues: (i) establishing a minimum set of common requirements; and (ii) harmonisation beyond the minimum level. The establishment of a clear level of requirements is necessary to have appropriate global crypto-asset regulation in place or to navigate and implement the relevant standards in practice.

The unique characteristics of the blockchain environment mean that its regulatory framework may rapidly become outdated and thus may need regular analysis even at the baseline level of harmonisation. This characteristic complicates the prospects of hard international law but does not eliminate them. In general, the need to amend the outlines of international conventions is an ongoing challenge and concerns not only the area of crypto-assets.

3.2.1. Establishing a baseline

This approach implies shifting away from reliance on detailed rules and depending more on broadly stated principles. The term ‘principles’ can be used to denote general requirements and express the basis of obligations that all participants should comply with. The implications of such an approach are clear: fear of overregulation and inflexibility in determining in advance the ‘final decision’ of an ICO regime, which may change suddenly for reasons such as technological improvements.

However, in the context of ICO harmonisation, the task of establishing common standards and guidance becomes more complicated due to the inability of small financial technology (FinTech) firms or consumers to interpret them. Moreover, such an approach engenders a lack of predictability regarding their performance. General principles leave much more room for debate over how to meet the aims of these principles as well as room for conflict if the legislator believes a violation has occurred. For these reasons, such a regime is not an effective option for regulating the blockchain at a global level.

3.2.2. Beyond the baseline

Once the baseline level of ICO regulation requirements is determined, one should consider developing the scope of the regulatory regime by setting detailed rules for compliance.

Thus, according to the ‘beyond the baseline’ approach, a detailed process is established. If this process is not followed, the regulation is considered to be violated. For obvious reasons, international harmonisation through such a regime, which requires the implementation of detailed mandatory provisions, is a serious challenge, and is unlikely to be accomplished in the immediate future. It must be noted that preliminary action must be taken by national States before entering into negotiations regarding establishing a convention at the international level. Such steps are needed to elaborate each party’s own regulatory approach based on the insights from a number of undertaken measures.

With this goal in mind, this article proposes the following recommendations as a step in addressing the needs of establishing global ICO regulation through detailed provisions.

Recommendation 1: a useful starting point for regulatory intervention is the registration process. The purpose of registration is to specifically obtain further understanding from participants. At present, not all jurisdictions around the globe have their own blockchain regulation. Therefore, it is necessary to propose to implement, at the national level of the States, the registration requirements for crypto-asset service providers. Registration should be required for all companies performing crypto-asset activities.
Recommendation 2: monitoring crypto-asset trading platforms by authorities.
Recommendation 3: following registration and monitoring, authorities will assess whether crypto-asset activities could fit into existing regulatory frameworks. Where no legal rules exist for certain crypto-asset-related activities,

the regulatory framework will be considered to decide where changes are required. This could either be in the form of amendments to existing regulations or the drafting of new regulations.
Recommendation 4: active involvement of technical experts in the blockchain field.
Recommendation 5: exchange of effective regulatory practices for scaling in the global space
Recommendation 6: elimination of dual regulatory framework in multiple-level jurisdictions (if necessary).
Recommendation 7: formation of a new global organisation that would present a comity, with representatives of States and national authorities. Members of such an organisation would cooperate closely, and having this kind of interaction as everyday practice would make it easier to prove facts that cannot be changed without a trace. The ultimate goal of this organisation should be the development of best practice standards and a common global ICO framework.

It is the view of the author that only via a gradual and complex study of the blockchain phenomenon can a workable international convention be developed. A phased development of regulatory practice is necessary, taking into account the dynamics and scale of the blockchain phenomenon.

3.3. Principles of harmonisation

At present, the US and the EU are the leaders in the technological area, representing Common and Civil law approaches to ICO regulation. Comparative diagnostics of the regulatory framework in both jurisdictions has revealed that there are deep differences between their legal approaches to the crypto-asset legislative framework. In some cases, rules that are formally the same are understood and applied differently. However, this does not mean that there can be no convergence: convergence does not call for uniformity. "Thus, even if, for example, differences in legal culture persist and transfers of legal rules do not lead to identity, there can still be convergence" (Arvind, 2010, pp. 65–88).

A comparative analysis of the United States and the European Union's ICO legal regulation in the previous section allowed the author to highlight certain principles and rules on which an international convention should be based so as to be regarded as a successful harmonising instrument. These differences could be transcended if this convention were to contain specific rules or unambiguous principles.

A convention should also build a bridge between the Common and Civil law systems, to be interpreted and applied identically in practice. The unification of private rules between Civil and Common law jurisdictions could be achieved by agreeing on certain rules which represent a compromise of Civil and Common law rules.

It is the view of this article that the following principles for regulating crypto-assets should form the basis of an international convention:

Principle 1. Uniform interpretation of basic terms and concepts related to the use of digital assets.
Unifying definitions and creating consistent terminology that is equally understood by all participants are important steps in seeking global regulation. Broad definitions cause uncertainty in the digitally networked environment. Therefore, the first need is to introduce a common terminology in the first section of the ICO convention by approving a unified glossary containing basic terms and definitions in the field of crypto-assets and blockchain. With regard to the classification of tokens according to their nature, the common approach should also be applied. When tokens share common elements with securities, it is especially important to determine whether a token is a security or a utility token. In some cases, tokens can have security elements, and the determination of such tokens should be based not only on the security framework but also on the rules, considering the overall functioning of the token.

Principle 2. Maintaining a balance between risk control and the implementation of innovative incentives for blockchain development, including:
(i) ensuring transparency and flexibility of the regulatory environment of the Member States in order to attract investment and reduce the scale of shadow transactions;
(ii) inclusion of self-regulatory organisations and professional associations in the system of regulation of economic activity in the field of digital assets.

Principle 3. Human-centric approach
At present, disparities among the USA and the EU in regulating consumers' rights could create significant barriers affecting the harmonisation of ICO regulation. This article proposes to apply the EU approach to consumer protection, which assumes securing human rights as an essential ultimate objective of the State.

A human-centric approach comes from the principles of liberalism and republican thought dating back to the Enlightenment, the early Middle Ages, and ancient Greece (Deudney, 2006). It considers people, regardless of nationality, as the main objects of security. States should perform a supportive role, protecting individuals' rights and wellbeing.

A human-centric approach should be based on the following rules:
(i) Disclosure of contract terms.
Smart contracts should include legal obligations on sufficiently informing the consumer in the context of mandatory website disclosure of agreement provisions.
(ii) Online enforcement.
Smart contracts should be coded to take into consideration the most common violations of contract or consumer rights in order to provide the contract's self-performing mechanism.
(iii) Judicial protection of consumers.
It is necessary to provide consumers the right to file a claim in the national offline court. There is, therefore, an urgent need for national courts specializing in ICO and blockchain issues. In my view, a well-functioning court should meet at least three requirements: the judges must have expertise and be experienced in dealing with such cases; the courts must be able to arrive at a speedy decision; and, this must be possible at low cost.

Principle 4. Transparency
In advance of the token sale, each token seller should have to disclose certain information:
(a) to reveal the code on the basis of which blockchain is based;
(b) to publish vital information about the company and the group of developers, also stating which person acts as the issuer;
(c) to state if any tokens were mined before the ICO;
(d) to indicate the beneficial owners of the tokens;
(e) to specify what rights and obligations are embodied by the tokens;
(f) to give a detailed overview of the purpose and development steps that are supposed to be funded by the collected investment.

These six key elements of token disclosure should provide necessary transparency concerning ICOs.

Conclusion

In conclusion, in the face of inexorable globalization and the trans-border nature of ICOs, the elaboration of a common regulatory approach to such phenomena seems irresistible. It is true that at the present time both the US and the EU are following different concepts in the field of a regulatory approach to ICOs, but in both jurisdictions there still exists no legal certainty. Meanwhile, the failure of either the United States or the European Union to regulate the crypto-assets market effectively will have spill over effects for other jurisdictions. There is, therefore, an urgent need for strengthening international standards in crypto-asset regulation. The analysis carried out by the author leads to several conclusions.

First, it is important to understand what differences exist in both systems (EU and US) regarding ICO regulation. This article shows that there exist certain differences which may create obstacles to the harmonisation of approaches:

- There is a difference in the application of the current securities regimes in the EU and US. For any token issuance, in any jurisdiction, one will have to examine the rights that the specific token grants to investors to make any informed judgment as to whether the token sale will fall under securities laws. These differences are caused by the correlation of legal regulation between EU law and Member State law; federal and State law in the USA.

- In Europe, blockchain legislation and policy emanates from centralized sources to a greater extent (with the exception of a few countries with their own ICO regulation). In contrast, the US system of blockchain law and policy is fragmented and relies on decentralized modes. Such divergences in regulatory choices are stipulated by multi-level legal systems (federal States and a supranational legal system).

- There are different approaches to status and judicial decisions. In the USA, the constant development of ICO regulation is possible because legislation can be defined or changed by judges through court decisions. However, different approaches to the interpretation of the legal rules from judges could introduce a certain level of inefficiency in the field of ICOs. In the EU, on the other hand, any modification must be carried out by the legislative authorities using special procedures, which prevents the process of expanding the use of blockchain technology. At the same time, this makes ICO legislation more sustainable for ICO participants. Such conclusions are related to different legal systems, namely those of Common and Civil law countries.

- Socio-legal factors shape ICO law and policymaking in different ways. Thus, the willingness of the US to develop an ICO legislative framework is closely connected with the ambition of strengthening the country's dominance in the world economy. This overwhelming focus on economic well-being also plays a key part in shaping ICO legislation. EU policy is similarly affected by economic considerations, but for the EU, in addition to the economic factor, it is essential to ensure the rights of consumers. Overall, EU policy is primarily designed to protect consumer welfare, whilst that of the USA is more focused on economic power.

- The USA leads the EU in total ICO projects and ICO funds raised due to more friendly legislative regulation in the field of blockchain technologies.

Second, it must be kept in mind that harmonisation can take many different forms. Such instruments of harmonisation as international conventions and model laws are both compatible with blockchain issues. However, due to the shortcomings of soft law, including the non-binding and complex nature of ICO phenomena, the method of international convention seems indispensable for the global regulation of ICOs. This convention should present the first international treaty aimed at global ICO regulation, and any future ICO convention has to keep up with the pace of social and technological change. Taking into due consideration the peculiarities of the existing legal system and the differences in their approaches to ICO regulation, this convention should represent a link between these approaches.

Third, regulators must be prepared to implement an international ICO convention. Therefore, the author came to the conclusion that harmonisation should start with small steps, such as considering emerging international practices and ensuring international cooperation on ICO issues.

Ultimately, one hopes that the U.S. and the E.C., as well as authorities from other jurisdictions, will converge upon a clear, consistent, and flexible approach to ICO regulation that takes full account of the problem of uncertainty in this area.

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SAME-SEX RELATIONSHIPS – THE ABSENCE OF LEGISLATIVE FRAMEWORK IN THE REPUBLIC OF KOSOVO

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Abstract. According to the Constitution of the Republic of Kosovo, all persons are equal before the law and no one shall be discriminated against on the grounds of sexual orientation, or any other personal status. Furthermore, the Kosovo Constitution leaves open the possibility that members of the LGBT+ community can even use their right to marry, as it provides that everyone has the right to marry and create a family. However, this provision refers to Family Law in all matters relating to marriage and divorce. On the other hand, the Family Law of the Republic of Kosovo recognizes only the marriage of two persons of different sexes. Related to this, the law provides that marriage is a legally registered community of two persons of different sexes. Moreover, the Family Law does not recognize civil unions or domestic partnerships, and these are not regulated by any special law here. In contrast to Family Law, the Criminal Law of Kosovo includes articles that protect persons of the LGBT+ community. This paper will also consider a comparative approach towards the legislative framework of other former Yugoslav States regarding same-sex relationships.

Keywords: LGBT+, same-sex, Constitution, family law, Kosovo, former Yugoslavia.

Introduction

According to the survey presented at the end of this study, in Kosovo, the acceptance of the rights of the LGBT+ community seems to be medium. However, according to a report by the World Bank Group (2018), the rates of discrimination based on sexual orientation in Kosovo fare among the worst compared to other countries in the region. Such an unjust reality, where LGBT+ persons are not accepted as normal, is considered present even within their close friends and families. Some still think homosexuality to be a disease, which is demonstrated by the fact that some individuals of the LGBT+ community have been forced into hospitals for treatment.

The Kosovo Progress Report of the European Commission (hereinafter – the Kosovo Report) for 2019, 2020, and 2021 found that, despite progress in the position of the LGBT+ community, much needs to be done because the level of awareness of the general population continues to be very low (Directorate-General for Neighbourhood and Enlargement Negotiations, 2019, 2020, 2021). On the other hand, these reports did not elaborate on the rights of this community according to civil laws; they only recommended legal developments to work towards

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eliminating discrimination. However, from an analysis that could be made of the legal framework in Kosovo, it can be freely stated that Kosovo's Constitution of 2008 protects all persons from discrimination, regardless of their sexual orientation. In addition, the Law on Protection from Discrimination (Law No. 05/L-021) and the Criminal Code (Code No. 06/L-074, 2019) contain concrete provisions that guarantee the protection of rights for all persons, regardless of their sexual orientation or gender identity. Moreover, based on the Kosovo Report 2020, the LGBT+ Advisory and Coordination Group developed a new 2019–2022 action plan (Directorate-General for Neighbourhood and Enlargement Negotiations, 2020, p. 36). Still, this program is not progressing as planned according to the Kosovo Report 2021.

The Constitution is considered the supreme law of the land in Kosovo, and all laws and bylaws must be made in pursuance thereof. This supreme law came into force in 2008, and, as such, it is considered a very advanced act by constitutional experts and to be relatively "modern" in terms of protecting the rights of LGBT+ persons. However, most laws and codes in Kosovo came into force before 2008, and all of them continue to be implemented today as positive legislation. The complication is that some of them are not entirely harmonized with the Constitution.

The Family Law of Kosovo (Law No. 2004/32) entered into force in 2006, just before the date when the Constitution came into effect (in 2008). The lawmakers drafted this law when the country did not have a constitution, the result of which is that it is not harmonized with this supreme Act of the land. Therefore, some articles of this law discriminate against persons of the LGBT+ community. For example, this law did not recognize the marriage, civil union, or domestic partnership of two persons of the same sex. This discrimination is also present despite the articles of the Constitution and the Law on Protection from Discrimination which call for equality for all regardless of the sexual orientation of persons. Set side by side, many of the former Yugoslav States stand in the same position according to same-sex relationships and legal framework regulation. However, three of these countries[4] (Croatia, Slovakia, and Montenegro) recognize civil unions or registered partnerships; while, Serbia, Bosnia and Herzegovina, North Macedonia, and Kosovo are in the process but still do not enshrine this right in their legislative frameworks (Kużelewska, 2019, p. 15). When we look further back in time, Yugoslavia's Criminal Code criminalized the sexual activity of homosexuals. In contrast, Kosovo's Criminal Code Act was listed as aggravated if a crime motivated by sexual orientation was committed against a person.

This situation brings many misrepresentations and misinterpretations of this community's rights. Such misrepresentations and misconceptions have been particularly present concerning the issue of same-sex relationships, even by public persons or legal experts, which has created misunderstandings about the rights of same-sex relationships. However, religious leaders here in Kosovo take a united stand against registered civil unions between same-sex persons (Bashkësia Islame ne Kosove, 2022).[5] They call the legislative body to stop any change, redefinition, or reinterpretation of any article regulating family relations. On the other hand, high-level politicians in Kosovo have supported the LGBT+ community, and continue to do so through their speeches or by attending Pride Parades. For instance, the former President of Kosovo, Hashim Thaçi, has taken part in many parades, and the current President of Kosovo, Vjosa Osmani, observed in a speech that "love is love, no one should discriminate this." Moreover, Albin Kurti, the Prime Minister of Kosovo, made a speech in a parliamentary debate on same-sex relationships, declaring: "human rights are the rights of every person because everyone is the creature of God or nature; this is what our constitution and ECtHR case law stated" (The Prime Minister Office, 2022). Thus, unlike religious leaders, some politicians have an attitude towards recognizing the rights and relationships of the LGBT+ community; still, in general, their interests are not represented by politics here in Kosovo (Freedom House, 2022).

This paper is structured as follows: initially, the concept of LGBT+ rights will be described according to the general legal framework here in Kosovo, followed by same-sex relationships based on Kosovo's Constitution, Family Law, and the Draft Civil Code; same-sex relationships will then be analyzed and compared with the legislations of former Yugoslavian States; and, at the end of this paper, conclusions will be presented.

[4] Former Yugoslavian countries.

[5] Leaders of Muslims, Catholics, Protestants, and Jews have made public statements declaring their opposition to the registered civil unions stipulated in the Draft Civil Code of the Republic of Kosovo.

Furthermore, we have prepared a questionnaire to display the conviction of heterosexuals according to the members of the LGBT+ community, as well as to show whether these persons (including the LGBT+ community themselves) support the recognition of same-sex relationships through the legal framework here in Kosovo. To achieve these results, it was necessary to use descriptive, analysis, synthesis, and comparative methods.

1. LGBT+ rights according to the legal framework in Kosovo compared to other former Yugoslavian States

As a young State that has existed for less than ten years, Kosovo has a legal system based on traditional sources of law, which constitutional experts (Shala, 2016, p. 165) consider to be quite advanced in terms of human rights. Human rights in the domestic legal system are harmonized with other international agreements and instruments. These are primarily stipulated by Kosovo's Constitution, which strongly supports the principles of equality and non-discrimination. These principles are also stated clearly in Kosovo's Declaration of Independence of 2008.

The principles of non-discrimination and equality are defined as international obligations under Kosovo's Declaration of Independence.[6] According to point 2 of this Declaration, "Kosovo is declared a democratic, secular, and multiethnic republic, guided by non-discrimination and equal protection under the law" (Bajrami et al., 2019, p. 42). The Constitution of Kosovo also establishes these principles in Art. 3 and 7 of Chapter One, titled "Basic Provisions," and in Art. 24 of Chapter Two, titled "Fundamental Rights and Freedoms."

Discrimination refers to treating a person with any distinction, exclusion, limitation, or preference to deny a right or equal protection. In Kosovo, this issue has also been addressed through the Law on Protection from Discrimination (Art. 3, 4, and others), which explicitly defines sexual orientation as a potential target for discrimination. Moreover, this law follows the rules of the Constitution in terms of forms of discrimination, and, in this way, it is harmonized with the supreme Act of the land. However, despite these legal provisions prohibiting discrimination, according to the World Bank's report of 2018, "Kosovo is considered the country with the highest percentage of discrimination against the LGBT+ community" (World Bank Group, 2018, p. 37). Furthermore, the Law on Civil Status (Law No. 04/L-003) in Kosovo and its bylaws do not even address the process of a sex change; this seems to be another way of discriminating against this community.[7] Various organizations have requested that this issue be addressed on several occasions, but without success (Center for Social Group Development, 2017, pp. 54, 55).[8] More importantly, some members of the LGBT+ community have even been abused and threatened because of their sexual orientation or gender identity; "Hence, our community continue to be discriminated against and abused because of their sexual orientation. However, we all will continue to seek the realization of our constitutionally guaranteed rights through parades and protests" (interview by Egzonis Hajdari with Blert Morina). However, this discrimination against this community still continues to be present despite the organization of many national conferences, parades, and protests held at the national level to protect their rights.

Kosovo's Criminal Code has recognized sexual orientation as a circumstance where a crime could be committed. The court should consider this an aggravating circumstance in any criminal case in this situation. According to Art. 141 of the Criminal Code, "everyone *who publicly incites or spreads hatred, discord, and intolerance based*

[6] Two members of the LGBTQ community were verbally and physically attacked in one of Kosovo's cities in June of 2016. Following this incident, two of the attackers were found guilty of criminal activity categorized under Art. 188 of the Criminal Code of Kosovo (Palushi, 2016, p. 5).

[7] On April 4, 2018, Mr. Blert Morina, a transgender man, requested permission from the Gjakova Civil Status Office to change his name and gender in identification documents. When the request was denied, Morina filed a lawsuit for organizational conflict with the Basic Court in Pristina and submitted a request for a constitutional review to the Constitutional Court of Kosovo. On September 5, 2019, the Constitutional Court dismissed the appeal and marked it as unsuitable and premature (Case AA. No. 244/2019). However, in December 2019, the Basic Court of Pristina affirmed Morina's right to change his name and gender category in his identification documents (Halili, 2020; Directorate-General for Neighbourhood and Enlargement Negotiations, 2020, p. 36). This was the first case in which a Kosovo citizen was granted permission to exercise this right.

[8] In this regard, the Center for Social Groups Development offered two best practices in Europe: a case-report of the European Court on Human Rights (*YY v. Turkey*, 2015), and a resolution on the protection of transgender persons from discrimination by the Council of Europe; but still without any progress. It should be noted that European Human Rights Law cannot force any state to legalize same-sex marriage; rather, it leaves this to the individual discretion of each member state.

on sexual orientation should be punished by imprisonment up to five years" (emphasis added).[9] Moreover, if a person deprives another person of their life because of motivation based upon sexual orientation, this would be penalized with imprisonment of not less than 10 years; hence, the Criminal Code categorizes this as aggravated murder. Further, sexual orientation is also mentioned in criminal offenses such as assault, light bodily injury, grievous bodily injury, destruction, or damaged property as an aggravating circumstance. The recognition of hate crimes based on sexual orientation is orientated towards the protection of the LGBT+ community.

It should be noted here that the Family Law of Kosovo, which came into force in February 2006 (before the Constitution was approved), does not align with the principles of equality and non-discrimination as stipulated by the Constitution of 2008. Specifically, this law disagrees with the Constitution concerning discrimination on sexual orientation, where the provisions for certain rights seem to be unequal. These rights include engagement, marriage, and domestic partnerships. However, the final draft of the Civil Code of the Republic of Kosovo, which is expected to enter into force this year, does provide some rights for the LGBT+ community; according to Art. 1138 par. 2 of this code: "Registered civil unions between persons of the same sex is allowed. A special law regulates conditions and procedures."[10] Based on this article, we considered that this final draft of the civil code had stepped forward by allowing civil unions between people of the same sex. Likewise, Slovenia has recognized same-sex partnerships since 2006 (Two Bad Tourists, 2016). Croatia also legalized life partnerships between two persons of the same sex in 2014 by entering into force the Same-Sex Life Partnership Act. According to Art. 7 of this Act, a life partnership could be considered if two persons of the same sex declare their free consent before the registrar; otherwise, the life partnership shall not be concluded (Art. 7 of the Same-Sex Life Partnership Act). On the other hand, Montenegro was the last country in this area that recognized civil unions between same-sex partners in 2021 by the Law on the Same-Sex Life Partnership.[11] Otherwise, other States of the former Yugoslavia, such as Bosnia and Herzegovina, Serbia, and North Macedonia, have no legislation in favor of same-sex alliances in the same manner as Kosovo.

1.1. Same-sex relationships according to Kosovo's Constitution – a comparative approach between the former Yugoslavian States

The Constitution of the Republic of Kosovo is considered a constitutive act to create the State of Kosovo. Kosovo's Constitution is based on the Ahtisaari Package,[12] which constitutes an act promoting high democratic standards and visions for the Euro-Atlantic path of the country (Bajrami et al., 2019, pp. 29–30). Constitutional experts consider Kosovo's Constitution to be quite advanced in human rights and freedoms, which are regulated within two chapters (see: Constitution of the Republic of Kosovo, 2008). The drafting process of this constitution was characterized by the participation of international and national experts, who were involved from the beginning of the process (Hay, 2014, p. 157). In the meantime, the framers of the Constitution drafted the Constitution with great importance placed on international human rights by attaching a particular clause (Hanski & Markku, 1999, p. 516).

Consequently, the Constitution is longer – it contains 162 articles. Within it, human rights and fundamental freedoms are guaranteed through Art. 22. This article guarantees the international agreements and instruments directly applicable in Kosovo, such as: "… (1) The Universal Declaration of Human Rights; (2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, etc." (Marko, 2008, p. 17). Moreover, the 2008 Constitution of Kosovo makes particular reference to the European Convention on Human Rights (ECHR); this served as one of the essential international safeguards. Hence, according to Art. 22 of the Constitution, the principles of non-discrimination and equality are among the international and

[9] If this criminal offense was committed by taking advantage of position or authority, it shall be punished by imprisonment up to 8 years.
[10] According to Art. 1133 of the final draft of the Civil Code, "Engagement is the mutual promise of two persons of opposite sexes to get married in the future"; Art. 1138 "Marriage is a legally registered union of two spouses of different sexes, through which they freely decide to live together as husband and wife…".
[11] Law No. 868 of July 1, 2020; according to Art. 8, 9, 10, and 11 of Law No. 868, the same-sex partners must be 18 years old, have total legal capacity, and should not be blood relatives. Neither of the partners should have an active marriage or be in another civil partnership.
[12] The *Ahtisaari Package* conditioned the drafters of Kosovo's Constitution to make a particular reference to the ECHR.

constitutional obligations that Kosovo has assumed in exchange for citizenship; this article constitutionalizes ECHR and its Protocols.[13] According to this constitutional provision, one must not use sexual orientation to discriminate against anyone, including the LGBT+ community. As a result, every domestic law must be in harmony with the ECHR and its Protocols; otherwise, it should be ruled out as an unconstitutional act (de Hert & Korenica, 2016, pp. 154, 156). Moreover, all public institutions and courts should implement the ECHR and its Protocols. However, Kosovo is not a member of CoE due to not having the capacity to be a signatory of the ECHR (Bajrami et al., 2019, p. 157).[14] On the other hand, following Art. 53[15] of the Constitution of Kosovo, European Court of Human Rights (ECtHR) case law does not have a direct effect or appliance in Kosovo as the ECHR. Accordingly, ECtHR case law is not considered the source of law in Kosovo.

As the supreme Act of the land, the Constitution sets out the basic principles of the country, the governmental system, and the human rights and freedoms recognized (Bajrami & Muçaj, 2018, p. 93). In this regard, equality before the law is one of the basic principles of Kosovo's Constitution. Furthermore, this principle clarifies that Kosovo's citizens have the right to equal legal protection, which shall be realized without any discrimination based on any circumstances. Moreover, this Constitution expressly prohibits discrimination based on gender identity and sexual orientation (Rexhepi, 2016, p. 35).[16] However, Professor Louis Aucoin (2008, pp. 123–128), involved as an expert in the working group on the drafting of the Kosovo Constitution, points to the difficulties encountered by locals in presenting discrimination based on sexual orientation as a form of discrimination.

According to Art. 24 para. 2 of the Constitution of Kosovo, "no one shall be discriminated against on the grounds of ...sexual orientation… or another personal status" because all are equal before the law. Here, among the grounds on which discrimination is prohibited, sexual orientation is explicitly mentioned. Based on this provision and the power of the Constitution as the highest legal act of the land, which requires all other laws and bylaws to be harmonized with it, the principle of non-discrimination on the above-mentioned grounds and according to the spirit of the Constitution should be present in all other laws and bylaws in the country. Regarding this, Enver Hasani, Professor of the University of Prishtina and former President of the Constitutional Court of Kosovo, states that "everyone has the right to marry or to coexist with a partner of their own volition or sexual orientation" (Bajrami et al., 2019, p. 52). Unfortunately, however, the principle of non-discrimination based on sexual orientation has not been adopted in some of the country's laws, including the Family Law. Hence, the current legislative framework does not support any same-sex relationships or same-sex marriage.

Art. 37 para. 1 of Kosovo's Constitution stipulates that, "based on free will, everyone enjoys the right to marry and the right to have a family as provided by law." This constitutional provision does not contradict Art. 24 para. 1 of the Constitution, which prohibits discrimination on the grounds of sexual orientation. The statement that "everyone enjoys the right to marry" thus removes any restrictions on the possibility of same-sex marriage. However, the Constitution also instructs that marriage and family formation shall be conducted under the Family Law. Like all laws in this country, the Family Law must respect the constitutional principle of non-discrimination; however, this principle is not well applied in this law. Moreover, Art. 37 para 2. of the Constitution of the Republic of Kosovo, it is stipulated that "Marriage and divorce are regulated by law and are based on the equality of spouses." However, this provision is contradicted by the stipulation that marriage and divorce are regulated under the Family Law.

The Constitution enshrines the right to marriage and family in Art. 38. Under this constitutional solution, everyone has the right to marry and have a family, but they must do so following the law. Moreover, para. 2 of this article instructs that marriage shall be concluded and terminated by the Family Law. Thus, the Constitution does not

[13] As such, the citizens of the Republic of Kosovo could not use the right to initiate cases in the ECtHR.
[14] Hence, the Constitution respects the spirit of Art. 8 of the ECHR, which stipulates that: "Everyone has the right to respect for his private and family life, his home and his correspondence."
[15] "Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights." This leaves the choice and option to apply the ECtHR case law for the courts here in Kosovo.
[16] "Kosovo is the only country in the Balkans that include provisions against discrimination based on sexual orientation in its constitution"; some developing countries, e.g., Turkey, do not present sexual orientation as a possible form of discrimination in its Constitution.

address the issue of marriage between same-sex persons, as it leaves this issue to the Family Law, which stipulates that marriage can only be between two persons of opposite sexes. Hence, the spouses are equal in rights and obligations, and no article in Kosovo's Constitution mentions the opposite sex as a condition for marriage. Thus, the spouses should be considered a married couple, regardless of their gender (Bajrami et al., 2019, pp. 52–53). Based on the relevant provisions of this law, the Center for Social Group Development,[17] in its 2017 report, states that the LGBT+ community is prohibited from having a legal marriage (Center for Social Group Development, 2017, pp. 10–16).

The principle of non-discrimination, which is embodied in the Constitution of Kosovo, also occupies an important place in the final draft of the Civil Code. Specifically, this final project of the Civil Code of Kosovo, which is expected to be approved this year by the parliament,[18] addresses the issue of equality in Art. 1128 of the fourth Book. This article states: "all persons enjoy the equal treatment of rights and obligations outlined in this Book. There shall be no direct or indirect discrimination against any person based on …sexual orientation… or any other status." Thus, the final project of the Civil Code has embodied the constitutional principle of non-discrimination within its structure.

Perhaps, first, one should keep in mind that Kosovo is the only country from the former Yugoslavian States which has to predict "sexual orientation" as a type of discrimination. Considering this conclusion, Croatia,[19] Slovakia,[20] Montenegro,[21] Bosnia and Herzegovina,[22] North Macedonia,[23] and Serbia[24] have not listed "sexual orientation" as a type of discrimination that shall be prohibited. Hence, these six constitutions do not exclusively regulate the prohibition of discrimination of persons based on sexual orientation, but this does not signify that these countries are against LGBT+ rights. To contextualize the discussion, Croatia, Slovakia, and Montenegro have recognized civil partnerships into their legislative framework.

Finally, comparing Kosovo with the Balkan countries, we can conclude that it is a part of the majority of these countries which does not recognize the civil union, and, consequently, nor same-sex marriage. However, Kosovo has a much more advanced Constitution in terms of addressing LGBT + community rights; this is because it is the only country that in its constitution presents sexual orientation within the principle of anti-discrimination. Moreover, the Constitution of Kosovo does not show the formal condition of the opposite sex for the validity of marriage (Art. 24 / Art. 37, Constitution of RKS).

