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CONTENT

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THE DUTY OF DISCLOSURE AS A BASIS FOR FAIR INVESTMENT ARBITRATION PROCEEDINGS

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Abstract. The duty of disclosure is a fundamental precondition of fair arbitration proceedings. Though the importance of this duty in investment arbitration is obvious, its content and application pose various questions which require complex analysis. The lack of common binding sources of the duty of disclosure leads to practical difficulties and may curb the effectiveness of arbitration proceedings and lead to successful challenges of arbitral decisions. The question arises as to which relevant information and circumstances arbitrators shall disclose to the parties and how. This research aims to reveal the standards for arbitrators to reveal information which may be relevant for ensuring the fairness of arbitration proceedings and how this duty should be exercised. The authors analyze the relevant rules on the duty of disclosure in the rules of arbitration and case law. Special attention is drawn to the protection of the right to a fair trial. The authors find that though there are no generally accepted standards of the exercise of the duty of disclosure in investment arbitration proceedings, arbitrators shall reveal to the parties all information which may be relevant to assess their impartiality. Furthermore, the exercise of this duty is continuous during arbitration proceedings. The latest development of the case law of the European Court on Human Rights in the *Beg S.p.a. v. Italy* case reveals the practical problems of the application of Article 6 of the European Convention on Human Rights in arbitration proceedings, and also highlights the importance of the proper exercise of the duty of disclosure in arbitration proceedings.

Keywords: right to the fair trial, investment arbitration proceedings, duty of disclosure in arbitration proceedings.

Introduction

Impartiality of the tribunal is a fundamental principle of fair proceedings (Clooney & Webb, 2020). The full disclosure of relevant information and circumstances by an arbitrator is indispensable not only to ensure the legitimacy of arbitral proceedings, but also to allow the parties to assess whether they wish to exercise their rights to challenge an arbitrator, or if they are of the view that the arbitrator meets the required standard of independence and impartiality (Born, 2011, p. 1620). This not only prevents a successful challenge that would otherwise disrupt the arbitral proceedings, but also lays the ground for the possible estoppel argument of the accepting party later seeking to challenge an arbitrator based on the same circumstances (Caron & Caplan, 2013, p. 195). The problems of the duty of disclosure of the relevant information and circumstances have already drawn scholars' attention (Leung & Chan, 2021).

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Nevertheless, there are uncertainties as to how far the arbitrator's duty to disclose should stretch. What exactly constitutes this duty? Should an arbitrator disclose only those circumstance that if not disclosed would constitute a successful challenge of the award? The question also arises as to what standards of impartiality should be applicable. Since the right to a fair trial established in the European Convention on Human Rights (hereinafter – the Convention), including the requirement for impartiality of arbitrators, is applicable in arbitration proceedings (Višinskytė, Jokubauskas, & Kirkutis, 2021), should this standard be the same as in the courts? To reveal the standards that constitute the duty of disclosure and how it should be exercised, the authors analyze various national laws and international soft law instruments which regulate this duty in arbitration proceedings. The relevance of this research is also confirmed by the current activities of the UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), which announced the Draft Code of Conduct for the Possible reform of investor-State dispute settlement (ISDS) in September 2022 (hereinafter – Draft Code of Conduct) which also establishes the duty of disclosure in arbitration proceedings. Thus, the international community is still looking for the optimal standards of the duty of disclosure, and this question remains unanswered.

This article focuses on an arbitrator's duty of disclosure for circumstances that may give rise to a successful challenge of arbitrator in investment arbitration proceedings. Thus, the aim of the article is to analyze the content and exercise of the duty of disclosure in investment arbitration proceedings and asses how the exercise of this duty is linked with the fairness of arbitration proceedings.

In certain situations, some circumstances, if not disclosed, will not have any "tangible" effects on the proceedings, yet they still fall within an arbitrator's professional duty of disclosure. The exact scope of the duty, as it largely depends on the circumstances of a given case, cannot be identified, though some common characteristics can be defined. First, the general framework regulating the duty is presented. The authors reveal the common standards for arbitrators to reveal relevant circumstances and how they should be exercised. Due to the limits and scope of this research, the authors focus mostly on the rules on disclosure established in the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration (2014) (hereinafter – the Guidelines) and the UNCITRAL Arbitration rules (2013) (hereinafter – the Rules) which, in the authors' opinion, reflect the main common standards of this problem. Thus, the authors do not analyze other arbitration rules of arbitration institutions such as the ICC, the VIA, the SIAC, Swiss arbitration rules and others. The analysis of these rules is also not particularly relevant for this research since the crux of the research is an analysis of the fairness of arbitration proceedings and how the standards of the right to a fair trial shall be ensured in investment arbitration proceedings.

Second, the main characteristics of the duty of disclosure are presented. Third, the problems of the application of Article 6(1) of the Convention on arbitration proceedings are analyzed. Since the procedural guarantees are to a certain extent applicable to arbitration proceedings, the authors analyze the current development of the case law of the European Court of Human Rights (hereinafter – the ECHR), which reveals the importance of the proper exercise of the duty of disclosure to ensure fair arbitration proceedings. This analysis reveals that the proper exercise of the duty of disclosure is intertwined with the requirement for fair arbitration proceedings, and the ECHR has established high standards for arbitrators for the time-proper implementation of this duty.

This article consists of four parts: first, it deals with the legal and regulatory framework of the duty of disclosure; second, it assesses the scope of the duty of disclosure; third, it analyzes the duty of disclosure and the right to privacy of arbitrators; and fourth, the standard of the duty of disclosure in the case law of the ECHR and the problematic aspects related to the right to fair trial are disclosed.

To reveal the problems of the research, the authors rely on methods which are common in such types of research (comparative, logical). Comparative analysis is the main method employed, and it is used for the assessment of the relevant rules which regulate the duty of disclosure in investment arbitration in both national laws and international soft law instruments. The logical method is used to make conclusions and provide suggestions as to how arbitrators shall exercise the duty of disclosure.

1. The Framework Regulating Disclosure

There are no generally accepted international standards as to the duty of disclosure in arbitration. Nevertheless, some developments can be recognized in this area. Pursuant to Article 12(1) of the UNCITRAL Model Law, prior to and during their appointment an arbitrator shall "disclose without delay any circumstances likely to give rise to justifiable doubts as to his impartiality or independence". Thus, even before the appointment procedure of an arbitration is carried out, the arbitrator has a duty to reveal all circumstances which may raise doubts as to their impartiality. Some States, such as the United States (Federal Arbitration Act Sect. 10 (2)) or the United Kingdom (Arbitration Act of 1996 Sect. 24(1) (a)), opt not to mention the duty to disclose separately, but rather refer to the independence and impartially of arbitrators in relation to the challenge proceedings.

One of the codifications of the general standards of impartiality of arbitrators is the Guidelines. The Guidelines were first issued in 2004, and the renewed version was released in 2014. Even though the Guidelines are often referred to by counsels, arbitrators, arbitral tribunals and even national courts, they remain a soft law, non-binding instrument adopted by a private body. Initially, the Guidelines were intended to be applied to commercial as well as investment arbitration, yet their application in investment arbitration remains controversial (IBA, 2014, para. 167).

General Standard 3 of the Guidelines (IBA, 2014) is dedicated to disclosure. It states that an arbitrator shall disclose such facts or circumstances that may, in the eyes of the parties, give rise to independence and impartiality. Two aspects of this provision are important. First, the word "shall" leaves no discretion to an arbitrator to decide on whether to disclose, but rather imposes a duty to do so. In determining what information to disclose, an arbitrator should consider all circumstances known to them (Explanation to General Standard 3 (d), p. 9). Any doubt as to whether to disclose certain facts or circumstances should be resolved in favor of disclosure (General Standard 3 (d), p. 9). Second, "in the eyes of the parties" indicates that the arbitrator shall assess the situation through the position of the parties as to whether to disclose certain facts. The rationale here rests on the principle that the parties have an interest in being fully informed of any facts or circumstances that may be relevant in their view (Explanation to General Standard 3 (a), p. 7). The Guidelines are intended to be a helpful tool to the arbitration community, and are not legal provisions that are either capable of or intended to override the applicable national laws or arbitral rules chosen by the parties.

The latter development regarding the regulation of the duty of disclosure is reflected in the Draft Code of Conduct (UNCITRAL Working Group III, 2022), which also provides certain guidance as to how this duty shall be exercised. According to Article 10 of the Draft Code of Conduct, a candidate and an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts – including in the eyes of the disputing parties – as to their independence or impartiality. Thus, this act also establishes the duty of disclosure of the relevant circumstances which may raise doubts as to the arbitrator's independence or impartiality.

Thus, the framework of the duty of disclosure varies heavily between States. The lack of binding international standards for the duty of disclosure opens doors for various interpretations of this duty by national courts and arbitration tribunals. Some States opt to include the requirement for the duty of disclosure expressis verbis in the law governing arbitration proceedings, while others simply establish the requirement of impartiality of an arbitrator which is deemed to also include a duty of disclosure.

2. The Scope of the Duty of Disclosure

The scope of the arbitrator's duty of disclosure cannot be clearly defined and largely depends on the factual circumstances of each case. A crucial question that must be answered when trying to define the scope of disclosure is whether it is enough to disclose all circumstances that may "cause doubts" or "justifiable doubts" in the eyes of the parties, or whether only those circumstances that are more likely than not to give rise to a challenge to an arbitrator. Can an arbitrator feeling that undisclosed circumstances would not amount to a successful challenge, despite knowing that they are relevant, decide not to disclose them? The authors argue that there seems to be no doubt that they can, yet there seems to be two positions as to whether by doing so they are complying with their disclosure duty.

In the Chagos Arbitration, Mauritius challenged the appointment of Judge Greenwood on the basis that he had acted for the United Kingdom within the past three years and that the relationship, according to Mauritius, continued. Mauritius argued that the standard applicable to the situation was the "appearance of bias", which implies that an arbitrator's independence and impartiality should be judged objectively as to whether the circumstances give rise to justifiable doubts. Mauritius very clearly reiterated that it did not allege actual bias against Judge Greenwood (*The Republic of Mauritius v. the United Kingdom of Great Britain and Northern Ireland*, 2011, para. 43). The Tribunal, after careful analysis, decided to reject the challenge; however, even though no actual bias was ever found or even alleged, the Tribunal stated that "the present proceedings to challenge Judge Greenwood's appointment to the Tribunal were not without object and purpose" (para. 184), this way implying that the "appearance of bias" standard should guide an arbitrator.

In another case administered under the auspices of the Permanent Court of Arbitration, Judge Schwebel was challenged on the basis of late and incomplete disclosure, multiple appointments, and an aggregate of the two grounds. Both parties agreed that the "justifiable doubts standard" under Article 10 (1) of the UNCITRAL Rules is an objective one (*Merck Sharpe & Dohme (I.A.) Corporation v. The Republic of Ecuador*, 2012, para. 72). However, they disagreed as to whether the standard required by Article 9 was an objective or a subjective one. The respondent argued that, based on General Standard 3 of the Guidelines which refers to "in the eyes of the parties", the standard was clearly a subjective one. At the same time, the claimant argued that Article 9, requiring the disclosure of "any circumstance likely to give rise to justifiable doubts", establishes an objective test and "presents a higher threshold for disclosure than the IBA Guidelines" (para. 74). When addressing the challenge, the Secretary General first assessed the "late and incomplete disclosures" of Judge Schwebel (para. 72–92). He concluded, with regard to the previous appointments, that "[t]hese circumstances clearly fall within the scope of his disclosure obligation" (para. 84). Then, when addressing the multiple appointments (para. 86–92), the Secretary General decided that "the prior appointments of Judge Schwebel while relevant disclosure items do not give rise to justifiable doubts in the eyes of a reasonable and fair-minded third person" (para. 92). Finally, Mr Siblez evaluated the circumstances in the aggregate and concluded that neither when viewed separately nor together did these circumstances give rise to justifiable doubts as to the independence or impartiality of Judge Schwebel. This reasoning, again, indicates that even through non-disclosed circumstances are not enough for a successful challenge, they do fall within the scope of what a prudent arbitrator should disclose.

A different position present in the arbitral jurisprudence is that if the non-disclosed circumstances would not result in a successful challenge they do not fall within an arbitrator's duty of disclosure. In *AWG Group v. The Argentine Republic* (2007), Professor G. Kaufmann-Kohler was challenged on the basis of her failure to disclose the fact that she had been appointed as a board member of the UBS Group. UBS was partly paying Professor Kaufmann-Kohler via the Group's shares. This meant that the Professor was a shareholder in UBS, which in turn owned stock in two of the claimants in related arbitrations. Professor Kaufmann-Kohler did not disclose this information, neither did she disclose the very fact of her appointment to the board. She explained that she did not disclose the fact of her appointment because Swiss banking law imposed a strict separation between the management and supervision of the bank. As a member of the supervisory body she was not involved in the management part of the bank's activities (*AWG Group v. The Argentine Republic*, 2007, para. 39). The Tribunal interpreted Article 9 of the UNCITRAL Rules 1976 as requiring the disclosure of only the circumstances that might give rise to "justifiable doubts", and that since the appointment did not create circumstances giving rise to such doubts, she was under no obligation to disclose them (para. 26). It is difficult to see how shareholding can fail to amount to disclosable circumstances. Even though the actual circumstances may finally be judged to be insufficient for a successful challenge, they may still fall within an arbitrator's duty to disclose.
It is also important to note that "in the eyes of the parties" should not be interpreted as allowing arbitrators to not disclose information that is likely already known to the parties and especially their legal teams. No case is "too small" or "too well-known" to believe that it can be omitted from the disclosure. As the PCA Secretary-General, H. Siblez, rightly noted when addressing a challenge against Judge Schwebel, even if the Respondent and its counsel knew or should be presumed to have known of Judge Schwebel's appointments in two public and high-profile arbitrations, this would not exonerate this judge from his duty to make prompt and full disclosure (*Merck Sharpe & Dohme (I.A.) Corporation v. The Republic of Ecuador*, 2012, para. 84).

Another relevant question when analyzing the duty of disclose is to whom this duty is applicable. It seems that this duty of disclosure is primarily designed for arbitrators since they render the award. However, when the dispute

is heard in institutional arbitration, various persons are involved in the dispute settlement. For instance, arbitrations assistants, secretaries and other persons are involved in the dispute settlement and perform certain procedural duties. Therefore, it may be argued that such persons could also have a certain interest in the case and could even impact the course of the settlement of the dispute. Unsurprisingly, this question is also addressed by international arbitration rules. The Guidelines provide that "Arbitral or administrative secretaries and assistants, to an individual arbitrator or the Arbitral Tribunal, are bound by the same duty of independence and impartiality as arbitrators, and it is the responsibility of the Arbitral Tribunal to ensure that such duty is respected at all stages of the arbitration" (IBA, 2014, p. 12). It is logical that persons working closely with an arbitrator are bound by the same duty of independence and impartiality as the arbitrator. However, interestingly, neither in national laws nor in the rules of the main arbitral institutions is the duty of disclosure of these persons mentioned.

This issue is particularly relevant in situations where an assistant to an arbitrator plays a significant role in the proceedings. An example of such a situation is the aftermath of the Yukos arbitration, where a request to set aside the awards was made (The Hague District Courts Judgement, 2016). The Russian Federation argued, inter alia, that the tribunal assistant played a decisive role during the deliberations as well as the drafting of the awards. Based on the disclosed fees and hourly rates, the assistant spent 65% more time on the case than the chairman of the tribunal. While it may be argued whether or not the assistant's role was decisive, the fact that he spent 3,006 hours working on the case (as revealed by the PCA) clearly shows that it was significant. The Court set aside the award without entering into deliberations of the question of the significant role played by the assistant. However, it would seem just that in such situations a duty of disclosure applicable to an arbitrator would be extended to encompass the assisting personnel. The authors argue that since the personnel of the arbitration can be involved in the decision-making process of the award, it seems that the duty of disclosure may even encompass not only arbitrators but also other persons working with the specific case.

Another significant aspect of the duty of disclosure is the continuation of this duty during dispute settlement in arbitration. So-called "advance waivers", i.e., declarations regarding possible future conflicts, do not discharge the arbitrator's ongoing duty of disclosure (IBA, 2014, Part I, 3 (b)). It is generally accepted that the duty to disclose ceases once the final decision is rendered, unless the final award is referred back to the original tribunal under the relevant applicable law or relevant institutional rules. A new round of disclosures may be necessary if the dispute is referred back to the same tribunal (IBA, 2014, pp. 4–5).

However, there are different opinions as to whether the duty to disclose is accompanied by a duty of due diligence. Should an arbitrator actively seek to find out about their potential conflicts of interest and other circumstances worth disclosing? The Guidelines state that "[a]n arbitrator is under a duty to make reasonable enquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to his or her impartiality or independence. Failure to disclose a conflict is not excused by lack of knowledge, if the arbitrator does not perform such reasonable enquiries" (IBA, 2014, p. 15). No reference to the active duty has yet been inserted into any of the main institutional rules, but it has found its way into some modern international agreements such as the Economic Partnership Agreement between the EU and SADC EPA States. Article 3.2. of the Rules of Procedure for Dispute Avoidance and Settlement States that "a candidate shall make all reasonable efforts to become aware of any such interests, relationships and matters, including financial interests, professional interests, or employment or family interests". Thus, it can be argued that the duty of disclosure is an active and continuous one which stretches during the dispute settlement in arbitration. Consequently, it requires an active role to be taken by the arbitrator to react to changes of circumstances which may show conflicts of interest in a timely manner.

The Draft Code of Conduct (UNCITRAL Working Group III, 2022) even establishes the list of information which shall be included in the disclosure: (a) any financial, business, professional, or personal relationship in the past five years with: (i) any disputing party or an entity identified by a disputing party; (ii) the legal representative(s) of a disputing party in the International Investment Dispute (hereinafter – the IID) proceeding; (iii) other arbitrators and expert witnesses in the IID proceeding; and (iv) any entity identified by a disputing party as having a direct or indirect interest in the outcome of the IID proceeding, including a third-party funder; (b) any financial or personal interest in: (i) the outcome of the IID proceeding; (ii) any other IID proceeding involving the same measure(s); and (iii) any other proceeding involving a disputing party or an entity identified by a disputing party; (c) all IID and related proceedings in which the candidate or the arbitrator is currently or has been involved in the

past five years as an arbitrator, a legal representative or an expert witness; and (d) any appointment as an arbitrator, a legal representative, or an expert witness by a disputing party or its legal representative(s) in an IID or any other proceeding in the past five years. Thus, the provisions of the Draft Code of Conduct tackle two main elements: economic, business, and professional links with the parties; and the previous involvement of the arbitrator in disputes between the parties. This development reveals that the duty of disclosure is primarily coupled with the disclosure of information which may include previous economic links and (or) involvement of the dispute resolution between the party to the dispute and the arbitrator.

3. Duty of Disclosure and the Right to Privacy of Arbitrators

Though the duty of disclosure plays a particularly relevant role in ensuring the fairness of arbitration proceedings, it should not cause imbalance in the rights to arbitrators. One may argue that an arbitrator's duty to disclose goes well beyond the duty to disclose the circumstances that may result in a successful challenge. An arbitrator's disclosure is crucial for the legitimacy of the arbitral process in general, which makes setting limits on it a very difficult task. At the same time, an arbitrator is a human being that has a right to privacy. This is particularly important regarding personal relationships. Each relationship is difficult and cannot be evaluated in any way other than on a case-by-case basis. An ICSID tribunal with regards to the challenge brought against Professor Kaufman-Kohler came up with a four-point test to establish whether the connection indicates a "manifest lack of the quality of independence of judgement and impartiality" as required under the ICSID Convention. The Tribunal looked at the proximity, intensity, dependence and materiality of the relationship. Due to the particularities of the challenge procedure under the ICSID, where a challenge is first decided by the co-arbitrators and the nearly-impossible standard of manifest lack of independence or impartiality, the ICSID jurisprudence is not of much use when discussing the duty of disclosure. However, the test formulated by the prominent arbitrators could serve as useful guidance. Nevertheless, this important aspect of the duty of disclosure is not mentioned in the Draft Code of Conduct.

However, though an arbitrator also has the legitimate expectation of protection of privacy, the authors argue that an arbitrator primarily has to ensure lawful arbitration proceedings. Without denying the right to privacy, an arbitrator should reveal all necessary information which is important for the proper exercise of the duty of disclosure to the parties, or simply reject an appointment if it could possibly lead to the annulment of the award due to the lack of impartiality.

4. The standard of the duty of disclosure in the case law of the ECHR

The requirements of the right a fair trial are also applicable in arbitration proceedings. According to Article 6 of the Convention, one of the founding principles of the right to a fair trial is impartiality of the tribunal. The development of the case law of the ECHR suggests that violation of the duty of disclosure of relevant information, which is important for the assessment of the impartiality of an arbitration, can led to the violation of the right to a fair trial.

There are no provisions in the Convention that stipulate that the requirements of the right to a fair trial are also applicable in international arbitration (especially investment arbitration) proceedings. However, the application of the standard of the right to a fair trial to arbitration proceedings is not a novelty in the case law of the ECHR. The ECHR has already dealt with the problems of impartiality of arbitration and the protection of the right to a fair trial. First, it should be noted that the conclusion of an arbitration agreement does not mean that the parties will not enjoy all procedural rights deriving from Article 6 of the Convention, since such a waiver should not necessarily be considered to amount to a waiver of all the rights under Article 6 of the Convention (*Suovaniemi and others v. Finland*, 1999; *Tabbane v. Switzerland*, 2016; *Mutu and Pechsteins v. Switzerland*, 2018; *Deweer v. Belgium*, 1980). Also, the general principles of litigation, such as the independence and impartiality of adjudicators, apply in a very similar manner in litigation before both national courts and arbitral tribunals (Hodges, 2007).

The latest developments and problems of the duty of disclosure are revealed in the *Beg S.p.a. v. Italy* (2021) case, in which the ECHR found a violation of Article 6(1) of the Convention because of the failure of an arbitrator to

disclose relevant information to the parties. In order to reveal the problems of this case, a short summary of the basic facts is provided.

The applicant, Beg S.p.a., contacted ENEL (a formerly State-owned electricity and gas provider) to see if it would be interested in distributing the power generated from a hydroelectric plant it was building in Albania. At that time, N. I. was vice-president and sat on the board of ENEL. The agreement between the applicant and ENEL was signed in 2000, and included an arbitration clause according to which future disputes between the parties should be settled by the Arbitration Chamber of the Rome Chamber of Commerce (ACR). In mid-2000, a dispute arose between the parties since ENELPOWER was unsatisfied with the audit of the applicant company's concession in Albania. The applicant commenced arbitration proceedings which sought the termination of the cooperation agreement and damages of around €130 million. The dispute was opened and the parties appointed respective arbitration. ENELPOWER appointed N. I. as its arbitrator. Around this time, N. I. was representing ENEL in a civil dispute. During arbitration proceedings, Beg S.p.a. became aware that N. I. had been working as counsel for ENEL. The ACR made its award against Beg S.p.a. on 25 November 2002, dismissing complaints, including a demand for the withdrawal of N. I. The Rome District Court also twice rejected applications to have N. I. withdrawn.

The applicant also lodged a claim against the ACR for negligence, seeking compensation of €374,482.91, which was dismissed by the Rome District Court. The court ruled that the ACR could not be held responsible for N. I.'s failure to declare a conflict of interest and it had no obligation to require an explicit negative disclosure. The applicant company appealed against the arbitral award. That appeal was dismissed by the domestic courts. The applicant brought the dispute to the ECHR and complained that the arbitrator, N. I., had not been impartial owing to his professional links with ENEL, impinging on its rights.

First, the ECHR found that though the parties to the dispute voluntarily concluded an arbitration agreement this did not mean that the parties waived their right to fair arbitration proceedings. This is a particularly important aspect of arbitration proceedings – that though the parties may waive the possibility of settling their dispute in court, it does not mean that the parties denounce the fundamental principles of fair arbitration proceedings.

Second, the court turned to the analysis of the duty of disclosure. The Rules of the ACR establish a requirement to disclose information before the arbitral proceedings which may reveal conflicts of interest between the parties. Pursuant to Article 6 of the Rules of the ACR, "All the arbitrators shall be impartial and independent of the parties to the proceedings. The arbitrator, having received notice of his or her appointment from the Arbitration Chamber, shall accept within 10 days. Together with the acceptance, the arbitrator shall indicate, by means of a written declaration: Any relationship with the parties or their counsel that might have an impact on his/her independence and impartiality. Any direct or indirect personal or economic interest in the subject matter of the dispute". Thus, said article of the arbitration rules compels the arbitrators to indicate, in their written declaration, any relationship with the parties or their counsel that might have an impact on their independence and impartiality, and any direct or indirect personal or economic interest in the subject matter of the dispute, but it does not compel arbitrators to explicitly indicate the absence of such relationships and/or economic interests. The court did not assess whether said article ensures the sufficient protection of the right to fair arbitration proceedings. Instead, it emphasized that the arbitrator, N. I., failed to reveal necessary information. The court found that N. I. had simply accepted the appointment and found in favor of the applicant's argument that, in the absence of an explicit negative disclosure, one could legitimately presume that such relationships and/or economic interests did not exist. Furthermore, the court dismissed the argument that the arbitrators were well-known figures and noted that though the applicant, through its arbitrator G.G., was most probably aware of the professional links between N. I. and the ENEL group, this did not mean that the applicant waived the safeguards provided in Article 6(1) of the Convention.

Third, the ECHR turned to the crux of the disputes: whether the failure of N. I.'s disclosure amounted to the violation of Article 6(1) of the Convention. The court found that the appointment of N. I. as an arbitrator raised doubts about his impartiality, and consequently found that the right to a fair trial was breached. The court employed a standard objective impartiality test, which requires ascertaining the relevant circumstances which may raise doubts regarding arbitration impartiality. A number of facts allowed the court to find a lack of N. I.'s impartiality in this case. It was found that N. I. had been Vice-Chairman and member of the Board of Directors of ENEL from June 1995 to June 1996. It is also an undisputed fact that the formal invitation to participate in the

project was sent by the applicant to ENEL, and ENEL's first positive reply was sent in 1996. It was not established that N. I. knew about these negotiations. However, the court emphasized that even appearances may be of a certain importance and found that, given the importance and the economic stakes of the business project, N. I.'s senior role in the entity which had conducted the first negotiations and whose subsidiary ENELPOWER would later oppose in the arbitration proceedings, seen from the point of view of an external observer, could legitimately give rise to doubts as to his impartiality. The court also found that N. I. had represented ENEL in some domestic civil proceedings. Moreover, the court assessed the corporate links between ENEL and ENELPOWER and N. I. It was established that N. I. was the counsel of ENEL and not of ENELPOWER, and that the latter had been created, as a separate entity from ENEL, in 1999. However, at the relevant time ENELPOWER was wholly controlled by ENEL, which held 100% of its share capital. Therefore, the senior position of arbitrator N. I. in ENEL; their possible knowledge of the negotiations between the parties before the agreement was made; the economic stakes of the business project; and the close corporate ties between the corporations were sufficient to find that arbitrator N. I. lacked impartiality, and the objective test of impartiality was thus found to exist.

This judgment has great relevance for the further development of the application of Article 6(1) of the Convention in arbitration proceedings and the exercise of the duty of disclosure. First, the ECHR affirmed its constant rationale that the conclusion of a voluntary arbitration agreement is not a waiver of the procedural guarantees of the right to a fair trial and the arbitration tribunal shall ensure these guarantees. Second, the court employed the standard subjective and objective tests of impartiality to test whether the arbitration proceedings were compatible with the right to a fair trial. Economic and legal links between the arbitrator and the parties, and possible awareness of the relevant circumstances of the legal relations between the parties before the dispute arises, may be found as sufficient to raise doubts about the impartiality of the arbitrator. Third, and most importantly, the court found that the duty of disclosure of the circumstances which may reveal conflicts of interest between the arbitrator and the parties to the dispute is an indispensable part of fair arbitration proceedings. This finding is crucial for the arbitrator and the arbitration institution in ensuring that the arbitrator clearly reveals the relevant circumstances to the parties before the hearing of the dispute. The failure to reveal such circumstances may result in the violation of Article 6 of the Convention and the annulment of the award by the national courts.

Conclusions

1. Fairness of investment arbitration proceedings depends on the independence and impartiality of the arbitrators. An arbitrator conveys the possession of such qualities by disclosing any relevant circumstances that may cast doubts. While there is a general broad framework regulating this duty, and some common denominators as to what falls within it can be identified, ultimately, no clear formula can be established. All of the above-mentioned binding and non-binding instruments are supposed to guide an arbitrator when deciding on what to disclose. However, only one's professionalism, experience and sense of duty determines the final decision. The newest development of the duty of disclosure is revealed in the Draft Code of Conduct, which establishes the list of information which shall be disclosed to the parties.

2. The duty of disclosure is an active and continuous one which stretches across the dispute settlement in investment arbitration. It requires the active role of the arbitrator in reacting in a timely manner to changes of circumstances which may show conflicts of interest. Nevertheless, a proper balance between the right to a private life of an arbitrator and the duty of disclosure should be established.

3. Exercise of the duty of disclosure is closely linked with the fairness of arbitration proceedings. Since the right to a fair trial does not cease to exist during arbitration proceedings, the principle of impartiality of the tribunal is applicable to the full extent in arbitration proceedings (subjective and objective tests of impartiality). The duty of disclosure is part of the principle of impartiality of arbitration proceedings. This means that violation of this duty may lead to violation of Article 6(1) of the Convention and also possible annulment of the arbitral award. The latest case law of the ECHR suggests that an arbitrator shall reveal all information to the parties before the appointment regarding the circumstances which could mean conflicts of interest. Circumstances such as previous employment with one of the parties – considering the term of employment, position in the company which is a party to arbitration proceedings, and possible knowledge of the factual situation of the dispute – shall be clearly announced to the parties.

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THE POSSIBILITIES OF COMBATING SO-CALLED DISINFORMATION IN THE CONTEXT OF THE EUROPEAN UNION LEGAL FRAMEWORK AND OF CONSTITUTIONAL GUARANTEES OF FREEDOM OF EXPRESSION IN THE EUROPEAN UNION MEMBER STATES [1]

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Abstract. Freedom of expression and the right of access to and use of information are fundamental human rights that are crucial for the functioning of democracy but also, for example, for the exercise of freedom of thought and scientific research. At present, the public debate on the need to combat so-called disinformation, to create a legal framework for its suppression and, if necessary, even to punish it, including the application of criminal repression, has gained momentum. This complex topic is not only discussed at the national level – it is a global issue. The invasion of Ukraine by the Russian Federation has opened up discussions in this area with new intensity, both in the Member States of the European Union and in the Union itself. This is not a simple issue, because the fight against disinformation and fake news borders very closely on the issue of censorship. All these issues are the subject of the present article, which focuses on the law and decisions of the European Union, the Republic of Poland and the Czech Republic. Restricting and blocking selected websites for political reasons is new in the EU Member States. This is also why the necessary debate on the nature and permissibility of such measures has not yet developed. The present article aims to contribute to this discussion, both from a comparative point of view and by presenting the details of the legal regulation in the Czech Republic in the context of EU law and in comparison with the legal systems of selected member states of the European Union.