[17] Center for Social Group Development was officially registered in October 2003 to support, protect, advocate for the rights of the LGBT+ community in Kosovo.
[18] Parliament is the legislative body of jurisdiction here in Kosovo.
[19] "All persons in the Republic of Croatia shall enjoy rights and freedoms, regardless of race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth, education, social status or other status" (Art. 14 of the Constitution of the Republic of Croatia).
[20] According to Art. 12 (par. 2) of Constitution of the Slovak Republic: "Fundamental rights shall be guaranteed in the Slovak Republic to everyone regardless of sex, race, colour, language, belief and religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent or any other status. No one shall be aggrieved, discriminated against or favoured on any of these grounds."
[21] "The limitations shall not be introduced on the grounds of sex, nationality, race, religion, language, ethnic or social origin, political or other beliefs, financial standing or any other personal feature" (Art. 25, para. 2 of the Constitution of Montenegro).
[22] Following Art. II (para. 4) of Bosnia and Herzegovina's Constitution "...without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."
[23] Art. 110 of the Constitution of the Republic of North Macedonia: "…as to the prohibition of discrimination among citizens on the ground of sex, race, religion or national, social or political affiliation" (Komiteti Shqiptar Helsinki, 1998, p. 170).
[24] "All direct or indirect discrimination based on any grounds, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability shall be prohibited" (Art. 21 of the Constitution of Republic of Serbia).

1.2. Same-sex relationships according to the Family Law of Kosovo – a comparative approach between the former Yugoslavian States

As noted above, the Kosovo Family Law entered into force in 2006. This Law regulates engagement,[25] domestic partnerships,[26] and marriage[27] in detail as family law institutions in a significant portion of its articles. The provisions of this Law, with some minor amendments made in 2019, are still in force.

First, according to Art. 9 of the Family Law of Kosovo, engagement is defined as "a mutual promise of two persons of the opposite sex to marry in the future." Thus, for the existence of the engagement to be valid, this Law requires that two persons of different sexes shall make this promise. This provision was made based on the consideration that only marriage between men and women can result in biological reproduction (Gashi, Aliu & Vokshi, 2012, p. 43). Based on this, I argue that the constituent elements of engagement as defined by the Family Law are "the promise of marriage" and "the presence of two persons of opposite sexes" (Podvorica, 2011, p. 73). Thus, disregard for either of these two elements renders the engagement invalid (null). This means that if one of the engaged parties changes their gender following the engagement, the engagement itself becomes invalid (Dural, Oguz, & Gumus, 2016, p. 18).

Second, marriage is considered a union between a man and a woman who voluntarily decide to live together and create and extend their family. Art. 14 of the Family Law defines marriage as "a legally registered union between two persons of different sexes, by which they freely decide to live together for the purpose of establishing a family." According to this legal definition, the fundamental elements of marriage are as follows: a) the marriage must be between two persons of different sexes; b) the marriage must be conducted in the presence of an official person; and c) both parties must declare their free decision to enter the marriage before the registrar (Dural, Oguz, & Gumus, 2016, pp. 71–77). If a marriage is entered into without these constituent elements in place, it is considered invalid (Helvaci & Erlüle, 2014, p. 159). Thus, according to the Family Law that is in force within the territory of Kosovo, marriage between two same-sex persons is considered invalid (null). It is thus clear that this legal provision of the Family Law goes against the principle of non-discrimination stipulated in Kosovo's Constitution, as this article of the Family Law clearly discriminates against persons on the grounds of sexual orientation, and Kosovo's Constitution prohibits this discrimination. Specifically, this discrimination occurs in the stipulation that prevents two people of the same sex (i.e., of a sexual orientation categorized as homosexual) from marrying legally. Thus, in reference to Family Law, members of the LGBT+ community do not have the right to engage, marry, or any civil partnership in accordance with their sexual orientation, whereas in accordance with the provisions of the Constitution, this community is protected against any discrimination against it, including discrimination with regard to the right to same-sex partnerships. Even in cases in which one of the spouses has not developed sexual characteristics according to age and sex (e.g., is missing reproductive organs or possesses other disorders that may lead to dysfunctions in sexual development), the marriage is considered null (Podvorica & Podvorica, 2015, p. 66; Podvorica, 2011, p. 74; IPSOS, 2015, p. 64).[28] University Professor Mr. Podvorica, in his book, stipulated that sexual relations between homosexuals are unnatural and that marriages between them are sterile and are defined as existential risks (Podvorica, 2019, p. 44). Such an opinion does not prevail in most European Union countries, where 15 of the 27 States recognize and perform same-sex relationships under their legislation.[29]

[25] "Engagement is a mutual promise to marry in the future, but without the legal obligation to marry. Neither of the engaged parties can force the other to marry. There are different views on the definition of engagement as a legal act; some jurists argue that engagement is a pre-contract, while others consider it a decision or contract in itself."

[26] "An out-of-marriage relationship is the factual relationship between the husband and the wife who live in a couple, characterized by a joint life that represents a character of stability and continuation."

[27] "Marriage is considered to be a legal act whereby two persons freely decide to live together, creating marital rights and obligations for each other. Marriage is considered a legal act, as the validity of the marriage consists of legal registration in the presence of the registrar."

[28] "Confirming bisexuality in one spouse does not foresee immediate cancellation of marriage if the sexual organ is opposite to the other spouse"; "In high proportion, the population in Kosovo (and generally in the Balkans) considers same-sex marriage unacceptable."

[29] EU countries: Denmark (2012), Norway (2009), Finland (2017), Sweden (2009), Scotland (2014), Ireland (2015), England (2014), Netherlands (2001), Belgium (2003), Slovenia (2017), Luxembourg (2015), France (2013), Spain (2005), Germany

Moreover, according to Art. 14 para. 2 of the Family Law, "Men and women, without any limitation due to race, nationality or religion, have the right to marry and found a family..." Thus, with this legal provision, the Family Law stipulates forms of discrimination that are prohibited with regard to the right to marry, as it states that no one can be prevented from marrying on the basis of race, nationality, or religion; however, this provision does not provide for sexual orientation. Thus, same-sex couples are not protected under this provision and are clearly discriminated against in other provisions of the Family Law.

Third, it is worth explaining the concept and some other issues related to the domestic partnership. This type of relationship is considered an out-of-marriage relationship, and such relationships have been very common in Kosovo for the last decade. The Kosovo Family Law, as well as the other laws in the Balkan countries, recognizes domestic partnerships. This law has addressed this issue in Art. 39–41. According to the provisions of this law, an out-of-marriage relationship is defined as a "domestic partnership between a man and a woman who live in a couple, characterized by a joint life that represents a character of stability and continuation" (Art. 39, para. 1). The difference of gender in the domestic partnership is present in order to avoid misinterpretations of this relationship as including same-sex persons, which the law does not allow (Gashi, Aliu & Vokshi, 2012, p. 100). In order to be considered a domestic relationship, out-of-marriage spouses must live as a couple and must be of different sexes. Thus, the Family Law in Kosovo, in terms of engagement, marriage, and domestic partnerships, clearly establishes the opposite sex of the partners as a condition of its validity. Therefore, a domestic partnership between two persons of the same sex is not in accordance with the legal requirements and, as such, cannot create legal effects.[30] As we noted above, discrimination against persons belonging to the LGBT+ community is evident in the Family Law's provisions, which regulate marriage in Kosovo in a way that prohibits any possibility for partnership between two persons of the same sex.

Contrarily, the final project of the Civil Code of Kosovo has taken an essential step in establishing the principle of equal treatment within the family book. Art. 1128 of this final project of the Code forbids direct or indirect discrimination against any person on the basis of several variables, including sexual orientation; from this, we conclude that members of the LGBT+ community cannot be lawfully discriminated against within the provisions of this book. However, in only a few articles below, we can see an example of discrimination in the realization of rights based on sexual orientation. Specifically, in this final version of the Civil Code, engagement or marriage between persons of the same sex is not allowed, but registered civil unions will be allowed. According to Art. 1133 of the final project of the Civil Code, "engagement is a joint promise of two persons of the opposite sex to marry in the future." Moreover, Art. 1138 defines marriage as a legally registered union between two spouses of different sexes, by which they freely decide to live together as husband and wife.

In contrast to Family Law, Art. 1138 para. 2 of the final project of the Civil Code discussed this: "Registered civil unions between persons of the same-sex are allowed. Conditions and procedures are regulated by a special law." Following this legal provision, one can conclude that the final project of the Civil Code is going to recognize civil unions.[31] This is significant progress on human rights and a very important step for the EU accession process, because we believe that there is causality between European Union accession and LGBT+ rights. Moreover, para. 4 of this article stipulates that: "Married people and partners in civil unions enjoy mutual rights and duties under this Code"; this means that married people and partners in civil unions are equal according to mutual rights and duties for caretaking, reciprocal financial support, and property rights. However, Graeme Reid and Evan Wolfson (2022, p. 2) – in their letter sent to Kosovo's President, Prime Minister, MPs, and Minister of Justice on March 16, 2022 – concluded that: "partners in civil unions do not enjoy equal access to rights and duties in practice". Otherwise, if the rights and duties would be the same, partners in civil unions would have the right to financial

(2017), Estonia (2016), and Austria (2019). Some non-EU countries that recognize same-sex marriage are as follow: Iceland (2010), Canada (2005), South Africa (2006), some US states (2015), some provinces in Mexico, Columbia (2016), Brazil (2013), Uruguay (2013), Argentina (2010), New Zealand (2013) and Taiwan (2017). Some countries in the EU, such as Croatia, Estonia, Germany, Slovenia, Hungary, Czechia, and Italy, recognized civil unions or registered partnership between persons of same-sex.

[30] "In the Southeast Europe countries only Croatia and Slovenia recognize same-sex union, actually Slovenia in 2017 has legalized a gay union" (World Bank Group, 2018, p. 11).

[31] The ECtHR requires such a legal framework to exist, in *Oliari v. Italy*, *Orlandi v. Italy*, and the most recent *Fedotova, Shipitko v. Russia*; however, ECtHR case law is not considered the source of law in Kosovo.

support and property rights; on the other hand, they would also be obliged by law to be faithful, reciprocally assist, respect, and financially support one another, especially when one partner lacks a sufficient material basis for living. Hence, there is an improvement for the LGBT+ community in this final draft of the Code[32] compared to the Family Law which is currently in force. It is therefore essential to harmonize the final draft of the Civil Code with the Constitution as soon as possible to remove all existing dilemmas and ambiguities with regard to same-sex relationships. Moreover, homosexual relationships have always been considered an aspect of private rather than family life (Binaku & Kumbaro, 2017, p. 748).[33]

Does any country from the former Yugoslavia recognize same-sex relationships in their legislative framework? Slovenia recognized same-sex partnerships from 2006, and this allowed gay couples to register their relationship and allowed them to adopt children from their previous relationship (Novak, 2017). Same-sex marriage was the subject of a referendum in Slovenia in 2015, where 63.51% voted against it, so same-sex marriage was not accepted (Kużelewska, 2019, p. 18). Likewise, Croatia recognized civil unions, but it did so in 2014. The Family Law of Croatia in 2009 defined marriage as a homosexual union; still, after the referendum,[34] it was stipulated that marriage should be considered valid only between a man and a woman (Kużelewska, 2019, p. 19). Montenegro has also recognized the civil relationship since 2021; hence, Montenegro is considered the first country in the Western Balkans which is not a member of the EU to allow civil partnerships for same-sex couples (Law on the Same-Sex Life Partnership, 2020). President Milo Djukanovic, after the law came into force, said that Montenegrin society "is maturing." In retrospect, only three countries mentioned above have recognized same-sex partnerships. Bosnia and Herzegovina, North Macedonia, Serbia, and Kosovo have not allowed the registration of civil unions by their legislative framework. Drawing on this, Serbia,[35] which in this aspect encounters many problems based on the internal legal system, even against the fact that there are some initiatives to advance the rights of the LGBT+ community, is still considered far away from recognizing the civil unions of homosexual couples (Knežević & Pavić, 2006, p. 23).

Based on this, there is a clear indication that Slovenia, Croatia, and Montenegro have ratings which are higher than other States from the former Yugoslavia related to LGBT+ rights. Hence, we can conclude that Croatia, Slovenia, and Montenegro, out of four other cases, are the three which recognize same-sex relationships. It is worth noting that Serbia canceled all Pride marches until 2014 under the excuse of public safety, because the 2010 Pride march was marred by violence (Maycock, 2019, p. 41). However, now, all these States (Serbia, Bosnia and Herzegovina, North Macedonia, and Kosovo) promote LGBT+ community rights as necessary for Europeanization. Still, they have far fewer legislative protections for this community than Slovenia, Croatia, or Montenegro. First, we believe that harmonization of the domestic legal framework with European norms on human rights issues is unavoidable, because all these States are in the EU accession process. Second, these necessary upcoming legislative changes around LGBT+ rights will meet resistance from homophobe individuals (including politicians, religious leaders, etc.); but these States should take actions to improve LGBT+ rights and decrease the rates of homophobia.

Beyond norm diffusion, the population in Kosovo is not yet ready to accept recognizing same-sex relationships (including, civil unions, marriage, etc.) in the domestic legal framework; LGBT+ people hide their sexual orientation, bound by social pressure here in Kosovo (Freedom House, 2022, section F4). Therefore, we conducted a questionnaire to assess the opinions of heterosexual and homosexual persons about the possibility of legalizing same-sex relationships. This questionnaire was filled out by 60 participants divided into two groups based on their self-reported sexual orientation. The first group included 30 people who declared themselves heterosexual, while

[32] The Civil Code probably will enter into force in 2022.

[33] For more see: *Salgueiro Da Silva Mouta vs. Portugal*; to respect the right of private and family life is guaranteed by Art. 8 of ECHR, and Art. 14 for non-discrimination. Mr. Da Silva Mouta claimed that he had been discriminated against because of his sexual orientation from Lisbon Court of Appeal when custody of the daughter was given to the mother, and the court forced him to conceal his homosexuality when he met his daughter.

[34] The referendum was held on 1 December 2013, where 65% who voted answered "yes" to the referendum question: "Do you agree that marriage is matrimony between a man and a woman?" Therefore, Croatians banned gay marriage in 2013.

[35] President of Serbia Mr. Vučić declared that he would not sign the law to recognize same-sex unions, which is in the drafting process this year! However, now, the President attends Prides and promotes the LGBT+ community as necessary for Europeanization.

the second group included 30 people from the LGBT+ community in Kosovo (33% gay, 20% lesbian, 43% bisexual, and 4% transgender). We understand that this was a small survey, but expanding the participants was almost impossible; this was because heterosexual persons were reluctant to fill out the questionnaire, while members of the LGBT+ community were difficult to contact. Data were analyzed using IBM SPSS version 23.0. We also performed statistical tests including *t*-tests, and used a *p*-value of 0.05 to indicate statistically significant differences between these two social groups.

Table 1. Survey statistics.

jj		*N*	Mean	Std. deviation	Std. error mean	*df*
Do you think that Family Law in Kosovo has to recognize same-sex relationships ?	Heterosexual	30	2.9000	1.64736	.30077	58
	LGBT+	30	4.6333	.92786	.16940	45.717

Participants were then asked whether they support recognizing any same-sex relationships by law in Kosovo, with responses rated on a five-point Likert-scale ranging from 1 (*strongly disagree*) to 5 (*strongly agree*). According to the data analysis from SPSS and *t*-tests regarding the legality of the same-sex relationships, the results are as follows: $\mu = 2.90$ of 5.00 of individuals from the heterosexual group indicated support for the recognition of same-sex relationships, while $\mu = 4.63$ out of 5.00 from the LGBT+ group indicated support (see Table 1). Based on these findings, with regard to this question, there was a statistically significant difference between the groups, with a p-value of $p < 0.05$ (See: Table 1). Thus, the LGBT+ group strongly supports the recognition of same-sex relationships by law in Kosovo, while the heterosexual group is more hesitant about recognizing this right within Kosovo's legal framework. From this small survey we can say that heterosexual persons in Kosovo are still not ready to accept same-sex relationships. Therefore, while it can hardly be stated that 60 persons represent the entire population of Kosovo, the lack of readiness to express an opinion on the issue of same-sex relationships from heterosexual persons gives confidence in the result achieved by this small number of participants. For the most part, the differences in views demonstrate a clear divide between heterosexual and homosexual persons according to same-sex relationships and their recognition within the legal framework. This questionnaire was necessary to present the state of perception of heterosexual and homosexual persons according to same-sex relationships; the result appeared within the frame of expectation.[36]

Conclusions

1. Kosovo's Constitution does not contain any prohibition on persons belonging to the LGBT+ community in matters relating to engagement, marriage, or domestic partnership. However, according to the Family Law of Kosovo, we can conclude that same-sex couples are not allowed to have any registered relationships under the current legal framework of Kosovo.
2. The ECHR is constitutionalized by Kosovo's Constitution, without ratifying it; likewise, the ECHR has its applicability within the constitutional system. In contrast, the ECtHR's jurisprudence is not constitutionalized or incorporated by Kosovo's Constitution. Thus, the Constitutional Court does not see itself bound by, but is consistent with, ECtHR case law.
3. The Final Project of the Civil Code of Kosovo, which is expected to enter into force this year by the Parliament of Kosovo, recognizes a registered civil union between same-sex persons. Still, it prevents same-sex engagement and marriage, even though this same Code stipulates that all persons should be treated equally under the Code regardless of their sexual orientation. Plus, according to the Criminal Code of Kosovo, if a crime committed was

[36] This, of course, should not have a negative impact; according to the ECtHR, popular opinion is not determinate on Convention-rights. That is, even if homophobia is prevalent, human rights must be ensured (see: *Shipitko and others v. Russia*).

motivated by sexual orientation, it may impose a more aggravated punishment on the perpetrator.

4. By comparing Kosovo with other former Yugoslavian States, we concluded that three (Croatia, Slovenia, and Montenegro) recognize civil union, while others do not realize this right for homosexuals; we expect that in Serbia, Bosnia and Herzegovina, North Macedonia, and Kosovo, there should be some movement towards promoting more LGBT+ human rights. On the other hand, Kosovo has advantages over its neighbours because it is only one step away from legalizing civil unions through its new Civil Code. Moreover, Kosovo is the only country from the former Yugoslavia that in its Constitution provides for non-discrimination on the principle of sexual orientation, and also does not define the condition of different sexes as representing the validity of the marriage.

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THE CRIMINALIZATION OF VOLUNTARY INCESTUOUS INTERCOURSE BETWEEN MEMBERS OF THE NUCLEAR FAMILY IN THE BALKANS

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Abstract. The aim of this paper is to assess whether the legal definitions used by some European legislators to criminalize voluntary incestuous intercourse are in line with the results of the most recent studies. As we are about to show, incest has for centuries been a taboo topic and the subject of cautionary tales. Given that available studies clearly prove that incestuous relationships more often than not have negative effects on both the participants and their offspring, this paper does not call into question the necessity of having such norms, but rather the manner in which such a legislative policy is to be carried out. By comparing the criminal law norms used by Albania, Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Hungary, Romania, Serbia and Slovenia, this paper provides a comparative insight regarding the rationale behind the criminalization of such relationships in the Balkans and the surrounding area.

Keywords: incest, criminal law, Balkans, Europe.

Introduction

A study such as ours might begin by remembering that the legal sciences have often been portrayed as a mirror of the society which created them. Legal norms protect the most important values of a society and provide structure to an otherwise chaotic community. As a consequence, more often than not, the law is the resulting product of the unmitigated encounter between culture, religion, science, tradition and many more factors.

One of the most shocking discoveries of the twentieth century was that incest was much more widespread than some would have preferred to suppose. It was, in fact, proven that incest has been an ever-present phenomenon in European society at least since antiquity, through the Middle Ages (Archibald, 2001, p. 230) and up until the first half of the twentieth century. However, many more interdisciplinary studies are required before one could argue with certainty as to the exact nature and purpose of the taboos which surround this phenomenon. In the words of one author: "We may now conclude that although incest taboos vary widely, they are necessarily responsive to an evolutionarily driven, biologically based aversion for associates of the first few years of life, who are usually members of the nuclear family. At considerable human cost, the aversion may be over-ridden" (Gates, 2005, p. 155).

The aim of this paper is to assess whether the legal definitions used by some European legislators to criminalize voluntary incestuous intercourse are in line with the most recent studies concerning this phenomenon. As we are about to show, incest has for centuries been a taboo topic – a subject for the cautionary tales of various religious institutions. This means that the topic has been avoided by public and/or scientific discourse until just a few decades ago. Nevertheless, all data seems to point to the conclusion that the phenomenon was and still is very much present in these societies, as it is everywhere else in the world. Given that the available studies clearly prove that incestuous relationships more often than not have negative effects on both the participants and their offspring

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(Erickson, 2005, pp. 177–179), this paper does not call into question the necessity of the criminalization of voluntary incestuous intercourse, but rather the manner in which such a legislative policy is to be carried out.

We should also underline the fact that taboos have been defined differently by various authors. For the purposes of this paper, by a taboo we understand an unwritten rule which prohibits the members of a society from acknowledging, practicing, discussing, analysing or mentioning a specific practice, idea, phenomenon or ideology. In this sense, our definition is closer to that of Westermarck, who believes that a taboo is essentially a moral rule (Arnhart, 2005, p. 212).

As this should be a brief analysis, we chose to limit our study to one single part of Europe where the component states share important historical and cultural links, more specifically to the Balkans and some of the surrounding countries. Consequently, the conclusions of this paper are mainly relevant for this part of the European continent, but they should also prove to be a good starting point for any future research, regardless of the geographical and/or cultural setting.

The structure of this analysis is composed of three main sections. The first is meant to provide the reader with a brief state of the art concerning studies on incest. As there are hundreds, if not thousands, of studies conducted on this topic, we are not going to attempt to include and generally review all of them. Instead, we are going to try to highlight some of the main ideas which result from this body of research and which are relevant for any legal study of said criminal law norms. An emphasis will be placed on the history of these efforts, as one of our objectives is to find out when humanity started to better understand this phenomenon. The second section includes a general overview of the relevant criminal law norms used by these states for the criminalization of voluntary incestuous intercourse. In order gain a basic understanding of the emerging patterns, we have consulted the Criminal Codes of Albania, Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Hungary, Romania, Serbia and Slovenia. The last section includes some conclusions and remarks concerning the data offered in the first two sections. We would have certainly liked to include examples of court rulings from each and every country, however this proved to be impossible because of the linguistical and technical barriers encountered during our research. Nevertheless, a short review of the jurisprudential trends in existence in Romania should be enough to provide the reader and future studies with a general direction.

One should also remember that this study is not about involuntary or coerced incestuous intercourse. As we have previously stated, the aim of this paper is to offer another perspective on the actuality of the legal definitions used by the national legislator in order to criminalize voluntary incestuous relationships. Therefore, we are going to review the corresponding offense for the latter type of conduct, which is usually named “incest”. We are aware that “true” incestuous relations are rare in the jurisprudence, as such acts more often than not involve some form of coercion. In another author’s words, “because children are normally reared by their parents and siblings with one another, nuclear family incest is rare except as child abuse” (Wolf, 2014, p. 134). Nevertheless, this is exactly why more legal studies are needed on this subject, while rape or sexual abuse between the members of the nuclear family has been extensively researched. This paper should provide a good stepping stone for any such future research on this topic.

Having said all that, we can move on to the first section of this study, where we offer a brief overview of the ideas which, in our opinion, should be taken into consideration before formulating any *de lege ferenda* proposition on the subject of incest.

1. **A few ideas concerning the state of research on the topic of incest**

For a very long time, the phenomenon of incest was shrouded in a veil of taboos and stereotypes. In fact, at the end of the nineteenth century, most scientists believed that incestuous relations were common in nature and uncommon in human society, as the latter, being the more evolved species, developed cultural mechanisms to prevent it. This idea was false, and was proven as such by studies conducted in the first half of the next century. In fact, we now know that it is the other way around. The reality, it would seem, is that incest is now more common than ever in human communities and uncommon in nature (Erickson, 2005, pp. 177–180).

Unfortunately, historians lack the data required to be able to create exact statistics for each era and for every society. However, what one could certainly argue is that incestuous relations, both inside and outside the nuclear family, have always played a role in European society. As we are about to see, these practices have gone from being perfectly acceptable or even the rule to being the subject of countless taboos.

In Ancient Rome, given the latest demographic-oriented studies, it would seem that marriages between siblings were a common occurrence. We now know this because the Roman administration organized a census of the population every fourteen years, and some scrolls recording these results have survived to this day (Scheidel, 2005, p. 93). However, one could hardly argue that these marriages were the norm in Roman society and we still do not know what motivated them, as the determining factors might have varied substantially. Religion, finances, culture, family history and many more factors could have led a family to decide to marry the siblings or the half-siblings.

Ancient Egypt was somewhat different, in the sense that marriages between siblings were the norm in that society even after the Roman conquest (Scheidel, 2005, p. 105). However, researchers are still not in agreement regarding the factors which favoured these sorts of matrimonial arrangements. It could be argued that there was not just one single determining driver, but multiple such elements of different natures.

We should point out that all these studies show is that incest between indirect relatives, even between members of the same nuclear family (e.g., between siblings), existed as a practice in the Mediterranean space during antiquity. It should not be understood that incest between direct (primary) relatives was common or that the existence of any kind of incestuous relations in this historical era serves as definitive proof that incestuous intercourse is less problematic from a medical point of view. In fact, more data is needed before jumping to any sort of conclusion.

During the Medieval Era, such forbidden practices were considered useful for moral and religious propaganda in the Christian kingdoms and principalities, as well as (more often than not) of great interest as chivalric adventures (Archibald, 2001, p. 229). However, it would be an error to believe that the conceptualization of such a prohibition was a random occurrence. Like most taboos, this rule played an important social role in a society which lacked other practical means of preventing it. In a time when general education and mass-media did not exist, cautionary tales passed from hearth to hearth would have been among the best means of communicating an important lesson for the public health of the general population. Moreover, instituting an incest taboo was viewed as useful by writers such as Thomas Aquinas, who believed that this would help people restrain their sexual urges when living in close and communal quarters, as most common-folk would have done in those times (Archibald, 2001, p. 230).

All this being said, it is easy to notice that these cautionary tales were mostly concerned with incestuous relations between members of the same nuclear family. In contrast to antiquity, marriages between siblings were no longer tolerated by the religious authorities and became the subject of very strict prohibitions. However, incestuous relations outside of the nuclear family were not only tolerated, but even encouraged. Marriage between first cousins became one of the most efficient ways of strengthening family bonds and preserving the wealth accumulated by previous generations.

The idea that certain incestuous relations were not only acceptable, but also normal, survived the end of the Medieval Era and was adopted by modern societies. In the modern era, when the wealth and good reputation of the family play an important social role, marriages between cousins were common both for high society and for the middle class (the bourgeoisie) in the most civilized nations of the era (Kuper, 2009, pp. 243–245).

All this being said, it would seem that incest was not a significant issue for European States at the beginning of the twentieth century; the phenomenon was widespread enough, but it was not of major concern. As we have previously said, intercourse between cousins was normal and encouraged, as long as it took place after marriage. Intercourse between direct relatives and/or between siblings was unacceptable, however unstoppable and impossible to research, as shame, the spectre of social stigma, and centuries of old taboos sealed the lips of most of the people involved. In addition, as we have previously indicated, most scientists, like most western societies,

embraced a stereotype and claimed that incest was a constant only in nature, where ethics, culture and religion did not exist.

One should consider not only the psychological damage produced by the abuse of the more powerful participant (the parent, the older sibling, etc.), but also the psychological issues that arise from the stigma that the more fragile participant, the one convinced to indulge the pleasures of the former, has to bear in society when the truth about the incestuous relationships becomes common knowledge inside that community (Hadreas, 2002, p. 219).

At the same time, the modern sciences of sociology and anthropology were in their earliest days, and even the most open-minded researchers of the time would have probably refused to be involved in any such investigation. One should remember that, in the first half of the twentieth century, academics of the social sciences viewed any interdisciplinary study which involved recognizing the methodology of natural sciences as dangerous for the autonomous status of their respective fields (Shepher, 1983, pp. 176–177).

This perspective slowly changed and, in the second half of the last century, academic discourse reached a point where collaboration might be possible. The number of scientists who still argue in favour of a purely unique determining cause is reducing each day. In fact, one could hardly argue, for example, that genetic and/or environmental determinism are still popular theories (Bateson, 2005, pp. 35–36). In fact, interdisciplinary discourse has shown the limitations of the knowledge accumulated by each field on this topic. In the opinion of one author, this is problematic, as the lack of scientific interest which exists in one field of study also limits the potential findings of the people who are studying the same topic in another field of study (Bittles, 2005, p. 54).

The latter idea can be easily illustrated by mentioning two apparently completely separate lines of inquiry. Firstly, one could remember that it was posited that the study of primates might prove useful for the understanding of the avoidance of inbreeding as a naturally selected behaviour. It is certainly true that this kind of research is still in its early stages and its findings should be treated cautiously for the moment, but one should also consider the impact of its basic assertions. If most primates seem to have a naturally selected behaviour which helps them to avoid the dangers of inbreeding (Pusey, 2005, pp. 71–72), it is certainly worth considering that the prohibition of incest has a much more solid footing than it would appear. Does this mean that the cultural (or religious) taboo is also driven by a natural instinct of the human being? The general answer is yes; however, at the turn of the century, the extent to which the latter shaped the former was still unclear.

In a study conducted in the last years of the twentieth century, it was shown that there were a lot fewer cases of biological fathers who initiated incestuous intercourse with their offspring than there were step-fathers, or fathers who initiated such relations with members of their extended families (Seto, Lalumiere & Kuban, 1999, p. 271). The authors believe that close childhood association between members of the nuclear family was the explanation, thus validating, at least partially, a theory formulated in 1889 by Westermarck. However, the general conclusion of the study is that more research is needed before drawing a more categorical conclusion. Ten years later, another study, sociological this time, draw the conclusion that close childhood connections are not enough to prevent incestuous intercourse if a strong prohibition is not already in place (Shor & Simchai, 2009, p. 1836). We have mentioned these two studies as examples for a much more heterogeneous reality of the state of the art on this topic.

Secondly, by switching to the social sciences, one might observe that, although these sciences have been somewhat more interested in the subject, the ideas that they may provide are general at best. As an example, from a sociological point of view, it has been said that marriages between siblings:

> …occur almost exclusively in societies where ranking is sufficiently developed to exempt high-status people from most manual labour, as in chiefdoms, or to give them class rights over society's basic means of production, as in states. And they are unlikely to occur where state-building had created sufficient mundane power to relieve the ruling class of most of its supernatural aura. Under conditions not fully mapped out, but surely recurrent in human history, our innate alertness to the emotional complexity of incest can be turned to precise political ends, until something more dependable comes along (Gates, 2005, p. 156).

This kind of perspective, which puts the accent on the social nature of prohibition, even if it completely ignores the biological and/or psychological drive, provides an important insight by adding another complex layer to a possible explanation of the phenomenon of incest.

Consequently, another way of looking at this problem is to take into consideration the two main products of the phenomenon in collective culture. On one hand there is incest avoidance: the ability, regardless of its disputed nature, of the human being to avoid endangering the future of its species by not getting involved in incestuous intercourse. On the other hand, one has incest taboos, which, regardless of their disputed nature, are social constructs which are passed between the members of a society in order to prevent the same thing: incestuous relations. Unfortunately, the literature shows that most researchers who conducted studies on this topic during the twentieth century, regardless of their specialization, favoured one aspect and completely ignored the other (Wolf, 2014, pp. 133–134).