Keywords: disinformation, freedom of expression, free access to information, restrictions, Internet.

Introduction

Freedom of expression is one of the most important constitutionally guaranteed rights in the Czech Republic and elsewhere. In the Charter of Fundamental Rights and Freedoms in the Czech Republic (1991; hereinafter – the Charter), this freedom is classified as a political right, but by its nature it is a freedom with content that is much broader. Freedom of expression is closely related to freedom of thought, conscience and religion, but also to freedom of scientific research and artistic creation, which are protected by Article 15 of the Charter. Every person expresses their opinions in normal interpersonal contact throughout the course of every day, and these opinions are largely non-political in nature. It is therefore appropriate to consider freedom of expression in a broader sense and not to limit it to expression of a political nature. After all, the provisions of Article 17 of the Charter deal with speech in its broadest sense, without any substantive definition according to the content of the communication. In this context, it is also worth recalling that people perceive the communication of their own views and opinions as a natural right, corresponding to the very nature of humanity, and not as a right granted by society, and therefore by the State. Therefore, any interference with the freedom of expression by public authorities usually arouses a

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great deal of public attention, coupled with discussions as to whether such a restriction is acceptable. Such discussions are all the more intense the wider the range of persons affected.

In recent years, the debate on the acceptability of restrictions on freedom of expression in the case of so-called disinformation or fake news has been gaining momentum, with both phenomena being increasingly associated with hybrid warfare. Discussions on this topic have intensified following the attack by the Russian Federation on Ukraine on 24 February 2022. The complexity of the problem is also demonstrated, among other things, by the fact that no legal solution to this problem has been found in recent years. This is hardly surprising, since, as will be shown below, the debate is about possible restrictions on freedom of expression of a political nature, which directly affects the question of democracy, for which the widest possible freedom of expression is crucial.

The topic also deserves attention because the establishment of prohibitions in law also requires their enforcement in the form of sanctions for violation of these interventions. Thus, possible restrictions on freedom of expression would also imply new tasks for the police. This could result in a qualitative shift in terms of the establishment of new police departments. This is something that has been essentially absent in the Czech Republic for the past 33 years.

In the Czech Republic, there are not only discussions on combating disinformation, but practical steps have already been taken. On 25 February 2022, the CZ.NIC[3] and NIX.CZ[4] associations blocked access to a number of websites that had been labelled as disinformation on the basis of a call from the government and with the methodological support of the National Cyber Operations Centre.[5]

The exact number of these websites is not known, but according to publicly available sources the number is between 8 and about 30.[6] In addition to these measures, individual operators also removed Russian TV channels from their offer to an unspecified extent (Seznam Zpravy, 2022a). These measures raise a number of questions as to their legality or constitutional conformity (Koudelka, 2022).

The whole matter also deserves attention because the Czech Republic adopted restrictive censorship measures before the European Union did so on 1 March 2022 in relation to the news websites Russia Today and Sputnik News. The European Union's measures have given a formal legal basis for the Member States' measures. Among the states that have referred to the decisions of the EU institutions in their measures is the Republic of Poland, whose actions will be shown below. However, the whole matter deserves attention for two reasons. First of all, and this reason applies in all EU Member States, there is a fundamental restriction on freedom of expression and access to information for purely political reasons. The European Union and its Member States have not yet worked with such a measure. However, there is a second reason. Some countries, such as the Czech Republic, explicitly prohibit the possibility of introducing censorship in their constitutions. Here we are faced with a difference in the legal framework of the European Union and some Member States. On the one hand, they are supposed to respect and implement the law of the European Union, which, incidentally, in view of Article 4(2) of the Treaty on the European Union, is supposed to respect, among other things, the constitutional arrangements of the Member States. On the other hand, they are supposed to respect their own constitutional provisions.

[3] CZ.NIC is an association managing the domain CZ. For more information see here: https://www.nic.cz/ [retrieved 15 October 2022].

[4] NIX.CZ is an association of major internet operators in the Czech Republic. For more information see here: https://www.nix.cz/ [retrieved 15 October 2022].

[5] Part of the Military Intelligence Service of the Czech Republic. For more information see here: https://www.vzcr.cz/kyberneticka-obrana-46 [retrieved 15 October 2022].

[6] It can be said with certainty that, as of 29 April 2022, eight websites located in the national .CZ domain were blocked by administrative exclusion from the registries. For a current list of blocked websites, but not a historical one, see here: https://www.nic.cz/page/4310/aktualne-administrativne-vyrazene-domeny/ [retrieved 15 October 2022]. However, in addition to the eight mentioned above, there are also less than ten websites located in other first-level domains, which are blocked in different ways by the above-mentioned associations (Seznam Zpravy, 2022a; Cibulka, 2022b). It is evident from these sources that access to other Czech websites in the .CZ domain, but also with an address registered in another country, as well as to foreign websites, often offering Czech content labelled as disinformation, is blocked. For example, Russia Today (www.rt.com) or Sputnik News (www.sputniknews.com). The exact number of such blocked websites is not known, nor is a complete list of them available. Some ISPs block some sites on their own initiative.

It is therefore also appropriate to pay attention to the constitutional enshrinement of freedom of expression (and the related right to information) and what legal and practical problems would have to be dealt with if restrictions on the dissemination of disinformation were to be introduced.

The following passages will compare the approach of the European Union to the problem of combating disinformation and the issue of censorship, in relation to the approach of selected EU Member States that explicitly prohibit censorship in their constitutions. Other constitutional and legal principles will also be highlighted, including those that define the role of criminal law in the legal order of European countries today. Attention will also be paid to the historical experience of restrictions on freedom of expression.

1. Restrictive measures at the European Union level

Key documents at the level of the European Union are Council Decision (CFSP) 2022/351 of 1 March 2022 amending Decision 2014/512 (CFSP) concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, and Council Regulation (EU) 2022/350 of 1 March 2022 amending Council Regulation (EU) No. 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine. Both measures ban the dissemination of content of the news entities Russia Today and Sputnik in the territory of the Member States of the European Union.

The European Union authorities justified the above-mentioned decisions on the grounds that those two entities are, on the one hand, directly linked to and financed by the budget of the Russian Federation and, on the other hand, are the source of constant propaganda and agitation repeatedly and consistently aimed at European political parties, in particular at election time, but also at civil society. According to the European Union institutions, these activities constitute a significant and direct threat to the public order and security of the European Union. Moreover, the European Union authorities have stated in the justification for their action that the restrictive measure is both temporary in nature, i.e., not absolute in time, and does not interfere in any way with the right to property or establishment, since the measures taken "do not prevent the media concerned and their staff from carrying out activities other than broadcasting, such as research and conducting interviews, in the territory of the European Union" (Council Regulation (EU) 2022/350, 2022, p. 1).

These measures did not go unchallenged, as on 8 March 2022 they were challenged before the Court of Justice of the European Union (CJEU) by RT France in an action requesting their annulment as contrary to, among other things, the Charter of Fundamental Rights of the European Union. The EU Commission, Belgium, Poland, France, Estonia, Lithuania, Latvia, and the High Representative for Foreign and Security Policy of the EU sided with the EU measures. The CJEU ruled on the action on 27 July 2022, rejecting it in its entirety and expressing its views on a number of issues related to the pending issue of restrictions on freedom of expression, or in restricting free access to information (*RT France v. Council of the European Union*, 2022).

In the first place, the CJEU has expressed itself on a number of issues which, in terms of the subject matter of this article, could be considered uncontroversial and formal, concerning the competence of the institutions of the European Union to adopt the contested acts. They will not pursued further, as the reasoning of the CJEU in this regard is persuasive.

The key and substantive issue is, whether it is possible to restrict freedom of expression and the right of access to information in accordance with the Charter of Fundamental Rights of the European Union. Article 11 of the Charter of Fundamental Rights of the European Union is decisive here. It guarantees the freedom to hold opinions and to receive and impart information or ideas without interference by public authority and regardless of frontiers. It further stipulates that the freedom and pluralism of the media must be respected. As the explanatory note to the Charter of Fundamental Rights of the European Union shows, the provisions of Article 11 of the Charter have the same meaning and scope as Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[7] In this context, it is worth noting that the European Union is not a party to the Convention and that both of the cited documents logically treat freedom as a right that can be restricted,[8] but unlike the

[7] See also Article 52(3) of the Charter of Fundamental Rights of the European Union.
[8] See also Article 52(1) of the Charter of Fundamental Rights of the European Union.

constitutions of some member states, whether of the European Union or the Council of Europe, they do not explicitly prohibit the introduction of censorship.

Thus, in the present case, it can be stated that the European Union institutions have adopted measures which fall within their competence and which are in the nature of restrictions on freedom of expression, but which are nevertheless lawful from the point of view of European Union law. It is arguable whether those measures did not infringe the very essence of the applicants' freedom of expression and the essence of the right of access to information of citizens of the European Union, since the contested acts ordered the blocking of any broadcasts by Russia Today and Sputnik. This was without distinguishing the subject of the information. The question is also whether the plurality of the media within the meaning of Article 11(2) of the Charter of Fundamental Rights of the European Union is preserved in substance. However, the main doubt lies in the question of whether the measures taken are not censorial in nature. As stated above, censorship at the level of the European Union is not excluded by its Charter of Fundamental Rights or by any other provision.

It is, however, excluded by the constitutional provisions of certain Member States of the European Union. Let us recall, for example, Poland and the Czech Republic, which will be discussed in more detail below, but also Sweden, which prohibits censorship in Section 1 of the Freedom of the Press Act, which is considered part of the country's constitutional structure. Denmark also prohibits censorship in Article 77 of its constitution. Among the countries that are closely linked to the European Union but are not members, we can mention Norway, which, unlike the countries mentioned above, has not adopted any censorship measures (Dahllof et al., 2022).

2. Restrictive measures in the Republic of Poland

Among the EU Member States that explicitly prohibit preventive censorship in their constitutions is the Republic of Poland. Censorship was abolished in Poland by law on 11 April 1990 (Press law abolishing censorship, 1990). This was as a result of the political and democratic transition that Poland was undergoing (Holda, 2011). As of that date, freedom of expression and the right of access to information were guaranteed in Poland at a level consistent with democratic states governed by the rule of law. The Polish Constitution of 2 April 1997 adopted this standard. Article 14 guarantees pluralism of the public media and Article 54 guarantees freedom of expression and dissemination of information. These rights are, of course, not absolute, but they can be limited within the rules set out in Article 31(3) of the Polish Constitution. This must be done by law if it is necessary in a democratic society to ensure the security of the state, public order, protection of the environment, health, public morals or the rights and freedoms of others (Pelc, 2012). In doing so, the substance and meaning of the rights and freedoms being restricted must be preserved (Garlicki, 2000).[9] Article 54(2) of the Polish Constitution explicitly states that "preventive censorship of the public media is prohibited".

Neither an explicit constitutional prohibition nor the historical experience of extensive censorship, whether under the communist regime or in the interwar period, has prevented the Republic of Poland from adopting measures restricting access to selected information sources, such as RT and Sputnik, or even from supporting the position of the EU institutions in the proceedings before the CJEU, as discussed above. At least in this respect, the positions of Poland and the Czech Republic differ.

In the Republic of Poland, the RT and Sputnik servers were blocked by a decision of the President of the Office of Electronic Communications (UKE) issued on 8 March 2022 (UKE, 2022). The President of UKE directly refers to Council of the European Union Regulation 2022/350 as a directly enforceable act. In the Republic of Poland, the national legal basis for the implementation of the cited Regulation is the Telecommunications Act (2004), specifically Article 178 and Article 180(1) thereof.

Article 178 of the Polish Telecommunications Act provides that, in situations of extreme emergency, the President of UKE may order the restriction of certain publicly available telecommunications services. Article 180 of the same Act further provides that the telecommunications service provider is obliged to proceed immediately to

[9] This is also consistent with the established case law of the Polish Constitutional Tribunal. See, for example, ruling K 11/94 of 26 April 1995, which established the so-called proportionality test in Poland.

block telecommunications connections or the transmission of information to the extent specified by the authorised bodies.

As can be seen, in the Republic of Poland, the relevant European Union acts have been perfectly implemented and the Telecommunications Act has been used as the legal basis. The President of UKE relied on the rather general concept of "extraordinary threat" used in Article 178 of the Act. In this context, two legal issues remain open which have not yet been discussed in Poland.

The first issue is whether there has been an extensive interpretation of the concept of "extraordinary danger"; whether the Telecommunications Act, in view of its systematics, does not mean threats directly to telecommunications networks or threats through networks, however direct and immediate. Is propaganda by an adversary, such as the Russian Federation, such a threat within the meaning of the Telecommunications Act? The second question concerns the compatibility of the measure adopted with Article 54(2) of the Constitution of the Republic of Poland. Does it not expressly prohibit the introduction of preventive censorship? No expert articles on this subject have appeared in the Republic of Poland so far.

3. The constitutional framework of freedom of expression (and the right to dispose of information) in the Czech Republic

The basic starting point for examining the legal framework of possible restrictions on freedom of expression (and the right of access to information) in the Czech Republic is the aforementioned Charter of Fundamental Rights and Freedoms. The Charter enshrines the guarantees of freedom of expression and freedom of access to information in Article 17, which will be discussed below.

In addition to the Charter, it is also worth looking at the provisions of international human rights treaties by which the Czech Republic is directly bound in accordance with Article 10 of the Constitution. Among the most important are the European Convention for the Protection of Fundamental Rights and Freedoms, published under No. 209/1992 Coll. (hereinafter referred to as the Convention), and the UN International Covenant on Civil and Political Rights, published under No. 120/1976 Coll. (hereinafter referred to as the Covenant).

Of the European Convention, Article 10, which enshrines the guarantees of freedom of expression and freedom of access to information, is particularly relevant to the selected topic. In particular, Article 10 of the Convention guarantees the right to hold opinions and to receive and impart information or ideas without interference by State authorities in such activities and regardless of frontiers.

The Convention does not conceive of these rights as absolute. In the first place, Article 10(1) still expressly provides that the above rights do not exclude the possibility for States to make the activities of radio, television and film companies subject to special authorisations. However, it may be noted at this point that the dissemination of information or so-called disinformation by other means, including websites, social networks or e-mail, does not fall within the limitation provided for in Article 10(1) of the Convention.

However, Article 10(2) of the Convention allows for restrictions on freedom of expression in forms other than those specifically addressed in Article 10(1). It does so with explicit reference to the fact that the exercise of freedom of expression also involves duties and responsibilities. This provision is noteworthy because, for example, the Charter of Fundamental Rights and Freedoms makes no such reference. The Convention therefore envisages a possible requirement of responsibility for the information and ideas disseminated, which is the basis for any restrictions. The Convention stipulates that any restrictions must have a legal basis and be necessary in a democratic society (i.e., the objective cannot be achieved except by restriction and the restriction itself must be compatible with the notion of a democratic society), all with the aim of protecting the following values: national security, territorial integrity or public safety, the prevention of disorder and crime, the protection of health or morals, the protection of the reputation or rights of others, the prevention of the leakage of confidential information, or the preservation of the authority and impartiality of the judiciary.
In relation to so-called disinformation, perhaps we can think about protecting national security or preventing unrest. The other values mentioned in the Convention are not threatened in the Czech Republic at the moment.