We are of the opinion that the prolonged reluctance of European and North American scholars to tackle the issues of causality and the legal regulation of incestuous sexual relations between members of the nuclear family led to immature and incomplete legislation concerning this topic. As we are about to see, the Balkan states have embraced different approaches to the subject, but none of them are based upon extended multidisciplinary research.

Having said that, we can now proceed to the second section of our paper, where we will briefly present the manner in which the national legislators from the Balkans elected to criminalize some forms of incestuous relations, while searching for emerging patterns.

2. The criminalization of incest in South-Eastern Europe

In the light of the information provided in the previous section, we can argue that, despite the fact that research on the subject of incest is still in its earlier stages, there are a few ideas with regard to which consensus may have already been achieved. Firstly, there is a strong medical argument against sexual intercourse between direct relatives, when and if such an intercourse leads to a pregnancy, as there is strong evidence that the child has a higher chance of having a severe medical condition as a result. Secondly, there is also a general consensus that most societies developed a taboo against incestuous relationships in one form or another, although there are notorious exceptions to this rule and the nature of those taboos is still very much disputed. Thirdly, the first two ideas are only applicable to incestuous relationships between members of the nuclear family.

If we are to accept that most of the countries which form the international community accept at least the validity of those three ideas, the fact that France, Spain, Russia, the Netherlands and some of the South American countries do not criminalize any kind of incestuous intercourse will certainly come as a surprise (O'Reilly, 2015, pp. 18–19). We are of the opinion that this kind of legislative policy is hardly the result of one single main driver, such as conservatism (Russia may be a conservative country, but France is not) or radical progressiveness (France and Spain may be more progressive, but Russia is certainly not). Consequently, we would suggest that an individual explanation has to sort through extensive future research on each country, or at least each geographical and/or cultural area.

Therefore, we will try to contribute to any such future efforts by providing a brief insight into the similarities and differences which mark the provisions used by some of the national legislators from, or historically linked to, a relatively conservative region: the Balkans.

In relation to the Albanian Criminal Code, henceforth the A.C.C., we mention the fact that we have consulted the most recent official translation of the Albanian Criminal Code; however, one should take note that it was marked as a provisional translation.

Very much like the other normative acts cited in this paper, the A.C.C. stipulates the conditions under which incestuous relationships are to be criminalized; however, it does so under a more peculiar name: sexual or homosexual activity with consanguine persons and persons in a position of trust. Thus, according to Art. 106 of

this act, "engagement in the act of sexual or homosexual intercourse between parents and children, brother and sister, between brothers, sisters, between consanguine relatives in an ascending line or with persons in the position of trust or adoption" is considered an offence and may be punished by imprisonment up to seven years.

Art. 106 of the A.C.C. is an excellent example to start with, as it shows how a national legislator might prefer to criminalize different forms of incestuous intercourse for different reasons. As we have previously stated in the first section of this paper, there is a general consensus that sexual intercourse between direct relatives is dangerous as it raises the risk of serious health issues for the offspring. Actually, in the case of inbreeding between direct relatives (some authors also call them primary relatives, but for the purposes of this paper, we will keep utilizing the term "direct relatives", as it is also commonly used in the English translations of the national Criminal Codes), the excess death-plus-major-defect rate is raised by 20 to 40 percent (Wolf, 2014, p. 134). However, this fact would not explain neither the criminalization of homosexual intercourse between direct or indirect relatives, nor the criminalization of sexual intercourse between the person who adopts (or one of their direct or indirect relatives) and the person who is adopted. Neither of these latter cases justify any kind of physiological health issues. However, as we are about to see, similar kinds of provisions have been adopted by most of the countries included in our brief study. Moreover, this kind of reasoning should not be surprising, as the very idea of justice is far from being extremely clear (Constantinescu-Mărunțel, 2020, pp. 70–71). At the end of this section, we will try to explain this one constant in light of the information provided in the first section.

In relation to the Austrian Criminal Code, henceforth the O.C.C., we should mention that we have consulted the Romanian translation of the Austrian Criminal Code, as we were unable to find a trustworthy source for an English or French translation. We took into consideration the fact that the Romanian translation is the result of an official project of the Romanian Ministry of Justice, in the context of which authorized translators were employed to translate into Romanian the Criminal Codes of all the members of the European Union.

The O.C.C. also provides for a definition of the offence of incest in Art. 211, which has four distinct paragraphs. According to dispositions set out by the first paragraph, a person may be prosecuted for incest if they engage in sexual intercourse with a direct relative, whether with an ascendant or with a descendant. If they are found guilty, then the court may sentence them to imprisonment up to one year or to pay a fine up to 720 daily penalties.

One should not believe that the penalty chosen by the Austrian federal legislator for this offence is a mild one just because it allows the courts to make a choice between imprisonment and a criminal fine. It is true that this would be the obvious conclusion if we were to compare the upper limit of the imprisonment term provided for by Art. 211 par. (1) of the O.C.C. with the upper limit of the imprisonment term provided for by Art. 106 of the A.C.C. However, we should point out that the Austrian legislator elected to set the same system of penalties for the basic version of manslaughter, pursuant to Art. 80 par. (1) of the O.C.C. At the same time, one should also notice that the court is allowed to impose a great number of daily penalties. In Austria, the amount of a daily penalties, pursuant to Art. 19 par. (2) of the O.C.C., ranges between 4 and 5000 euros, and is to be determined by the court in accordance with the circumstances of the case. Under those circumstances, we believe that the Austrian system of penalties for the offence of incest may also be considered harsh.

The second paragraph of Art. 211 criminalizes the act of the person who instigates one of their descendants to engage in sexual intercourse with the perpetrator. As this is, in fact, an act of inciting incestuous relations, one could expect that the Austrian legislator would have set out a more forgiving system of penalties. However, this is not the case. In fact, the penalty for this specific form of instigation is imprisonment up to three years. If we are to consider that imprisonment is regarded in general as a more severe form of punishment than a criminal fine, we could argue that Art. 80 par. (2) of the O.C.C. provides for an aggravated form of incest.

Art. 80 par. (3) of the O.C.C. provides for an attenuated form of incest. In this case, the Austrian legislator elected to criminalize the act of the person who engages in sexual intercourse with their sister. Taking into account that such conduct may be punished by imprisonment up to 6 months or by up to 360 daily penalties, we would suggest this means that, in the eyes of this legislator, incestuous intercourse between indirect relatives is less serious than incestuous intercourse between direct relatives.

In any case, pursuant to the fourth paragraph of the same article, a person who was under 19 years old when the offence was committed shall not be punished if they were instigated to do so. This means that, under these specific circumstances, a person otherwise criminally accountable will not be prosecuted and convicted, even if it has been proven that they committed the offence.

Given the fact that Bosnia and Herzegovina are a federation, similar norms may be found in normative acts adopted by the states which form the federation. We are not going to conduct an in-depth analysis of the all the relevant Bosnian legal provisions, as that would mean that this paper would have to become much too long. Therefore, for the moment, we are going to limit ourselves to presenting the federal criminal dispositions. One should also take note that we were unable to find any official translation of this code into English or French, therefore we have used an unofficial consolidated version, but from the most reputable source we could find.

The Criminal Code of the Federation of Bosnia and Herzegovina, hereinafter the B.H.C.C., also includes several provisions dedicated to the criminalization of incestuous relations. Specifically, Art. 213 of this normative act includes one basic form and two aggravated forms of this offence. In its basic form, the offence of incest may have been committed by "whosoever has sexual intercourse, or commits sex acts tantamount to sexual intercourse, with a lineal relative or a sibling". A person convicted pursuant to Art. 213 par. (1) may be punished by a fine or by imprisonment for a term of no less than 6 months and no more than two years. By a lineal relative, one understands a direct (primary) relative, either a descendant or an ascendant. Therefore, one could notice that Art. 213 par. (1) of the B.H.C.C. criminalizes a larger sphere of conducts than, for example, Art. 211 par. (1) of the O.C.C.

Prior to the presentation of the two aggravated forms of this particular offence, one should know that the B.H.C.C distinguishes between the notions of juvenile and child. Pursuant to the dispositions of Art. 2 par. (13), a juvenile is a person who has not reached the age of eighteen years. A child, pursuant to the dispositions of par. (12) of the same article, is a person who has not reached fourteen years of age. Therefore, in Bosnia and Herzegovina, according to the criminal law, a person is to be considered a child from the moment of their birth and up to the last moment until they turn fourteen. From the moment a person reaches fourteen years of age and up to the last moment before they turn eighteen years of age, they are considered a juvenile.

If the national legislator creates such thresholds, more often than not, an offence committed against a juvenile is considered more serious than the same offence committed under the same circumstances against an adult. Likewise, an offence committed against a child would be considered more serious than the same offence committed against a juvenile.

On that matter, it should be noted that we do have some reservations in relation to this manner of distinguishing between the severity of one offence in comparison with another. Although we do agree that an offence committed against a minor should be considered more serious than the same offence committed against an adult, we think that one should create differences between minors based on their age. We see no clear advantage in creating such differences in a general manner, for the entire Criminal Code. If there is a need to differentiate between victims based on their age in a very specific circumstance, we believe it would be better to simply introduce a set of special norms for that case.

The first aggravated form of the offence of incest, according to the second paragraph of Art. 213 of the B.H.C.C, is the perpetration of the same acts between the same categories of persons, with one major difference. This time, the perpetrator commits the offence with a juvenile. The same applies for the second aggravated form of the offence, pursuant to Art. 213 par. (3), but, in this instance, the perpetrator commits the acts with a child. As expected, the first aggravated form is sanctioned less severely than the second: imprisonment for a term of between one and five years, pursuant to Art. 213 par. (2), and imprisonment for a term of between two and ten years, pursuant to the third paragraph, respectively.

Bulgaria is one of the most northern states in the Balkans, and its legislator has also elected to include the offence of incest in its Criminal Code. According to Art. 154 of the Bulgarian Criminal Code of 1968 (with amendments up until 2017) henceforth the B.C.C., incest is defined as "sexual intercourse between relatives in ascending and

descending line, between brothers and sisters, and between adopters and adopted persons". The penalty for committing any one of these acts is imprisonment for up to three years for both participants.

One can easily see that Art. 154 of the B.C.C. and Art. 106 of the A.C.C. have been drafted in a very similar manner, in the sense that both are an expression not only of the medical concerns regarding the effects of incestuous intercourse on potential offspring, but also of the taboos and stereotypes which forbid any kind of sexual activity between members of the same nuclear family, regardless of whether they are blood relatives or not. As we are about to see, the same may be said about the relevant provisions adopted by the Croatian legislator.

The Croatian Criminal Code of 2011, henceforth the C.C.C., has one of the most lenient attitudes towards the offence of incest, which is defined by the provisions of Art. 179 par. (1). The Croatian legislator decided that such acts may be punished with imprisonment not exceeding 1 year. Accordingly, the offence may be committed by "whoever engages in sexual intercourse or an equivalent sexual act with a relative by blood in direct line, a brother, sister, half-brother or half-sister, by blood or by adoption". The second paragraph of the same article establishes that a participant to the commission of the act who was a child at that moment, that is to say that the child was under 18 years old, is not to be punished.

However, one could also consider the option of differentiating between the versions of incest by qualifying each of them in a different manner. Pursuant to Art. 199 par. (1) of the Hungarian Criminal Code of 2012 henceforth the H.C.C., "any person who engages in sexual activities with their relative in direct line is guilty of a felony", and they may be punished by imprisonment not exceeding three years. It may be noted that the Hungarian legislator opted to expressly stipulate that, under these circumstances, the acts of the perpetrator(s) constitute a felony. At the same time, pursuant to the second paragraph of the same article, "any person who has sexual intercourse with his or her sibling shall be punishable for a misdemeanour". Consequently, the punishment for the latter conduct is less severe, the judge having the right to impose imprisonment not exceeding two years.

Given what we have seen so far, it is certainly interesting that a national legislator from this geographical area would elect to differentiate between the forms of incest based on how closely related the perpetrators are. However, if we are to consider the information provided in the first section of this paper, it is to be expected for a European country to establish that sexual intercourse between siblings is a less severe breach of the law than sexual intercourse between relatives in a direct line. After all, countries such as Hungary and Austria are simply transposing within their legislation the various degrees of severity which have characterized incest taboos for centuries.

Even more so, pursuant to Art. 199 par. (3), if one of the perpetrators is under the age of 18 years and if said person is a descendant of the other perpetrator(s), the former will not be punished. This is not instituting a ground for exemption from criminal responsibility, but it allows the authorities to adopt a much more lenient attitude towards minors in a circumstance which is extremely sensible for all the parties which have been involved. If the descendant is a minor, this means that at least one of their ascendants has convinced them that they should engage in sexual intercourse. In such a situation, even if the minor is old enough to understand the implications of such an act, they might have been easily convinced otherwise, given the already intimate relationship existing between them as members of the same nuclear family.

The Romanian Criminal Code, henceforth the R.C.C., adopts a "classical" attitude in relation to the offense of incest. According to the provisions of Art. 377, the act is defined as "sexual intercourse with consent, between persons related in direct line or between siblings". However, if we are to compare the system of penalties adopted by the Romanian legislator with what we have discovered from consulting the criminal legislation of other countries from the same region, we would be inclined to believe that the former is rather severe. Pursuant to the same norm, the offense of incest is punishable in Romania by no less than 1 and no more than 5 years of imprisonment.

However, it should be noted that Romania, unlike Albania, for example, does not criminalize incestuous relations between members of the same nuclear family if the nature of those relations is homosexual (Udroiu, 2019, p. 742). This would reflect a shy and self-conscious attempt on the part of the Romanian legislator in 2014 to break away

from the stereotypes and taboos of the old world, while not upsetting the more conservative part of Romanian society. As a result, even if it is not explicitly mentioned by the text of the law, and even if most Romanian literature criticizes this option, Art. 377 of the R.C.C. also covers homosexual incestuous relations between members of the same nuclear family (Trandafir, 2019, p. 473).

In comparison with the other national legislators presented in this paper, the Serbian legislator in its criminal legislation includes the narrowest definition of incest. According to Art. 197 of the Serbian Criminal Code of 2005 (with amendments until 2013) henceforth the Sr.C.C., the offense may have been committed when it is proven that an adult engaged "in sexual intercourse or an act of equal magnitude with an underage relative by blood, or an underage sibling". If the perpetrator is convicted, then the court may apply a punishment with imprisonment of six months to five years. Regarding this point, one should also remember that in many cases of incestuous sexual intercourse between direct relatives, the non-participating spouse of the ascendant plays an important role by ignoring the relation or by tolerating it (Ricker, 2006, pp. 37–40).

As we have already seen, this is easily one of the most severe punishments stipulated by a national legislator from this geographical area for this offense, at least if we are to compare it with the penalties imposed for the basic forms of this offense in other states.

It might be useful to note at this point that the Slovenian authorities have defined incest in the same manner, whilst electing to impose a much more lenient punishment. Pursuant to Art. 195 of the Slovenian Criminal Code of 2008, henceforth the Sl.C.C., "an adult who has sexual intercourse with an underage lineal relative or underage brother or sister shall be sentenced to imprisonment for not more than two years".

While we have presented the relevant norms and their corresponding formal expressions in the normative acts, it should be stressed out that the definitions of incest used by the national legislators previously mentioned are the product of various theories, taboos, social practices and stereotypes which were relevant at the beginning of the twentieth century. One should also consider that sometimes the incest taboo functions inversely. If the social ties of a family are important for the very survival of the entire community, the taboo incest appears in order to force families to enter into marriage unions, even if the community does not have a problem with what an incestuous relationship actually entails (Hadreas, 2002, p. 219).

The legal traditions and philosophies of these states, which are mostly conservative, prevented any kind of update. This in an era in which sociology and anthropology discovered that all of the theories which were posited during the first sixty or seventy years of the twentieth century were unable to provide a sufficiently coherent explanation for the various types of voluntary incestuous relations (Schepher, 1983, pp. 177–178).

Having said all of this, we may proceed to conducting a short review of Romanian jurisprudence on the matter, which should allow us to assess whether the norms presented above are a simple archaic remnant or are actually applied by public authorities with the (at least tacit) support of the public.

3. Incest in Romanian jurisprudence

As we have previously indicated, the criminalization of certain voluntary incestuous relationships was preserved by the Romanian legislator in 2014, when a new Criminal Code was adopted in this country. Pursuant to the dispositions of Art. 377, if direct relatives (e.g., mother and son) or siblings engage in sexual relations, this is an offence punishable by one to five years of imprisonment.

On the 4th of November 2021, the Oradea Court of Appeal decided that a man who engaged in sexual intercourse with his daughter several times between the 26th of January 2018 and the 4th of February 2018 had committed the offence of incest, pursuant to the dispositions of Art. 377 of the Romanian Criminal Code, and sentenced him to 1 year and 6 months of imprisonment. Through the same decision, the daughter was sentenced for the same offence to 8 months of imprisonment, but the court elected to postpone the execution of the punishment, pursuant to the dispositions of Art. 83 par. (1) of the Criminal Code.

In the same vein, the Ploiești Court of Appeal ruled that a man who engaged in voluntary sexual intercourse with his daughter (sixteen years old at the time) committed both the offence of sexual intercourse with a minor (Art. 220 of the Criminal Code) and the offence of incest (Art. 377 of the Criminal Code). It should be mentioned that the daughter became pregnant as a result of repeatedly engaging in sexual intercourse with her father, and she gave birth to a healthy child which she then abandoned to the care of the public authorities. The father was sentenced to a total of 24 months of imprisonment, of which 20 months was for the offence of sexual intercourse with a minor and 12 months was for the offence of incest (reduced to 4 months pursuant to the dispositions of Art. 38 par. 2 of the Criminal Code).

We could, of course, continue to provide the reader with several examples of similar court rulings from each year prior to 2021, but the building of such an extensive archive within the limits of this paper is hardly necessary. The simple fact is that Romanian courts judge dozens of incest-related cases each year, many of those resulting in convictions of months, if not years, of imprisonment, especially when minors are involved. Therefore, one could argue that the dispositions of Art. 377 are being consistently applied in Romania.

The fact that the Romanian public authorities have a constant policy of reporting, prosecuting and condemning the perpetrators of the offence of incest is also visible in the jurisprudence of the Romanian Supreme Court. The latter decided in 2021 that these specific trials could be optimized if the corroborated interpretations of certain norms from the Romanian Criminal and Civil codes were changed. Therefore, the Romanian High Court of Cassation and Justice, hereinafter the Romanian Supreme Court or ICCJ, ruled that the criminal courts are competent to judge if there is a direct biological link between the alleged perpetrators of the offence of incest, even if, pursuant to the dispositions of the Civil Code, this preliminary problem should have been sent to a civil court. The intent of the Supreme Court was to interpret the legal dispositions in such a manner as to, in effect, optimize the criminal trials where such deeds are judged.

That being the case, we should highlight that, at least in Romania (but we would not be surprised if this were true for the countries that were mentioned in the previous sections), the following three aspects of the phenomenon have to be accepted:

1) The national legislator recently considered that the criminalization of incest is still necessary, and that such a criminal policy adequately reflects the moral and/or religious values of the majority of its citizens; therefore, it included/retained the definition of the offence of incest in the newest version of the Criminal Code;

2) The public authorities are constantly reporting, prosecuting, judging and even convicting people who committed the acts criminalized under the legal definition of incest;

3) The public does not interfere with this process and there is no significant public pressure to decriminalize these voluntary incestuous relations.

However, none of the three points mentioned above are the result of an acknowledged, informed and coordinated public debate on the subject. In our opinion, the validity of the Romanian criminal norms on the subject has to be seriously questioned, as this validity is not the result of a scientific, methodologically sound exercise, nor is it the result of a democratically tested public debate. The Romanian criminal norms regarding the prohibition of incestuous relations are, in our opinion, the result of a socially accepted inertia. In 2014, the Romanian Parliament simply elected to push aside a much-delayed subject. From a political point of view, the subject was too dangerous for MPs, so they voted for a "safe" option: to continue to implement a criminal policy which was dictated by the *socially, religiously and culturally acceptable perceived reality* of the beginning of the twentieth century.

Having said all that, we can proceed to the next and last section of our paper, where we will present the results of the analysis conducted up to this point.

Conclusions

In the modern world, one would expect national legislators to adopt a more cautious attitude when criminalizing conduct such as that which is broadly termed incest. As we said at the beginning of this paper, we do believe that some forms of incestuous intercourse have to be criminalized: when and if strong scientific data shows that such conduits have negative effects for the entire society, or at least for an innocent third party. However, this is not the case in the Balkans or in the surrounding states. All of the states included in this study have criminalized some forms of incest; however, most ignored the clearly defined limits of what is dangerous from a scientific perspective, and elected to maintain to this day a set of provisions which is at least in part the expression of medieval cautionary tales.

In our opinion, when considering the validity of these norms as legal means aimed at the prevention of a harmful social phenomenon, i.e., incest, one should also check if they are the expression of the most recent findings with respect to that phenomenon.

Consequently, we going to end this paper with a division of the countries mentioned above according to four different criteria. We hope that this data will help other researchers in their future studies, as more research is clearly needed. As we have seen, the rationale currently used by the different national legislators is incomplete at best.

Firstly, it is interesting to note that all of the nine states included in this study have criminalized voluntary incestuous relations between direct relatives. However, one should take note of the fact that Serbia and Slovenia have criminalized such conduct only when one of the participants is a minor, probably in reference to the high probability of the presence of some form of child abuse in such cases. It should also be mentioned that Bosnia and Herzegovina elected to impose a much more severe punishment for those perpetrators who participate in incestuous intercourse with a minor.

Secondly, all of the states included in this study have criminalized voluntary incestuous relations between siblings. Albania, Bosnia and Herzegovina, Bulgaria, Croatia and Romania utilize the same system of penalties as they do for voluntary incestuous relations between direct relatives. Austria and Hungary have criminalized these relations; however, they included them in an attenuated form of the offense. Serbia and Slovenia have also criminalized these relations; however, only if such an act has been committed by one or more adults with a minor.

Thirdly, there are three states which criminalize voluntary incestuous relations between members of the same nuclear family even if they are not blood relatives: Albania, Bulgaria and Croatia.

Lastly, there is one country which criminalizes voluntary homosexual incestuous relations between members of the same nuclear family: Albania.

As a final remark, we are of the opinion that, irrespective of the medical arguments which may or may not support the idea that the criminalization of incest is or is not necessary in a contemporary and democratic society, this issue cannot and should not be analysed whilst ignoring the moral and/or religious views of the majority of the citizens of these countries. Therefore, if these norms exist and are being applied with the democratic support of citizens, in a context where no fundamental right of the perpetrators is suppressed, it is not our place to judge their validity solely on the basis of the existence or non-existence of otherwise neutral scientific arguments.

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LEGAL COOPERATION IN CRIMINAL MATTERS: THIRTY-YEARS' EXPERIENCE OF THE BALTIC STATES

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Abstract. This article overviews the 30 years of experience of Lithuania, Estonia and Latvia in developing national systems of legal cooperation in criminal matters. In order to reveal individual experiences of the three States, the developments of law and practice of each State from the re-establishment of its independence to the present day are covered in separate sections of the article. For this purpose, experiences related to the development of national laws are presented over two time periods – before and after membership in the European Union. The experience of each State in concluding different international agreements on legal cooperation in criminal matters is also discussed. Considerable attention is paid to the implementation of the secondary legislation of the European Union, such as Council framework decisions and directives. Irrespective of the membership of the Baltic States in the European Union and the areas of freedom, security and justice developed in this area on the basis of the principle of mutual recognition, the system of cooperation with third countries retains its particular relevance and is also analysed in this article. In order to reveal the positive and negative experience of each State in this area after the re-establishment of independence, an analysis is conducted of both national and international legislative provisions. The article also highlights and explores the main transformation trends of international legal cooperation in criminal matters in an effort to create fast and smooth criminal proceedings in line with the highest standards of human rights protection, where much importance and significance is attributed to legal cooperation both within the European Union and in relationships with third countries.

Keywords: re-establishment of independence, Baltic States, legal cooperation, EU law, international agreements, bilateral agreements.

Introduction

International legal cooperation in criminal matters became particularly relevant in the early 19th century. The increasing migration of criminals led to the issue of returning them to the country where the crime was committed in order to bring them to justice. In Europe, the first international treaties specifically devoted to extradition were signed between the French Republic and Great Britain in 1843 and 1852. However, no criminal was extradited under these treaties (Moore, 1896, p. 750). The same fate was shared by the extradition provisions contained in Article 20 of the Treaty of Amiens between France, Spain, Holland and Great Britain, signed on 2 March 1802 (Moore, 1896, p. 750). The omission of international treaties led European States to regulate extradition by national law. The first extradition act was adopted in the Kingdom of Belgium in 1833 and was an important stimulus for the development of the institution of extradition (Billot, 1874, p. 284).

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Lithuania, Estonia and Latvia did not adopt an independent policy on extradition and other legal cooperation in criminal matters until the re-establishment of their States in 1918. However, the period of independent policy-making did not last long. In 1940, the three Baltic States were occupied, then annexed and isolated for long decades.

In the early 1990s, however, the three Baltic States availed themselves, taking advantage of the unique opportunity to restore their independence. This step, of fundamental importance and significance to our States, brought about a large range of challenges, including the need to create an effective mechanism of legal cooperation in criminal matters.

Lithuania, Estonia and Latvia had to build the fundamentals of their legal cooperation in criminal matters by, first of all, amending and improving the code of criminal procedure inherited from the Soviet times. At the same time, active efforts were made to conclude bilateral agreements with the nearest neighbours.

In the first stage of creation of the State governed by the rule of law, consistent efforts were made to move legal cooperation to conventional levels. This was pursued by acceding to the most important conventions of the Council of Europe designated to ensure legal cooperation in criminal matters. This process, which gained its momentum in the first decade of independence, has successfully, although at a slower pace, continued to date.

It is undoubted that the most significant period of existence of Lithuania, Estonia and Latvia has begun since 1 May 2004, i.e., with the European Union membership of these States. Until this time, however, these States had to accomplish tremendous work to enable their national systems to promptly transpose the whole law and *acquis communautaire* of the European Community. The implementation of this task was rather smooth.

It should be noted that one of the objectives of the EU is the development of the areas of freedom, security, and justice. It is the implementation of this objective that brings along the need for certain transformations in order to develop a fast and smooth criminal procedure in line with the highest standards of human rights protection, where legal cooperation is an important and significant constituent. The Baltic States implemented changes in this area, and continue to make them diligently. The relevant activities even predetermine the need to revise the system of criminal procedure rules governing legal cooperation in individual States.

Irrespective of active and wide-ranging efforts in improving criminal proceedings, the strengthening of legal cooperation and its development with third countries remains an important and significant area for our States. All of these States have been actively working towards this direction for more than thirty years.

At the national level, analysis has been limited to country-specific issues related to various aspects of legal cooperation in criminal matters. The following national authors have focused on extradition, the European Arrest Warrant and other problems of legal cooperation in criminal matters: Abramavičius et al. (2005); Čepas (2003); Čepas and Švedas (2008); Feldmane (2015); Jõks (1996); Kaija (2013); Meikališa (2001); Melnace (2012); Nevera (1999, 2016); Nevera and Melničenko (2009); Ploom (2010); and Švedas (2008, 2014).

Hence, the aim of this article is, for the first time at a scientific level, to analyse the provision of the criminal procedure codes and the criminal codes of the three Baltic States, their bilateral and multilateral agreements, as well as the secondary law of the EU as far as it relates to the national systems of legal cooperation in criminal matters, using the methods of systemic analysis, synthesis, critique, comparative analysis, and other methods of scientific research.

1. Legal Cooperation in Criminal Matters: Lithuanian Experience

The Act of the Re-Establishment of the State of Lithuania of 11 March 1990 *inter alia* states that the Supreme Council of the Republic of Lithuania, expressing sovereign power, by this Act begins to exercise the complete sovereignty of the State. One area in which sovereignty of the State is exercised is the implementation of independent criminal policy, which also is expressed in the legislation of criminal procedure law.

At the time of re-establishment of independence, the 1961 Criminal Procedure Code was in force in Lithuania, which regulated the issues of legal cooperation in criminal matters very narrowly (Criminal Procedure Code, 1961). Article 21 of the 1961 Criminal Procedure Code of Lithuania only stated that 'the procedure of communication by courts, prosecutor's offices, pre-trial investigation bodies with the relevant foreign institutions, as well as the procedure of execution of requests of these institutions shall be defined by laws and international agreements made by the Republic of Lithuania with the relevant States'.

1.1. Development of national law and signing of international agreements, 1990–2003

Thus, after the re-establishment of independence, Lithuania stepped into the first period of creation for the rule of law system. It is undoubted that, 50 years ago, the State forcibly erased from the European map the wording of the 1961 Criminal Procedure Code that defined the rules of legal cooperation, thus posing a problem of application of the international agreements that were in force during the inter-war period (1918–1940). Over that time, Lithuania signed a number of international agreements, also dealing with extradition (*Lithuanian agreements with foreign countries*, 1930, 1939). Such agreements were also signed with the USA and the Kingdom of Belgium, which stated that after the re-establishment of Lithuania's independence they would also adhere to the agreements signed before 1940 when dealing with extradition issues. Such positions of these States, most likely, were underpinned by the fact that they had never recognised the occupation and annexation of Lithuania; therefore, there was no legal basis to set aside the universal principle of *pacta sund servanda*. There was, indeed, no real need to adhere to them.

Since 1940, however, the world has changed considerably. The issues of legal cooperation in criminal matters were moved from the level of bilateral agreements to the level of conventions, which were drafted, implemented, and supervised both by the United Nations and by other international organizations, including the organization which became most important for the region of Europe: the Council of Europe.

For this reason, the newly re-established State had to accede to a number of international agreements dealing with different matters of legal cooperation. As these procedures take time, Lithuania started amending the 1961 Criminal Procedure Code and, at the same time, initiated and successfully completed the process of acceding to bilateral agreements on legal assistance and legal relations in civil, family and criminal matters. Naturally, due to proximity, such agreements started with Latvia, Estonia, Poland, Belarus, Ukraine, Moldova and the Russian Federation (*Treaties of the Republic of Lithuania on legal assistance and legal relations in civil, family and criminal matters*, 1994). The agreements currently in force regulate the transfer of criminal proceedings, extradition, taking over of sentenced persons, and other issues of execution of judgments.

These international agreements were significant for the start of Lithuania in developing bilateral legal relations in criminal matters with foreign countries, in particular its closest neighbours. Their significance was also manifested through the fact that the most advanced provisions on the legal cooperation of European States in criminal and other matters were transposed to such agreements.

Taking into consideration the fact that Article 21 of the 1961 Criminal Procedure Code did not conform to the needs of the independent State, in 1991, Lithuania introduced provisions regulating the procedure of communication for national courts, prosecutor's offices, pre-trial investigation and interrogation bodies with the relevant foreign States in the 1961 Criminal Procedure Code. Differently to the present-day procedure, requests for legal assistance had to be sent not only through the Ministry of Justice and the Prosecutor General's Office, but also through the Ministry of the Interior (Article 21) at that time. The procedure applicable to the requests of foreign authorities to carry out procedural actions (Article 21^1) was also regulated in a specific manner – authorisation was required from the Ministry of Justice, the Ministry of the Interior, or the Prosecutor General's Office for the requests received directly by courts, investigation or interrogation bodies.

It was obvious that the relevant provisions established a rather convoluted scheme for the execution of legal assistance requests. The necessity of such a procedure, however, was predetermined by the complicated inherited system of pre-trial investigation institutions and the prosecutor's office. Limited experience of legal cooperation in criminal matters was also an important factor for having such a procedure in place.

It was then that the fundamentals were also laid for requests to initiate or take over criminal proceedings (Article 21^2). The provisions related to the institution of criminal proceedings against citizens of the Republic of Lithuania who commit criminal offenses abroad and return to the Republic of Lithuania, and the rules on the sentencing of foreigners who commit criminal offenses in the territory of the Republic of Lithuania and leave Lithuania, have undergone little transformation over the period of thirty years. At present, there is an additional requirement to deal with the relevant issues in accordance with provisions of an international agreement; in addition, it is regulated that requests to open or take over criminal proceedings may also be made by international organisations.

At that time, the legal regulation also established the grounds and procedure of presenting requests to foreign States to extradite a person (Article 22), and grounds, conditions and procedure of extradition of persons from the Republic of Lithuania (Articles 22^2, 22^4). It is important to note that extradition had been addressed in Article 7^1 of the 1961 Criminal Code of Lithuania that was in force until 2003, and regulated the grounds for extradition of foreigners and Lithuanian citizens from Lithuania (Criminal Code, 1961)[4].

An assessment of the provisions of the 1961 Criminal Procedure Code demonstrates that, since 1991, legal cooperation of the Republic of Lithuania with foreign States became possible on the basis of international agreements or national law. As far as national laws were concerned, the only law that contained provisions on legal cooperation in criminal matters was, and, in principle, remained until 2003, the 1961 Criminal Procedure Code and Article 7^1 of the 1961 Criminal Code. That said, on 2 November 1992, the Constitution of the Republic of Lithuania came into force, article 13 of which established and still upholds the legal cooperation principle, which prohibits extradition of a citizen of the Republic of Lithuania to another State unless an international treaty of the Republic of Lithuania provides otherwise. On the other hand, we are well aware that this principle only allows or excludes extradition; it is not a provision of national law regulating extradition as such, or other forms of legal cooperation. No other national laws designated specifically for legal cooperation issues were adopted even when the new 2000 Criminal Procedure Code and the new 2002 Criminal Code, which was prepared by Lithuanian scholars and practitioners, came into force on 1 May 2003 (Law on the entry into force and implementation of the Criminal Code of the Republic of Lithuania, the Code of Criminal Procedure and the Code of Enforcement of Sentences, 2002).

It is also interesting to note that somewhat double standards for the extradition of Lithuanian citizens and foreigners were in force in Lithuania until that date. Under Article 7^1 of the 1961 Criminal Code, foreigners could be extradited only on the basis of an international agreement or, if there were none, in accordance with laws of the Republic of Lithuania. It was not allowed to extradite citizens of the Republic of Lithuania in any case. Meanwhile, the initial wording of Article 22^2 of the 1961 Criminal Procedure Code that was effective after independence stipulated that foreigners and Lithuanian citizens could be extradited abroad only if there was an international agreement.

Such a dualistic approach was retained in the law even after the entry into force of the Constitution of the Republic of Lithuania, which, as mentioned, allowed the extradition of Lithuanian citizens in principle only if such a possibility was regulated in a specific international agreement of the Republic of Lithuania. The grounds of and conditions for the extradition of foreigners and Lithuanian citizens were harmonized only after the entry into force of the new Criminal Procedure Code and the new Criminal Code. For both categories of persons, extradition became possible only in the presence of an international agreement.

Thus, differently than during the period of 1990 to 2003, Lithuania may currently cooperate with foreign States on the issues of extradition only on the basis of an international agreement. In the opinion of the authors, this maxim should also apply as far as the legal grounds of other forms of legal cooperation in criminal matters are concerned; however, practice shows that Lithuania, nevertheless, takes the opposite approach – it also submits

[4] It should be noted that Lithuania still has the tradition of regulating extradition (and also the European Arrest Warrant since 27 April 2004) both in the Criminal Procedure Code and in the Criminal Code.

and executes applications in the absence of an international treaty.[5] There have been cases, however, when an application submitted without an international agreement was treated by a foreign State as an *ad hoc* international agreement – for example, Canada[6].

It is interesting that such an approach of Lithuania is masked by legal cooperation based on the principle of good faith (Nevera, 2016, pp. 437–451). Good-faith legal cooperation, however, can be relied upon only when it is clearly set out in the Criminal Procedure Code or in a special national law. Lithuania does not have such a special law. Therefore, under Lithuanian law, there can be no international legal cooperation without an international agreement; however, in, practice this is not the case.[7]

The conclusion of bilateral or multilateral agreements with different States is a long, difficult and hard-to-implement process. For this reason, in the second half of the 20th century, both Europe and other regions initiated the adoption of various conventions meant to facilitate the cooperation of Member States on different issues of legal cooperation in criminal matters. It was these more universal, broader in scope and more time-tested instruments of legal cooperation in criminal matters that Lithuania had in focus when it signed the above-referred-to international agreements and made the first changes in the Criminal Procedure Code.

The most important of such international documents were undoubtedly the 1957 European Convention on Extradition (entry into force 18 September 1995), the 1959 European Convention on Mutual Assistance in Criminal Matters (entry into force 18 September 1995) and the 1970 European Convention on the International Validity of Criminal Judgments (entry into force 9 July 1998). The signing of these international agreements and their follow-up ratification have opened new avenues of legal cooperation in criminal matters for Lithuania both with the Member States of the Council of Europe and with some other countries, because the first two international agreements are also open for signature to non-Member States of the Council of Europe.

On the other hand, these international agreements brought along certain challenges for Lithuania. The first difficulty was the hierarchy of international agreements, because identical issues of legal cooperation were regulated both in bilateral agreements and in the relevant conventions that were in force. The problem was that the conventions provide that the Contracting States may not enter into bilateral or multilateral agreements on the issues addressed by such conventions, except in cases when amendments to convention provisions or facilitation of the application of their principles is intended.

The latter problem, in fact, has not been resolved to its full extent in Lithuania to date. However, it has been minimised as a large number of Contracting States are Member States of the EU. This is particularly relevant as far as the processes of extradition and mutual assistance are concerned because these forms of legal cooperation have the largest practical applicability.

On the other hand, it is important to emphasise that the process of entering into bilateral agreements that has been continuing to date[8] not only creates preconditions to make legal cooperation more effective and extensive, but it also keeps coding the above-referred-to problem in a certain sense. This is particularly relevant for the States

[5] Lithuania and Vietnam do not have any bilateral agreements on legal assistance and legal relationships in criminal matters. Neither do they participate in any extradition conventions together. Nevertheless, in 2016, Vietnam extradited Sergei Rachinstein, a businessman convicted of multi-million dollar tax fraud, to Lithuania (ELTA & BNS, 2016).

[6] Data of the General Prosecutor's Office of the Republic of Lithuania are available at the request of the authors.

[7] In accordance with the principle of good faith, Lithuania applied for legal assistance to: Afghanistan, Bahamas Islands, Belize, Bangladesh, Dominica, Guinea, Ecuador, Philippines, Iran, Japan, United Arab Emirates, Cameroon, Cayman Islands, Costa Rica, Panama, Seychelles. In the absence of an international agreement, Australia, Egypt and Kosovo applied to Lithuania with extradition requests, and Lithuania applied to Canada, Columbia, Egypt and Vietnam. Statistics of the General Prosecutor's Office of the Republic of Lithuania are available at request of the authors.

[8] For example, 2001 Extradition Treaty between the Government of the Republic of Lithuania and the Government of the United States of America; 2013 Agreement between the Government of the Republic of Lithuania and the Government of Georgia on Cooperation in the Fight against Crime; 2017 Treaty on Extradition between the Republic of Lithuania and the Republic of India. All bilateral agreements on legal assistance and legal relationships signed between Lithuania and foreign countries are published on the website of the Ministry of Foreign Affairs of the Republic of Lithuania (2022) or websites of the Seimas of the Republic of Lithuania (2022).

which are parties to the above-referred-to conventions of the Council of Europe, as bilateral agreements most often avoid defining the rules of relationships with other international agreements.

It should be noted that, during the period between 1990 and 2003, depending on the form and basis of legal cooperation, applications in Lithuania were submitted to and received from foreign States through the Ministry of Justice, the Ministry of the Interior, or the Prosecutor General Office of the Republic of Lithuania. Where a request was sent directly to the court or to the investigation or interrogation body, it could be executed only with the consent of the Ministry of Justice or, respectively, the Ministry of the Interior or the Prosecutor General Office (Articles 21 and 21[1] of the 1961 Criminal Procedure Code). With the coming into force of the new Criminal Procedure Code in 2003, two channels of legal cooperation remained: the Prosecutor General's Office and the Ministry of Justice. Where an international agreement provides for such a possibility, Lithuanian courts, the prosecutor's office, and pre-trial investigation bodies may send requests directly to foreign States and international organisations. Hence, in the new phase, Lithuania has implemented more equitable routes for legal cooperation in criminal matters.

1.2. Membership in the European Union and changes in legal cooperation

There is no doubt that Lithuania's membership in the EU since 1 May 2004 has opened a whole new page of legal cooperation for the State both with the EU and with countries that have already become third countries. With these countries, legal cooperation has continued towards the signing of bilateral international agreements and conventions adopted at Council of Europe level – for example: the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (2001); the Additional Protocol to the European Agreement on the Transmission of Applications for Legal Aid (2001); and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005).

Of course, the most distinct changes of the Lithuanian legal system were linked to the objective to approximate the Lithuanian legal system with the EU legal instruments that were in force at that time. This process began even before Lithuania's membership in the EU, when a whole series of national laws were drafted and implemented immediately after membership.

It should be noted that during the first years of Lithuania's membership in the EU, Lithuania, similarly to Latvia and Estonia, not only dealt with the issues of national law-making in line with the framework decisions of the Council that were of major impact on its criminal law and criminal procedure law, but also had to ratify, as supporting EU legal instruments, a range of EU conventions which regulated the grounds and procedure of legal cooperation between EU Member States in criminal matters. These included, for example, the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, relating to extradition between the Member States of the European Union (1996); and the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union adopted by the Council in accordance with Article 34 of the Treaty on European Union (2000). The importance of these EU legal instruments is obvious – they operate as back-up EU legal acts that can be used in relationships with those EU Member States which have not implemented a particular framework decision of the Council.

The Council Framework Decisions and the national laws adopted on their basis have allowed for the incorporation into national law of new models of legal cooperation in criminal matters, the emergence of which in EU law has been based on mutual recognition and mutual trust.[9] The most important instrument of legal cooperation between the EU countries since then has been the European Arrest Warrant. By virtue of this so-called simplified procedure

[9] The main Council Framework Decisions implemented at the Lithuania national level and strengthening legal cooperation in criminal matters between EU Member States have been the following: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States; Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union; Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.

for the transfer of suspected offenders or convicted persons, the level of legal cooperation between Member States in criminal matters has become much faster and more extensive. In 2020, Lithuania issued 170 European Arrest Warrants (240 in 2019; 224 in 2018). On the basis of these legal instruments, 40 persons were transferred to Lithuania in 2020 (94 in 2019; 94 in 2018; 141 in 2017; 133 in 2016; 154 in 2015). Meanwhile, 93 persons were transferred from Lithuania to other EU Member States (112 in 2019; 98 on 2018; 88 in 2017; 114 in 2017; 103 in 2015).[10]

In the field of Lithuanian legal cooperation at the EU level, the Eurojust system, which was established by Council Decision 2002/187/JHA of 28 February 2002, setting up Eurojust with a view to reinforcing the fight against serious crime, also plays an important role. In 2020, the Lithuanian National Member for Eurojust provided assistance to prosecutors and pre-trial investigation officers in 337 cases (244 in 2019). At the request of the Lithuanian authorities, 76 communication cases were opened at Eurojust in 2020 (44 in 2019; 42 in 2018, 67 in 2017, 90 in 2016, 64 in 2015). The authorities mainly approached Eurojust to ensure the coordination of cross-border investigations and to provide cooperation assistance in the investigation of fraud, drug trafficking, trafficking in human beings and other serious crimes. Foreign countries applied to the Lithuanian Desk at Eurojust in 87 cases (80 in 2019; 90 in 2018, 80 in 2017, 72 in 2016, 62 in 2015).[11] Requests for assistance most often concerned crimes committed by criminal organizations, crimes committed by organized groups, money laundering, and drug trafficking. The role of Eurojust in the area of legal cooperation is important in the exchange of information and in direct consultations in order to avoid concurrent criminal proceedings, and also in order to concentrate them in one single Member State. Although concurrent proceedings do not violate the principle of *non bis in idem* in a direct sense, the aim of dealing with the issue of concurrent proceedings is predetermined by the objective to avoid the consequences of such proceedings, the most serious of which is the sentencing of the same person for the same offense in several EU Member States (Nevera & Melničenko, 2009, p. 95).

The development of EU law, in particular after the signing of the Treaty of Lisbon, led to the gradual transfer of sovereign powers of Member States in the areas of criminal law and criminal procedure law. In order to ensure effective EU policy, the Treaty of Lisbon also opened the gateway for decisions of the European Parliament and the Council in the area of criminal justice. The issues of legal cooperation at the EU level started to be regulated by directives. The importance of this secondary legal act of the EU is considerably greater than that of a framework decision of the Council because, in case the State does not implement provisions of a directive until the set time limit, it starts having a direct impact on the legal relationships between the person and the State.

Lithuania has implemented a number of directives in its national law,[12] and not all of them have had a considerable impact on the strengthening and developing of mutual legal cooperation between EU Member States. The most important are those which: regulate the right to a defence counsel in criminal proceedings and, under the European Arrest Warrant procedure, ensure legal aid for suspects and accused persons in criminal proceedings and for persons whose transfer is sought under the European Arrest Warrant procedures; and ensure the presumption of innocence as well as access to information in criminal proceedings. The importance of these directives should also be emphasised because of the fact that they secure a guarantee for the rights of suspected and accused persons at the highest level, even in cases when such rights are not implemented at the national level. Moreover, they also ensure a balance of rights of the parties to criminal proceedings. On the other hand, developments in EU law have, in fact, led to the need for the Criminal Procedure Code to separately regulate two systems of legal cooperation: the first with EU countries, and the second with third countries. This issue has not yet been discussed in Lithuania, probably because it is assumed that there is no such need. However, the experience of Latvia and Estonia shows

[10] Data of the General Prosecutor's Office of the Republic of Lithuania are available at the request of the authors.
[11] Data of the General Prosecutor's Office of the Republic of Lithuania are available at the request of the authors.
[12] The most important directives implemented in the national law of Lithuania are the following: Directive 2012/29 of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime; Directive 2013/48 of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty; Directive 2014/41 of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters; Directive 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

that these two strands of legal cooperation need to be separated because of their individuality and different operational principles.

While legal cooperation at the EU level is a priority area, legal cooperation in criminal matters with third countries has been an important and significant direction of Lithuanian legal relations for several years now. In 2020, Lithuania received 399 legal assistance requests from third countries, and submitted 282 (238 in 2019). The extradition of persons from Lithuania was applied 19 times (18 in 2019; 13 in 2018, 12 in 2017, 11 in 2016, 14 in 2015), no request was not granted (1 in 2019; 4 in 2018, 6 in 2017, 2 in 2016, 3 in 2015), and 3 persons were extradited to Lithuania (6 in 2019; 6 in 2018, 3 in 2017, 7 in 2016, 7 in 2015).[13] The statistics show that the legal cooperation of Lithuania in criminal cases is steady and consistent. Nevertheless, the main problem remains that cooperation with certain third countries is further continued in the absence of international agreements, which are compulsory in accordance with the Criminal Procedure Code of the Republic of Lithuania. Considering such an approach in Lithuania and bearing in mind that legal cooperation based on the principle of good faith is impossible without a legal basis, there is a need for a national law to regulate all forms of legal cooperation with third countries in the absence of an international agreement. It is regrettable that this issue has not been discussed in Lithuania, even though the idea of an extradition law was announced even before Lithuania became a member of the EU (Nevera, 1999, pp. 14–20).

2. Legal Cooperation in Criminal Matters: Estonian Experience

Similarly to Lithuania and Latvia, in Estonia, the history of international legal cooperation in criminal matters has been shaped by the reforms of the justice system after the re-establishment of independence. The Supreme Soviet of the Republic of Estonia declared the restoration of the Republic of Estonia on 20 August 1991, proclaiming legal identity and continuity with the pre-World-War-II Republic of Estonia (Mälksoo, 2005, p. 145). Important steps in returning Estonia to the family of democratic States governed by the rule of law were the adoption of the Constitution of the Republic on 28 June 1992, becoming a member of the Council of Europe on 14 May 1993, accession to the EU on 1 May 2004 and the ratification of the European Convention on Human Rights and Fundamental Freedoms, which became binding for Estonia as of 16 April 1996 (Laffranque, 2015, pp. 4–5). The choices Estonia made in rebuilding its justice system and reforming its criminal law determined the competences of the judicial authorities in criminal procedure and their roles in matters of international legal cooperation (Sootak & Pikamäe, 2000, pp. 61–78). Similarly to Lithuania and Latvia, international agreements were important in developing Estonia's relations with other countries, including in the matters of legal cooperation.

2.1. Development of national law and signing of international agreements, 1991–2003

One of the first steps towards a modern justice system after the Soviet annexation era was the establishment of the Prosecutor's Office on 27 August 1991 (Decision of the Presidium of the Supreme Council of the Republic of Estonia, 1991). According to the Prosecutor's Office Act § 1(1) and 1(1^1), the Prosecutor's Office in Estonia is a government agency within the area of government of the Ministry of Justice, and is independent in the performance of its functions arising from law: the Prosecutor's Office participates in the planning of surveillance necessary to combat and detect criminal offenses, directs pre-trial criminal procedure and ensures the legality and efficiency thereof, represents public prosecution in court and performs other duties assigned by law (Prosecutor's Office Act, 2020). Paragraph 2(2) of the Prosecutor's Office Act stresses that prosecutors shall be independent in the performance of their duties and act only pursuant to law and according to their conscience. The aforementioned is relevant in legal cooperation, especially in the context of EU Framework Decision 2002/584 on the European Arrest Warrant, as the issuing judicial authority has to be independent and participate in the administration of criminal justice (*Minister for Justice and Equality v. OG & PI*, 2019).

The roles of the prosecutors and courts in international cooperation in criminal matters have also been determined by the model of criminal procedure chosen after the restoration of independence. The choice between the elements of competing versus noncompeting models of criminal procedure was discussed in the process of preparing the first draft of the new Code of Criminal Procedure in 1993 (Kergandberg, 2000, p. 86). Although the first draft of

[13] Data of the General Prosecutor's Office of the Republic of Lithuania are available at the request of the authors.

the Code of Criminal Procedure was not passed as a law, its ideas influenced the development of the Estonian Code of Criminal Procedure valid today (Lõhmus, 2020, pp. 198–199).

As there was an urgent need to develop cooperation in legal assistance with neighbouring States, bilateral legal assistance agreements covering a broad range of issues in the field of justice were concluded in the 1990s (Jõks, 1996, pp. 8–10). First, Estonia signed bilateral agreements with Latvia, Lithuania, Russia and Ukraine (Jõks, 1996, pp. 8–10). These agreements provided the citizens of contracting States with equal legal protection and required that the judicial institutions of the States provide mutual legal assistance in civil and criminal matters, recognising judgments in civil matters and judgments concerning compensation for damage caused by a criminal offense (Jõks, 1996, pp. 8–10). The foundation of police cooperation between Estonia and Finland was the bilateral agreement on crime prevention, which was signed on 7 June 1995 (Agreement of the Republic of Estonia and Finland, 1995). The Treaty between the United States of America and Estonia on Mutual Legal Assistance in Criminal Matters was signed in Washington on 2 April 1998 (Treaty between the United States of America and Estonia, 1998). The same year, an Agreement of the Republic of Estonia and the Republic of Poland on Provision of Legal Assistance and Legal Cooperation in Civil, Labour and Criminal Matters was signed on 27 November 1999 (Agreement of the Republic of Estonia and the Republic of Poland, 1999).

Alongside this, the objective of acceding the Conventions of the Council of Europe was undertaken: in 1997, a number of Conventions of the Council of Europe, including the European Convention on Extradition, were ratified by the Estonian Parliament (Laatsit, 1999, p. 192–194). Similar to other Baltic States, before accession to the EU, cooperation in criminal matters in Estonia was based on individual bilateral agreements with other countries and multilateral international agreements in the Council of Europe framework. After accession to the EU, due to the primacy of EU law, bilateral agreements between Estonia and EU Member States remained relevant mostly in matters not covered by EU law (*Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, 2008, para. 285, 291).

2.2. Membership in the European Union and changes in legal cooperation

Analogous to Lithuania and Latvia, Estonia carried out a profound criminal law reform around the period of accession to the EU. After a long preparation period, the Estonian Code of Criminal Procedure was passed on 12 February 2003 and entered into force on 1 July 2004 (Code of Criminal Procedure, 2003). By that time, the new Penal Code and a number of laws shaping Estonia's courts system had been adopted (Lõhmus, 2020, pp. 198–199). In correlation with becoming a member of the EU, the provisions on international cooperation in criminal matters were revised, and the amended Code of Criminal Procedure that entered into force on 1 July 2004 already contained both the forms of legal cooperation based on the Council of Europe Conventions and those deriving from EU law (Code of Criminal Procedure, 2003). However, already in 2009, a draft act to thoroughly reform criminal procedure was launched to add even more elements from the common law tradition and create a better balance between the elements of competing and noncompeting models of criminal procedure in favour of the former (Lõhmus, 2020, p. 199). As the revision influenced the roles of the courts and the Prosecutor's Office in criminal procedure, they also affected their competences in matters of legal cooperation.

As Estonia has chosen the model in which the pre-trial stage of the criminal procedure is non-competitive, according to § 211(2) of the Code of Criminal Procedure, an investigative body and the Prosecutor's Office has the obligation to gather incriminatory and exculpatory evidence to ascertain the facts vindicating or accusing the suspect (Code of Criminal Procedure, 2021). Paragraph 30(1) of the Code of Criminal Procedure states that the Prosecutor's Office directs pre-court proceedings and ensures the legality and efficiency thereof and represents public prosecution in court. This means that investigators are guided by the instructions given by the prosecutor in charge of the criminal investigation. Although the Prosecutor's Office has a key role in international cooperation during the pre-trial stage of the criminal procedure, it is balanced by the provisions demanding court authorisation for certain procedural acts. For instance, in accordance with § 130(2) of the Code of Criminal Procedure, in pre-court proceedings, a suspect or accused may be taken into custody at the request of the Prosecutor's Office on the basis of an order of a preliminary investigation judge or on the basis of a court order. The specific roles of the prosecutors and courts in international cooperation in criminal matters are described in

chapter 19 of the Code of Criminal Procedure, which contains the regulation regarding legal cooperation in criminal matters.

The regulation in chapter 19 of the Estonian Code of Criminal Procedure derives from the EU and international agreements. Paragraph 433(1) of the Code of Criminal Procedure states that international cooperation in criminal proceedings comprises the extradition of persons to foreign States, mutual assistance between States in criminal matters, execution of the judgments of foreign courts, taking over and transfer of criminal proceedings commenced, cooperation with the International Criminal Court and Eurojust, and extradition to Member States of the EU. The structure of chapter 19 of the Estonian Code of Criminal Procedure has been criticised for not referring to the legal acts the regulation originates from (Ploom, 2010, p. 73). For example, the division of surrender does not refer to Council Framework Decision 2002/584 of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. This kind of approach makes it difficult for practitioners to connect the regulation in the domestic law to its source in EU or international law (Ploom, 2010, p. 73).

As stated in § 435(1) of the Code of Criminal Procedure, the central authority for international cooperation in criminal proceedings is the Ministry of Justice, unless otherwise provided by law or international legislation binding on the Republic of Estonia. This means that most of the requests in the mutual legal assistance and mutual recognition regime must still be sent to the Ministry of Justice, which verifies whether a request meets the requirements and communicates it to the competent judicial authority. Courts, the Prosecutors' Offices, the Police and Border Guard Board, the Security Police Board, the Tax and Customs Board, the Environmental Inspectorate, the Competition Board, and the Military Police are the judicial authorities competent to engage in international cooperation in criminal proceedings to the extent provided by law and international legislation binding on the Republic of Estonia (para. 435(2) of the Code of Criminal Procedure). The role of the Ministry of Justice as a central authority for international cooperation in criminal proceedings was significantly reduced, as more direct communication between the judicial authorities was allowed with the transposition of a group of EU directives in 2015 (Act amending the Code of Criminal Procedure and other connecting acts, 2014). The same happened in 2017, when Directive 2014/41 regarding the European Investigation Order was implemented (Act amending the Code of Criminal Procedure and the Code of Criminal Procedure Implementation Act, 2017).

As the EU has been actively legislating in the field of legal cooperation in criminal matters, the regulation of legal cooperation in criminal proceedings in the Estonian Code of Criminal Procedure has frequently been revised correspondingly. Due to the numerous amendments, the coherence of chapter 19 has suffered, and the division between the general and special provisions requires clarification (Justiitsministeerium, 2020, p. 1). Significant changes to chapter 19 of the Code of Criminal Procedure were made recently in connection with Directive 2014/41 regarding the European Investigation Order, which was transposed into Estonian national legislation on 6 July 2017. Since then, in accordance with Article 34 of Directive 2014/41/EU, the European Investigation Order has become a main legal tool to gather trans-border evidence, and mutual legal assistance procedures remain applicable only to matters falling outside of the scope of European Investigation Orders, such as legal cooperation with countries not participating in the European Investigation Order regime. In 2019, Estonia issued and submitted close to 300 European Investigation Orders and more than 70 requests for mutual legal assistance in criminal matters (Prokuratuuri aastaraamatud, 2019).

2.3. Current reforms

Up to the present moment, Estonia has faced a challenge in meeting the requirements of international and EU law concerning the regulation of cooperation matters. A work group in the Ministry of Justice has concluded that the regulation on most of the cooperation matters in the Code of Criminal Procedure needs to be changed (Pere, 2019; Plekksepp, 2019). In 2015, the Ministry of Justice started the next profound multi-staged revision of the Code of Criminal Procedure (Justiitsministeerium, 2015). As part of this ongoing process, the regulation in the Code of Criminal Procedure concerning cooperation in criminal matters is currently under review. Another category of challenges for the legislator, also tied to the issues of international cooperation, concerns the questions on how to make criminal proceedings fully digital and solve the problems relating to seizing digital evidence (Laurits, 2016, pp. 113–120).

Among other suggestions, the working group in the Ministry of Justice has pointed out the need to change the rules of surrender, taking into account the recent case law of the Court of Justice of the EU (Pere, 2019, pp. 21–28; Plekksepp, 2019, pp. 11–16). The survey also draws attention to further regulating the exchange of information collected by surveillance activities between EU Member States (Pere, 2019, pp. 29–31; Plekksepp, 2019, p. 16). The problems regarding the latter are not solely related to the gaps in Estonian law, but indicate that there might be a need for common EU standards in this field (Pere, 2019, pp. 29–31). The current detailed regulation in chapter 3^1 of the Code of Criminal Procedure on surveillance activities does not fit together with the European Investigation Orders regime, and the problems faced by practitioners remain unaddressed in law (Pere, 2019, pp. 29–31).

The legislative intent drawn up by the Ministry of Justice in 2020 to prepare a draft Act acknowledges the problems pointed out by experts in the current regulation, and sets a goal of changing the part of the Code of Criminal Procedure that covers the matters of international cooperation (Justiitsministeerium, 2020, pp. 1–17). The revision planned should enhance the cooperation of Estonian judicial authorities with EU agencies, correct the errors formerly made in the implementation of international and EU law, help to assure the rights of the participants in criminal proceedings, and facilitate legal certainty (Justiitsministeerium, 2020, pp. 1–17).

3. Legal cooperation in criminal matters: Latvian experience

Similarly to the other Baltic States, the legal system of Latvia has been subject to several periods of transformation. The first period began on 21 August 1991, when Latvia re-established its independence. Within a short period of time, Latvia had to move from the Soviet to the continental European legal system in the form of a democratic and legal State. The second period pertains to Latvia's accession to the EU.

As Latvia re-established its independence, citizens had to rediscover the importance of the idea of a legal State. Not only did we have to understand these values academically, but also to ensure their practical implementation in legal reality. The creation of the new legal system was a serious challenge not only for the legislator, but also for the Latvian community of lawyers. The Western legal system is based not only on well-composed normative acts, but also on the skills of law enforcement actors to fairly apply the rights created by the legislator (Āboltiņa, 2012).

In order to transform the two legal reform processes (Kaija, 2013, pp. 15–20) in Latvia, the volume of the required legislative work was significantly higher than in most other EU countries. This is because these other countries were characterized by a stable legal system that had been formed for decades, where legal principles did not all have to be rapidly altered because instead they had been continuously developed.

3.1. The development of national law, 1990–2005

It is important to stress that in the 1990s the transformation of criminal law was the least problematic area of law compared to other rights. Immediately after the restoration of independence, after the abolition of anti-democratic criminal law rules (anti-Soviet propaganda, etc.), Latvian criminal law theory generally met the requirements of a democratic legal State. However, many criminal-political concepts were outdated (Meļķisis, 1999), and a new legal framework for international cooperation was also needed.

As one of the first laws in the field of international cooperation in criminal matters, the Law of the Republic of Latvia on Amendments and Supplements to the Latvian Soviet Criminal Procedure Code and the Latvian Soviet Civil Procedure Code was adopted on 13 August 1991 (On amendments and supplements to the Code of Criminal Procedure of the Latvian SSR and the Code of Civil Procedure of the Latvian SSR, 1991). The amendments provided the procedures under which judicial and pre-trial investigation authorities would contact relevant foreign authorities following the arrangements determined by the laws in force in the Republic of Latvia and in accordance with international agreements concluded by the Republic of Latvia with relevant foreign States. Communication with foreign States with whom agreements were lacking would take place via the Ministry of Foreign Affairs of the Republic of Latvia.

The subsequent laws to be mentioned refer to the Law of the Republic of Latvia on Amendments and Supplements to the Latvian Civil Procedure Code, Latvian Criminal Code and Latvian Criminal Procedure Code of 27 April 1993 (On amendments and supplements to the Latvian Civil Procedure Code, the Latvian Criminal Code and the Latvian Code of Criminal Procedure, 1993). This law amended the existing articles on cooperation and provided supplements for the Criminal Procedure Code with a number of new significant articles, providing procedures for the following: 1) communication between the court, prosecution office and inquiry authorities, on one hand, and relevant foreign authorities on the other; 2) the application of the criminal procedure law to foreign citizens and stateless persons; 3) carrying out of assignments of foreign authorities while conducting procedural operations; 4) tackling issues pertaining to the requests of foreign institutions to initiate a criminal case, initiate or take over criminal proceedings in relation to a person who had committed a criminal offense abroad and had returned to the Republic of Latvia; and 5) the application of a procedure to a foreign citizen who had committed a criminal offense in the territory of the Republic of Latvia and then returned to their home country. The amendments also established the procedure for extradition requests concerning the persons to be directed and determined the limits of criminal liability of the persons extradited abroad.