However, even in relation to the notions of national security and riot prevention, it must be stressed that the threatening action would have to be of a considerable intensity.

In the case of the Covenant, Article 19 is key. It guarantees, in the first place, the freedom to hold one's opinion without any hindrance. Within the meaning of the Charter, this is the right to freedom of thought. Furthermore, Article 19 of the Covenant, in paragraph 2, guarantees freedom of expression. This includes, in the words of the Covenant, the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, through the arts or by any other media of one's choice.

However, even the Covenant does not conceive of freedom of expression as an unrestricted, absolute freedom. On the contrary, Article 19(3) of the Covenant explicitly states, in a similar way to the Convention, that the exercise of this freedom also entails specific duties and responsibilities. These in turn imply the possibility of restrictions. However, these must be based on law, in order to protect the rights or reputations of others and to protect national security, public order, public health or morals.

It is evident that the Covenant approaches the question of the restrictiveness of freedom of expression and the right of access to information in a similar way to the Convention. The same partial conclusion as in the case of the Convention also applies to it. The Charter itself enshrines freedom of expression and the right of free access to information in its aforementioned Article 17. First, paragraph 1 implies the natural law nature of both freedom of expression and the right of access to information. This is apparent from the wording, which "guarantees" both rights. The Charter thus assumes that every individual is endowed with these rights, that they do not need public authority, and hence the State, to realise them, and that the nature of every person as a human being corresponds to the fact that they have both curiosity and the desire to communicate their opinions and ideas to others. This fact is important in relation to any restrictions on those rights. For one thing, it is more difficult to justify taking away something of which the public authority is not the originator. It can also be assumed that the more a particular right affects each individual, the more sensitively the restriction of that right will be perceived and the more one can expect such action to be rejected, even if few people actually exercise that right in the sense of political expression in the public sphere.

Article 17(2) defines the content of the rights guaranteed by Article 17 of the Charter. First, it provides a demonstrative list of the types of expression protected by the Charter. Given the demonstrative nature of the list, this means that freedom of expression in any form is protected. This includes via the internet, whether in the form of websites, e-mail or posts on social networks. Due to its demonstrative nature, this provision cannot become technologically obsolete.

The second part of the above provision guarantees the right to seek, receive and impart ideas and information regardless of national borders. It is clear that the right of access to information, as well as the freedom of expression, should be universal in nature according to the drafters of the Charter and should not be limited by the state only to its territory. This is important in relation to the issue of blocking websites located or registered abroad.[10]

Article 17(3) of the Charter is particularly interesting because it explicitly prohibits censorship. This can be understood as interference by the state, or public authorities,[11] where such interference is driven by political considerations. A systematic interpretation already leads us to the conclusion that interference with the rights and freedoms guaranteed by Article 17, which are provided for in paragraph 4 of the Charter, is not considered censorship. It shows that there may be constitutionally protected interests to which both freedom of expression and the right to free access to and use of information must give way.

[10] This provision was added to the Charter in the wake of the experience with the cancellation of radio stations, particularly Free Europe and Voice of America, by the Communist government in Czechoslovakia.

[11] The use of the term *public authority* is probably more appropriate, since it cannot be excluded that the State, in the context of the transfer of the exercise of administration, may entrust such a task to an entity separate from it, as is the case, for example, in the operation of technical inspection stations in the Czech Republic. After all, the operation of the internet itself is carried out by purely private entities. They have also implemented the blockages.

A clear summary of what can be considered censorship and what forms it can take is given by Dr. Z. Koudelka (2022) in his overview article related to the current situation. The CZ.NIC and NIX.CZ associations, on the other hand, did not show any knowledge of the matter, and on 25 February 2022 they began blocking individual websites on the grounds that they are so-called disinformation websites. Six years earlier, the same association had launched a public campaign called The Censor is Coming, the aim of which was to block the adoption, or at least the repeal, of Act No. 186/2016 Coll. on gambling (Novinky.cz, 2016). Section 82 of the Act allows the Ministry of Finance to order internet service providers to prevent access to websites with unauthorised internet gambling games. These measures are not politically motivated but fall within the regime of Article 17(4) of the Charter.

Article 17(4) of the Charter provides for possible restrictions on freedom of expression and the right of access to and use of information. It lays down three conditions for the establishment of a possible restriction, the fourth condition being derived from the general provisions of the Charter, namely Article 4(4) thereof.

The rights guaranteed by Article 17 of the Charter may therefore be restricted under the following conditions, which must be met cumulatively:

- the restriction must be laid down directly by law (statutory reservation);
- the restriction must be necessary in a democratic society (necessity proviso);
- the restriction must be for the sole purpose of one of the five enumerated protected values;
- any restriction must not be of such a scale or nature as to negate the essence and purpose of the rights being restricted (see Article 4(4) of the Charter).

As regards the first condition, which is the reservation of the law, its purpose is to guarantee the high legitimacy of the restriction adopted. The latter results both from the fact that the people, at least indirectly through Parliament, decide on the restriction and from the fact that the discussion of bills is public. Thus, the public is at least informed about such sensitive measures and can react at its own discretion.

The second condition is already of a significant content and value character and is crucial for the eventual defence of the constitutionality of the approved restriction, for example in proceedings before the Constitutional Court of the Czech Republic (hereinafter – the Constitutional Court). The Charter insists that restrictions on the freedom of expression and the freedom to obtain and freely dispose of information must be an extreme, ultima ratio measure if the desired objective cannot be achieved otherwise. At the same time, this condition means that the restriction approved must be compatible with the existence of a democratic society. In other words, the restriction must not destroy democracy. This is consistent with the above distinction between censorship expressly prohibited by Article 17(3) of the Charter and permissible restrictions under Article 17(4).

The third condition is that the freedoms protected by Article 17 may be restricted only in the interests of protecting the rights and freedoms of others, the security of the State, public safety, public health and morals. It can already be stated here that the protected values listed fully correspond to the values which both the Convention and the Covenant provide for the protection of. It has also already been mentioned above that it is difficult in the current situation to subsume the blocking of websites under any of the listed protected values without a very extensive interpretation of them. It is not constitutionally correct to do so, because in the event of any doubt as to how the constitutionally guaranteed rights and freedoms should be interpreted, the principle of *in dubio pro libertate*, to which the Constitutional Court of the Czech Republic has repeatedly subscribed, must be applied.[12] This is moreover in the context of, for example, the Constitutional Court's ruling published under No. 91/1994 Coll., which expressly addresses the conflict between freedom of expression and other constitutionally protected values (Ústavní soud, 1993).

The fourth condition means that any restriction fulfilling the previous three conditions must not be of such scope, character or intensity that it would negate the very essence of the rights and freedoms protected by the Charter. Thus, measures necessary in a democratic society, introduced by law to protect some of the values protected by the Charter, must still allow the exercise of freedom of expression, or the right to free access to and use of

[12] See, e.g., the decision in case No. III ÚS 924/06 in particular, but furthermore also III. ÚS 276/96, I. ÚS 22/99, IV. ÚS 273/02, IV. ÚS 666/02, II. ÚS 669/02, I. ÚS 3930/14 or III. ÚS 2264/13, and a number of other cases.

information. Thus, limiting these rights to, for example, one hour, preferably at night, per month would exceed this limit and would constitute an interference with the essence and meaning of the protected rights and freedoms.

There are a number of laws restricting freedom of expression within the meaning of Article 17(4) of the Charter in the Czech Republic. An exemplary list of these can begin with the Civil Code (2012) and its provisions ensuring the protection of personality and continue with the Criminal Code (2009), which provides for the most serious cases of violation of personality rights and the subsequent criminal protection.[13]

In this context, the aforementioned Gambling Act may also be mentioned. Reference may also be made to the Law on the protection of classified information (2005), the existence of which can be linked to the interest in protecting national security. As far as the protection of public security is concerned, mention may be made, for example, of the Act on the Police of the Czech Republic (2008).

In order to protect public health, the Advertising Regulation Act (1995) or the Medicines Act (2007) provide for the possibility to restrict speech specifically in Section 101c, which allows the blocking of illegal websites offering medicines within the meaning of this Act. An example of a law regulating freedom of expression to protect morality is the Broadcasting Act (2001), which imposes a number of obligations and restrictions on broadcasters.

The above list of laws restricting freedom of expression is not exhaustive. However, it can be generalized that there is no such law in the Czech Republic that would restrict the expression of opinions of a purely political nature on current social events, whether national or international, in the sense of what is currently referred to in general discourse as so-called disinformation. There is one exception: unless it is quite clear that such conduct is in the nature of a criminal offence.

4. On selected issues of possible criminal punishment of so-called disinformation

The following passage aims to highlight only some selected aspects of the problem of criminal punishment of so-called disinformation, especially those in the nature of statements offering an alternative view of the conflict in Ukraine, or the activities of the Russian Federation towards Ukraine, or the attitude of the Czech Republic towards this conflict and its participants. In addition, there may be statements endorsing, for example, the targeted killing of civilians or other actions that have the characteristics of war crimes.

The Criminal Code in the Czech Republic has a number of elements that could be used in this case. First of all, the offence of denying, questioning, approving or justifying genocide under section 405 of the Criminal Code may be considered. However, it should be pointed out that the fulfilment of the facts of this offence cannot be achieved at all by statements of the first kind referred to above.

Depending on the nature of a statement aimed, for example, at approving the invasion of Ukraine itself, the facts of the above-mentioned offence could probably be fulfilled. However, in this context, it should be pointed out that the offence under section 405 of the Criminal Code is a deliberate offence and the perpetrator must be aware that they are fulfilling its constituent elements. As stated by Robert Fremr[14]: "The perpetrator must therefore be aware that he is denying, disputing, approving or justifying crimes that have been proven, so that the perpetrator is aware of the falsity of his argument." Therefore, according to Fremr, it would not be sufficient for criminal liability "if such conduct was the result of the perpetrator's ignorance" (Draštík et al., 2015, p. 2975).

It is worth emphasizing Fremr's words on proven crimes. Thus, questioning whether the current events in Ukraine constitute genocide or war crimes cannot lead to the commission of that crime, because the circumstances in

[13] The Criminal Code itself naturally contains a wider range of verbal offences and provides protection not only for the rights and freedoms of others, but in principle for all the protected values listed in Article 17(4) of the Charter. However, a list of these will not be given here, as the purpose of this paper is different.

[14] A specialist in criminal law and public international law, Fremr is one of the world's foremost experts on genocide, war crimes and their investigation and prosecution. Judge of the International Criminal Tribunal for Rwanda from 2006 to 2008 and 2010 to 2011, judge of the International Criminal Court from 2012 to 2021 and its 1st vice-president from 2018 to 2021.

which the massacre of the population in some Ukrainian villages took place have not yet been established, much less proven to be crimes under Article 405 of the Criminal Code (2009).

Successful prosecution and final conviction of the perpetrator may perhaps occur in the matter of possible positive statements regarding the invasion of Ukraine by the Russian Federation. However, even here doubts may arise in connection with the above commentary by R. Fremr, for it is clear that not every military intervention by one state (or group of states) against another state has in the past been described as a crime against peace. Consider, for example, the bombing of Yugoslavia in 1999, or the attack on Iraq in 2003 (Bílková & Drápal, 2022). Let us add that the conflicts taking place everywhere else in the world, as well as the opinions expressed by various people about them, are completely outside the attention of politicians and law enforcement authorities. This ultimately contradicts the principle of legality.

In principle, for the same reasons, I consider it doubtful to consider in this context the assessment of the aforementioned actions as a misdemeanour offense of approval of a criminal act under section 365 of the Criminal Code. This is primarily because, again, this is a deliberate offence and the perpetrator should have known that they were committing an approval, and specifically a crime. In the Czech Republic, it is not a crime to approve offences. Thus, the perpetrator should have a certain awareness of the criminality of the act that they are approving within the meaning of the Criminal Code (2009), as well as of its basic legal qualification. While such a consideration can fairly be required – even with reference to the principle of *ignoratia iuris non excusat* or, in the Czech Republic, to the provisions of Article 4(1) of the Civil Code (2012),[15] which establishes a rebuttable presumption that everyone is endowed with the reason of an average person and can be presumed to use it – in the case of easily recognizable crimes such as murder, robbery, rape or theft, it is difficult to do so in the case of possible crimes under international law. This is due both to the lack of available information and to the difficulty for the layman to legally qualify them. This is currently also difficult in view of the less than clear-cut behaviour of many states in the world towards, for example, the Russian Federation or Belarus.

The ambiguity of the conduct also applies to law enforcement authorities in the Czech Republic. On the one hand, their representatives talk about investigating and prosecuting not only war crimes committed in Ukraine, but also certain publicly expressed views on the conflict.[16] On the other hand, however, there is no evidence that the same officials have taken any steps, even if of a purely formal and symbolic nature, to prosecute the actual perpetrators of the Russian-Ukrainian war, for example, for committing the crime of aggression under Section 405a of the Criminal Code. In this respect, the actions of the aforementioned officials appear to be somewhat disproportionate.

In view of the above arguments, I consider that the use of provisions § 365 and § 405 of the Criminal Code (2009) to sanction statements directly endorsing war crimes may encounter a number of problems. However, these statements are not what has long been referred to as so-called disinformation.

Such statements are referred to as attitudes towards the current policy of the Czech Republic in relation to Ukraine or the Russian Federation, attitudes towards the causes of the war and their assessment, attitudes towards the consequences or possible consequences of the war for the Czech Republic, etc. It is obvious that the expression of attitudes of this type is completely outside the scope of the Czech Criminal Code (2009). For the sake of completeness, let us add that, for example, the offence of spreading an alarm report under Section 357 of the Criminal Code does not apply to the above-described actions at all. After all, the discussion of a country's foreign policy is an essential element of democracy and it is difficult to find justification as to why a citizen of a democratic country should be denied the right to express their opinion on the policy of their own government, the consequences of whose decisions they bear.

However, it is apparent that some members of the Government of the Czech Republic view the impossibility of sanctioning the above type of statements negatively – they are equally critical of the lack of a legal basis for

[15] It states, "Every person of capacity is presumed to have the mind of an average person and the ability to use it with ordinary care and caution, and that every one may reasonably expect this of him in legal dealings."
[16] See, for example, the statement of Lenka Bradáčová, head of the High State Prosecutor Office in Prague (Seznam Zpravy, 2022c), or the statement of Igor Stříž, head of the Supreme State Prosecutor Office (Supreme State Prosecutor's Office, 2022).

blocking so-called disinformation websites (Seznam Zpravy, 2022b). As a side note, they are legally problematizing the crackdown on selected servers that took place in the Czech Republic on 25 February 2022. Other politicians, however, are saying that disinformation is a problem – in fact, the Czech Republic has established a government commissioner to combat disinformation (Government of the Czech Republic, 2022) – but politicians' statements about whether new legislation is in the pipeline to provide a legal basis for punishing it are contradictory (Cibulka, 2022a; Loudová, 2022).

5. On some issues related to the possible legal restriction and sanction of so-called disinformation

As has been repeatedly mentioned above, the topic of the need to combat so-called disinformation resonates in the public space not only in the Czech Republic (Mamak, 2020). This is not an entirely new topic at the moment. In January 2017, the Ministry of the Interior of the Czech Republic established the Centre against Terrorism and Hybrid Threats (Government of the Czech Republic, 2017). However, it does not have executive powers, and at the same time no legal framework has been adopted to define what so-called disinformation is and to restrict its dissemination, for example. The previous government also commented on the appropriateness of addressing this issue in 2021 (Janochová, 2021). As mentioned above, the current government appointed its Anti-Disinformation Commissioner on 23 March 2022. Current developments in the drafting of a law that would give a legal framework for the suppression of so-called disinformation are unclear. Following strong statements by politicians calling for its creation, the situation has changed, with the relevant ministries apparently discussing the whole issue and considering possible solutions, including all their legal implications.

The legal side of the whole issue of misinformation is not simple. First, this is because there is no legal definition of what so-called disinformation is. The Ministry of the Interior itself (MVCR, n.d.-b) defines so-called disinformation as "dissemination of deliberately false information, especially by state actors or their offshoots vis-à-vis a foreign state or the media, with the aim of influencing the decisions or opinions of those who receive it" (MVCR, n.d.-a).

However, we are currently witnessing the dissemination of a range of information where is difficult to prove not only whether the information is *deliberately* false, but whether and to what extent it is true or false at all. If we take into account the originator of so-called disinformation and its objectives, it is again questionable in how many cases so-called disinformation is spread by state actors against the state or the media. The vast majority of information of a dubious nature is unlikely to meet this criterion, or at least it will be very difficult to prove.

In order to limit the possible dissemination of disinformation, a completely new legal framework is needed. This may be a rather complex matter, but it must start with the Charter. However, it is difficult to find a reason in Article 17(4) for restricting freedom of expression in the form of what is termed *disinformation* which would not already be restricted or even penalised by law. In recent months, the need to protect the security of the state has been raised in this context. Naturally, some so-called disinformation can be so dangerous, either in terms of its content or in the overall narrative, that it can undermine citizens' confidence in the state itself, its leaders, the political system, etc. However, this is an extreme case, and it is difficult to apply this scale to the current situation. Thus, at the present time, it is difficult to bring the sanctioning or restriction of what can be read mainly on alternative websites or in news disseminated by e-mail under the conditions set out in Article 17(4) of the Charter.

However, if we are to restrict something as unlawful, we must first determine what is lawful. Thus, if we want to restrict and punish *disinformation*, we must say in the first place what is meant by *information*. Or rather, what is *truth*. Here is the crux of the matter, so to speak. Napoleon declared that history is a fable agreed upon by men (Vaněk, 2009, p. 345); in the area of today's Czech Republic, we have seen these "agreements" change at least five times in the last 120 years. This should lead us to some caution about social truth.

It is also worth remembering that in the Czech Republic, the state itself has unfortunately become a candidate for the biggest disinformer over the past 2 and a half years. It is easy enough to look up everything that state officials have officially said on the subject of coronavirus and vaccination against it. Almost invariably, they have done so without adding words such as "probably", "we believe" or "in view of the scientific knowledge to date, it appears that...". On the contrary, they were absolutely clear and without any doubt. Subsequently, it transpired almost without exception that what the opponents of the official statements claimed was confirmed within a few months,

in the form of another official communication from the Minister of Health. On 26 April 2022, the Iniciativa21 association asked both the Government Commissioner for Disinformation and the Prime Minister to investigate the statements of the Minister of Health as disinformation (Iniciativa21, 2022). This way of acting and expressing oneself has shaken public confidence in official information in the Czech Republic.

So how do we define so-called disinformation? The only robust definition of *disinformation* is that disinformation is anything that differs from the official message. This definition, while rather cynical, is largely true to reality. Above all, this shows the difficulty and delicacy of the whole issue.

Where then do we find the yardstick for what is and what is not *information*? Here again we come back to the need for a law to determine this. One option is to set up an authority to deal with this issue – for example, the Information Authority.

It would be totally inappropriate for any restrictive law to contain vague provisions, for example, prohibiting the dissemination of misinformation or unverified information, without providing a more detailed definition of these terms. The problem of determining what to restrict or penalise and what not to restrict or penalise would then be delegated to the authorities with such repressive powers. They would then have to act in each individual case at their own discretion, on their own responsibility, and to prove the grounds for restriction or even sanction each time. Naturally, such legislation may exist, but it is doubtful whether it can meet the requirements of the rule of law if we are talking about a democratic state governed by the rule of law.

Above all, such a solution would conflict with Article 39 of the Charter, according to which only the law determines what conduct constitutes a criminal offence. One of the basic principles of criminal law is *nullum crimen sine lege certa*. Thus, a law complying with this provision should be sufficiently specific. It is true that the use of non-specific terms in criminal law is neither unusual nor unconstitutional (Ústavní soud, 2021).

However, if we know what *information* is, it will not be difficult to sanction everything else at the discretion of the legislator. There is no need to use foreign models in this matter, as we have several historical solutions of our own.

For example, the provisions of Section 100 of the Criminal Code of 1961, which until 30 June 1990 defined the crime of *sedition*, come to mind. For the sake of completeness, let us recall the wording of these provisions.

> (1) Whoever, out of hostility to the socialist social and state system of the Republic, outrages at least two persons
> (a) against the socialist social and state establishment of the Republic,
> (b) against the territorial integrity, defence or independence of the Republic, or
> (c) against the allied or friendly relations of the Republic with other States,
> shall be punished by imprisonment for six months to three years.
>
> (2) Anyone who, out of hostility to the socialist social and state establishment of the Republic, allows or facilitates the dissemination of the seditious speech referred to in paragraph (1) shall be punished in the same way.
>
> (3) The offender shall be punished by imprisonment for one to five years,
> (a) if he commits the act referred to in paragraph 1 by means of the press, film, radio, television or other similarly effective means, or
> (b) if he or she commits the act referred to in paragraph 1 or 2 while the State is on national emergency alert.

It is clear that Section 100 of the Criminal Code (1961) can serve as an inspiration in this regard. In principle, it is sufficient to substitute a few adjectives in its wording in order to bring it up to date for present-day conditions. For example, it would suffice to replace “socialist establishment” with “democratic rule of law”.

Another option is to dig even deeper into the past and look at the Austrian Penal Code of 1852. Section 308 of the Criminal Code (1852) established the offence of *spreading false alarming rumours or predictions*. Its provision read as follows:

> Whoever by means of public announcement (by nailing on the wall, by public speeches or lectures, etc.) disturbs or spreads a false rumour which is alarming to public safety, without sufficient reason to believe it to be true, or whoever disturbs or spreads something in this manner which passes for a prediction, is guilty of a misdemeanour, and shall be punished by rigorous imprisonment from eight days to three months.

In this case, too, it is apparent that the construction of the quoted provision may be applicable even today.

However, the crucial question is whether to follow the suggested path. Above all, this would mean abandoning the current approach to freedom of expression. At the same time, however, it would also be an admission that the developments of the past 33 years, based on the non-prosecution of political speech, or speech consisting in the expression of opinions on current social issues, has been a dead end. It would also mean the need to create "political police", which would have a major impact on the public perception of the police. If after 1989 the police made great efforts to rid themselves of the label of a repressive regime organ in the eyes of ordinary people, then, together with the prosecution of so-called disinformation, the results of these efforts may very quickly be wasted. This all comes back to the basic question of whether we should have a police force to investigate, for example, the letter "Z" made up of cucumbers and peppers on sandwiches (Idnes.cz, 2022). It should be also remembered, that where criminal sanctions are concerned, these are to be the last resort (Novotný et al., 1997; Gerloch, 2004).

Conclusion

It is obvious that the issue of combating disinformation has been resonating in society for many years, and not only in the Czech Republic. This is a transnational phenomenon that is likely linked to the development and availability of the internet. This has led to an extraordinary expansion of the possibilities for sharing information. At the same time, it has meant the loss of a number of filters which in the past, when the means of sharing information were concentrated in the hands of a few individuals or institutions and their operation was demanding and exclusive in every respect, allowed considerable control over public discourse. The development and accessibility of the internet has democratised the process of information sharing, but without correspondingly restrictive mechanisms.

The fight against so-called disinformation is one aspect of the process of finding a new balance between the free sharing of information and accountability for it. However, this is not a new phenomenon. European society has already gone through similar processes several times. First with the invention of the printing press, which marked the end of ideological unity in a space originally dominated by the Catholic Church. Then with the development of newspapers and the rise of mass political parties in the 19th century. In the 20th century, a similar move was the privatisation of radio and television broadcasting. The only difference today from the past is that the means of sharing information is available to virtually everyone. There is no difference, however, in the actions of two antagonistic forces, one striving for the freest possible expression and plurality of opinion, the other for more or less control over what is published and for unity of opinion, at least as far as basic social assumptions are concerned.

Interference with freedom of expression and information sharing, or access to it, should primarily take place within the framework set by the Charter of Fundamental Rights and Freedoms. The latter takes a distinctly liberal view, allowing the rights set out in Article 17 to be restricted only in the most extreme case, if there is no other way. Thus, it is naturally possible to restrict these freedoms in the case of flagrant crimes, flagrant violations of the rights and freedoms of others or other objectively socially harmful conduct. The introduction of new criminal offences or misdemeanours may be considered. Where criminal sanctions are concerned, these are to be the last resort. The same applies to administrative interference in the exercise of freedom of expression, for example in the form of blocking websites.

However, views on domestic and foreign policy should stand outside these constraints. To do otherwise would risk limiting democracy itself, for which freedom of expression is essential. In any case, the question is whether the measures taken both at the level of the European Union and at the level of its Member States do not constitute censorship, which is expressly prohibited not by European Union law but by the constitutions of some of its Member States.

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RESTRENGTHENING THE ROLE OF SUPREME AUDIT AGENCY IN SUPERVISING STATE-OWNED ENTERPRISES?

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Abstract. Many parties have questioned the existence of the State Audit Agency to supervise State-Owned Enterprises. The Indonesian Constitutional Court decided on verdicts 62/PUU-XI/2013 and 26/PUU-XIX/2021 regarding the position of the Supreme Audit Agency as the external supervisor of State-Owned Enterprises. This study compares how Indonesia and Hungary, two countries that follow the civil law system, place the Supreme Audit Agency (Badan Pemeriksa Keuangan and Állami Számvevőszék) in their legal system. Moreover, this paper explores and confronts the legal doctrines and legislations of the two countries in auditing and strengthening the corporate governance of public companies. In conclusion, this study explains that Indonesia and Hungary regulate Badan Pemeriksa Keuangan and Állami Számvevőszék in their Constitutions as the fundamental law and further regulate it in the Act as a complementary law. Both countries used the Board or Collegiate model of audit institution and assigned the Supreme Audit Agency as a protector of state assets by preventing fraud and strengthening good corporate governance in the management of State-Owned Enterprises.

Keywords: State-Owned Enterprises, Supreme Audit Agency, Indonesia, Hungary.

Introduction

The responsibility for managing state finances is on the paradigm of public law regulated in several regulations such as the state finance law, the law on auditing bodies of finance, the law on state financial supervision, and the law on state companies. In contrast, the company's business activities are in a corporate legal framework which is part of private law (Kasim, H., 2017). Therefore, State-Owned Enterprises (hereinafter - SOEs) are in two paradigms of public law and private law.

The position of SOEs whose majority or most of their capital comes from the state creates a dualism of the supervision paradigm based on the government judgment rule and business judgment rule. This supervision is also related to the role of the audit agency in charge of supervising SOEs. In 2013, the SOEs Legal Forum submitted a judicial review of several articles in the State Finance Law to the Indonesian Constitutional Court. There are three norms tested, namely the definition of state finances, state assets, and the audit authority of the Supreme Audit Agency for SOEs (hukumonline, 2014).

In verdict number 62/PUU-XI/2013, the Constitutional Court rejected all requests from the SOEs Legal Forum. The separated state assets as SOEs' capital are state assets and the State Audit Board remains authorized to supervise and audit SOEs for managing state finances (Indonesian Constitutional Court, 2013). The decision

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emphasized the duties and authority of the Supreme Audit Institution in examining the management and financial responsibilities of SOEs as stated in Law Number 17 of 2003 on State Finance (Paputungan, M.H., 2017).

Furthermore, the issue of the Supreme Audit Agency's supervision of SOEs does not yet end. Muhammad Helmi Kamal, former President Director of the Pertamina Pension Fund, examined several articles of the Supreme Audit Agency Law to the Indonesian Constitutional Court in 2021. In his lawsuit, the Pertamina Pension Fund is a subsidiary of PT Pertamina, a state oil and gas company, which collects employee contributions as a pension fund. Therefore, the Supreme Audit Agency is not authorized to audit the company because it does not manage state finances. However, in verdict number 26/PUU.XIX/2021, the Indonesian Constitutional Court rejected the request by stating that the Supreme Audit Agency (SAA) is eligible for conducting the examinations on all legal subjects that are directly or indirectly related to state finances. Besides, SAA has a firm authority to audit and supervise SOEs (Indonesian Constitutional Court, 2021).

This paper will compare legal doctrines and legislations on supervision of SOEs held by the Audit Board of Indonesia (hereinafter - Badan Pemeriksa Keuangan) and the State Audit Office of Hungary (hereinafter - Állami Számvevőszék). It also asks how different legal systems has addressed problems that our law faces but in a different way, and with degree of perceived success or failure (Salter, M. and Mason, J., 2007). To collect data, this research will take a secondary data from books, legislations, journals, newspapers, reports, and other publications related to the topic of research. All data will be analyzed qualitatively regarding the qualities of sources rather than its quantity.

The study explores the following research questions; how do Indonesian and Hungarian legislations regulate the role of the Supreme Audit Agency in supervising SOEs? If so, how do SOEs constantly need supervision and audit to bolster good corporate governance based on Indonesia's and Hungary's experiences?

Although geographically located on different continents with thousands of kilometres, Indonesia and Hungary have had economic cooperation in the form of the Indonesia-Hungary Investment Fund (hereinafter - IHIF) since 2021. IHIF aims to provide funding sources for national strategic projects in the fields of digital infrastructure, water treatment clean, and other public infrastructure in Indonesia. Over the past five years, bilateral trade between the two countries has continued to increase. When the pandemic emerged in 2020, trade between the two countries increased by 13.35 percent (Ministry of Foreign Affairs of Indonesia, 2021). The comparative study of the supervision of state companies by the Supreme Audit Agency becomes very interesting because of the good relations between the two countries in investment and trade. The study results will provide educational benefits in strengthening state corporate governance in running a business by strengthening the supervisory role of the leading audit agency.

1. The Relation Between State and State-Owned Enterprises

How to give the meaning of State-Owned Enterprises (SOEs) is that there is no one the exact meaning because many definitions are used differently. For instance, Asian Development Bank (hereinafter - ADB) defines SOEs as "a legal entity established to undertake commercial activities and owned fully or largely by the sovereign" (ADB, 2018, p. 3). Besides, the Organization for Economic Co-operation and Development (hereinafter - OECD) Guidelines defines SOEs as "any corporate entity recognized by national law as an enterprise, and in which the state exercises ownership. It includes joint stock companies, limited liability companies, and partnership limited by shares. Also, statutory companies, with their legal personality established through specific legislation, must be considered as SOEs if their purposes and actions, or parts of their actions, are of a mainly profitable nature" (OECD, 2015, p. 14-15).

Another definition introduces SOEs by dividing it based on the number of shares owned by the state. European Commission for Economic and Financial Affairs explains that SOEs can include the following categories:

1) SOEs fully owned by public authorities.
2) Public authorities have a majority share.
3) Public authorities retain a minority share but have special statutory powers.

4) Public authorities have a minority share and no special powers. These are generally not considered as SOEs however they may be of relevance to obtain a fuller picture of governments' stake in the economy (European Commission Directorate-General for Economic and Financial Affairs, 2016, p. 6-7).