The norms of the Latvian Criminal Procedure Code were subsequently supplemented and amended by the laws of the Republic of Latvia of 2 June 1994, 20 February 1997, 14 October 1998 and 22 December 1999, which specified the procedure for extradition of a person, determined the terms and deadlines for the detention of a foreign citizen and other issues. International cooperation and relevant procedures in Latvia were regulated not only by the Latvian Criminal Procedure Code, which sets out the general principles of cooperation, but also by international agreements concluded by the Republic of Latvia or its institutions with the respective countries or their institutions. In 1999, the Criminal Law entered into force. There was a great need for the adoption of a new Criminal Procedure Law because the old Criminal Procedure Code of the Latvian Soviet Republic of 1961 was still applicable in Latvia, which was renamed the Latvian Criminal Procedure Code after the restoration of State independence. Finally, on 1 October 2005, the Criminal Procedure Law entered into force in Latvia (Criminal Procedure Law, 2005), which was designed to attain the following aims: 1) to create an opportunity for Latvian law enforcement institutions to act in accordance with the principles of criminal justice of the Council of Europe and the EU and to use a more modern solution of criminal procedural relations recognized in the world; 2) to prevent the expanding backlog of pending cases in pre-trial investigation institutions and courts as well as to reduce lengthy legal proceedings; and 3) to reduce the basis for complaints about violations of human rights. Part C of the Criminal Procedure Code specifically focuses on international cooperation in criminal law and stipulates that Latvia requests and ensures a foreign country with cooperation in the following areas of criminal law: 1) extradition of a person for criminal prosecution, trial or execution of a judgment, or determination of coercive measures of a medical nature; 2) transfer of criminal proceedings; 3) execution of procedural actions; 4) execution of security measures not related to deprivation of liberty; 5) recognition and enforcement of a judgment; and 6) in other cases provided for in international agreements.

3.2. Membership in the European Union and changes in legal cooperation

Less than two years before the adoption of the Criminal Procedure Law, another very important event took place when, on 1 May 2004, Latvia became a full member of the EU. Prior to and especially after accession to the EU, a number of laws were developed in Latvia in order to adapt the national legal framework to the EU regulation.

In the past in Latvia, as well as in other EU countries, in order to ensure more efficient and expeditious criminal investigations, legal cooperation in criminal matters within the EU was largely determined by international agreements, such as the Conventions on: Mutual Assistance in Criminal Matters; the Transfer of Legal Proceedings; the Execution of Criminal Sentences; the Transfer of Sentenced Persons; and Extradition. These Conventions mainly regulate the issues that do not directly affect an individual; instead, they regulate the mechanism of cooperation between competent national authorities and determine the procedural arrangements for cooperation. Then, within the EU, traditional mutual assistance is replaced by new instruments based on mutual recognition.

For a long time, criminal law was the sovereign domain of each country, including Latvia; however, over time more and more sovereign rights have been transferred to the EU. With the implementation of the Lisbon Treaty

in particular, criminal law is being aligned with other areas of EU activities. The EU has acquired a clear legal basis for the adoption of directives in criminal law, which is done in order to ensure the effective implementation of EU policies involving harmonisation measures. The Lisbon Treaty gives the EU wide competence in both criminal and substantive criminal law (Towards an EU Criminal Policy, 2011).

At present, legal cooperation in criminal matters in the EU is one of the fastest growing areas. The impact of EU regulation in Latvia has been seen in several important directions. For example, the Criminal Procedure Law in Latvia has been supplemented and enhanced by the norms pertaining to more than 10 EU Council Framework Decisions,[14] which have significantly contributed to the development of the mutual legal assistance and mutual recognition framework. One of the most extensive amendments to Part C of the Criminal Procedure Law entered into force on 1 July 2012 when Part C was restructured, separating the legal framework applicable in cooperation with EU countries from that applicable in cooperation with other countries.

Under Article 34(2)(b) of the Treaty on the EU, firstly, framework decisions are binding to Member States as to the result to be attained but leave the choice of form and methods to the national authorities, and, secondly, they do not exercise a direct effect. However, although Framework Decisions cannot have a direct effect, their binding nature means that national authorities, in particular national courts, have an obligation to interpret national law in conformity with EU law, allowing national courts to implement their competence in order to ensure the full effectiveness of EU law in cases submitted to them. In applying national law, the national court must interpret it, which is why it has an obligation to conduct interpretation taking into account, as far as possible, the wording and purpose of the Framework Decision in order to achieve the expected results (Judgment of Ognyanov, 2016, para. 56, 58, 59).

Another aspect to consider is the fact that the obligation of the national court is to take account of the content of the Framework Decision in interpreting and applying the provisions of national law, and it is constrained by general principles of law – in particular, the principle of legal certainty and the principle of non-retroactivity. These principles do not preclude that such an obligation, passed on the basis of the Framework Decision and irrespective of the law adopted for its implementation, may impose or increase criminal liability on persons who violate those legal provisions in their activities (Judgment of Daniel Adam Popławski, 2015, para. 32, 33).

Another development of the Criminal Procedure Law includes amendments aimed at strengthening procedural guarantees for persons involved in criminal proceedings, both the person entitled to defence and the victim. The amendments were designed to implement minimum standards in criminal proceedings in national law, which resulted from the directives of the European Parliament and of the Council.[15] Evaluating the requirements of the directives and their impact on the Latvian legal norms of criminal procedure and their practical application, it can be concluded that changes were necessary both in the norms of the Criminal Procedure Law and in the practical execution of criminal proceedings. Changes in the Criminal Procedure Law, however, would not be considered fundamental, which completely changed the understanding of the range of rights of victims or other persons involved in criminal proceedings. It should be noted that in some aspects the Criminal Procedure Law even provides for a broader and more favourable regulation of, for example, the status of a victim. It should also be noted that the directive lays down minimum rules, and each Member State may extend the rights set out in the directive in order to ensure a higher level of protection.

In the context of legal cooperation in criminal matters, Directive 2011/99 of the European Parliament and of the Council of 13 December 2011 on the European Protection Order should be emphasized. The Directive was transposed in Latvia by amendments to the Criminal Procedure Law, which entered into force on 25 February 2015. The introduced mechanism provides that the protection provided to a natural person in one Member State remains and continues to apply in any other Member State to which the person is moving or has moved. It also ensures that citizens of the EU do not lose protection under Article 3(2) of the EU Treaty and Article 21 of the

[14] See footnote 9. In additional, for example: Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.
[15] See footnote 12.

Treaty on the EU Functioning by legally exercising their right to free movement and to residence in the territory of the Member States.

The protection measure included in the European Protection Order adopted by the EU Member State may be recognised in Latvia by the State Police, making a decision and applying to the person a highly similar protection measure in accordance with the security measures provided for in the Criminal Procedure Law or alternative sanctions or probation measures included in the Criminal Law.

In the context of the exchange of information between Member States and EU agencies, reference should be made to Directive 2014/41 of the European Parliament and of the Council of 3 April 2014 on the European Investigation Order in Criminal Matters, which has been implemented by introducing amendments to the Criminal Procedure Law, which entered into force on 26 April 2017. This Directive extended the possibilities for the EU Member States to obtain evidence on the territory of another Member State and facilitated obtaining it, since it is necessary to fill in one single form document, the European Investigation Order, in order to obtain new or existing evidence and to obtain evidence in real time. This replaced the arrangements previously in place, which required a two-step system for obtaining specific evidence, initially asking for a freeze of evidence, but subsequently requesting the transfer of that evidence in the form of a separate request for legal assistance. It should be noted that the provisions and regulations of the Directive are not binding in cooperation with Denmark and Ireland.

In criminal legal cooperation, the competent authorities of Latvia are entitled to cooperate with Eurojust and the European Judicial Network in Criminal Matters. The immediate challenge for the future in the field of legal cooperation relates to the adoption of Council Regulation 2017/1939 of 12 October 2017 in order to implement enhanced cooperation for the establishment of the European Public Prosecutor's Office, on the basis of which the European Public Prosecutor's Office (hereinafter – EPPO) will be established with the aim to protect the financial interests of the EU. However, on 14 November 2018, Regulation 2018/1805 of the European Parliament and of the Council was adopted on 14 November 2018 on the Mutual Recognition of Freezing Orders and Confiscation Orders. In accordance with Article 41 of the Regulation, this Regulation will start to apply to all EU Member States with the exception of Denmark and Ireland from 19 December 2020.

It should be noted that, evaluating the norms included in Part C of the Criminal Procedure Code, it can be concluded that the legal regulation of international criminal co-operation can be divided into two types: 1) legal norms regarding the Member States of the EU; 2) legal norms for all countries that are not Member States of the EU. Latvia has concluded several agreements with foreign States on legal assistance and legal relations in civil, family and criminal matters.[16] However, having analysed the statistical data provided by the Prosecutor General's Office for International Cooperation, it can be concluded that cooperation is most actively conducted with EU countries. For example, when assessing requests for extradition from foreign countries for the period of 5 years, it is concluded that overall there were 79 requests received in 2015, with only 10 requests for extradition from outside the EU. In 2016, a total of 80 requests for extradition were received, of which 64 were European arrest decisions, while only 16 were extradition requests from outside the EU. Similar trends were also observed in 2017, when a total of 83 requests were received, of which 10 requests were from outside the EU. As for 2018, the total number of received requests was 66, of which 16 were from outside the EU. In 2019, a total of 80 requests were received, of which 13 were from outside the EU. In 2020, only 55 requests were received, of which 10 were from outside the EU (Latvijas Republikas ģenerālprokurora ziņojums par 2020. gadā paveikto un 2021. gada darbības prioritātēm, 2021, p. 136). In turn, in 2021, 68 extradition requests were received from abroad, including 10 extradition requests from non - EU countries (Latvijas Republikas ģenerālprokurora ziņojums par 2021. Gadā paveikto un 2022. Gada darbības prioritātēm, 2022, p. 228).

[16] For example: Treaty between the Republic of Latvia and the government of the United States of America on mutual legal assistance in criminal matters (1997); Treaty between the Republic of Latvia and the People's Republic of China on Mutual Judicial Assistance in Criminal Matters (2004). A full list of main treaties of Latvia is available at https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX%3A52010XC1217%2801%29.

4. Assessing experiences and prospects for legal cooperation

One of the most significant benefits in terms of comparative research is the opportunity to gain knowledge of different legal systems and different countries, which allows us to find both commonalities and differences. It must be admitted that Latvia, Lithuania and Estonia have a lot in common. This is primarily due to the similar historical development of these countries over the last 30 years.

The three Baltic States have started to reform their national legal norms at essentially the same time, which has led to their independent policies on legal cooperation in criminal matters. The policy of signing international treaties and acceding to international conventions already in force was also developed independently, but along very similar lines. This ensured the smooth and efficient handling of various legal cooperation issues, allowed for the transformation of their legal systems and provided adequate preparation for the major challenges of EU membership.

The period of membership of Lithuania, Estonia and Latvia in the EU and the experience of the European Court of Human Rights have shown that the desire to ensure that the level of human rights does not fall below the standards guaranteed by the Charter of Fundamental Rights of the EU or by the European Court of Human Rights has led to periodic changes in the area of legal cooperation in criminal matters. Much of this change is also linked to the implementation of the Lisbon Treaty, which gave the EU a clear legal basis for adopting directives in the field of criminal law. The changes brought about by the Directives also require changes at the national level. In fact, their multiplicity and pertinence make it possible to say that legal cooperation in criminal matters is becoming the fastest-growing area. It is this aspect that leads to the need to review national regulation. Latvia largely met this challenge in 2012, when it separated the systems of legal cooperation between EU countries and third countries in the Criminal Procedure Code. Estonia identified this need in 2015 by initiating a thorough and multi-level review of the Criminal Procedure Code. Regrettably, in Lithuania there is no discussion on this issue yet, although the need for it is clear. There is also a lack of a national law on extradition, although history and the experience of other countries show that it is necessary to ensure smooth legal cooperation based on the principle of goodwill.

Undoubtedly, the regulation of criminal procedure will continue to be significantly affected by the development of EU law, which aims at harmonising rights and promoting cross-border cooperation. The activities of the EPPO will become an important area of legal cooperation between the Member States of the EU in the near future. The challenges related to the establishment of the EPPO and its cooperation with the national Prosecutor's Office will become known in the near future, after the EPPO starts operating. As the EPPO will operate within national legal systems, the co-existence of EU and national law may raise issues of further integration in the field of criminal procedure.

The processes of digitisation of criminal procedure that are gaining momentum both in the Baltic States and in other Member States of the EU will also have a major impact on the area of legal cooperation. It is likely that EU legal instruments will undergo considerable transformations in this area in order to ensure smooth cooperation of judicial institutions and also a high level of protection of the rights of all participants in criminal proceedings. This challenge will be in particular relevant in developing legal cooperation with third countries because the national rules of EU Member States regulating legal cooperation with third countries are currently applied in isolation to a certain extent, and there is no information exchange system which would be unified at least at the minimum level.

Conclusions

1. After the re-establishment of independence, Lithuania, Estonia and Latvia have accomplished much in order to create frameworks of legal cooperation in criminal matters that are underpinned by national laws, EU legal acts, and international agreements. Although each State dealt with the issues of legal cooperation arrangements differently, they have succeeded in ensuring the smooth and effective application of different legal cooperation issues.

2. At present, the process of legal transformation in Lithuania, Estonia and Latvia has been completed. The Baltic countries are fully-fledged members of the Western legal system with confidence in the values of a democratic and legal State, such as respect, human rights and the rule of law. The three countries are aware of themselves as part of a united Europe and recognize the value system on which the EU is based. A significant amount of work has been completed over the period of the last 30 years, the evidence of which is a system that facilitates and accelerates international cooperation in the field of criminal law.
3. The ambition to ensure that the level of human rights should be not lower than the guaranteed EU standards means that legal cooperation in criminal matters must be developed periodically. Moreover, the pursuit of the relevant goals should predetermine reforms in the provisions of national criminal procedure codes regulating legal cooperation.
4. Undoubtedly, the challenges related to the establishment of the EPPO and its cooperation with the national Prosecutor's Office will become known in the near future, after the EPPO starts operating.
5. The digitisation of criminal proceedings will also have a significant impact on the area of legal cooperation. This challenge will be particularly relevant for the development of legal cooperation with third countries, as currently the national legal rules of the EU Member States on legal cooperation with third countries are applied in a somewhat isolated manner, without a system of information exchange that is harmonised at least at a minimum level. For this reason, the right of citizens of EU Member States and their family members to move and reside freely within the territory of the EU is not ensured if a person is detained in any other EU Member State as a result of an international search initiated by a third country.
6. A search for statistics relevant to the research showed that they are given different meanings in the Baltic countries. In Lithuania and Latvia, official statistics are given more attention and can therefore provide much more information when assessing the situation of legal cooperation, correlations with legislative developments and tendencies.
7. The experience of legal cooperation with third countries also shows that there is a need to address not only the issue of the development of such cooperation but also the need for national laws to regulate legal assistance based on the principle of good faith – otherwise, such processes may not be considered as legal. This ensures, at least, the fundamental rights of suspects, the importance of which has been emphasised in all EU legislation and international legal instruments that are binding for all the Member States of the EU.

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ELECTRONIC VOTING IN ADOPTING RESOLUTIONS OF LIMITED COMPANIES: THE EXAMPLE OF ESTONIAN LAW

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Abstract. In the wake of the COVID-19 crisis that began in 2020, countries all over the world had to develop new solutions in legislation to replace various traditionally physical operations with digital solutions. Estonia, with rules in the field of company law and in holding shareholders' meetings, was no exception. In May 2020, new regulation was introduced into Estonian law, allowing shareholders to participate in meetings using digital means. Although electronic voting itself was already allowed under Estonian law before 2020, the new situation raised a number of legal issues. This article addresses these issues and possible solutions with regard to the legal perspective of electronic voting. As the law does not contain precise requirements for holding an electronic vote, there are many aspects that must be considered in order to comply with the general principles of company law, e.g., how to identify the person giving their vote, and how to ensure the security and reliability of electronic voting. Based on the analysis in this article, the procedure must ensure the identification of shareholders as well as the reliability of casting votes, but must also be proportionate for achieving these aims.

Keywords: shareholder rights, company law, electronic voting, exercising shareholder rights in digital form.

Introduction

In the legal literature, it has already been noted previously that the development of the rights of shareholders has been strongly affected by two important modern trends – digitalisation and globalisation (Zetsche, 2005, p. 112). Electronic meetings and electronic voting have several advantages compared to meetings held physically. In particular, they enable shareholders to participate in a meeting and vote regardless of their current location, thus making participation in adopting resolutions more accessible for a larger number of these people. This also means smaller expenses which shareholders would have to incur in connection with travel. For quite some time, the development of modern technology has enabled the use of different solutions for shareholders to communicate with the management board at a meeting, and to raise objections and questions (on participation in a virtual general meeting, see, e.g., Zetsche, 2005, p. 112).

In the legal literature, it has also been found that replacing an ordinary vote with an electronic one enables making voting more transparent since the voting results are disclosed to the participants immediately and can be monitored and verified (Cohen, 2021). In terms of the latter aspect, electronic voting is particularly useful for public limited companies with a large number of shareholders since determining the results of voting in physical meetings may take time, in particular if voting takes place in writing.

The issue of flexible use of electronic means of communication in the exercise of shareholder rights arose especially strongly in connection with the restrictions imposed in Estonia as well as other countries in spring 2020 due to the spread of COVID-19, which posed significant impediments to customary modes of travel and direct communication. In connection with this, on 24 May 2020, legislative amendments entered into force in Estonia which now clearly stipulate that, regardless of whether a company's articles of association provide for this kind of voting, each company may hold their general meeting virtually and offer shareholders an opportunity to exercise all their rights by electronic means of communication (see in more detail: Vutt, 2020, pp. 34–46). The

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explanatory memorandum to the Draft Act notes in this regard that the need to prepare the draft arose in particular during the emergency situation declared by the Estonian Government on 12 March 2020, but the solutions set out in the draft are also intended for use after the end of the emergency situation.

The aim of this article is to find answers to the questions of which legal requirements extend to the exercise of voting rights by electronic means of communication and whether, as a result of legislative amendments of a permanent character introduced in Estonian law, regulation of this issue has become more flexible than before. It will also explore the opportunities that could be used for voting by electronic communication at a virtual general meeting (shareholders meeting) and those that could be used for voting without convening a general meeting in the context of the current legal framework.[2]

The main methods the author applies in this article are the method of teleological interpretation of legal provisions and the comparative method. Germany has been chosen as the main reference country as Estonian private law, including company law and general rules of civil law, has been largely developed on the basis of the principles of German law. The comparable company types in Germany are *Gesellschaft mit beschränkter Haftung* (GmbH), which is similar to an Estonian private limited liability company, and *Aktiengesellschaft*, which is similar to an Estonian public limited liability company. The fact that Estonian law has followed the concept of different types of limited companies is also the reason why German law has been chosen to be compared to Estonian law.

1. The legal framework of electronic voting – temporary or permanent?

The development of electronic communication has already for some time affected the general meetings of shareholders in two ways: first, by enabling distance voting for shareholders; and second, by enabling general meetings to be held so that shareholders do not have to attend physically (Boros, 2004, margin reference 2). As a third option, the above article also mentions allowing the possibility of electronic voting by an appointed proxy holder, but due to its limited scope the present article will not analyse the institution of proxy voting and related legal problems. A distinction is drawn in the legal literature between whether a meeting takes place physically but shareholders who so wish are enabled to attend through electronic means of communication, or whether all the participants are at different locations during the meeting and no physical meeting is held at all (Fairfax, 2010, p. 1367).

Under § 33^1(1) of the General Part of the Civil Code Act (hereinafter – GPCCA) in force as of 24 May 2020 (General Part of the Civil Code Act, 2002), a member of a body of legal persons may participate in a meeting of the body, and exercise their relevant rights, via electronic means, without being physically present at the meeting, having recourse to two-way real-time communication or to other similar electronic means that allow the member, while at a remote location, to follow, and speak at, the meeting and to vote in any matters that have been tabled for resolution, unless otherwise provided for by law or by the articles of association. Subsection two of the same section lays down that a meeting held via electronic means is subject to the provisions applicable to taking decisions at a meeting of the body in question.[3]

Along with amending the GPCCA, certain provisions of the Commercial Code (1995) were also amended. Previously, § 298^1(1) of the Commercial Code laid down for public limited companies and § 170^1(1) of the Commercial Code for private limited companies a possibility to prescribe in their articles of association that shareholders may vote on draft resolutions prepared in respect of the items on the agenda of a general meeting by using electronic means prior to the general meeting or during the general meeting if this is possible in a technically secure manner. Section 290^1(1) of the Commercial Code (in respect of listed public limited companies), § 298^1(1) (in respect of ordinary public limited companies) and § 170^1(1) (in respect of private limited companies), in force

[2] The issues concerning exercise of other shareholder rights during a shareholders' meeting have been covered in the previous published paper of the author that has been referred to in this article.
[3] The explanatory memorandum to the Draft Act does not indicate that Estonia used a direct example of the law of any other country, but rather the underlying approach proceeds from general proposals made during a review of company law.

as of 24 May 2020, only refer to § 33[1] of the GPCCA and stipulate that any participation and exercise of rights (including voting) at a general meeting of shareholders may take place electronically.

Thus, as of 24 May 2020 it is no longer necessary to lay down the possibility of electronic voting or the relevant rules in a company's articles of association. On the one hand, this should mean more flexibility and options as to how to arrange electronic voting. At the same time, however, this makes the manner of voting and the environment to be used less predictable for shareholders. Although § 298[1](3) of the Commercial Code is no longer in force, in the opinion of the present author electronic voting should still take into account that the procedure laid down for electronic voting must ensure identification of the shareholders and security and reliability of voting and be proportionate for achieving these objectives.

It should also be noted that on 27 March 2020 Germany passed a law for alleviating the consequences of the COVID-19 pandemic (Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht [Act to Mitigate the Consequences of the COVID-19 Pandemic under Civil, Insolvency and Criminal Procedure Law, COVInsAG], 2020). This law also lays down rules on virtual general meetings and electronic voting in the case of public limited companies. Article 2 § 1(1) of COVInsAG entitles the management board to organise voting either in writing or by means of electronic communication, regardless of whether the articles of association provide for this option or not. Specifically, § 118(2) of the AktG (Stock Corporation Act) lays down that articles of association may allow shareholders to vote without attending the meeting either in writing or by means of electronic communication. Articles of association may also stipulate that the management board can decide whether to organise a written or electronic vote. According to the implementing provisions, the above rules in Germany apply to shareholder meetings held and resolutions adopted in 2020. Article 6(2) of the Act lays down that the temporary rules cease to have effect at the end of 2021.

However, changes arising from the restrictions in relation to the pandemic have been planned as temporary in Germany. The more regular (so to speak) provisions are more general in nature – § 118(2) of the AktG stipulates that articles of association may allow, or may grant authority to the management board to allow, shareholders to cast their votes without attending the general meeting, in writing or by means of electronic communication. The legal literature uses the general term "postal vote" (*Briefwahl*) for this type of voting, and according to the legal literature this type of voting also includes voting in cases where the general meeting is virtual (Herb & Merkelbach, 2020, pp. 811–812). Legal scholars have posed the question of what technical possibilities could also be considered as admissible from the legal point of view. It is also debated whether holding a virtual meeting is precluded by the fact that under § 121(3) of the AktG the general meeting is supposed to take place at one specific location[4] and, in order to exercise their right to vote, a shareholder should go to that location (Goette et al., 2018 § 134, margin reference 90). Since transposition of the Shareholder Rights Directive (Directive (2007/36/EC) of the European Parliament and of the Council, 2007) into German law (see Act for the implementation of the Shareholder Rights Directive, 2009), however, the importance given to the "single location of the meeting" has diminished since articles of association may authorise, inter alia, casting one's vote either by letter, e-mail or onscreen form (*Bildschirmformular*), or in another similar manner. Before these changes, the main option for distance voting was to appoint a proxy holder (*Stimmrechtsvertreter*, *proxy voting*) who had to attend the meeting instead of the shareholder and vote on their behalf (Goette et al., 2018 § 134, margin reference 90).

2. Electronic vote – a mere digital signature?

Under § 33(1) of the GPCCA, a shareholder's vote constitutes a declaration of intention and the provisions of law concerning transactions apply to voting. Under § 68(1) of the GPCCA, a declaration of intention may be expressed in any manner unless otherwise prescribed by law. If a company organises an electronic vote, the question may arise as to whether this means that casting a vote must always take place in electronic form within the meaning of § 80 of the GPCCA. Specifically, § 80(2) of the GPCCA stipulates that, in order to comply with the requirements for electronic form, a transaction must be entered into in a form enabling repeated reproduction, must contain the names of the persons entering into the transaction, and must be electronically signed by the persons entering into

[4] More specifically, this provision stipulates that, inter alia, the place of holding the meeting must be notified to the shareholders.

the transaction. Under subsection three of the same section, an electronic signature must be given in a manner which allows the signature to be associated with the content of the transaction, the person entering into the transaction, and the time of entry into the transaction, and a digital signature is also deemed to be an electronic signature.

On this basis, it may be asked whether electronic voting within the meaning of the Commercial Code must only be the type of voting where shareholders have cast their vote by a digitally signed declaration of intention. The author of this article is of the opinion that probably this is not quite so since such a requirement would render electronic voting in a specially designated digital environment impossible. Thus, electronic voting at a general meeting and a meeting of shareholders, as well as prior to the meeting, should be understood as casting a vote in any manner which enables a guarantee in a technically secure manner that only the right persons can vote, that the votes can be correctly counted in the environment used, and that taking account of restrictions on voting is also ensured.

3. The possibilities to apply legal remedies in the event of technical problems

One of the legal issues arising in relation to electronic voting is what legal remedies could be available to a shareholder who cannot vote due to a technical reason.

If a shareholder of a private limited company cannot vote because they were not given information necessary for accessing the voting environment then, under Estonian law, this probably constitutes a serious breach of procedure for passing resolutions within the meaning of § 177^1(1) of the Commercial Code, and leads to nullity of the resolution. The situation is somewhat more problematic in the case of a public limited company since, for nullity of a resolution of a general meeting of shareholders, the procedure for convening the general meeting must have been seriously breached (§ 301^1(1) clause 4 of the Commercial Code). In the opinion of the present author, however, in the latter situation, it should be concluded, similarly to a private limited company, that this constitutes a breach leading to nullity of the resolution since such a breach impedes a shareholder in participating in passing the resolution and exercising their right to vote (Saare et al., 2015, p. 205, margin reference 995).

If voting fails due to a circumstance within the control of a shareholder, in the opinion of the author it may be deduced from the general principle of distribution of risks under private law that in such a situation a shareholder cannot rely on a technical error or invoke a remedy arising from a technical error because prior to the vote the shareholder should check their readiness to participate in voting. However, the matter is different if a company has maliciously chosen an unreasonable and uncommon voting environment (which for some reason is difficult to access or unstable). In part, the risks are probably mitigated by the fact that, similarly to voting in writing or by e-mail, a shareholder should be provided a reasonable time-frame for casting a vote in an electronic environment (Supreme Court Civil Chamber judgment of 23 May 2016 No 2-16-9415/41, para. 22).[5]

It may also be asked whether a shareholder who was given the necessary data for access to the voting environment but who, for technical reasons beyond their control, could nevertheless not vote, could contest the resolution by relying on a technical error or whether they could have a claim to oblige the company to enable them a new (electronic) vote. In view of the material preconditions for contestation, the possibility of contesting a resolution in the above case could arise only if the company has breached the requirements of the law or the articles of association.[6] However, similarly to the principle of distribution of risks which underlies liability under the law of

[5] According to Supreme Court opinion, the basis for determining a reasonable time should be § 7 of the Law of Obligations Act under which, with regard to an obligation, reasonableness is to be judged by what persons acting in good faith would ordinarily consider to be reasonable in the same situation. Additionally, to be taken into account in assessing what is reasonable are the nature of the obligation, the purpose of the transaction, the usages and practices in the fields of activity or professions involved and other circumstances. The Supreme Court reached the opinion that, depending on the circumstances and the substance of the resolution put to the vote, a reasonable time may also be merely two days.

[6] Under § 178(1) and § 302(1) of the Commercial Code, an entitled person may request annulment of a resolution which is contrary to the law or the articles of association.

obligations, impediments to voting which are beyond the control of the company cannot be considered a breach.[7] Thus, if the technical problems due to which a shareholder could not vote in the voting environment were such that the company could not affect them and, arising from the principle of reasonableness, it could not be expected to take this circumstance into consideration or avoid it or overcome the impeding circumstance or its consequence, then the company cannot be expected to organise a new vote. For the same reason, in that situation a shareholder also has no right to request that a new vote be organised.

4. The use of electronic communication in voting taking place at a meeting and in voting prior to a meeting

4.1. Electronic voting and different modes of voting at a general meeting

Under Estonian law, in the context of voting we mostly speak of two types of relevance in terms of electronic means of communication. In turn, this relates to how resolutions are passed. Shareholders in both private and public limited companies may pass resolutions either at a meeting or without convening a meeting (Commercial Code § 173(1) and § 299[1]) (Saare et al., 2015, p. 415, margin reference 885, 948, 1992). The third option for passing a resolution is a unanimous written decision, but from the point of view of this article that situation has only limited relevance in terms of electronic voting because this type of vote presumes a written form. Under § 80(1) of the GPCCA, this may be replaced by an electronic form which, under § 80(3) of GPCCA, means digitally signing a resolution.

First, a question may be raised as to the choice of modes of voting available to a company and the compatibility of different modes of voting with an electronic meeting. In the context of Estonian law, if the adoption of a resolution takes place at a meeting, a distinction should be drawn, first, between a situation where shareholders are given an opportunity to vote prior to a meeting by means of electronic communication or in an electronic environment specifically designated for this, and, second, a situation where voting takes place at a meeting carried out virtually so that the participants are connected to each other by two-way, real-time communication and all participants can directly perceive the development of voting results. The meeting and voting may also be combined so that participation takes place by two-way, real-time communication, but the vote should be cast in an electronic environment specifically designated for this.

In a situation where the meeting takes place virtually and the participants, in order to vote, must each show themselves and express verbally whether they are for or against the resolution, the voting may be considered electronic only within its narrower meaning. In that case, only an electronic channel of communication is created between the meeting participants. In that situation, the meeting environment must also enable the chair of the meeting to ascertain who is voting and how.

The Commercial Code does not regulate how voting must take place. Thus, if the management board decides to carry out a physical meeting for passing resolutions, then arising from the general principle of private autonomy the company is free to decide how to organise the vote. A company's articles of association may, of course, lay down a more specific procedure for voting, yet it is more common that the voting procedure is set by the board or the chair of the meeting. It should be noted that, for instance, in German practice, it is customary that the articles of association of at least large listed public limited companies authorise the chair of a meeting to set the voting procedure, since this enables a more flexible choice of mode of voting depending on needs (von der Linden, 2012, p. 931).

Section 130(2) of the German AktG (Aktiengesetz [Stock Corporation Act], 2017) stipulates with regard to the minutes of the general meeting that, in addition to the results of the vote, the minutes must also state the manner of voting. German legal literature notes with regard to different modes of voting that the customary manner of voting includes ballots, raising a hand, standing up, or saying one's name when asked who is for the draft resolution. By now, electronic voting is also one of the possible modes of voting at a meeting in German practice

[7] A statutory obligation exists between a shareholder and both a public or private limited company which gives rise to an overall duty to observe the principle of good faith in their mutual relationship and to take into account each other's legitimate interests. The principles of strict liability extend to this relationship of obligation.