Indonesian law, particularly stated in Law Number 19 of 2003, mentions that SOEs is an enterprise or company which the value of shares possessed by the state either majority or entirely through direct equity participation obtaining from the limited state properties. Moreover, SOEs is divided into three: First, State-Owned Limited Liability Company (Perusahaan Perseroan) means a SOE which has the following characteristics: incorporated as a limited liability company, the company's capital is divided into shares, the total share ownership or at least 51% is owned by the Indonesian government, and the main objective is making a profit. Second, State-Owned Listed/Registered Company (Persero) means a SOE that has met certain criteria in equity and the number of its shareholders or Persero that has made a public offering through the capital market mechanism in accordance with applicable legal provisions. Third, Public Corporation (Perusahaan Umum/Perum) means a fully owned company by the state since the capital is not divided into shares which goal is to produce advanced quality stuffs and/or services for public utilities and concurrently to acquire gains under the corporate governance values.

The existence of state company is based on the thought of the Constitution of the Republic of Indonesia 1945 who adheres to the Pancasila economic theory which runs parallel to and beside the major economic systems in the world (Peter, M., 1982). In addition, The Pancasila economy, in line with the struggle for political sovereignty, establishes the basis for national economic development through the struggle for economic sovereignty (Madjid, A. and Swasono, S.E., 1988). Article 33 of the Indonesian Constitution is the fundamental thought of the urgency of SOEs that stated five frameworks of Indonesian economic principles. First, principles of kinship are basic structure of economics as a joint enterprise. Second, state must control several important and vital production sectors for livelihood of people. Third, state should manage and have control of land and waters and the natural wealth contained in it to utilize for the optimal welfare of the people. Fourth, the principles of solidarity, efficiency with justice, sustainability, environment concept, autonomy, as well as by safeguarding the balance of progress and national economic unity are the principles of economic democracy as the national economic management. Fifth, the laws, under the hierarchy of the Constitution, will further regulate the implementation of the provisions of the national economy.

Hungary also has a special enterprise format to organize publicly owned economic activities ruled by Act V. of 2013 on the Civil Code. These are the forms of the Hungarian economic enterprises: General Partnership (3:138), Limited Partnership (§. 3:154), Private Limited – Liability Companies, and Limited Companies (§. 3:159 and §. 3:210), on the Civil Code. The last two types of companies are the only formats that can be State Owned Enterprises. (Papp, T. and Auer, A., 2016). Besides, the basic norm of SOEs is taken from the Fundamental Law of Hungary. For instance, the article M states that the economy of Hungary shall be based on work which creates value, and on freedom of enterprises. Moreover, article XII paragraph (1) says that everybody shall own the right to decide his or her occupation and profession without restraint and to partake in entrepreneurial interest. Everyone, in accordance with his or her abilities, capabilities and readiness, must support and contribute to the enrichment of the community through his or her work.

It is also an important regulation in Hungarian law that a local government's entrepreneurial activity shall not jeopardize its critical functions' performance. A local authority may participate only in an undertaking whose liability does not exceed the extent of its financial contribution (Act CXCVI 2011 on National Asset). In the Hungarian Fundamental Law, "the local governments may engage in entrepreneurial activities using their assets and revenues available for this purpose, without jeopardizing the performance of their mandatory duties."

More specifically, the Hungarian constitution also presents the concept of asset ownership as the basis for regulating individual ownership and state ownership of an asset. Article 38 of the Hungarian Fundamental Law declares: First, the national asset, both state and regional governments, shall be public properties. Those public assets should be operated and protected to serve the public interest, to meet common benefit, to conserve natural wealth, and to consider the needs of the next generations. A Cardinal Act will regulate the conditions for managing and guarding national properties and controlling the state assets. Second, a Cardinal Act will determine the scope of the exclusive assets and activities of the State. Besides, the law will also rule out the limitations and conditions of the alienation of national properties of outstanding importance to the national economy. Third, the transfer or

displacement of national properties shall comply with the Act with the exceptions decided in an Act and reflect on the demand of commensurate values. Fourth, the organization which has the power to manage national assets by order of the state are transparent in managing state assets and responsible to implement the contracts on the use or transfer of national assets. Fifth, a Cardinal Act will regulate the management and governance of business organizations owned by the State or local governments autonomously and responsibly based on the lawfulness, prudence, and efficiency requirements. Sixth, a Cardinal Act will regulate the establishment, operation, and termination of, and the performance of public duty by, a public interest asset management foundation.

During the 2000s, Hungary shifted the policy from privatization of SOEs to asset management. From an administrative point of view, according to Act CVI of 2007 on state property, the Hungarian National Asset Management is a legal and official institution by the law to control and carry out state assets (Papp, T. and Auer, A., 2016). To enlarge fiscal revenues, multiply employment, and restrict dependence on multinational businesses, the governments utilized the role of SOEs. After 2010, the government transformed its gesture toward foreign-owned enterprises and reconsidered the state duty. For example, the government reduced exaggerated foreign ownership in Hungarian banking sector by buying outs the foreign shares in several top commercial banks. The Hungarian capital owners, in some cases, reprivatized their assets to foreign investors while the state retained these assets (Szanyi, M., 2019).

SOEs has a significant economic role in many countries. For instance, SOEs are assigned a central role in transforming Indonesia into a developed economy. From the mid-2010s, the Indonesian government began to strengthen its direct participation in the economy by investing significantly in and via SOEs. In most cases, SOEs have a commanding influence on the industry in which they operate, and indeed the primary challengers to similar businesses also are other SOEs. This case confirms the dominance of public enterprises over strategic manufacturing (Kim, K., 2021). For instance, Pertamina, a national oil company of Indonesia, had a market share of 96% in 2016 in the sector of fuel retail. State-owned banks dominated 40% of national banking assets, and state-owned constructions took control of infrastructures like water, toll roads, ports, and airports. Bio Farma, a national pharmaceutical company, possessed absolute power over vaccine and serum manufacturers in Indonesia. SOEs are generally exempt from legislation preventing or controlling trusts or other monopolies when their market power fulfills the aim of national development objectives (OECD, 2021).

In Hungarian perspective, SOEs contribute around 2 percent to total economic output and 4 percent of total employment. Besides, SOEs dominated more than 60 percent of energy sector output and influenced more than 20 percent of transport sector (Böwer, U., 2017, P. 7-8). Hungary has almost 600 state-owned companies. According to the latest data from the Hungarian government released from 2010 to 2020, the book value of assets owned by the Hungarian state increased by 52 percent. The total value of assets reached about 18,000 billion Forint in 2020. State assets increased due to two causes: the government buying a new property and the increase in the value of state companies' assets (Moldicz, C., 2021).

As regulated by the Act CXCVI of 2011 on National Assets, one of the principal supporting institutions of the Minister of National Development is the Hungarian National Asset Management Inc. It is a public sector holding owned by the central government of Hungary. In addition, it is responsible for the management of SOEs assets. Its portfolio includes companies and both tangible and intangible properties (KPMG and Bocconi University, 2018). Based on Hungarian law, the holding company has to manage and supervise the state properties and assets, including gaining financial profit and surplus in organizing the portfolio. Moreover, the holding company has ownership rights to state assets of over 16,000 billion forints. This amount is equivalent to almost 50 percent of the annual GDP of Hungary. It is responsible for nearly 553,000 properties and about 100,000 other movable property items (Xin, C., 2021, p. 46).

2. The Role and Responsibility of *Badan Pemeriksa Keuangan and Állami Számvevőszék*

As a form of company, SOEs have the concept of internal and external supervision. Internal supervision is carried out by the Board of Commissioners who represents the interests of the company's shareholders. In the theory of corporate supervision, European countries such as France, Germany, and the United Kingdom have introduced the concept of corporate supervision through inspectors, commissioners, supervisory councils, or the Board of Trade (Conard, A.F., 1984, p. 1459-1488). Meanwhile, external supervision is carried out by an independent audit

agency requested or appointed by the company. Both internal and external supervision is exceedingly significant for ensuring good corporate governance. The external control makes the surveillance stronger due to its role as the complement and counterbalance. Although, social processes and structural governance factors incorporation are the notable elements to reaching the effectiveness of internal and external supervision (de Waal, M.M., 2020). All forms of supervision, internal and external, aim to ensure that the company carries out its business activities following the company's founding objectives, such as profit and prosperity.

SOEs get external supervision by a state agency or institution called the State Audit Institutions (hereinafter - SAI) or Supreme Audit Agency (hereinafter - SAA). Each country establishes this institution to convince that all public expenditures are managed and spent economically, efficiently, and effectively through audit and examination. More importantly, they comply with existing laws and policies to espouse national priorities. There are three main models of SAI: Judicial or Napoleonic model, Westminster model, and Board or Collegiate model. First, the Judicial or Napoleonic model is applied in the Latin countries in Europe, Turkey, Francophone countries in Africa and Asia, and several Latin American countries such as Brazil and Columbia. Second, the Westminster model is adopted in the United Kingdom, several Commonwealth countries, many Saharan African, a few European countries such as Ireland and Denmark, and Latin American countries such as Peru and Chile. In other terms, this model is mentioned as the Anglo-Saxon or Parliamentary model. Third, Board or Collegiate model is used in some European countries such as Germany, the Netherlands and Hungary, Argentina, and Asian countries such as Indonesia, Japan, and the Republic of Korea (OECD, 2010, p. 15-20).

In the Judicial or Napoleonic model, SAI, called the Cour des Comptes (Court of accounts), has both judicial and administrative power. It is an independent institution and an integral part of the judiciary, which excludes from executive and legislative branches. Its main task is to audit every government agency, such as ministries, departments, commercial and industrial bodies under the ministry, and social security bodies. In addition, the Cour des Comptes can make decisions and oversee legal compliance with government policies, especially concerning the use of public funds (The World Bank, 2001).

SAI, with the Westminster model, has professional auditors and technical experts to submit periodic reports related to government institutions' financial and operational reports. The difference with the Judicial or Napoleonic model is that it does not have judicial authority. However, the audit findings can be used as the basis for investigations by legal institutions. The Board or Collegiate model has similarities with the Westminster model, which does not have judicial authority. SAI is led by the president, who is also the general auditor. Its main task is to examine and analyze government revenues and expenditures and to report its findings to parliament (The World Bank, 2001).

Indonesia has SAIs which is known as Badan Pemeriksa Keuangan (the Audit Board of Indonesia). It has been regulated by the Indonesian Constitution 1945 Chapter VIIIA The Financial Audit Board. Article 23E paragraph 1 mentioned that Supreme Audit Agency, a free and autonomous institution, was established by the State to examine the organization and responsibility in managing state finances. Next, paragraph 2 declared that the People's Representative Council, the Regional Representative Council, and the Regional People's Representative Council receive the result of an examination of the state finances in line with their authority. Afterward, paragraph 3 emphasized that the representative institution and or board must follow up on the result of an examination in compliance with the laws. The People’s Representative Council is the mandated institution by Article 23F paragraph 1 to elect the Supreme Audit Agency members in consideration with the Regional Representative Council. Next, the President inaugurates those members. Then, all members, as stated in paragraph 2, choose the leadership of the Supreme Audit Agency among them. Lastly, Article 23G explained that the Supreme Audit Agency is domiciled in the capital city of Indonesia and shall have a representation in every province. Further provisions regarding this institution shall be regulated by laws.

Furthermore, Article 1 paragraph (1) of Law Number 15 of 2006 states that the Supreme Audit Agency, a state institution, has the assignment to inspect and verify the management and responsibilities of state finances. This task complies with the provision of the Indonesian Constitution 1945. The meaning of state finances, explained in Article 1 paragraph (1), are all state rights and obligations. Those can be appraised or rated in money, as well as everything in the form of money or in the form of assets that can be used as state property in regard to the performance of these rights and obligations. Moreover, state finances are state-owned finance and/or assets

managed by the Central Government, Regional Governments, State-Owned Enterprises, Regional-Owned Enterprises, and other institutions or bodies such as central banks, pension funds, foundations, public service agencies, and others.

Several laws and regulations, synchronous and complimentary, have regulated the authority of the Supreme Audit Agency to oversee SOEs. Law Number 17 of 2003 concerning State Finances, Law Number 15 of 2004 concerning Audit of Management and Accountability of State Finances, and Law Number 19 of 2003 concerning State-Owned Enterprises are following the provisions of Law Number 15 of 2006 related to the authority of the Supreme Audit Agency to examine SOEs (Anggoro, C., 2018). However, this authority has a weakness because the Supreme Audit Agency is only a co-auditor institution. The House of Representatives must have and receive all results of state financial audits from the Supreme Audit Agency. For financial audits in provinces and municipalities, the Regional People's Representative Council obtains the results of audits according to its authority (Dahoklory, V, 2020). Therefore, the Supreme Audit Agency cannot directly follow up when it finds state losses on the management of SOEs, but it must report it to the competent law enforcement agencies such as the Corruption Eradication Commission, the Police, or the Prosecutor's Office (Asshiddiqie, J., 2012).

In Hungary, Állami Számvevőszék (the State Audit Office) was established on 1 January 1990 after the country amended the Constitution by Act XXXVIII of 1989 on the State Audit Office. It is the responsible organization of the Parliament for financial and economic auditing. It is an external and independent organization of the Hungarian state control, and the Hungarian State Audit is accountable only to the Parliament each year. As an authoritative institution, it must organize its audits officially, efficiently, and prudentially (Halász, Z., 2012, p. 286). Moreover, the State Audit Office contributes to good governance model with the fundamental pillars such as high-quality lawmaking, lawfulness, accountability, transparency, integrity, economic and financial sustainability, a model organization, and effective and efficient management (Domokos, L., Pulay, G., Pályi, K., Németh, E., and Mészáros, L., 2016). It also supports the effectiveness and efficiency of governance both public entities and state-owned enterprises by enforcing transparency and measurability of performance. Therefore, the State Audit Office is a supreme audit institution that plays a prominent role in public management reform, particularly in state finances (Domokos, L. et al, 2016).

The main legal basis for the State Audit Office of Hungary is the Fundamental Law of Hungary. The primary duty of the State Audit Office is a financial and economic audit. In the organizational structure of the State, it is an independent and external organ of the State which is responsible for the State Audit. The Fundamental Law of Hungary said: The State Audit Office shall be the organ of the National Assembly responsible for the financial and economic audit. The State Audit Office shall audit the implementation of the central budget, the administration of public finances, the use of funds from public finances and the management of national assets. There are four audit scopes, regulated by law, such as the implementation of the central budget, the administration of public finances, the use of funds from public finances, and the management of national assets. In carrying out its duties, the State Audit Office must pay attention to the criteria of lawfulness, wisdom, and efficiency. Interestingly, the term of service for the President of the State Audit Office is twelve years. The election of the President is with the votes of two-thirds of the members of the National Assembly. Every year, the President submits accountability to the Member of the National Assembly.

Furthermore, Act LXVI of 2011 emphasizes the legal position and authority of the State Audit Office of Hungary. It mentions in Article 1 that the State Audit Office is the top independent audit institution for state finance supervision. It is also responsible to the National Assembly. Moreover, it conducts its audit independently of any other organization since it has supreme control over examining and verifying the management of public funds and assets organized by central and local governments. More importantly, the State Audit Office supports the National Assembly, its committees, and the work of the audited entities, thus facilitating well-governed operations. Its findings, recommendations, and advice based on its audit experience are highly beneficial for implementing good state governance. Based on its conclusion, the State Audit Office may propose and begin actions with the competent authority against the audited entities and the persons responsible. However, its reports, findings, and resolutions are legal and binding. Someone or an institution can confront and contest them in courts or other authorities.

3. The Importance of Supervision of State-Owned Enterprises by Supreme Audit Agency

The state establishes SOEs with social and profit goals. In the concept of state administration, the social function of SOEs is as a state apparatus to provide public services in the form of goods or services to citizens. At the same time, the profit function is carried out by seeking profit within the private legal framework (Dahoklory, V, 2020). Besides, SOEs has a function as an agent of development of the state. SOEs provide public services by working on national development projects on assignment from the government as the majority shareholder. SOEs carrying out their duties receive many incentives and subsidies such as government funding assistance, tax cuts or write-offs, and debt interest reduction (Marisi, 2017).

In administrative law theory, supervision can be divided into two forms. First, supervision according to the institution consists of internal supervision and external supervision. Second, supervision is based on its nature, namely preventive supervision and repressive supervision (Setiawan, A., 2019). OECD Guidelines on Corporate Governance of SOEs mentioned the great signification of supervision. SOEs must pay attention to high standards of transparency and be subject to the same high quality of accounting, disclosure, compliance, and auditing standards as listed companies. Moreover, SOEs annual financial reports should be subject to independent external audit based on excellent levels. Exclusive state control procedures do not substitute for an independent external audit (OECD, 2015).

To prevent fraud and corruption, audit institutions have three roles in prevention and detection to improve overall transparency and accountability, support an environment that limits corrupt behavior, and promote a climate of good governance (Latif, A., 2002). Audit institutions are “the guardians of public interest” since people trust them. More interestingly, they possess national faith more than other powers of the regime. Moreover, they play a significant role in uncovering professional misconduct and unprofessional behavior. Indeed, auditors are proficient in discovering unfair financial notifications that can disguise corrupt activities (Chêne, M., 2018).

The Supreme Audit Agency of Indonesia has experienced uncovering the cases of state loss. Next, those cases were submitted to the Corruption Eradication Commission for further investigation. This role is under the statutory order that if the Supreme Audit Agency finds a criminal element in the examination, they must report it to the authorized law enforcement agency (Ilahi, B.K. and Alia, M.I., 2017). The Supreme Audit Agency utilizes the results of inspections by the internal control agency. Those results become one of the most prominent papers for verifying and investigating how institutions manage their financial activities. More importantly, they have three types of audits. First, the financial audit of reports submitted by state institutions and SOEs. Second, examination of the performance of state financial management from the aspect of efficiency and effectiveness. Third, an examination with a specific purpose is an investigative examination carried out at the request of law enforcement officials (Kaldera, N.X., Muthi, A. and Faza, H.A., 2020).

Based on Hungarian experience, State Audit Office has a great role in enforcing a good corporate governance for SOEs. It constitutes cornerstone of the models ensuring that the institutions deliver objective and unbiased findings (Domokos, L. et al, 2016). More importantly, State Audit Office pointedly audited and assessed SOEs in many aspects such as financial circumstances, management of assets and properties, the structure of the domestic control system, and fulfillment with the connected rules in areas justifying integral parts of the former. Besides, the audits included the assessment of some fields in leadership performance (Domokos, L., Makkai, M. and Szommer, V., 2019).

Conclusions

Indonesia positions the Badan Pemeriksa Keuangan in the Indonesian Constitution 1945. Article 23E, 23F, and 23G in Chapter VIIIA regulate the general role and duty of the Audit Board of Indonesia. These laws show that the Supreme Audit Agency is a high state institution that works based on the constitutional mandate. Moreover, several laws such as Law Number 15 of 2006, Law Number 17 of 2003, Law Number 15 of 2004, and Law Number 19 of 2003 strengthen the legal standing of the Supreme Audit Agency. Furthermore, the Indonesian legal framework established the SOEs' capital as state assets. The state consequently controls the SOEs by assigning the Supreme Audit Agency.

In Hungary, the Állami Számvevőszék is the independent organ of the National Assembly and the responsibility of the National Assembly. The principal legal norm for the State Audit Office of Hungary is the Fundamental Law of Hungary, particularly in Article 43. Besides, the legal status and powers of the State Audit Office are under Act LXVI of 2011 on National Assets. From the Hungarian legal perspective, SOE's property is part of national assets. The State Audit Office, therefore, has the right to audit SOEs to support their transparency and measurability of performance.

Indonesia and Hungary adhere to the Board or Collegiate model in the audit system of government institutions which eliminates judicial authority for audit institution. However, both Badan Pemeriksa Keuangan and Állami Számvevőszék have a significant role in reinforcing and strengthening the good governance of SOEs. As the external supervisor, the Supreme Audit Agency can prevent fraud and corruption, precisely improve overall transparency and accountability, support an environment that limits corrupt behavior, and promote a climate of good governance. The two countries utilize the existence of the Supreme Audit Agency to protect and safeguard the state assets as a part of the capital and wealth of SOEs.

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A COMPARATIVE ANALYSIS OF INFORMED CONSENT LEGISLATION IN UKRAINIAN AND LATVIAN LEGISLATION AND CASE LAW

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Abstract. Informed consent is one of the key principles in safeguarding human rights in the sphere of healthcare. It presupposes the expression of the patient's free will relating to his medical examinations, treatment and diagnostic procedures, as well as the physician's duty to inform the patient on the forthcoming medical interventions, including the facts regarding the potential risks of these medical interventions. This principle is one of the elements of contemporary medical law, which has marked the transfer from paternalistic medicine to a modern model of medicine, where the patient is an active participant in the process of medical treatment. In this paper, the authors illustrate the legal aspects of safeguarding the patient's right to informed consent in the legislation and legal practices of Ukraine and the Republic of Latvia. The institute of informed consent, which needs to be safeguarded, as a key element of the legitimacy of a medical intervention (such as surgery, or vaccination), requires a specific form of fulfillment, which is conducted in writing. A medical intervention, excluding cases of emergency, is legitimate only when the consent of the patient is provided; unconsented medical interventions frequently cause lawsuits, where plaintiffs seek to recover damages for performance of a medical intervention without their informed consent. The authors have highlighted these issues while commenting on the recent case law of the Supreme Court of Ukraine and the Supreme Court of the Republic of Latvia.

Keywords: informed consent, medical malpractice, medical law, Ukrainian law, Latvian law, patient's autonomy, European Court of Human Rights

Introduction

Safeguarding patient's rights in the field of healthcare is becoming a frequent legal problem, wherein various violations of patient's rights, as well as ordinary medical malpractice, have caused thousands of lawsuits worldwide over the last decades. In earlier times, the most frequent remedy for medical malpractice was a lawsuit against a hospital, occasionally a medical practitioner, who was allegedly in fault according to the plaintiff's view. This principle has not drastically changed over the decades, but the scope of violations of the patient's rights

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substantially elaborated beyond ordinary medical negligence, such as unconsented medical operations, which were necessary for the patient in the physician's view, who disregarded the necessity to ask the patient's consent, or an unauthorized disclosure of medical information by physicians or hospitals, which also caused lawsuits by the aggrieved parties. Informed consent is a principle of protection of the patient's body integrity and autonomy, where the patient has a right to decide for himself/herself what medical treatment should, or should not be applied to him/her in the course of healing a malady. Historically, informed consent at its earliest, developed in a number of common law jurisdictions, as United States and Canada as well as in XIX and XX century case law of France and Belgium; over the last decades, the European jurisprudence has witnessed a substantial number of legal cases, dealing with the issue of legitimacy of unconsented medical procedures. The principle of informed consent has also been anchored in Art. 5-6 of the Convention of Oviedo (1997), as well as a number of judgments of the European Court of Human Rights, which frequently dealt with medical malpractice cases, which were appealed to the European Court, as a court of last resort. The recent jurisprudence of the courts of Ukraine and Latvia has shown an increased topicality in the issue of safeguarding the patient's right of body integrity, shaped in the institute of informed consent; in the respective cases, the highest judicial instances of both states (the Supreme Court of Ukraine and the Supreme Court of Latvia) have also provided their position for the interpretation and the application of the institute of informed consent. The institute of informed consent has repeatedly became the object of legal research of different legal scholars, such as Rene Demogue (1932), Vincent MacDonald (1933), Michelle del Carril (1966), Gerald Robertson (1984), Christiane Hennau-Hublet (1986), Robert Leflar (1997 and 1997), as well as many others.

The object of the research is the informed consent as a legal institute in Ukraine and the Republic of Latvia. The aim of the research is to analyse the regulation of this institute in Ukraine and the Republic of Latvia, and to conduct its comparison determining its correspondence with the practice of the European Court of Human Rights. In order to fulfill the research, the following tasks are put by the authors:

1) to analyse the peculiarities of the regulation of informed consent institute in Ukraine (legislation and case law);
2) to display the legislative and jurisprudential regulation of informed consent in Latvian legislation and case law;
3) to conduct a comparative analysis of this institute in both states, to display mutual and divergent features;
4) to display relevant national case law;
5) to research upon the correlation of national legislation with the practice of the European Court of Human Rights.

The methodology of the article is grounded mainly upon the comparative method, which is used for the analysis and comparative of the legal institute of informed consent in Ukraine and the Republic of Latvia. At the same time, a number of other institutes is also used in the work, namely: method of legal case practice is used for illustrating the topic from the side of applying legislation in case law; and the formal-legal method is used to provide a complex characteristics of the legal regulation of the institute of informed consent, and finally, the method of legal hermeneutics, which is used for clarifying the content of the legal norms and the legal gist of the institute of informed consent.

1. Development of the institute of informed consent: the past and the present

The democratic processes of modern society and the objective trends in the development of medical science correspond to the stabilization and strengthening of the principle of the obligation of informed consent in the legal relationship between the patient and the treating person (doctor). It is undeniable, that the factors influencing modern medical science raise the issue of understanding the terms 'information' and 'consent', transforming informed consent into a form of a legal relationship between the treating person and the patient that is more in line with changes in medicine. But it should be noted, that in the history of the world there was a long and winding road to the existence and meaning of the patient's expression of will. In the Continental legal system, the concept of informed consent is primarily known to have been originated in French and Belgian law. One of the earliest examples is the Antiquaille Hospital Case, adjudicated by the Correctional Court of Lyon in 1859, where two doctors were condemned to a fine for conducting a medical experiment to treat a minor patient from ringworm by a syphilitic inoculation, where the court found that such inoculation without the consent of the patient should be regarded as a battery in the sense of criminal law (Correctional Court of Lyon, 1859, p.p. 87-88). In the further doctrine of oldtime French and Belgian medical law, the lack of the consent of the patient was regarded as malpractice (negligence) from the side of the medical practitioner. For instance, in Belgium, the doctrine of

informed consent is well-known by the case of Dechamps c. Demarche (1889-1890), where a surgeon conducted an osteotomy on a 3-year-old minor, allegedly without the parent's consent; though not the lack of consent was the fault (it was not properly established), but a lack of diligent post-operative care, which caused a development of a gangrene and a subsequent amputation of the foot (Liege Civil Court, 1889, p. 471-474, Liege Court of Appeals, 1890, p. 281-282). The term 'informed consent' has originated in in French case law in the 1930s, which pronounced 'consentement libre et éclaire' (Court of Cassation (France), 1933; Civil Court of Seine (Paris), 1935, judgment of the court of appeals in the same case: Paris Court of Appeals, 1937), while its American analogue 'informed consent' originated in 1957 in the case of Salgo v. Leland Stanford Jr. University Board of Trustees, adjudicated by the California Court of Appeals in favor of plaintiff (California Court of Appeals, 1957, p. 560-579). In England, informed consent is frequently associated with the 1957 judgment of the Queen's Bench Division of the High Court of Justice in the case of Bolam v. Friern Hospital Management Committee, where plaintiff litigated with the hospital for suffering damages during an electroconvulsive therapy, the court held that in case the physician's acts are in compliance with established medical practices, and the doctor has shown reasonable skill and care within medical treatment, he could not be held liable for negligence. As to the issue of necessity of informed consent, the Court outlined, that hospital staff usually asked the patient's consent to medical interventions, but then, it was common for the doctors not to warn the patients on the risks of medical interventions, if such risks were small, unless the doctors were asked. (High Court of Justice, Queen's Bench Division, 1957, p.p. 585-594).

The patient, as an autonomous individual, can unambiguously act freely according to his, or her own will, conscience and chosen plan, or intention in the context of his or her medical treatment. However, the content of a patient's consent to treatment may vary: the patient expresses a will in relation to his or her treatment, but this amount may be affected by a number of factors (L. Mazure, 2011). In addition, the most important criteria for the division of the patient's will should be noted, and one of them is the origin of the patient's will. Based on this criterion, expressions of will are divided into: 1) initial, i.e. the patient expresses the will for a specific treatment for the first time (consent to or refusal of treatment); 2) the derivative, i.e. the patient revokes the decision made by changing his will (revocation). (L. Mazure, 2011) One way or another, all these elements were summed up in the concept of the autonomy of the individual's private will. Although there are various theories that explain the concept of personal autonomy and its elements, they all generally acknowledge that there are two basic conditions that characterize personal autonomy: freedom as an independent, non-controlling influence and the ability of a person to act consciously (Beauchamp T.L., Childress J.F., 2001). Predicting the prospects for liberal development, we can see that there is a sign of equality between the autonomy of the will and the individual's right to self-determination, and this approach is reflected in the ruling of the European Court of Human Rights in the case of Pretty v. The United Kingdom (App. No. 2346/02), which states that, although none of previous medical law-related cases relating has established that the right to self-determination derives from Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights considers that the concept of personal autonomy is an essential principle in the context of the interpretation of the aforesaid provision of the European Convention of Human Rights (European Court of Human Rights, Pretty v. United Kingdom, 2002, para. 61). The Latvian legal scholars, who conduct research in the sphere of medical law, have also discussed this judgment in the view of patient's right to autonomy (Ašnevica & Slokenberga, 2015, p. 309-310). The right to self-determination includes such rights as, for example, the right to medical treatment and the right to choose the type and option of treatment, and negative rights, in the context of right to refuse (forego) medical treatment (Toebes B., Hartlev M., Hendriks A., Herrmann J. R., 2012, p. 122). While this freedom of choice is important, a patient's decision (according to his or her own beliefs and values, without regard to the patient's irrationality and intelligence) can affect others. For instance, in the USA, the courts usually use the test, amalgamated by the District Court of Appeal in Florida, United States, in the case of Satz v. Perlmutter (1978), upon which, a court, dealing with case, where is a dispute relating to refusal of medical treatment, may assess the case upon the following issues:

1) The state's interest in preservation of citizen's life;
2) The need to protect innocent third parties;
3) The state's duty to prevent suicide;
4) The maintenance of ethical integrity in medical profession (District Court of Appeal of Florida, United States, 1978, p.p. 162-164).

Informed consent has a "positive" and "negative" side of its interpretation: informed consent presupposes that the patient does not only have a right to determine what medical procedures should be conducted, but has the right to refuse the medical procedure, or at least the method of its performance. The segment of this feature of right to patient's autonomy in Ukrainian and Latvian healthcare legislation is relatively small, though in both of the states; the healthcare legislation of Ukraine and Latvia provides the patient a possibility to forego medical treatment after signing special documents. In a number of other European States. The patient's right to forego medical treatment, as provided by Article 5 of the Oviedo Convention, was also considered by the Supreme Court of Poland in its 2005 decision relating to the plaintiff's right to refuse blood transfusion on basis of her religious beliefs, where the court confirmed this right from the side of the plaintiff, quashing the district court's judgment to authorize blood transfusion, and remitting the case to the district court (Supreme Court of Poland, 2005). The Conseil d'Etat (France) in its 2001 judgment ruled, that the doctor, who transfused blood to a patient in a critical condition regardless of the patient's objection on basis of religious beliefs, does not commit a fault in the sense of provision of medical care (Council of State (France), 2001).