(Hüffer & Koch, 2020, § 130 margin reference 17). Legal scholars have found that the choice of mode of voting must take into account that ascertaining the results of a vote should be as simple and certain as possible and that voting takes as little time as possible. Thus, in the case of a meeting with a small number of participants, raising a hand or expressing one's position verbally is more suitable, while at a general meeting with a large number of participants (in particular in the case of listed public limited companies) it is more reasonable to use ballots or electronic means of voting (e.g. postal vote prior to the meeting or in a separate voting environment) (Hüffer & Koch, 2020, § 130 margin reference 35).

Under § 304(1) clause 5 of the Commercial Code, the minutes of a general meeting must record, inter alia, the resolutions adopted at the meeting together with the voting results, including the number of shares that gave the votes, the proportion of the share capital of the shares represented by votes, the total number of votes, the number of votes given in favour of and against each resolution, and the number of abstentions.[8] Thus, Estonian law does not directly prescribe that the minutes of a general meeting or of a meeting of shareholders of a private limited company should necessarily record the mode of voting. Nevertheless, in the opinion of the present author, the fact that voting at a general meeting or a meeting of shareholders of a private limited company takes place electronically should be considered "another material circumstance at the general meeting" within the meaning of § 304(1) clause 7 of the Commercial Code which should be recorded in the minutes since this may have significance in ascertaining the voting results and their subsequent verification.

One possible legal issue in relation to voting at a meeting (or prior to a meeting) is also whether the vote must be public or whether it may also be secret. This issue is not regulated by either German or Estonian law, and thus, at first sight, it might be concluded that private autonomy of companies applies here as well. Nevertheless, a question may arise as to whether, in the case of a secret vote, it is verifiable who voted and how, and how in such a situation compliance with restrictions on voting is ensured.

Probably this is largely the reason why, according to German legal literature, it is debatable whether a secret vote may be held at a general meeting of a public limited company. For example, it has been found that even though the law does not preclude this, in that case it should definitely be ensured that restrictions on voting are already checked when distributing the ballots. As for preventing manipulation of votes, this must be verifiable by the chair of the meeting. At the same time, a view has also been expressed that a secret vote is impractical, especially in the case of public limited companies with a large number of shareholders and, if necessary, ballots with a concealed name may be used instead (Goette et al., 2018 § 134, margin reference 93). In conclusion, it is found that even though the chair of a meeting may decide to hold a secret vote, a shareholder has no individual right to request this (Hüffer & Koch, 2020, § 134 margin reference 35).

Under Estonian law, a secret vote at a general meeting of shareholders or a meeting of shareholders of a private limited company is not precluded since the law does not prescribe that voting results should record by name how someone voted. This applies to both public and private limited companies. However, it should be concluded that, in holding a secret vote, steps should be taken to ensure that only those whose voting rights are not restricted can cast a vote. If a company fails to comply with this requirement, then a shareholder may request annulment of a resolution of the meeting (Supreme Court Civil Chamber judgment of 11 June 2014, No 3-2-1-55-14, para. 23).[9] It should also be taken into account that each meeting participant should be ensured the right of objection.[10]

4.2. Voting prior to a meeting

In Estonia, casting a vote before a meeting is regulated under § 298^2 of the Commercial Code, whose first subsection lays down that a shareholder may vote on draft resolutions prepared in respect of the items on the

[8] Arising from § 171(5) of the Commercial Code, the cited provision also applies to the minutes of a meeting of shareholders of a private limited company.
[9] In line with Estonian case-law, a shareholder may request annulment of a resolution passed in breach of a restriction on voting rights.
[10] Under § 178(3) and § 302(3) of the Commercial Code, a shareholder who participated in a meeting may request annulment of a resolution only if they had their objection to the resolution recorded in the minutes.

agenda of a general meeting by submitting their vote to the public limited company prior to the general meeting at least in a format which can be reproduced in writing, unless otherwise prescribed in the articles of association, provided that identification of shareholders and security and reliability of voting is ensured in voting prior to the meeting. The right of shareholders of a private limited company to vote prior to a meeting is regulated in the same way (§ 170(5) Commercial Code). Both private and public limited companies are governed by § 298^2(3) of the Commercial Code, under which a blank form designated for this by the company must be used for voting prior to the meeting. This may give rise to the question of whether such a requirement of a blank leaves any possibility to carry out voting prior to a meeting in an electronic environment. Answering this question involves analysing which statutory requirements apply in this regard. According to § 298^2(1) of the Commercial Code, these requirements are as follows:

- casting a vote must be possible at least in a format reproducible in writing;
- identification of shareholders must be ensured;
- security and reliability of voting must be ensured.

First, in the case of electronic voting, a question may arise as to the meaning of "casting a vote must be possible at least in a format reproducible in writing". A question may also be raised as to whether in a situation where voting is organised in a specially designated electronic environment the requirement of a form reproducible in writing can be considered to be fulfilled.

In line with § 78 of the GPCCA, the requirement of a form reproducible in writing is fulfilled if the vote is cast in a manner enabling a permanent record reproducible in writing and contains the names of the persons entering into the transaction. Unlike the written form, this need not contain handwritten signatures. In that light, the online environment where voting takes place must enable a permanent record reproducible in writing. In the legal literature, it has been noted that a website fulfils the requirement of reproducibility in writing if the information on the relevant website can be downloaded and saved (Varul et al., 2010, § 79 comment 3.2). A voting environment enables reproduction in writing if printouts from it can be made (in the author's opinion, the type of environment should also be visible) and data can be saved on an external data carrier. On this basis, in the opinion of the author it may be concluded that a voting ballot used in the electronic environment can also be considered a form reproducible in writing on the precondition that the blank form can be saved on an external data carrier.

However, in order for the requirements imposed on electronic voting to be considered fulfilled, the electronic environment where voting takes place should also enable the identification of persons. In this regard, a question may be raised as to how strong the means of identification used in this situation should be. The strongest possible link between the voter's identity and the voting result is created by digital means of identification that apply, for example, when electing representatives to parliament (Riigikogu Election Act, 2002).[11] However, in the author's opinion, it would not be reasonable to impose such strict requirements on voting by shareholders because, after all, organising the vote, including electronic voting, takes place at the expense of the company, which in turn affects the company's management costs and ultimately also the profit earned by the shareholders.

A question may also be raised as to which requirements the precondition "the transaction contains the names of the persons entering into it" must comply with. In German law, as regards the form reproducible in writing, it has generally been found that it is sufficient if the declaration of intention can be attributed to the person in some way – the person making a declaration of intention in a form reproducible in writing must be reasonably recognisable by the addressee of the declaration of intention (i.e., the company and other shareholders) (Schubert, 2021, § 126b margin reference 7).

[11] For example, electronic internet voting is subject to the requirement that the e-voting system must comply with the ISKE baseline security standard, a risk analysis must be carried out to determine the required level, and the security class of the system must be set. The security class is assessed on a regular basis, the system must use an appropriate and up-to-date cryptographic algorithm while the precise specification of the algorithm is determined by the State Electoral Office before each election. An information systems auditor must be present at generation, use and destruction of secret keys used in electronic voting.

In the opinion of the present author, it follows from the foregoing that simply sending the shareholders a link to the voting environment without the possibility of verifying who can use this link is not sufficient in order to identify the persons who voted. For this reason, in the opinion of the author, for voting on draft resolutions of shareholders it is not possible to use an ordinary poll organised in an electronic environment – i.e., where each person receiving the link can enter their name and simply note whether they are for or against the resolution. It would probably also not be compatible with the spirit and purpose of the law if the voting environment did require that the persons entering it should identify themselves but did not reflect who voted and how, because the data about who voted in favour of the resolution constitutes an important part of the record of voting according to the law.

Thus, to ascertain the results of voting, the necessary personalisation requirements are probably somewhat higher, and the requirement of a form reproducible in writing should be considered fulfilled when the environment not only displays how many votes were given in favour or against a certain resolution, but also shows who voted and how. This interpretation is also supported by § 299^1 and § 173 of the Commercial Code, which regulate the adoption of resolutions without convening a meeting, and whose rules are similar to voting prior to a meeting. Specifically, § 299^1(4) and § 173(3) of the Commercial Code lay down the requirements of form for a record of voting in the case of a vote without convening a meeting. Under these provisions, the voting record must indicate not only the resolutions adopted along with the voting results but also the names of the shareholders who voted in favour of each resolution (§ 299^1(4) clause 3 and § 173(3) clause 3 of the Commercial Code). The purpose of this requirement is to ensure the verifiability of votes cast outside the meeting (regardless of how the votes are cast) as well as of the voting results. In the author's opinion, whether a vote is cast prior to a meeting or without convening a meeting at all should involve no significant distinctions in terms of legal regulation.

If the underlying consideration is the purpose of the rules for voting and adopting a resolution and the accompanying shareholder rights (e.g., raising an objection to a resolution or subsequent contestation of a resolution) then, in the author's opinion, the application used for electronic voting should be constructed so that the voter understands at what moment their vote is submitted, i.e., the voter should see confirmation to this effect. Every shareholder who has voted should have the possibility to verify whether the application used for voting has duly submitted their vote to the voting environment in line with their intention. This is necessary, for example, for a shareholder to be aware of whether they were actually ensured the opportunity to vote as one of the most important membership rights. The voting environment must also ensure that the voting results only take into account the votes cast by the shareholders with the right to vote.

5. Electronic voting without convening a meeting

If a company decides to organise a so-called written vote, the question also arises as to what extent the current law enables shareholders to use electronic communication for voting. Section 33^1 of the GPCCA does not directly regulate the issue of how electronic voting takes place when a resolution is adopted without convening a meeting.

When opting for this type of decision-making, the management board must send the draft resolution in a form reproducible in writing to all shareholders and set a deadline during which a shareholder must submit their opinion. This opinion must also be at least in a form reproducible in writing. A shareholder who fails to notify whether they are for or against the resolution by the deadline is deemed to have voted against the resolution (§ 173(2), § 299^1(2) of the Commercial Code). The management board must prepare a record of voting concerning the voting results and, in the case of a private limited company, the record must be sent to all shareholders. The management board of a public limited company does not have to send the record of voting to shareholders but must make the record available for shareholders. The law also lays down the minimum content of a record of voting, which, among other important data, must also contain the resolutions adopted along with the voting results, including the names of shareholders voting in favour of the resolution (§ 173(3) clause 3, § 299^1(4) clause 3 of the Commercial Code) and, at the request of a shareholder expressing dissent in respect of the resolution, the substance of their dissent (§ 173(3) clause 5, § 299^1(4) clause 4 of the Commercial Code). Opinions submitted by shareholders about draft resolutions sent to them form an inseparable part of the record of voting (§ 173(4), § 299^1(5) of the Commercial Code).

In the author's opinion, the same requirements apply to the so-called postal vote. These will apply when shareholders are given the opportunity to vote prior to a meeting. All shareholders must be ensured access to draft resolutions put to the vote. Identification of those who voted, and, if a special environment is used for voting, the security and reliability of that environment, must also be ensured. It is also important that the environment should enable restrictions on voting to be taken into account as well as to ascertain who voted and how.

While in Estonian law adopting resolutions without convening a meeting is regulated similarly both for private and public limited companies, in German law the rules for a private limited company, i.e. GmbH, and for a public limited company, i.e. AktG, are different. This is because in German law a closed company is a much less regulated form of company due to historical traditions. In view of this, it may be asked whether Estonian law, which has created similar rules both for small closed companies and large open companies, is excessively restrictive for private limited companies.

The passing of resolutions by shareholders of a German closed limited liability company, i.e. GmbH, is regulated by § 48 of the GmbHG (Gesetz betreffend die Gesellschaften mit beschränkter Haftung, GmbHG [Limited Liability Companies Act], 2021), under subsection 1 of which shareholder resolutions are passed at a meeting of shareholders. Under the second subsection of the same section, a meeting need not be held if all shareholders declare their consent in a form reproducible in writing either to the resolution or to the fact that voting takes place in writing. In the legal literature, it has been noted that the provisions on form laid down by § 126b of the BGB (Bürgerliches Gesetzbuch [Civil Code], 2021) apply to shareholder consent provided in a form reproducible in writing and, to comply with this requirement, the shareholder's relevant declaration must be readable and attributable to the consenting shareholder. Besides, a shareholder may give relevant consent, for example, by fax or e-mail but also in the online environment of a private limited company or even in a social media group (Schultleis, 2020, p 170). Thus, the GmbHG distinguishes between voting in a form reproducible in writing – this presumes affirmative votes given in the relevant form by all shareholders – and written voting, which, in turn, presumes that all shareholders should agree at least in a form reproducible in writing to adopt the resolution by written vote. In the legal literature, "all shareholders" is understood as meaning both shareholders with the right to vote as well as those who for some reason are not entitled to vote in passing the resolution. This is justified by the fact that a written vote must also replace a shareholder's right to attend a meeting and not only the shareholder's right to vote. According to the legal literature, however, this position is debatable since such an interpretation is allegedly too restrictive in its scope of application (Fleischer & Goette, 2019, § 48 margin reference 156, 157). In the latter case, the formal requirement of "reproducible in writing" applies to consent, while the requirement of written form applies to the resolution itself within the meaning of § 126 of the BGB (Wicke, 2020, § 48 margin reference 5), which means primarily the requirement of a handwritten signature or an electronic signature replacing this.

In the opinion of the author, the above provision in the GmbHG cannot be considered a successful solution in terms of legal clarity. German legal literature also indicates that the provision is open to several interpretations. For example, it has been found to be debatable to what extent, in the case of consenting to the resolution itself (i.e., when voting in favour of a resolution), the statutory requirement that the shareholder must have consented to passing a written resolution can also be considered to be simultaneously fulfilled. One possible interpretation is the opinion that consenting to the resolution itself means simultaneous consent to a written vote, while votes against the draft resolution cannot be deemed as such consent. This interpretation is justified by the fact that only in this way is it possible to distinguish between the two alternative modes of voting laid down by § 48(2) of the GmbHG. In the event of this interpretation, a resolution cannot be deemed adopted in a situation where all shareholders have voted in writing but the resolution has not gained the votes of all shareholders entitled to vote. This means that such a resolution cannot be passed by a majority vote because votes against may be construed as a need to still hold a meeting to pass the resolution.

However, this approach is found to be difficult to reconcile with practice by arguing that for those shareholders who vote in favour of the resolution, thus having also consented to a written vote, it generally makes no difference whether the resolution is finally adopted by majority or by consensus. Casting a vote may also be interpreted as a shareholder's wish to participate in passing the resolution without convening a meeting and that way contribute to passing the resolution. Thus, allegedly it cannot be presumed that in a situation where no consensus is reached

the shareholders who voted in favour would necessarily see the need to convene a meeting to pass the resolution. At best, such a wish may be attributed to those shareholders who vote against the resolution and who must clearly express their consent to a written vote so as to be able to conclude that they subjected themselves to the will of the majority in choosing the mode of voting (Fleischer & Goette, 2019 § 48 margin reference 159). In conclusion, according to the predominant opinion, under the cited provision of the GmbHG, as a first option, it is thus possible to pass a unanimous resolution which must be made in a form at least reproducible in writing, and second, in the event of consent of all shareholders given in a form reproducible in writing, a vote complying with the requirement of written form is possible (Michalski et al., 2017, § 48 margin reference 203).

In the opinion of the present author, it may be concluded from the above that, even though at first sight Estonian rules for smaller companies are stricter in comparison to German law, the legal clarity of the Estonian rules is better and is not open to debate over whether shareholders have consented to a postal vote or not. In the author's opinion, problems with interpretation of German law inevitably spill over to situations where a GmbH wishes to organise an electronic vote, which in turn may impede reasonable use of digital technologies.

6. Practice relating to the use of electronic communication in holding general meetings of shareholders

As a continuation of the above legal theoretical debate, it may be asked how the restrictions in spring 2020 affected the practice of holding general meetings of public limited companies. As large open limited companies, public limited companies are precisely the types of companies for whom holding a general meeting is important since the meeting allows the most effective communication between the company's management board and the shareholders. The biggest need for holding a general meeting is for public limited companies with many shareholders with fragmented share participation and where shareholders themselves do not manage the company.[12] In both Estonia and Germany the latter group of companies includes primarily listed public limited companies. Concerning specific industries, it has been found in the legal literature that virtual shareholder meetings are more frequent among tech firms, and firms traditionally more engaged with shareholders whose intention is to increase shareholder participation (Brochet et al., 2021).

The practice of general meetings of Estonian listed public limited companies in 2020 shows that companies opted for different approaches. As one example, we could mention the public limited company AS Ekspress Grupp who, in 2020, offered a possibility of electronic voting prior to the meeting for passing the resolutions of the extraordinary general meeting. Although the meeting itself took place on 20 September 2020 physically at the company's registered office, the management board recommended that the shareholders vote electronically on draft resolutions concerning items on the agenda prior to the general meeting and not physically attend the general meeting. To vote electronically, a ballot had to be filled out which was attached to the notice of the meeting both on the Nasdaq Baltic stock exchange and the company's own homepage. A ballot that had been filled out and scanned had to be sent by e-mail to the designated address at the latest by the start of the meeting with either a digital or handwritten signature along with a copy of the personal data page of the identity document (AS Ekspress Grupp, n.d.). A more precise procedure of electronic voting was attached to the notice convening the meeting on the above websites.

AS Tallinna Sadam (Port of Tallinn) held a written vote instead of a regular general meeting. The list of shareholders was closed on 19 June 2020 and the deadline for voting was 29 June. It was possible to choose between two options: first, a shareholder could submit a filled-out and digitally signed ballot or a ballot signed on paper and scanned to the e-mail address indicated in the notice; second, a shareholder could submit a filled-out paper ballot with a handwritten signature or send it by post to the company's address. The notice indicated that in the absence of technical tools a ballot paper may also be filled out and signed at the company's head office on weekdays from 9:00 to 16:00. In addition to shareholders being able to vote without being physically present at the meeting, at the beginning of the voting period the company also organised an online seminar on their YouTube channel, providing shareholders an opportunity to ask questions both before and during the meeting through the

[12] The needs of closed limited companies are mostly different – unlike shareholders in a public limited company, who mostly only play the role of investors, shareholders of private limited companies usually themselves participate in the company's daily activities and thus probably use more flexible options for decision-making than a meeting.

application of the relevant channel (AS Tallinna Sadam, n.d.). On the company's website, a more precise description of the voting procedure was also published along with the subsequent materials of the webinar.

As a third example, AS Merko Ehitus enabled its shareholders to vote electronically prior to the meeting. To do so, a ballot had to be filled out by clearly noting on it one's vote (for, against, or abstaining) in respect of each draft resolution. Then, the ballot had to be confirmed by electronically signing it with an e-signature.[13] A shareholder could also record their vote only in respect of some of the draft resolutions. A ballot that had been filled out and electronically signed had to be sent by e-mail to the company's e-mail address by the designated time (AS Merko Ehitus, 2020).

As concerns German practice in holding electronic meetings, this option is still viewed with scepticism. The first examples of public limited companies which organised their general meeting during the restrictions electronically under the current law were Bayer AS and Deutsche Lufthansa AG. According to the Lufthansa notice of general meeting of 25 June 2020, shareholders were also given the option of distance voting, in addition to appointing a proxy, for which they had to send a filled-out ballot to the company either by post or fax by midnight on 20 June at the latest. In addition, until the beginning of the meeting it was possible to cast one's vote either by e-mail or in the online environment offered by the company (Deutsche Lufthansa AG, 2020). However, in the German legal literature it has been noted that several public limited companies cancelled meetings that had been physically convened for spring or summer and postponed them instead of using electronic possibilities for holding the meetings and voting (Schäfer, 2020, p. 484).

Thus, the practice of Estonian listed public limited companies nevertheless shows that shareholders were enabled to use the simplest electronic means of communication for distance voting, and no separate electronic environment was used. The response of German public limited companies to the restriction on physical meetings arising from the emergency situation was similar or even more conservative. The restrictions in spring 2020 did not lead to the development and introduction of a special voting platform for companies. The reason for this is probably that no companies have so far seen the need to develop such a voting platform: until the other options (e.g., voting by e-mail) are no longer sufficient for companies, they are not ready to contribute to developing new applications. So far, the stock exchange market and the government have also not seen the immediate need to create a separate voting platform, yet such an application would probably help to avoid many disputes since it would create a stable and well-designed voting environment. However, it is worth mentioning that a simple and functional environment has been created for apartment associations in Estonia, which, for example, enables sending notices of a general meeting and voting on draft resolutions of the general meeting put to the vote.[14]

Conclusion

In connection with the legislative amendments entering into force in Estonia on 24 May 2020, it is no longer necessary to lay down the possibility of electronic voting in a company's articles of association. Even though this means greater flexibility and more options for companies, at the same time it also makes the mode of voting and the environment to be used less predictable for shareholders. Although the law contains no precise requirements, it should be taken into account that the procedure laid down for electronic voting must ensure the identification of shareholders as well as the security and reliability of electronic voting. The above must also be proportionate for achieving these aims.

In the opinion of the present author, in the case of electronic voting it is not justified to interpret the law so that, in order to cast an electronic vote, it must definitely be electronically signed by the person casting the vote. Otherwise, electronic voting would become excessively onerous in environments specially designated for this. On this basis, electronic voting at a general meeting and at a meeting of shareholders, as well as prior to the meeting, should be understood as casting a vote in any manner which enables a guarantee, in a technically secure

[13] In Estonia, such identification tools are either an ID-card, Mobile-ID or a newer Smart-ID complying with the qualified e-signature standard.
[14] This environment is at the website www.korto.ee.

manner, that only the right persons can vote, that the votes can be correctly counted in the environment used, and that taking account of restrictions on voting is also ensured.

Since in the case of electronic voting a company must ensure that only the right persons can vote, it cannot be considered sufficient that simply a link to the voting environment is sent to shareholders without the possibility of verifying who can use that link. The environment used should also enable ascertaining who voted and how. For these reasons, it should not be allowed to use an ordinary poll organised in an electronic environment to vote on draft resolutions – i.e., where each person receiving the link can enter their name and note whether they are for or against the resolution.

In practice, in connection with the emergency situation in force in spring 2020, many companies used the possibilities of electronic voting. At the same time, the practice of large listed public limited companies in Estonia shows that only simple tools were used for carrying out distance voting. According to information available to the author, the use of separate electronic environments is rare; indeed, this is still viewed with scepticism. However, such scepticism has no proper basis in a situation where a company has complied with all the statutory requirements when holding an electronic vote.

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AMICABLE DISPUTE RESOLUTION AT COURT: CONCILIATION HEARINGS, THE AUSTRIAN AND GERMAN PERSPECTIVES[1]

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Abstract. Both the Austrian and German civil procedures deploy an intra-court conflict resolution proceeding that follows the principles of a mediative conciliation process. The decisive difference between the two institutions cannot be found in the name, but in the fact that the German initiative is already legally enshrined, whereas in Austria, it is still assumed to be a project. For this reason, contrasts between the two approaches can be found in the legal qualification and the procedure of court conciliation, as well as in the legal classification, role and function of the conciliation judge. In both cases, however, conciliation proceedings at court convey the idea that there is a hidden solution in almost every conflict that is profitable for all parties. It is never too late to seek such a solution in any phase of conflict management, even in the judicial environment. A conciliation hearing at court brings movement into deadlocked conflicts by the conciliation judge gathering facts together with the parties and trying to shed light on the underlying interests to facilitate comprehensive conflict management tailored to the parties involved, and thus finally solving the overall conflict. Judges take on this role of a conciliation judge in addition to their in-court settlement work in standard proceedings. This article aims to compare the legal situation in the two countries, address the two approaches of introducing the method of the conciliation process at court, analyse the scope of their legal regulation, as well as to discuss questions about their successful practical implementation in the organisational framework and to reveal the role, standing, and training of conciliation judges.

Keywords: Conciliation judge, legitimacy, adjournment, (court) settlement, mediation.

Introduction

In almost every conflict, there is a profitable hidden solution for all parties. It is never too late to seek such a solution in any phase of conflict management, even in the judicial environment. Thus, the conciliation hearing can bring movement into deadlocked conflicts by the conciliation judge gathering facts together with the parties and trying to shed light on the underlying interests in order to facilitate comprehensive conflict management tailored to the parties involved to finally resolve the overall conflict. This conveys the idea that mediately trained judges, in addition to their work on in-court settlements in standard proceedings, can also take on the role of a conciliation judge. In a separate procedural step, they accompany the parties in finding an independent, interest-based solution and, if necessary, work with them on the overall conflict beyond the limits of a legal claim. However, the conciliation hearing and the role of the judges in this process are somewhat different. Therefore, the purpose of this article is an examination of the method of the conciliation hearing at court, the scope of its legal regulation, and its practical application in Austria and Germany. What is necessary for successful implementation, and what are the ways of gaining a high level of acceptance for this method of amicable dispute resolution within the affected groups? Finally, a dogmatic and comparative law approach was taken to answer these questions.

To facilitate understanding and entry into the topic, a brief scenario: the applicant sought that the defendant immediately ceased causing specific noise effects emanating from the flat above, namely that children were almost

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constantly, but especially late at night, running through the flat, screeching and banging on the floor with their toys. The undue noises substantially impaired the customary use of the flat.

It was impossible to settle in the oral hearing, but the parties accepted the offer of a conciliation hearing. In the conciliation discussion, it turned out that the applicant was seriously ill. The party underwent treatment approximately once a month, which was very painful, and she was sensitive to noise and in need of rest afterwards. The given information was important for the case, as the applicant regularly did not stay in the flat for many days, instead spending time at her friend's place.

The solution of the parties was as follows: firstly, they exchanged mobile phone numbers; secondly, the sick party notified the family when she was due to receive her treatment, at which time the family spent time outdoors or with relatives; thirdly, the rest of the month there were no restrictions.

The apparent points of contention (noise, children, different cultures) dissolved when the parties came to talk about their interests. A solution adapted to the living situation was found, which could not have come in the form of a judgement. Mediation was out of the question because the parties had no other financial means (RIV Fachgruppe Einigung, unpublished).

Now, how does this method of amicable dispute resolution work in court? The conciliation hearing is a voluntary, non-public procedure in which an independent judge without decision-making authority, i.e., the "conciliation judge", who is specially trained in communication, mediation, and conflict management, assists the parties in working out an amicable solution to their problems themselves (Eisenreich-Graf & Rill, 2019; Moritz, 2021). This is an intra-court alternative dispute resolution procedure embedded in the civil procedure system, linking the civil process and ADR (Hammerl, 2017).

1. The development of court conciliation in Austria

For almost a decade now, judges trained as mediators, or judges who have completed additional training in conflict resolution and settlement, have been working in the Higher Regional Court District of Vienna, at individual district courts, and at the Vienna Regional Court to reach settlements in conflict disputes that have become pending in court. The conciliation procedure is currently in project status, dealing with civil, family, or tenancy law cases. Judges do this work voluntarily and receive no unique benefit (Eisenreich-Graf & Rill, 2019; Meisinger, 2021) – they are credited in the schedule of responsibility, but only for the sake of clarity.

At present, some of the involved judges are also mediators, but most of them voluntarily complete a modular program of 100 hours, including a theory and a practical part on conflict resolution (Janitsch, 2014c). In this training, the participants are introduced to the basics of settlement and communication as well as self-perception and perception of others. They learn about the individual phases of settlement: from a successful opening to working out interests and needs as a basis for successful settlement to finding solutions and, in the end, a successful conclusion. In addition, the procedure of a conciliation hearing is dealt with specifically, and, among other contents, it is clarified which cases are suitable for such a hearing in the first place. It is also explained how to ensure the parties' voluntariness to participate in the conciliation procedure. In the long term, the necessary additional training to become a conciliation judge should be included in the general training of judges in Austria (RIV Fachgruppe Einigung, unpublished).

One point of contention in Austria in executing the project around conciliation judges is the legitimacy and the legal basis on which the conciliation hearing is carried out. The conflict arena has already been extended to court, and the conciliatory work has been delegated to a judge. The legal basis for this project situation is primarily § 204 Austrian Code of Civil Procedure (Zivilprozessordnung – ZPO, 1895) and the idea conveyed by EU Mediation Directive 2008/52/EC (2008). Specifically, § 204 ZPO offers two connecting factors for the use of conciliation judges. These are, on the one hand, § 204 para 1 sentence 2, according to which, if it appears suitable, reference is to be made to institutions that are suitable for the amicable resolution of disputes. On the other hand, § 204 para 2 sentence 1 can also be considered. According to this, to attempt a settlement, the parties may, if they agree, be referred to a requested judge (Eisenreich-Graf & Rill, 2019; Moritz, 2021).

This is not the judge responsible for the proceedings. Therefore, with the parties' consent, the trial judge can refer conflictual cases, in which mediating appears more practical than judging, to a specially trained colleague judge. Within the time frame of an average of half a day, or two sessions of approximately two hours each, this judge assists the parties in working out an amicable solution using the methods of conflict management (Eisenreich-Graf & Rill, 2019; Meisinger, 2021; Thau, 2016). Of course, the procedural principle of neutrality also applies in this phase.

At what point do the trial judges refer the parties, for whom they consider such a procedure helpful, to the conciliation judge? In principle, this already happens in the preparatory hearing, occasionally also at a later stage of the proceedings. Ideally, when the trial judges refer the parties to the conciliation judge, they assign the next hearing date. So, if the parties will not settle, the court proceedings are not delayed (Eisenreich-Graf & Rill, 2019). In any case, the settlement hearing does not constitute grounds for an adjournment of the next hearing according to § 134 ZPO (Mayr, 2012). For the duration of the conciliation proceedings, no taking of evidence is carried out in the judicial contentious or non-contentious proceedings (Schmidt, 2016). Finally, as explained later in this article, it can be stated that there is no sending away of the parties; the conflict resolution remains within the court.

Furthermore, in matters of non-contentious proceedings (e.g., matters of custody and contact rights), the instrument of interruption is available pursuant to § 29 Non-Contentious Proceedings Act (Außerstreitgesetz – AußStrG, 2003). This provision serves to pause the proceedings to enable an amicable settlement, particularly with the support of an appropriate body (Mayr, 2012; Schmidt, 2016). Further examples of an interruption of the proceedings are the suspension of proceedings and consensual interruption. Such procedural steps help the judges, as the pending case is temporarily removed from their annual statistics.

A not inconsiderable legal issue arises from the lack of an explicit confidentiality protection provision. However, such can be created through judicial activity and can be procedurally implemented through § 320 n. 3 ZPO (Hammerl, 2017). In this case, the offence of maintaining official secrecy applies to the judges. The problem here is the possible release from the duty by the president of the Higher Regional Court. In practice, furthermore, the contractual confidentiality clause is used by agreeing on confidentiality in the conciliation hearing so that facts that become known may neither be brought forward nor used in any subsequent contentious or non-contentious proceedings. In addition, the conciliation judge may not be called as a witness (Hammerl, 2017; Schmidt, 2016). However, whether these agreements are legally valid is unclear, as the ZPO does not recognise such exclusion-of-evidence arrangements. The same applies to an indemnity clause, so the latter measure could remain toothless.

What happens in the event of a decision in favour of a conciliation hearing? If all involved parties agree to conduct judicial conciliation proceedings, the conciliation judge schedules the first hearing. In principle, all parties to the proceedings take part in this non-public hearing. However, a representation system may be necessary in exceptional cases where many parties are involved (e.g., in condominium cases). It is also conceivable that third parties are involved. Of course, the participation of legal representatives is permissible, although – as known from mediation – the judge has to ensure procedural clarity and equal opportunity (Schmidt, 2016).

The conciliation judges are responsible for the proceedings and are thus judges with special training in communication, mediation and conflict management, but without decision-making authority. In comparison, it is unclear whether they are allowed to propose non-binding solutions. Conciliation judges assist the parties to resolve the conflict, which has led to court proceedings, by themselves in an amicable and future-oriented manner (Moritz, 2021).

The essential point is that in cases where the conflict has little to do with the subject matter of the legal dispute, the court proceeding is the wrong choice. In contrast, in the conciliation hearing, like in mediation, the parties are guided to recognise each other's needs behind the conflict to shift away from their often rigid positions and standpoints and move towards a common goal. The conciliation judge does not give legal information or advice, and unlike court proceedings, a conciliation hearing is never conducted from the judge's table (Hammerl, 2017). This difference is already evident in the settings. While in the courtroom, there is a fixed seating arrangement in accordance with the hierarchy; this is entirely free and variable in the conciliation hearing. The parties should be able to meet each other at eye level (Eisenreich-Graf & Rill, 2019).

The conciliation proceedings run through three phases. In the beginning, the parties should open up by presenting their point of view and perceiving the other's point of view (open mind). In the second phase, the judge should enable the parties to show feelings and meet the other's feelings with appreciation (open heart). In the third phase, they should openly discuss their ideas of a future-oriented solution (open will). A conciliation hearing will be successful if and as long as the parties are constructively interested in and work to solve the problem. Therefore, it can be terminated at any time by the parties and the conciliation judge if the preconditions for this are not (or are no longer) given (Eisenreich-Graf & Rill, 2019). The conciliation hearing must consequently also be terminated if no progress can be seen in the conciliation process.

The conciliation hearing seems to be something like a short-term mediation, as essentially the same issues are worked through – from conflict management to conflict resolution – and the settlement judge does not make any decisions themselves. However, there is no obligation for the conciliation judge to comply with the provisions of the Mediation Act in a conciliation hearing (Janitsch, 2014c). A procedure before the conciliation judge allows the parties to find an interest-based agreement in a different ambience than the adversarial climate of the courtroom, without being sent away by the court, for example, to an external mediator (the conflict resolution remains with the court) and without incurring additional costs. However, the judicial conciliation procedure is not suitable for all cases, so the value of out-of-court mediation in many highly contentious conflicts should not be denied. Certain cases can only be dealt with via classical mediation (Janitsch, 2014b).

At the end of the conciliation process, it is possible to reach an agreement on the further proceedings before the conciliation judge. This agreement will be documented informally for the parties, again similarly to mediation, such as via a flipchart protocol. In any case, the parties are advised to discuss an agreement with their legal representative before concluding it. If the parties are unrepresented, the conciliation judge will ask the parties to seek legal advice or switch to the trial proceedings before entering into an agreement. The conciliation judge does not assume any substantive responsibility (Janitsch, 2014a; Hammerl, 2017).

Only thereafter it should be decided whether the agreement reached should be concluded either out of court or in the next hearing before the trial judge as a court settlement. The latter approach makes it possible to create a court settlement filled with the content agreed upon in the conciliation hearing and thus an enforceable execution title. Sometimes, however, the parties agree to suspend the proceedings.

On the other hand, if they do not reach an agreement or only a partial settlement, the court proceedings continue seamlessly. If the parties need more time to deal with the conflict on their own, they can be referred to mediators outside the court or other experts whenever they wish (Eisenreich-Graf & Rill, 2019).

As far as the costs for the conciliation proceedings are concerned, these are already covered by the court fees (legal costs). Thus, there are no additional costs for the parties. However, representation costs, travel costs and expenses, e.g., for a translator, are not reimbursed, and must therefore be borne by the parties themselves. Low-threshold assistance, such as a grandson acting as a translator, is permissible due to the informality of the process (Eisenreich-Graf & Rill, 2019; Schmidt, 2016; Thau, 2016).

As already mentioned, an entry is also made in the schedule of responsibility for conciliation proceedings, but, at present, there is no case-related discharge for the conciliation judges when they are used. The only purpose of the record is to provide transparency for all parties involved. In addition, it reinforces the statement that the work as a conciliation judge is also a task by the court. In summary, it can be stated that the judges active in the project primarily enjoy being able to provide very individual and cost-saving support to parties seeking help in dealing with their conflict.

2. The development of court conciliation in Germany

The situation in Germany is somewhat different. First of all, the conciliation hearing has been legally enshrined since 2013 with the creation of the German Mediation Promotion Act (Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung – MediationsG, 2012). Before that, model projects since 2002 have tested whether there is a possibility for mediation within courts by an appointed judge, other than

the one responsible for the trial's decision and with the appropriate training as a mediator. These projects proved that with a communicative negotiation approach that follows the principles of mediation, considerable settlement successes could be achieved even in conflicts that are already pending in court (Greger, 2017). However, pilot projects met in some cases with approval from legal science and practice representatives, but also with scepticism or even decisive rejection in others. Proponents emphasised the sustainable conflict solutions through in-court mediation, the higher satisfaction of those seeking justice and the associated higher reputation of the judiciary in society. In addition to this, they pointed out the internal relief effect for the judiciary and the positive impact of in-court mediation as a door opener for out-of-court mediation. On the other hand, critics are of the opinion that the judicial mediator, as a judge, enjoys a "natural authority". Even if judges are trained as competent mediators through additional training, there is a danger that the parties, out of a subjectively perceived inferiority, accept a conflict solution that counteracts the voluntary consensus characteristic of mediation. Furthermore, they believe the offer of in-court mediation has a particular "luring effect". This means that when a lawsuit is filed at court, the application for judicial mediation is filed at the same time. This creates a competitive advantage in favour of in-court mediation, which is reinforced by the fact that no additional costs are incurred. Out-of-court mediation at the usual market prices thus becomes unattractive from an economic point of view (Eberhard, 2012). The introduction of the Mediation Promotion Act primarily put an end to this discussion about in-court mediation and judge-mediators. This was not intended. Instead, the institution of the conciliation judge was created, who can use all methods of conflict resolution, including mediation, when appointed by the trial court to conduct a conciliation hearing (Greger, 2017; Saenger, 2021).

By now, in a pending case, pursuant to § 278 German Code of Civil Procedure (deutsche Zivilprozessordnung – dZPO, 2005), the trial court can choose the conciliation judge from several options for consensual conflict resolution. The parties may be referred to a conciliation judge in any procedural situation without their consent by order of the trial court, as provided for by § 278 para 5 dZPO (also § 36 Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction [Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit – FamFG, 2008] and § 54 Labour Courts Act [Arbeitsgerichtsgesetz – ArbGG, 1979]) (Prütting, 2020; Steiner, 2015).

The conciliation judges act as organs of the administration of justice with complete judicial independence (§ 21e para 1 sentence 1 Courts Constitution Act; Gerichtsverfassungsgesetz – GVG, 1975). They are, therefore, "real" judges who must, in principle, be included in the business allocation plan. They are judges of another panel, not another court (Saenger, 2021). Conciliation judges are explicitly free to apply all methods of conflict resolution, including mediation, in conciliation proceedings, but may not make any substantive decisions (Dürschke, 2013; Greger, 2016; Prütting, 2020). It is thus quite possible that either a phase-structured mediation can take place or merely a conflict moderation in which mediative communication and creativity techniques are used. Interviewed judges spoke, for example, of the "possibility of conducting mediation in a narrower sense" (Greger, 2007). For these reasons, it is clear that it is nearly impossible to distinguish between the conciliation procedure and out-of-court mediation (Bushart, 2021). Even if the conciliation judges are allowed to mediate, they are not bound by the restraints concerning the proceedings and tasks of a mediator according to § 2 German Mediation Promotion Act. For instance, Saenger therefore considers a legal assessment and the presentation of a proposed solution by the conciliation judge – different than in Austria – to be permissible (Saenger, 2021; different view Steinbeiß-Winkelmann, 2021).

Apart from that, the personal appearance of the parties at the hearing is to be ordered by § 278 para 3 dZPO. Whether the judges use this possibility is at their discretion (Meisinger, 2021). If one party does not appear, a conciliation hearing cannot occur. If both parties fail to attend, the proceedings are suspended (para 4). However, constructive participation cannot be enforced (mark of voluntariness); neither does it trigger any additional procedural costs. Generally, the parties do not incur additional court fees for the proceedings before the conciliation judge. Representation by a lawyer is also not required under procedural law (Greger, 2012; Prütting, 2020), although the granting of legal aid by the trial judge is possible in principle (Schneider, 2020). It remains controversial, though, whether the termination of proceedings is subject to the obligation to be represented by a lawyer (e.g. Steiner, 2015; different view Prütting, 2020). The confidentiality of judges is ensured by the statutory duty of confidentiality (§ 46 German Judiciary Act [Deutsches Richtergesetz – DriG, 1972]), which is also safeguarded by procedural law (§ 383 para 1 n. 6 dZPO). Furthermore, the requirement of publicity does not

apply. From the parties' perspective, the confidentiality of the conciliation hearing can only be achieved by contract.

As far as the duration of the conciliation proceedings is concerned, the time limit in the pilot projects was mostly set at two or three hours. Practice has shown, however, that the parties need more time than this (Greger, 2016). On average, around five hours of judicial working time were needed to conclude a procedure (Greger, 2007). During the proceedings, the conciliation judge documents the hearings in the form of a record if both parties agree to this. If they reach an agreement at the end, it must be clarified whether it should be written down. This depends solely on the parties' will (Greger, 2016). The final agreement can then be notarised by the conciliation judge within the framework of a court settlement pursuant to § 794 para 1 n. 1 dZPO, whereby a title is created by the conclusion of an enforceable settlement (Schneider, 2020; Saenger, 2021). Furthermore, the proceedings can be terminated by a concordant declaration of settlement and by the withdrawal of the action. If the parties do not reach a result, the proceedings before the conciliation judge are terminated, and the trial judge continues the process (Prütting, 2020; Greger, 2012, 2016).

3. Comparison of Austrian and German models of court-conciliation: The search for the most effective solution

Before comprising the final findings, it seems fruitful to summarise the main legal differences of both concepts on conciliation proceedings in Austria and Germany, starting with the fact mentioned so often that the conciliation procedure has been legally established in Germany but is still a project in Austria. For this reason, contrasts can also be found in the legal classification of the conciliation judge. In Austria, the judges work on a voluntary capacity; in Germany, they function as organs of the administration of justice. In both cases, though, they are not acting as extrajudicial mediators. Furthermore, the conciliation judges in Germany can give legal advice and propose solutions. This is not provided for in Austria. What is common, however, is that the conciliation judges in both countries have no decision-making authority. In addition, judges in Austria and Germany must be trained mediators or complete appropriate training in order to be allowed to act as conciliation judges. Similarities can also be found in the proceedings themselves. The average duration is around half a day, the judges can use all methods of conflict resolution, representation by a lawyer is not required, and there are no additional costs for the parties to the proceedings.

These previous remarks may assume that conciliation judge proceedings are a mass phenomenon, but Germany's case figures show the contrary (Masser et al, 2018). However, undoubtedly the offer is perceived as sympathetic (Meisinger, 2021), and the process-ending conclusion frequency of such proceedings is quite solid if the parties agree to initiate the conciliation hearing in advance; albeit, there is a mere order to refer the parties to the conciliation judge in most cases, which increases the risk of failure and thus of double referrals.

The German regulation clarifies that despite the idea of peace under the law through mediation, the structural integration of a conciliation judge into judicial procedural law must fulfil its primary purpose. This means that the foremost goal of the court proceedings remains the determination and enforcement of subjective rights (Prütting, 2020).

Finally, by deliberately leaving the definition of conciliation hearings open, the use of a range of conflict management procedures is permissible. Consequently, moderation, evaluation, conciliation and final offer procedures would be conceivable. The only question is whether and to what extent methodological clarity must be established for the parties (Greger, 2016).

Such detailed legal regulation is lacking in Austria, but some commentators, especially Austrian lawyers, see juridification as the necessary next step in helping the existing project of conciliation proceedings achieve a breakthrough (Eisenreich-Graf & Rill, 2019). However, the preceding statements on the German situation do not support this demand.

Conclusions

The conciliation hearing conveys the idea that, in addition to their in-court settlement work in standard proceedings, mediately trained judges can also take on the role of a conciliation judge. Such dispute resolution proceedings only come about after the pendency of a dispute has arisen, by means of a referral by the judge of the proceedings and based on the voluntariness of the parties. Conciliation judges have no decision-making authority; this remains solely with the trial judge.

The above allows for the conclusion that, ultimately, for the successful implementation of this concept a high level of acceptance of the procedure is required. This can be achieved by creating an adequate legal basis which provides suitable organisational framework conditions.

Therefore, a cautious minimum regulation that safeguards legal activity (judicial action, business allocation) and protects the parties (confidentiality, clarity of costs) is recommended. This seems to be a practical approach for all those seeking to expand the judicial function in the sense of an additional facet with conciliation judges. However, the parties and their lawyers need clarity: they need to know whether their case will still be heard in court or whether it will be negotiated out of court. This applies to the conciliation procedure as a whole. The parties must be clear about the possibilities and benefits of the conciliation hearing so they do not have exaggerated expectations. Thus, in order for the conciliation procedure to unfold to its full effect, the professional groups concerned must be informed more intensively. Above all, this primarily affects the legal profession; if they are not more involved in further elaborating the concept of the conciliation hearing, resistance will continue. Finally, together with those involved, the question will also have to be answered as to what this all means for court-annexed mediation. At first glance, conciliation in the judicial environment gives the impression that out-of-court initiatives would be pushed out of the court and the mediator displaced. However, after a closer look, it becomes clear that mediation-trained conciliation judges carry the idea of consensus into the judiciary and pass it on to the parties and the legal profession. The concept of mediation will become suitable for everyday use.

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CERTIFICATION AS A REMEDY FOR RECOGNITION OF THE ROLE OF AI IN THE INVENTIVE PROCESS[1]

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Abstract. Artificial Intelligence and its subfield Machine Learning have considerable potential to improve the welfare of humans. Due to the specifics of Artificial Intelligence and its enhancing capabilities, there is an increasing incentive to innovate if the role of Artificial Intelligence in the inventive process is recognized not solely as a tool under the patent legal framework. Nonetheless, since the concept of an "inventor" is traditionally attributed to natural persons, there is no consensus on whether the mentioned term should be interpreted as a living instrument. This article focuses on interpreting the concept of an "inventor" under the patent legal framework. It outlines the potential approaches to address an incentive to innovate if the role of Artificial Intelligence in the inventive process not only as a tool is reflected. The main argument developed in the article is that proposals to amend the patent legal framework to address the issue might not be as preferred as introducing the certification system instead.

Keywords: artificial intelligence, inventor, patent, certification.

Introduction

Artificial Intelligence (hereinafter – AI) and its subfield Machine Learning (hereinafter – ML) have a considerable potential to augment the prosperity of humans. Moreover, the capability of AI and ML has already exceeded the abilities of humans, leading toward singularity (European Parliament [EP], 2019). Despite the outlined AI advantages, attempts to patent inventions indicating AI as an inventor before the European Patent Office (hereinafter – EPO) and many other patent offices have been unsuccessful (O'Neil, 2021).

The concept of an "inventor" under the European Patent Convention (hereinafter – EPC) was designed before AI emerged (Lee et al., 2021). In this regard, there exists a tension between an intention for the role of AI in the inventive process to be recognized not solely as a tool and a stance of the EPO on how to interpret the concept of an "inventor" in the context of AI. If the mentioned incentive is not addressed, it leads to opting for other protection methods such as trade secrets. Consequently, those seeking patent protection come across disadvantages, and general public knowledge experiences a deficiency of enrichment.

This article focuses on addressing challenges that stem from the incentive that the role of AI is recognized not only as a tool under the patent legal framework of the EPC. The main argument of the article is that *sui generis* framework, by introducing certification for the recognition of the role of AI in the inventive process not solely as a tool, might be preferable to balance incentives to innovate and the EPC framework instead of incentives to amend the EPC, respectively.

The article relies on analytical, descriptive, comparative, and historical legal methods, and provides examples from other jurisdictions for comparative and substantive purposes.

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Scientific literature, primary and secondary legal sources, and case law are referred to evaluate the main argument of the article. Within four sections and sub-sections, aspects of ML and its role in the inventive process, the concept of an "inventor" under the patent legal framework of the EPC, and an incentive to innovate are analyzed. The fifth section focuses on the solutions to address the role of AI in the inventive process, including also a preliminary overview of certification as a remedy for recognizing the role of AI in the inventive process.

The scope of the article is limited to the analysis of patent law within the framework of the EPC. Therefore, considerations on the issues outlined in the article outside the jurisdiction of the EPC beyond comparative purposes exceed the respective framework.

1. Machine Learning and its role in the inventive process

AI and one of its fields, ML, focus on capacitating computers to learn identifying patterns of data, constructing explaining models (mathematical algorithms), and conducting predictions without specifically programmed instructions. Self-learning should be distinguished from self-improvement exceeding human intelligence or singularity (Maini & Sabri, 2017, pp. 9–11). Due to the capacity of ML to generalize and process large amounts of different types of data, it has various applications, including drug discovery (Feldmann & Bajorath, 2020, pp. 1–2), and considerable potential in improving human welfare (European Commission Directorate-General for Communications Networks, Content and Technology, 2020, p. 35).

AI can be divided into narrow or weak intelligence, which refers to the limited task or simulated thinking, and general or strong intelligence, which describes the ability to perform any task that a human can accomplish, including learning, decision-making under uncertainty, and reprogramming itself (Maini & Sabri, 2017, pp. 9–11). Narrow intelligence currently dominates; namely, many applications are created to automate tasks by making computers produce the output from the input or raw data (Sevahula et al., 2020).

ML algorithms (models) range from simple linear regression to complex, such as artificial neural networks. Depending on the type of ML model and the desired outcome, learning methods vary from trivial to sophisticated, such as deep learning (Sevahula et al., 2020).

The developmental process of AI can be divided into stages: 1) formulation of a problem to be solved by applying computation; 2) design of an algorithm, which also comprises the identification of key features (terminals, functions, fitness measure, termination criterion, and result designation) or elements based on which the algorithm should be built; 3) introduction of controlling parameters to measure the accuracy of the output (Koza et al., 2003, p. 10); 4) translation of the algorithm into a programming language; 5) preparation of input and testing data (standardization, normalization); 6) model execution; 7) output verification and application (Kim, 2020, p. 449); and 8) model usage.

It must be outlined that problem formulation is not necessarily a decisive factor in algorithm building, since there can be no issue to be solved at all. For instance, in the DABUS case (Carlson, 2020), the created algorithm provided random outputs based not on the ideas previously conceived by humans but on the programmed general knowledge about the world. Namely, initially deciding whether the generated output can be useful in the real world based on learned knowledge and afterward potentially combining with other revelations.

Nonetheless, no *consensus* exists on the borderline between humans and the role of AI in the inventive process. Namely, there is a stand that a human is always behind all processes related to AI, including building and adjusting a model, choosing relevant data that, simultaneously, involves the direction of a model (stipulating the problem to be solved), predicting the output of inserted randomness, and others. In this regard, AI is solely an automated tool for humans because all AI activities derive from a direction pre-set by humans (Kim et al., 2022).

Conversely, there is a view that models like DABUS, with an architecture of multiple neural network models, allow: 1) not only associate but to generate new patterns; 2) adapt to a variety of scenarios without additional input from humans; and 3) perform self-assembly. Therefore, the model cannot be deemed purely human-made to solve a problem (*Thaler v. Commissioner of Patents*, 2021, para. 37, 41). Consequently, the stand on the role

of AI in the inventive process depends not only on its technical capabilities to act partially or fully autonomously but also on a cognitive position taken on the respective matters (Kim et al., 2022, p. 26).

It can be agreed that since AI and ML do not have built-in functionality and need human assistance, the term "AI Autonomously Generated Inventions" is unfounded for describing the role of AI in the inventive process (European Commission Directorate-General for Communications Networks, Content and Technology, 2020, p. 100). Hence, the proposed term "AI-assisted output" can be accepted to describe cases when AI is applied only as a tool (p. 9). Additionally, the term "AI collaborated/contributed output" could also be used to define situations when the role of AI in the inventive process, not solely as a tool, would be deemed recognized. The respective situations will be discussed in the following chapters.

2. The concept of an "inventor" under the patent legal framework of the EPC

2.1. General overview

Article 62, in conjunction with Article 81 of the EPC (European Patent Office [EPO], 1973), foresees that the inventor and the applicant should be mentioned before the EPO. The inventor must be stated in the application according to the EPC and not under national regulation or case law (Muir et al., 1999, pp. 187).

Furthermore, pursuant to Rule 41(2)(c) of the Implementing Regulations to the EPC (2020; hereinafter – Implementing Regulations), the applicant of the patent must be mentioned, and this can be both a natural and a legal person as well as bodies equivalent to legal persons under the law governing them. Rule 41(2)(j) of the Implementing Regulations also requires the designation of the inventor in the application if the applicant is also the inventor.

Rule 19 of the Implementing Regulations refers to the name, surname, country, and place of residence of an inventor. Additionally, Rule 20(1) of the Implementing Regulations allows an inventor to waive the rights to be mentioned as an inventor and to inform the EPO. Subsequently, that means excluding it from the inspection under Rule 128 Paragraph 4 according to Rule 144(c) of the Implementing Regulations. According to Rule 60(1), Rule 163(1) and (6) of the Implementing Regulations, non-compliance with Rule 19 can lead to the refusal of the application.

Article 60(3) of the EPC stipulates that the applicant is automatically deemed entitled to exercise the right to a patent (CARDIAC/Correction of mistake, 1997, para 38). Nonetheless, Article 80(c) of the EPC requires that the applicant is identified even by name (WARHEIT/Identity of applicant, 1987, para 40).

It should be noted that the concept of an invention is intrinsically linked with the concept of an inventor. It is outlined that the legal meaning of an "inventor" is not only recognition of a creator of an invention but also possession of the rights to invention and entitlement to execute deriving rights (EPO, 2021). In other words, the inventive right provides the right of an inventor that contains: 1) rights to patent as the economic right (ownership); 2) rights to be called an "inventor" as the personal right. The inventive right originates not from the applicant of the invention but from the inventor as a person (Haedicke & Timmann, 2014).

Furthermore, under Article 60(1) of the EPC, an inventor and owner can only be one or multiple natural persons that have created the invention, not a company. The EPO in the so-called DABUS case (EPO, 2020; 2022; Boards of Appeal of the European Patent Office [EPO BA], 2021), where AI was indicated as an inventor in the patent application, stated that only a human being could be considered an inventor in the scope of Article 60 of the EPC. Nevertheless, the succession of rights is possible, requiring the inventor to transfer the respective rights by disposal (Haedicke & Timmann, 2014, p. 244).

The right to a patent rises from the creation process of the invention that a patent application recognizes. Inventing requires a physical process, not a legal transaction. Namely, the assignment of an agent, intent without physical, personal labor, does not embody physical action in the sense of the invention. In this regard, a person that lacks legal competence can also invent. Thus, an intellectual, inventive process is the main precondition that enables an

inventor right. The right of an inventor also requires technical usability or completion of the invention and official public announcement (Haedicke & Timmann, 2014, pp. 244–245).

Another aspect is that the personal rights of an inventor are much less personal and, subsequently, transferable than copyright law. Nonetheless, Article 62 of the EPC stipulates that the rights to be declared as an inventor are strictly in-transferable, or personal. Furthermore, the right to invention arises as soon as a person generates the invention, irrespective of patentability. In contrast, the right to a patent is accorded to an inventor or its legal successor, allowing an application of a registered right to a patent (Haedicke & Timmann, 2014, pp. 246–247).

Furthermore, economic rights or the right to own a patent guarantee the commercial exploitation of an invention and exclude others from the utilization of the invention. The economic value of an invention is identified by: 1) a desire to realize the value by the holder of rights; 2) the ability to realize the value by the holder of rights; 3) the desire to pay for the value by others. In this regard, control over the product by the owner should also be recognized by others.

2.2. Co-inventorship

Co-inventorship requires: 1) an intellectual contribution (identification of a new, non-obvious technical aspect) – support for only physical, construction, and financial activities does not qualify as an intellectual contribution; 2) resulting in individualistic creative contribution – "creativity" is viewed as an activity and a degree of intellectual participation that corresponds to the average capability of a person skilled in the art assessed interrelated to the invented concept, in turn, "individualistic" corresponds to independency that should exceed pure assistance or implementation of activities that are attributed to the specified instructions; 3) to resolve a particular technical issue (in this regard, personal thoughts of novel solutions for a technical problem are relevant to determine "individualistic creativity" or impact on the result – this may also encompass the prevention of errors); 4) commonly (whether, objectively, co-inventorship can be identified as related to the same subject matter) (Haedicke & Timmann, 2014, pp. 248–251).

Similar to single inventorship, joint inventorship also gives rise to both personal and property rights. Each inventor enjoys non-transferable personal rights to be called a co-inventor. Property rights or rights to a patent are owned collectively (Haedicke & Timmann, 2014, p. 252).

Furthermore, property rights can be assigned in whole as a derivative. An example is the derivative acquisition of property rights in employment relationships. Therefore, only property rights but not personal rights can be transferred in the case of co-inventorship and owned commonly by shares based on the significance of the respective, individualized contribution (Haedicke & Timmann, 2014, pp. 252–253).

As it derives from the aforementioned, the concept of an "inventor" under the EPC is intrinsically linked with the underlying philosophy of elements that identify products as intellectual. It appears that, under the EPC, only a natural person is deemed an inventor. Thus, the respective aspects should be analyzed for a comprehensive understanding of the position.

2.3. Notion of an inventor as only a natural person under the EPC

2.3.1. Elements that identify intellectual products

From the travaux préparatoires of Article 60 EPC (1973, pp. 43, 108–110, 114–116), it can be deduced that under the EPC, the concept of only the physical person as an inventor was designed with an autonomous meaning or regardless of the respective interpretation under the national law. The notion was that only a natural person conceives an invention. Nonetheless, there was an intervention by France to also incorporate the legal person as an inventor. The substantiation was based on its respective national case law which foresaw that, after establishment, a corporation becomes an inventor. Discussions resulted in an exception for inventions developed during employment and reference to the national law. It was also accepted that the respective employee who created an invention is only entitled to moral rights.

The travaux préparatoires of Article 81 EPC (1973, p. 32) affirms the notion of the intellectual creation by an inventor. The emphasis is on the role of an inventor and the illegitimacy of profiting from the usurpation of an extraneous invention.

Generally, intellectual products may be identified based on elements: 1) an objectively observable form (visual or otherwise expressive, intangible teaching format). An idea without a concrete form of expression cannot be classified as an intellectual product; 2) properties apart from a form of expression of a product that distinguishes it from other creations. Namely, for the product to be conceived intellectually, the evaluation is made based on – a) qualities of the form of expression; b) intentions of respective creators towards the product as intellectual; c) the perception by the society; and 3) one or multiple human beings to whom the existence of the mentioned elements could be attributed (excluding non-natural actors as machine and animals). No intellectual product could be conceived in the absence of a human element. In this sense, incapacitated natural persons could create intellectual products (Pila & Torremans, 2019, pp. 69–73).

It should be noted that the mentioned criterion could create internal tension. Namely, the second element attributes the product as intellectual also based on the intention of the creator to make something of an intellectual nature. Simultaneously, the third criterion imputes the element of the intellect also to the incapacitated natural persons regardless of the cause of their incapacity (infancy, mental disorder, or other). Thus, depending on its nature, incapacity may wholly or partially deprive a person of the ability of the consciousness of their activities. It also comprises intentions behind the activities of a person, including the incentive to make intellectual products.

Furthermore, as was outlined, non-human actors cannot be perceived as intellectual creators either because of the presence or the absence of direction by a human (Pila & Torremans, 2019, p. 72). In this aspect, it can be deemed that the so-called "human creative consciousness" could similarly result from directions and teaching by other human beings (parents, teachers), external environment, and genetic material. Thus, creations by humans may not necessarily be said to be purely the product of their intellect without any external or internally inherited guidance. In this regard, the interconnection between the mentioned second criterion that defines the intellectual product and the third aspect that refers only to humans regarding products of intellect is blurred.

Hence, it can be concluded that the understanding of an intellectual product under the EPC is not necessarily linked with the incentive to innovate (the second criterion of elements of intellectual products outlined previously), but rather to the involvement of intellectual labor by one or multiple actors. In other words, the EPC *expressis verbis* does not require that the invention should be original. For the explanation of the argument, a parallel could be drawn to the stance towards copyright protection. Namely, creating work is an arduous process where the prevailing is not necessarily an initial concept but whether the intellect conceives something by a particular creation (Eco, 1986). In that regard, a pure execution solely does not necessarily embody an original idea since it can only be a mechanical repetition process. In terms of conception, decisive is the action in the human mind that results in an outcome, not the resulting idea that cannot be supported (Shemtov, 2019, pp. 20). Therefore, the execution could follow the idea and *vice versa*.

As it appears, only an overview of elements that identify intellectual products does not provide clarity of attribution of intellectual products solely to a natural person under the EPC. Thus, for a more comprehensive understanding of the position of an inventor as only a natural person under the EPC, the underlying philosophical concepts of intellectual products should be analyzed.

2.3.2. Philosophical concepts of intellectual products

2.3.2.1. Labor theory

Previous considerations also emphasize that the EPC legal framework is based on the Lockean Labor theory (Article 60 E Travaux Préparatoires, 1973; Mueller, 2020). This theory supports the attribution of natural property rights of previously unowned or common resources to a person who labors upon those resources in a proportionate amount so that it does not deprive others of similar rights (Locke, 1980). Hence, it constitutes the possession of a labored property as a reward for the efforts of a person but does not support monopoly rights. Patents for non-

naturally occurring genetic data such as gene sequences could serve as examples (*Association for Molecular Pathology v. Myriad Genetics*, 2013). It can be concluded that Lockean theory only supports reward for personal labor, not reward for the labor that, in reality, was made by others.

The EPC does not reward a pure idea without execution since it has adopted the labor theory literarily. Namely, for the EPC framework, whether an idea or execution was first is indifferent as long as the invention fulfills the patentability criteria. It can be approved, for instance, in cases of patents for the second medical use where the first is the initial medical use, after which only comes an idea of the second medicinal use (*AP-1 complex, SALK INSTITUTE*, 2004).

At the same time, the EPC also stands toward the reward of personal labor, either solely or collectively. Nonetheless, the EPC, in the sense of the right to be called an inventor, does not account for who performed a pure execution but who had some role in a creative concept. Simultaneously, the EPC does not exclude that a creative concept could result from a team effort, and it may be a set of random interrelated factors that leads toward the final idea.

In terms of involved labor, it pertains to inventions involving AI in the sense that humans are always behind the AI since it was a human or a team who programmed the set of steps which the algorithm follows, reads, interprets the results, and applies them (Shemtov, 2019, p. 35). This statement can be supported only partially. Namely, as was outlined before, the EPC approved only true and personal labor, or solo or co-inventorship, respectively. In regard to co-inventorship, there is no requirement that all co-inventors should equally conceptualize the creative concept or have an identical consciousness of their idea at the moment of the ultimate invention. It may be so that one idea leads towards another that eventually leads to the result. For example, it might be that the first actor does not even have the same awareness of the impact of an idea as the second, who uses the borrowed idea and manipulates it towards the outcome. The same goes for execution, where changes of a small fraction by one actor might lead to a different outcome as initially conceptualized by others. Creative contribution to the ultimate result of all the actors cannot be denied. In the example, co-inventorship might be attributed to all of the actors.

The same goes for inventions created by incapacitated persons. Newborns do not have "built-in" instructions apart from their genetic material. Besides, a child is nurtured by legal guardians, other persons, and the external environment from birth (Rutter, 2006, p. 153). The obstacle that the person might not be aware of what they are doing does not change the fact that they might have created an invention that only others could comprehend, interpret, and apply. In addition, nurture by others *per se* does not automatically and necessarily mean that these persons could have ever created or even conceptualized or come across the same phenomenon as the incapacitated person. A different situation occurs when other persons actively aided in creating a particular invention.

Interestingly, in cases, J 8/20 (*Food container*, 2021), J 9/20 (*Devices and methods for attracting enhanced attention*, 2021) (hereinafter – cases J 8/20 and J 9/20), the EPO refused appeals for the so-called DABUS application. Amongst others, the EPO stipulated that the inventor could only be a person with a legal capacity and that the machine cannot transfer any rights to a human; thus, a human cannot be a successor in title (EPO BA, 2021). Although those decisions are not available yet, there is an ambiguity regarding the amplitude of the meaning of the words "a person with a legal capacity": namely, whether the words should be interpreted narrowly as only excluding non-humans, or even more restrictively – excluding even legally incapacitated humans from inventorship. The narrowest meaning could be revolutionary since, as mentioned above, legal incapacity is hardly related to intellectual creation, even by accident, because legally incapacitated persons can also invent.

Similarly, in the case of AI, although humans are the ones that created the set of instructions, trained and applied the model, this does not necessarily mean that those creators could have ever reached the same outcome. It is undeniable that AI outperforms human capacity in many areas, and it might take numerous years for a human to conduct equal calculations and computations (Kim, 2020). Nevertheless, if the approach that humans in all activities, including inventive processes, are always behind AI is accepted, identical conclusions should then be drawn for creations made by incapacitated persons and in cases of co-inventorship. Namely, the fact that, for instance, the parent that nurtured the child did not create the invention does not necessarily mean that it could not eventually, or even its descendants, achieve the outcome. Analogous is the fact that the author of the initial idea

did not comprehend "the bigger picture" of the potential of their idea at the time does not mean that the person could not have ultimately reached the same outcome. In this regard, solo inventorship should have been granted to the parents and the author of the initial idea.

However, the EPC legal framework does not support this kind of "usurpation" of the reward, but instead follows the "first-come, first-served" principle. If the person who nurtured AI did not have an idea of all of the ultimate inventive outcomes, the reward for the respective labor, subsequently, *mutatis mutandis*, should not be attributed to said human. For instance, genetic programming is a systematic method that applies an evolutionary approach or a Darwinian theory of natural selection to automatically solve the problem by computer programs (Koza et al., 2003, p. 1). Genetic programming is also used in the field of AI. Nevertheless, a fitness measure (that has to be measured amongst the candidates) does not comprise all the conditions, conscious or unconscious, that may have crossed a human mind (Koza, 2010, p. 273). Hence, considering adaptation to changing external conditions, genetically evolved solutions may encompass features that would never occur to humans (Koza et al., 2003, p. 22).

Another aspect that has been outlined is that humans are always behind the invention, since a human pre-programmed also randomness and because AI *per se* does not have any built-in instructions; therefore, it could not deviate from those programmed by humans (Kim et al., 2022). It should be noted that AI might also display an output by mistake that has not been pre-programmed by a human. The erroneous output could be an invention as well, and could be used as a step towards the ultimate result.

Hence, human labor and consciousness might not be behind the entire conception. It might be perceived that all inventorship might not be referable only to the respective humans, but the role of AI should also be reflected. Otherwise, the EPC legal framework should be re-conceptualized if the labor that cannot be entirely attributed as own could be left unrecognized.

It can be concluded that contrary to tangible property rights, the EPC legal framework stipulates that the invested labor should be rewarded only for twenty years with a possible extension (Article 63). Thereby, the EPC rewards intellectual work with limited ownership despite the actual time that has been involved in creating an invention, even if it exceeds twenty years. That could be the case, for instance, for drug development as was with the treatment for Alzheimer's (Lalli et al., 2021). The EPC does not consider the actual labor put into creating an invention but has incorporated the limited reward time. Hence, the EPC adjustment serves to enrich common general knowledge instead of the proper reward for the involved labor.

2.3.2.2. Personality theory and the theory of value-added labor

According to Personality theory, the justification for the reward of the extension of personality in the form of intellectual creation (Drahos, 2016; Hughes, 1988) would not answer for the balance of the interests since the personality of an inventor is not limited to the short patent protection time.

Analogously, the theory of Value-Added Labor could not justify the EPC legal framework for the reward concept. According to the theory, the efforts of creators that enhance the public good are rewarded by granting intellectual property rights (*mutatis mutandis Mazer v. Stein*, 1954, para. 35). Generally, unlike real estate, intellectual property may grant a benefit to its subject only through its commercial utilization or disposal to another person (Pretanar, 2009). However, the patent owner could use the patent only to deprive others of the utilization of the invention (*mutatis mutandis Continental Paper Bag. v. Eastern Paper Bag*, 1908, para. 424–425). Moreover, the patent information could even be rendered confidential based on the law, as is the case with inventions for defense purposes as foresees the agreement by the member states of the North Atlantic Trade Organization (Agreement for the Mutual Safeguarding, 1960). The principle of secrecy has been subsequently incorporated within the national law, for instance, in Estonia (Patents Act, 1994, Article 18.1), Latvia (Patent Law 2007, Article 11, 69(2)), and Lithuania (Patents Act, 1994, Article 26).

2.3.2.3. Utilitarian theory

Furthermore, even the Utilitarian theory that stands toward the maximization of social welfare enshrined in the criteria of industrial application of the invention in the patent context (Pila & Torremans, 2019; Lee et al., 2021) cannot be a justified basis for the EPC patent legal framework. The essence of the theory is that the patent system must be seen in the context of economics and not philosophy (*mutatis mutandis Brenner v. Manson*, 1966, para. 386). It can be argued that the welfare of society cannot be based solely on economic gain without regard to moral and ethical considerations. Being guided solely by economic considerations, especially regarding granting patents for biotechnological inventions, may have severe consequences for human development (Kim, 2020, p. 447). For instance, this was the case with the so-called Onco-mouse patent application (*Transgenic animals/HARVARD*, 2004).

Thus, from the previously explored philosophical concepts, it can be concluded that the philosophical approach *per se* does not justify he right to be called "inventor" under the EPC only for humans. Despite the aforementioned, the DABUS case has outlined that the EPO does not support the attribution of an inventive role to machines due to the lack of their legal capacity. What can be concluded as a result of analyses incorporated within section 3 of this article is that, although the term "legal capacity" entails ambiguity regarding its interpretation, it would seem to be too revolutionary to also exclude from its scope persons that lack legal capacity, such as minors. Although legally incapacitated persons may lack consciousness or understanding of their activities, that does not necessarily mean that these persons cannot invent. In these situations, the inventive role would be attributed to the incapacitated person and not the persons that provided nurture. Analogous observations are also attributed to "co-inventorship".

Nevertheless, the EPO has not taken a similar approach regarding recognition of the role of AI in the inventive process, not beyond solely as a tool. Namely, contrary to the position of the inventive role of legally incapacitated persons, the EPO takes a stand that there is always a human behind AI; thus, the role of AI in the inventive process cannot exceed more than just a tool. Hence, it appears that the EPC entails a plurality of aspects defining the concept of an "inventor", seemingly addressing an incentive for innovation of creators.

The understanding of the concept of "inventor" in general also depends on cognitive position (Kim et al., 2022, p. 26). As was outlined, the current stand for an "inventor" under the EPC as only a human lies in the aspect that only humans may have incentives to innovate. Hence, only the role of a human in the inventive process should be recognized. Thereby, considering whether the accepted meaning of an "inventor" under the EPC still addresses the incentive to innovate, it should be determined what constitutes an incentive for innovation and whether the reflection of the role of AI in the inventive process would impact the incentive to innovate.

3. An incentive to innovate

The general stance is that the inventor is the first owner of the invention (Shemtov, 2019, pp. 11). Nonetheless, there exist exceptions within the national jurisdictions; for instance, in the Netherlands (The Dutch Patent Act, 2009), France (Intellectual Property Code, 1994), and Japan (Patent Act, 1959), where the law attributes the first ownership to an employer in the employment relationships. Therefore, jurisdictions without assignment of ownership rights or based on law leave the discretion for the respective employees and employers to agree on whether the first owner of the invention should be an employee instead.

The monopoly theory stipulates that the incentive to innovate stems from the moral and financial reward since the purpose of the patent is to promote scientific development by ensuring the protection of the rights of the inventor and the owner. The mentioned social contract represents the disclosure of the working principles of the invention, promoting scientific development in return for monopoly rights (Carlson, 2020).

Another theory stipulates that the incentive to innovate does not depend on the possibility of obtaining monopoly rights but rather on the chance of gaining any benefit that, in turn, increases competition. It is attributed to the fact that no barriers exist to entering the market to various patent approaches that solve an identical technical problem for inventions involving, for example, natural resources. Thus, the patent framework facilitates fair competition,

not allowing a patent to be granted without personal innovative efforts. In this regard, anyone can be an inventor, not only the one with a monopoly of resources (Pretnar, 2009, pp. 847–851).

There is a stance that recognition of the role of AI in the inventive process would benefit only those with considerable resources constituting monopoly rights (McLaughlin, 2018, p. 26). Nevertheless, an opposing view reflects that due to the involvement of AI, on the contrary, especially in the biotechnology field, the number of researchers has increased (Lee et al., 2021, p. 44). This is also attributed to the reduction of costs for large-scale computation exceeding the amount of genetic data processing which could most efficiently be done by applying deep learning (Ravid, 2018, p. 2241). The mentioned contradicting view could also be supported by the fact that, for instance, the EPC does not limit the number of inventions per actor, actors per invention, or co-existence of similar inventions by multiple actors. Thus, it derives that everyone has an equal opportunity to be an inventor under the EPC. Besides, the EPC does not preclude the *modus operandi* of creating an invention – whether by accident, luck, lengthy efforts, circumventing existing patents, or others. Hence, it appears that, amongst both of the mentioned theories, the incentive of the involvement of AI in the inventive process lies not in the monopoly purposes but rather in gaining any benefit that, in turn, increases competition.

The view exists that the role of AI in the inventive process should not be recognized since AI does not need more than electricity (Samuelson, 1985, p. 1199). However, it can be deemed that in the patent framework, the needs of an inventor are equally important as the needs of the general public. In other words, the benefit for an inventor should correspond to the benefit for society. Namely, the goal of the patent is also to enrich general knowledge. However, for instance, there could exist the legitimate aim for an inventor not to render an invention public, such as in cases of inventions for defense purposes (Agreement for the Mutual Safeguarding, 1960), which prevails in the public interest to gain publicly available information about the invention. In this case, the primary benefit for the society would be not obtaining available information about an invention but rather public defense.

Analogous to this, there could exist an interest of an inventor not to gain a personal benefit but to enrich general knowledge as a primary goal to obtain a patent. Thus, instead of personal financial benefit, an incentive for an inventor is to provide a benefit for society. For instance, the incentives behind the DABUS case were not to obtain monopoly rights but: 1) to enrich the common general knowledge; 2) to facilitate scientific progress; and 3) not to dilute the patent legal framework by allowing humans to usurp the reward, thus creating economic stability (Abbott, 2020, pp. 12, 72).

In conclusion, the incentive to invent is not intrinsically linked to a desire to obtain ownership. Instead, ownership follows from a created invention, but does not automatically indicate possession since there are also concepts stipulating attribution of ownership not to a creator but, for instance, to the employer or contractor without a separate assignment (Intellectual Property Code, 1994; The Dutch Patent Act, 2009; Patent Act, 1959). In addition, in the field of innovations involving AI, there exists both: 1) the incentive to innovate in general; and 2) the desire for the recognition of the AI role in the inventive process. Furthermore, in the case of inventions created by incapacitated persons, the legal representative is obliged to pursue the best interests of the respective person. This may also comprise submitting the patent application on behalf of an incapacitated person. Similarly, it appears that an incentive for the role of AI in the inventive process to be recognized appears to be rather primarily related to enriching general public knowledge, facilitating scientific progress, and providing stability by not allowing humans to usurp unrelated rewards for labor conducted by AI. Hence, financial reward due to gaining a patent does not seem to be the main reason behind an incentive to innovate in these cases.

Therefore, due to the development of new technologies, the concept of an “inventor”, at least in the industry, is shifting towards pluralism. Since the mentioned incentives are present, the potential solutions to address the incentive should be observed.

4. Solutions to address the inventive role of AI

4.1. Solutions that involve amendments to the EPC legal framework

As outlined in previous sections, the decisions by the Board of Appeals of the EPO (hereinafter – EPO BA) in cases J 8/20 ruled that under the EPC, only a human can be an inventor mentioned in the application and that machines do not have the legal capacity to transfer rights to a human. In this regard, the mentioned decisions signalize that EPO treats AI solely as a tool under the existing EPC legal framework. Moreover, the wording by the EPO BA does not even presume that recognition of the inventive role by a subject other than a human could be compatible with the EPC. Hence, the approach by the EPO differs from its stand toward products of nature. In other words, according to Article 52(1)(a) EPC, a purely natural phenomenon is not patentable (cannot be usurped) because it lacks an innovative element or technical teaching. However, concerning inventions involving AI, the EPO does not follow a similar path allowing usurpation of creations.

Thus, it appears that unless AI reaches a singularity level, it is hardly likely that the inventive role of a machine, regardless of its legal form, would be recognized under the EPC legal framework. Thereby, none of the following approaches would be potentially recognized by the EPO: 1) *sui generis* electronic personhood for AI (EP, 2017). Nonetheless, there is opposition to the approach of AI as a legal person (presumably, in the sense of Commercial Law) by other actors in the field of AI, for instance, UNESCO (2021, p. 16); 2) personhood for AI similarly as for inanimate objects (*Sierra Club v. Morton*, 1972) for the purposes of being recognized as a "co-inventor" or "co-contributor" only in a moral sense (proposed by the author); and 3) status as a legal person for AI similar as is under the Inheritance Law (proposed by author), for instance, in Latvia (Civil Law, 1937, Provision 383), according to which an estate is a legal person that may acquire rights and assume obligations. A human acts as a legal guardian or a trustee of an estate to guarantee civil stability. *Mutatis mutandis*, the approach could embrace only the ability for AI to have the right equated with a "co-inventor" in a moral sense. A human would act as an owner of the invention based on the law without additional succession. Besides, a human would also have to act as a trustee and legal guardian for AI in other legal matters based on law.

Another approach that could be taken but most likely will not be supported by the EPO for the reasons mentioned previously would be recognition of the role of AI as a "contributor" or "co-contributor" in output generation. Germany has taken the direction of this approach in DABUS applications DE 10 2019 128 120 (*Food container*, 2020) and DE 10 2019 129 136.4 (*Devices and methods for attracting enhanced attention*, 2020) (hereinafter – applications DE 10 2019 128 120 and DE 10 2019 129 136.4). In delineating, the patent office, similarly to the EPO, stated that an "inventor" mentioned in the application could be a human. However, conversely to the EPO, the German Federal Patent Court, in a decision that is not yet publicly available, took the stance that the involvement of a computer represented by a human could be mentioned in the application (O'Neil, 2021).

Interestingly, Germany was one of the countries that took an active role in designing the concept of an "inventor" under the EPC (Article 60 E Travaux Préparatoires, 1973; Article 81 Travaux Préparatoires, 1973). However, the EPC was implemented before the emergence of AI. Thus, the fact that Germany took an approach also may signal that there is a development of pluralism in the AI role in the inventive process.

It should be noted that the German Federal Patent Court (hereinafter – GFPC), similarly to the EPO BA, dealt not with the substance of an "inventor" but with the designation of the inventor in the application (O'Neil, 2021). Nevertheless, considering discussions reflected in the travaux préparatoires (Article 60 E Travaux Préparatoires, 1973; Article 81 Travaux Préparatoires, 1973), the substance of an "inventor" under the EPC refers only to a human. Hence, the motivation of the GFPC could be to find a compromise between an incentive for the role of AI in the patent framework to be recognized and not diluting the respective legal system. However, as mentioned before, the GFPC dealt only with aspects of the formal side of an application. Considering that the GFPC also stated that an "inventor" could only be a human, the approach suggested by the GFPC that the involvement of a computer could be mentioned in the application would still not address an incentive for the role of AI in the inventive process to be recognized not only as a tool.

Alternatively, proposals to leave the block of the designation of the inventor in the patent application blank and to mention only a legal person as an owner have been suggested (O'Neil, 2021). None of these approaches might be supported under the EPC despite the incentives. Namely, Rule 20 EPC allows an inventor to waive rights to be mentioned as an inventor. In this regard, even if a human has been partly involved in the inventive process, a waiver of rights would still not provide information on the role of AI in a particular inventive process, not addressing the incentive to innovate. Hence, the solution would not address the previously mentioned incentive to innovate.

Furthermore, the designation of a legal person as an owner would also require conceptual amendments to the EPC. In other words, the EPC, as also reflected in the travaux préparatoires (Article 60 E Travaux Préparatoires, 1973; Article 81 Travaux Préparatoires, 1973), precludes the designation of a legal person as an attributer of personal rights. Hence, conversely to countries that by law allow for an employer (Intellectual Property Code, 1994; the Dutch Patent Act, 2009; Patent Act, 1959) to be an inventor also in personal rights, the EPC does not follow a similar path. This suggestion would not correlate with the ruling by the EPO BA in cases J 8/20 and J 9/20 that a machine is not entitled under the EPC to transfer rights, including rights to apply for a patent on behalf of a machine. Thus, it appears that the EPO would hardly likely support the proposal.

Moreover, the DABUS application has also been denied in the United Kingdom (*Thaler v. The Comptroller-General of Patents, Designs And Trade Marks*, 2020) and in the United States of America (*Thaler v. Hirshfeld*, 2021), stipulating similar reasoning as the EPO BA in cases J 8/20, J 9/20. Conversely, the patent for DABUS indicated as an inventor has been granted in South Africa (DABUS, 2021, p. 255) and ruled in favor of in Australia (*Thaler v. Commissioner of Patents*, 2021).

It is worth mentioning that the Federal Court of Australia (hereinafter – FCA) initiated to interpret the term "inventor" not grammatically but as a living instrument in the present-day context to fulfill the social contract between an incentive to innovate and patent protection. The court also recognized that algorithms with such a complex architecture as the DABUS could be deemed semi-autonomous or even autonomous. Furthermore, the FCA ruled that AI can be an inventor but not an applicant or a patent grantee. It was also noted that the "derivation" of rights is not limited to "assignment" since the owner can be entitled to fruits yielded by its possession (*Thaler v. Commissioner of Patents*, 2021, pp. 124, 126, 189, 198, 226).

It derives that the judgment by the FCA follows the direction of proposals two and three outlined above – recognition of moral rights for AI as an inventor and ownership rights for a human. Simultaneously, the FCA takes an approach to the derivation of rights based on possession of AI, not based on law. In this regard, the FCA proposes an approach different from that existing under the employment relationships for possession of inventions. Instead, it seems that the path of the FCA is a mixture between property rights and intellectual property rights. The EPO BA has not followed this approach, since it enacted its ruling in cases J 8/20 and J 9/20 after the FCA.

Therefore, it appears that under the current patent framework evolves legal pluralism toward the role of AI in the inventive process. Considering that the concept of an "inventor" is a subject of the national law (European Commission Directorate-General for Communications Networks, Content and Technology, 2020, p. 9) and following the outcomes of observed DABUS patent applications, the decentralized approach to the role of AI in the inventive process prevails. Thus, it seems that the role of AI in the inventive process not only as a tool could be more likely recognized: 1) in patent systems that intend to interpret the concept of an "inventor" as a living instrument like in Australia (*Thaler v. Commissioner of Patents*, 2021); and 2) under national patents in countries that do not attribute the concept of an "inventor" solely to a natural person – for instance, Cyprus, Monaco (EPO, 2019, p. 4).

4.2. Certification

Considering that most likely none of the previously mentioned approaches would be currently supported under the EPC or the concept of an "inventor" broadened, the author proposes certification as an alternative path to solutions mentioned in the former sub-section that would require conceptual amendments of the EPC for the role

of AI in the inventive process to be recognized not only as a tool. Namely, certification as a *sui generis* mechanism could be an alternative to the protection under the EPC in countries of its territorial jurisdiction. This approach could be introduced as a voluntary primary for inventions where the role of AI not only as a tool in the inventive process is desired to be recognized, but also available for other inventions involving AI if chosen.

In more detail, the certification could be introduced as *sui generis* mechanism similarly as, for instance: 1) in the electricity market (Norwig, 2020), where a certificate approves the possession of a particular amount of generated electricity by the owner (Karakosta & Petropoulou, 2021, p. 2); 2) for medical devices also comprising medical devices applying AI (EP, 2017); and 3) as suggested by the so-called AI Act (European Commission, 2021). Despite the criticism towards the specifics of the certification proposed in the AI Act (Ebers, 2021; Ebers et al., 2021, pp. 589, 595), it can be deemed that the proposal emphasizes the extraordinariness of AI from other phenomena due to which there is a necessity to introduce an AI-specific, *sui generis* legal framework.

In this regard, analogous to electricity, a certificate could *mutatis mutandis* affirm the role of AI in creating a particular invention. Simultaneously, a certificate could act as a tracking mechanism for the state-of-the-art and prior art for AI involvement in the inventive process. Thus, it could provide legal certainty on the extent of human input in the inventive process. At the same time, the certification could address the increasing incentive to innovate if the role of AI in the inventive process is recognized not only as a tool. Namely, it would be possible to alienate the certificate as other assets, depriving others of obtaining the certificate for the same invention. Additionally, it would be possible to allow others to use the certified invention in return for compensation or as gratuitous, similar to patents under the EPC. Hence, the certification would also, simultaneously, provide a financial benefit for its owners in the respective area if desired. Additionally, rendering public all the inventions to which certificates will be issued could also promote scientific development and enrich general public knowledge.

As was mentioned before, an incentive to innovate if the role of AI is recognized not only as a tool lies not primarily in a financial benefit but rather: 1) to complement the general public knowledge; 2) to improve scientific progress; and 3) to maintain economic stability or not to impair the patent legal framework by permitting natural persons to usurp undeserved reward of labor conducted by AI (Abbott, 2020, pp. 12, 72). Considering the aforementioned, certification would allow addressing all the outlined incentives. Namely, certification would not require one to settle for recognition of the role of AI in the inventive process, as would opting for protection under the EPC. Additionally, certification would also not require one to reconcile with a "covered" role of AI in the inventive process that would still not provide the complete disclosure as suggested by the GFPC (applications DE 10 2019 128 120 and DE 10 2019 129 136.4); thus, would not address the mentioned goals above. Opting for the stipulated approaches that would not allow for recognizing the true role of AI in the inventive process would instead disregard the respective, long-standing incentives to innovate (O'Neil, 2021).

Therefore, the *sui generis* certification could exist in parallel with the EPC patent legal framework, similar to the possibility of registering a utility model in many countries, for instance, Germany (World Intellectual Property Organization, n.d.). Furthermore, similarly to the utility models, choosing a certification would deprive patentability since an invention would already become state-of-the-art. However, *vice versa*, the certification would also prevent others from patenting an identical invention since the creation would already become public. Therefore, certification would not dilute the EPC but would provide economic stability by not allowing humans to usurp the undeserved reward for labor that, in reality, would be deemed conducted by AI. Certification would also provide a benefit by facilitating fair competition. Namely, certification would allow humans to "compete" with humans and AI with AI. Hence, it would entail economic stability by disclosing to the public the true role of humans and AI in the inventive process, not permitting usurpation of the reward for non-conducted labor. Thus, certification would provide a choice as to whether to reconcile with the recognition of the role of AI as not more than a tool and to apply for a patent under then EPC or to opt for certification.

Additionally, unlike the utility model, the evaluation criteria for *sui generis* certification could require equally stringent criteria of the invention as a patent under the EPC except for the possibility of recognizing the role of AI in the inventive process, not solely as a tool. The protection period or validity of a certificate could be less than for a patent depending on the extent of the role of AI in the inventive process. At the same time, certification could provide a proper and justified reward for the creative efforts of a human, not diminishing the incentive to

innovate. The justification is that inventive activity for AI could require less effort than is required for a human. Hence, the protection time could be diminished accordingly.

In turn, the evaluation period to issue a certificate could be equal to or lower than for a patent depending on the evaluation criteria, namely, whether, for instance, the "non-obviousness" element would be equally stringent since AI will act as a "co-contributor" in the inventive process. Furthermore, certification fees could be equal to or less than for a patent depending on the designated competent authority – patent office or other – to evaluate the invention and grant a certificate. One approach could be to unify the certification proposed in the article with the certification suggested by the AI Act and performed by a legitimized body. Namely, the certification proposed in the AI Act could be a starting platform and could be adjusted to evaluate the role of AI in the inventive process. A variety of certificates could be issued depending on necessity.

The proposed certification is suggested as voluntary and not an additional, mandatory procedure, especially in fields with already existing certifications as for medical devices (Regulation (EU) 2017/745 and (EU) 2017/746). Thus, no additional, objectionable administrative onus would be imposed on the involved parties by the proposed certification. Moreover, the AI Act foresees compulsory certification for AI algorithms of a particular risk that are also intended to be placed in the market in the European Union (hereinafter– EU). Besides, many member states of the EPC (EPO, 2022) are also bound by the AI Act. Thus, a unified certification approach could save resources for all the involved stakeholders due to the ability to conduct centralized certification.

During the proposed certification, the main focus would be evaluating technical aspects of the role of AI in a particular inventive process, not examining the ethical and moral justification of the output. Nevertheless, those additional observations could be verified if desired by those that would opt for it. This option could aid in alleviating the administrative burden of undergoing multiple certifications for several purposes. In other words, it appears that the AI Act renders said regulatory framework for AI as a part of the novel public order. Hence, if the AI Act is enacted, then certain-risk algorithms intended to be placed in the market in the EU would also have to comply with the introduced moral and ethical considerations. Hence, an opportunity to undergo unified certification could relieve the onus.

Furthermore, the role of AI in the certificate would be recognized in a moral sense, mentioning it, for instance, as a "co-contributor" in the inventive process along with the respective humans. The owner and applicant for a proposed certificate would be a human. Similarly, a human would also exercise other legal matters, thus, acting as a trustee, legal guardian for AI based on law. Hence, no additional contractual assignment of rights would be required.

This approach could primarily be of interest to actors that would want to place the invention in the market in the EU and, at the same time, for the AI inventive role to be recognized not only as a tool. Nonetheless, this suggestion could also be considered for territories outside the scope of the EPC. Furthermore, a combined approach could be considered for territories with utility models.

The incorporation of certification would require both political *consensus* and also respective legal adjustments. Nevertheless, certification would not require amending the EPC. Therefore, incorporating certification would not impair the current legal framework of the EPC. Instead, certification would provide an opportunity not to hide the role of AI in the inventive process. Hence, certification would allow maintaining economic stability by providing trustworthy information on the role of AI in the inventive process. Thus, certification would not permit humans to usurp the reward of labor, in reality, conducted by AI, publicly disclosing it. In this regard, certification would facilitate the enrichment of general public knowledge since the society would obtain comprehensive information about the invention and involved actors. Thereby, certification would: provide a proper reward in cases of inventions involving AI; not deprive an incentive to innovate toward those that desire the role of AI to be recognized in the inventive process not solely as a tool; and not dilute the existing EPC legal framework.

Conclusions

AI and its sub-field ML have a considerable capacity to improve various aspects of society. Due to increasing computation power and decreasing respective expenditures, AI and ML have numerous applications, for instance, in health care, drug discovery, and others. Consequently, augmentation of the complexity of ML models leads closer to the singularity of AI.

More and more incentives to innovate are related primarily not to gaining either monopoly rights or any benefit that aids in diminishing losses. Instead, an increasing incentive exists to enrich common general knowledge and promote economic stability by recognizing the role of AI in the inventive process beyond its use solely as a tool. In other words, usurpation of reward is not supported by labor conducted by AI by indicating a human either or also as an inventor.

Nevertheless, the EPC was designed before the emergence of AI and also incorporated labor theory, recognizing only humans with a legal capacity as inventors. The author deems that the EPC *per se* incorporates legal pluralism since even legally incapacitated humans, for example, minors, could invent without consciousness of innovative conception.

During the development process of Articles 60, 81 of the EPC, the proposal to cover legal persons under the concept of an "inventor" was not supported. The EPO BA in cases J 8/20 and J 9/20 basically reaffirmed the approach reflected in the respective travaux préparatoires. In this regard, contrary to the FCA, the EPO BA has not opted for the interpretation of the concept of an "inventor" as a living instrument in the present-day context. Based on the above, most likely, none of the following listed approaches proposed in the literature and intended for the role of AI to be recognized in the inventive process not solely as a tool under the EPC would be supported:

1) *sui generis* electronic personhood for AI; 2) in parallel with a human inventor, where the involvement of a computer represented by a human could be mentioned in the application; 3) to leave the block of the designation of the inventor in the patent application blank and to mention only a legal person as an owner; or 4) designation of a legal person as an owner.

An analogous argument is attributed for approaches that the author has added to address the role of AI in the inventive process under the EPC not only as a tool: 1) personhood for AI similarly as for inanimate objects for the purposes of being recognized as a "co-inventor" or "co-contributor" only in a moral sense; 2) status as a legal person for AI similarly as is under the Inheritance Law, for instance, in Latvia. This approach could embrace only the ability for AI to have the right equated with a "co-inventor" in a moral sense – a human would act as the owner of the invention based on the law without additional succession and as a trustee or legal guardian for AI in other legal matters based on law; and 3) recognition of AI as a "contributor" or "co-contributor" in output generation. The role of a human would be similar to that mentioned in the previous clause.

Namely, the outlined proposals would require conceptual amendments to the EPC. Nevertheless, the so-called DABUS case has reflected that the stance of the EPO is not in favor of the respective amendments. Hence, none of the listed suggestions would serve as a solution to balance an incentive to innovate if the role of AI is recognized not solely as a tool in the inventive process with the legal framework of the EPC.

Consequently, under the existing patent frameworks, the role of AI in the inventive process could be more likely recognized: a) in patent systems that intend to interpret the concept of an "inventor" as a living instrument like in Australia; and b) under national patents in countries that do not attribute the concept of an "inventor" solely to a natural person – for instance, Cyprus, Monaco.

It derives that under the current EPC legal framework, AI is, and probably will be until it reaches singularity, considered solely as a tool in the hands of a human inventor. As a remedy for recognizing the role of AI in the inventive process and addressing the respective incentive to innovate, the author proposes certification. The *sui generis* voluntary approach could exist in parallel with the EPC primarily to recognize the role of AI in the inventive process and could be available for others as well if desired. The certification suggested in the AI Act

could be used as a starting point to diminish administrative burden. It should be adjusted and rendered centrally, with certification as proposed in the article. Said certification could exist along with the systems of utility models, or a unified system could even be considered.

The suggested certification would require respective political choices and legal amendments. However, simultaneously, it would not dilute the EPC legal framework and would remedy an incentive to innovate if the role of AI as not only a tool in the inventive process was recognized.

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