The principle of informed consent has also been the subject of the recent case law of the European Court of Human Rights. In Botoyan v. Armenia (2022), the Court has again underlined the importance of the right of ones, who face risks to their health condition to obtain information relating to their health, so the said persons would be able to assess the conjectural risks; hence, the Contracting States possess an obligation to provide a sufficient legislative regulatory mechanism in order the medical practitioners could consider the conjectural risks, deriving from prospective medical procedures for the physical integrity of their patients, and informed their patients concerning the consequences of such medical procedures in beforehand so as the latter ones could provide their informed consent (European Court of Human Rights, 2022, para. 98). This statement of the European Court of Human Rights reiterates the statement in the case of Csoma v. Romania (2013) and earlier, in Codarcea v. Romania (2009), as and affirmed in the most recent judgment of the European Court of Human Rights relating to the patient's informed consent in the case of Reyes Jimenez v. Spain (2022) (European Court of Human Rights, 2009, para. 104-105; European Court of Human Rights, 2013, para. 42, European Court of Human Rights, 2022, para. 30). In Pretty v. United Kingdom (2002), the European Court held, that the refusal to accept medical treatment may be thanatoid, though the imposition of medical treatment to an adult, mentally competent person without the consent of the said person would be a violation of the person's physical integrity, protected under Art. 8 (1) of the European Convention of Human Rights (European Court of Human Rights, 2002, para. 63). The same principle was reiterated by the European Court in the case of Junkhe v. Turkey (2008), where the Court held, that any medical intervention, done against the person's will, or without the free informed consent, has to be regarded as an interference in the person's private life (European Court of Human Rights, 2008, para. 76).

2. The Institute of Informed Consent in Ukrainian Legislation and Case Law

According to Part 1 of Article 43 of the Law of Ukraine (1992) "Fundamentals of the legislation of Ukraine on health care' (hereinafter – the Fundamentals), informed consent of a patient, who has reached fourteen years of age, is required for the use of methods of diagnostics, prevention of diseases and medical treatment (Law of Ukraine "Fundamentals of the legislation of Ukraine on health care, 1992, Art. 43). If the patient is a minor under the age of fourteen, or a legally incapable person, then the medical interventions may be performed with the consent of their legal representatives. The provisions of Part 3 of Article 284 of the Civil Code of Ukraine (2003) (hereinafter – the Civil Code of Ukraine) stipulate that the provision of medical care to an individual, who has reached fourteen years of age, is carried out with his consent (Civil Code of Ukraine, 2003, Art. 284). According to Part 1 of Article 43 of the Law of Ukraine (1992) "Fundamentals of the legislation of Ukraine on health care' (hereinafter – the Fundamentals), informed consent of a patient, who has reached fourteen years of age, is required for the use of methods of diagnostics, prevention of diseases and medical treatment (Law of Ukraine 'Fundamentals of the legislation of Ukraine on healthcare', 1992, Art. 43). If the patient is a minor under the age of fourteen, or a legally incapable person, then the medical interventions may be performed with the consent of their legal representatives. The provisions of Part 3 of Article 284 of the Civil Code of Ukraine (2003) (hereinafter – the Civil Code of Ukraine) stipulate that the provision of medical care to an individual, who has reached fourteen years of age, is carried out with his consent (Civil Code of Ukraine, 2003, Art. 284). The implementation of the general rules on informed consent has many problematic issues related to legal controversies, some of which we will disclose. Consent to medical care must meet such eligibility criteria as: a) awareness; b) voluntariness; c) competence. Part 1 of Art. 39 of the Fundamentals stipulates that the age of the subject to whom medical

information is provided, is the age of adulthood, that is, the age of 18. Therefore, it is not possible to reach an informed agreement between the ages of 14 and 18. It seems that in order to find a proper legal solution, one should refer to the letter of the Ministry of Justice of Ukraine № H-35267-18 (Letter of the Ministry of Justice of Ukraine, 2009), which explains the possibility of using analogy under a set of conditions, including similarities between the circumstances and existing rules upon essential legal grounds. The search for a possible analogy of the law can be provided within the Fundamentals (1992), namely in Art. 44. Thus, the extrapolation of the algorithm of Art. 44 Fundamentals on Art. 43 of the Fundamentals, in order to balance with Art. 39 of the Fundamentals, enables to provide such a normative structure for patients aged 14 to 18: medical care is provided with the consent of the patient, and with the consent of his legal representative, because consent can only be informed, but the patient, who is aged 14 to 18, has no right and the right to medical information. It should be denoted, that Art. 44 of the Fundamentals is devoted, in particular, to the regulation of new methods of prevention of diseases, diagnostics, and treatment in the interests of the patient, including medicines, which are yet to be approved, but only with the written consent of the patient.

According to Art. 6 of the Law of Ukraine 'On Protection of the Population from Infectious Diseases' (2000), preventive vaccination for legally-capable adult patients are carried out with their consent after providing objective information concerning the vaccination, the consequences of refusing undergoing vaccination, as well as possible post-vaccination complications. Prophylactic vaccinations are performed with the consent of their objectively informed parents or other legal representatives of patients, who have not reached the age of fifteen, or have been declared legally incapable in accordance with the procedure, established by law. Patients between the ages of fifteen and eighteen, or patients, who were recognized to possess limited legal capacity by a judgment of a court, should be vaccinated with their consent after providing objective information, and with the consent of objectively informed forbearers, or other legal representatives of the said patients (Law of Ukraine 'On Protection of the Population from Infectious Diseases' (2000), Art. 6). There is a form of consent for this form of legal relationships – namely, Informed consent and assessment of the person's health condition, or a minor with one of the forbearers, or another legal representative of a minor for vaccination and tuberculin testing, filling which is one of the stages of medical examination of minors before vaccination in accordance with the Regulations on the organisation and the performance of preventive vaccinations (Order of the Ministry of Health of Ukraine, 2011, No. 595; in the edition of the Order of the Ministry of Health of Ukraine, 2014, No. 551).

In this context, much attention should be drawn to the Recommendations of the Committee of Ministers of the Council of Europe on Child-Friendly Health. The given Recommendations have set out five principles of child-friendly health care, including "participation", meaning that the minors should have the right to be informed, heard or advised, to express their own opinion independently of their forbearers, as well as the right to have their opinion taken into account. The level of a minor's participation depends on his or her age, maturity, and the importance of a medical decision that needs to be made. Minors, given their age and maturity, as well as their families, need to be fully informed and involved. Minors should be encouraged to exercise their right to participate actively in making decisions concerning their health and treatment. An interesting international soft law instrument is the Charter on the Rights of Children in Hospitals (Recommendations of the Council of Europe Committee of Ministers, 2011), which provides that minors and their forbearers have the right: a) to information grounded upon their age and level of understanding (Article 4); b) a right to informed participation in making decisions concerning the provision of medical care to them (Article 5). International standards seem to suggest that Ukraine should also ensure the implementation of the child-friendly health care concept by ensuring that minors are informed about their health. There is no doubt, that the age of awareness and the age of consent to health care must be identical. A systematic analysis of international standards and the national legislation suggests that information should be provided to the minor's legal representative, but given the minor's age and level of understanding, such information should be provided to a minor patient so that he or she can make an informed decision about his or her health. When highlighting the specifics of exercising the right to consent to medical care for persons aged 14 to 18, it should be borne in mind the need to regulate the rights of persons with limited civil capacity. By analogy with the law, in particular, Part 2 of Art. 44 of the Fundamentals, it follows that along with the consent of such a person with limited legal capacity for medical care, the consent of the legal representative of such a patient must be given. Although at the level of both laws – the Civil Code of Ukraine and the Fundamentals, the form of consent is not specified, but a systematic analysis of the Ukrainian legislation provides the foundation to conclude, that the patient's consent must be given only in writing, as there is an approved standard form of patient's consent. The Order of the Ministry of Healthcare of Ukraine of 14 February 2012 No.

110 has approved the form of primary accounting documentation № 003-6/o 'Informed voluntary consent of the patient to diagnostics, treatment, performance of surgery and anesthesia, and the presence, or the engagement of participants in the educational process' (hereinafter – the form No. 003-6/o) (Ministry of Healthcare of Ukraine, Order No. 110, 2012).

Let us highlight a few issues dealing with the issue of using the form № 003-6/o. The analysis of the form №003-6/o and the Instruction on filling in this form, approved by the Order of the Ministry of Health of Ukraine № 110, gives grounds to conclude, that this form is made for adult patients who have the right to receive medical information. Clause 3 of the Instruction stipulates that the attending physician provides the patient with information on the diagnostic and treatment plan, provides in an accessible form information on the probable course of the disease, the consequences of refusing treatment. Therefore, there is no doubt, that this is attributed to a patient who has reached the age of eighteen. Paragraph 11 of the Regulations on the organization of the educational process in health care institutions with the engagement of scientific and teaching staff of higher education institutions, which provide higher education in the field of health care states, that medical care in the educational process is provided, in particular subject to the informed voluntary consent of the patient for the presence of healthcare education students during diagnostics, treatment, surgery and anesthesia, and the engagement of research and teaching staff in the diagnostics, treatment, surgery and anesthesia in the form, approved by the Ministry of Health. Paragraph 11 of the 2020 Regulations on the organization of the educational process in health care institutions with the participation of scientific and pedagogical staff of higher education institutions that provide higher education in the field of health care states that medical care in the educational process is provided, in particular subject to the informed voluntary consent of the patient for the presence of health education students during diagnostics, treatment, surgery and anesthesia and the participation of research and teaching staff in diagnosis, treatment, surgery and anesthesia in the form approved by the Ministry of Health (Decree of the Cabinet of Ministers of Ukraine, 2020, No. 1337). According to the Instruction on filling in the form No. 003-6/o, the patient's consent to the presence of healthcare education students in the diagnostics, treatment, surgery and anesthesia, and the participation of research and teaching staff in the diagnostics, treatment, surgery and anesthesia is filled in by the patient in the healthcare institution, which provides the educational process in the field of healthcare and the students may be present for the necessity of their practical training. It should be denoted, that that the form № 003-/o is used, according to the legislation of Ukraine, in such primary accounting documents as: 1) medical record of an outpatient; 2) medical record of an inpatient; 3) medical record of abortion; 4) history of pregnancy and childbirth. For all other types of forms of primary accounting documentation, which are used in other legal relationships, there are either specially designed forms, or the form of consent is free, as in the field of dentistry when filling out a medical record of a dental patient.

Let us conduct an analysis of the functioning of the institute of 'informed consent' in special legal relations in the field of medical care. COVID-19 has resulted in a spectral complement to the Ukrainian legislation, including the treatment of the coronavirus infection. The Ministry of Health of Ukraine has developed a form of informed consent of the patient (his legal representative) for medical care in accordance with the protocol 'Provision of medical care for the treatment of coronavirus disease (COVID-19)'. This form is used for: 1) treatment of the coronavirus disease under the protocol 'Provision of medical care for the treatment of coronavirus disease (COVID-19)'; 2) use of medicinal products, namely: a) unregistered medicinal products, which are recommended by the official body of the United States of America, the EU Member States, the United Kingdom, the Swiss Confederation, Japan, Australia, Canada, the People's Republic of China, the State of Israel for treatment of coronavirus disease (COVID-19) in the country concerned; b) registered medicinal products for indications not specified in the instructions for medical use, provided that there is a proven efficacy in the treatment of coronavirus disease (COVID-19) and/or if such medicinal products are recommended by the official body of the United States, European Union member states, the United Kingdom, the Swiss Confederation, Japan, Australia, Canada, the People's Republic of China, the State of Israel for the treatment of coronavirus disease (COVID-19) in the respective country.

At the same time, the form of informed consent in its content does not cover both cases to which it applies. In particular: 1) the form applies to the segment of treatment according to the 'covid' protocol, because the form states that the patient certifies his consent to the use of the protocol 'Provision of medical care for the treatment of coronavirus disease (COVID-19)'; 2) the use of this form in the use of medicines seems to be concerning, because the given text does not mention the possibility of using, for example, off-label medicines. It is also not mentioned in the Protocol 'Provision of medical care for the treatment of coronavirus disease (COVID-19)' (Order

of the Ministry of Health of Ukraine, 2020, No. 762, in the edition of the Order of the Ministry of Health of Ukraine, 2022, No. 358). Next, let us draw attention to the issue of providing medical care without obtaining informed consent, the general regulation of which is provided in the Civil Code of Ukraine and the Fundamentals. The Civil Code of Ukraine and the Fundamentals allow the provision of medical care to a patient without his consent or his legal representatives in the presence of signs of imminent threat to the patient's life. We emphasize that the exception does not apply to the entire urgent state of man, but only a direct threat to life. Thus, the Ukrainian legislation protects the human right to informed consent for medical care and creates a regulatory platform for active participation in medical relations. There is no direct provision that enshrines the algorithm of providing medical care without the informed consent of the patient in imminent threat to the patient's life. From the literal interpretation of the norm, it follows that the duty of the attending physician will provide necessary medical assistance to the patient. According to Article 43 of the Fundamentals, the patient, who has full legal capacity, has a right to forego medical treatment; in case the refusal of the patient to undergo medical treatment may cause harm to the health of the patient, the physician is obliged to provide explanation of it to the patient; in case of further refusal – to request a formal (written) approval, or certify the refusal in the presence of witnesses. In fact, the institute of refusal of medical treatment has rarely been in the focus of case law. The District Court of Lypova Dolyna, Sumy Oblast in its 2018 decision dealt with the issue of legitimacy of refusal of medical treatment, where a patient (the plaintiff) litigated with defendant hospital because of the defendant's denial to accept his refusal to any medical interventions. The Court upheld the plaintiff's claim, finding, that the patient's right to refuse medical treatment is limited by urgent conditions, by a serious threat to the patient's health and in cases, where the consent of the patient is impossible to obtain due to objective (District Court of Lypova Dolyna, Sumy Oblast, 2018).

The role and significance of informed consent as a legal institute can be illustrated through the prism of Ukrainian jurisprudence. One of the earlier cases on informed consent was heard by the Chernivtsi Court of Appeals (Case No. 10-1/08, Judgment of 03.01.2008). There, a woman lodged a criminal complaint against the doctors of a regional clinical oncological infirmary for severe corporal damage. The criminal case was closed due to lack of the content of crime, and the complainant impugned it in a court, the complaint was dismissed. In her appeal, complainant demanded to quash the judgment of the first-instance court and refer the criminal case for re-opening; the complainant claimed that the operation was conducted without her consent, the treatment was performed incorrectly, and the complainant also claimed that the signature in the informed consent was forged, and no original was augmented to the case (there was only a copy), and that no necessary expertises were conducted; the complainant also claimed that all the writings her medical records in terms of diagnosis and medical examinations were forged. The Chernivtsi Court of Appeals established, that the complainant indeed underwent a surgery due to a severe oncological condition; at the same time, the expertise showed that the diagnosis was correctly determined, and it demanded a surgical operation. The expertises also showed that the writings in the medical records corresponded to her actual health condition, thus, the claim of the complainant in terms of an alleged forgery of medical records was dismissed. The informed consent form provided information that the patient was accustomed with the proposed medical treatment and gave her written consent, which dismissed the arguments in the appeal relating to her claim that she had not given the consent to the said medical intervention. Hence, the appeal was dismissed (Chernivtsi Court of Appeals, 2008).

Cases on informed consent were recently heard by the Supreme Court of Ukraine as well. One of such judgments was handed down by the Higher Specialized Court on Civil and Criminal Cases of Ukraine (such was the name of the cassation court for civil and criminal cases in Ukraine before the reform of the Supreme Court) in 2016. The plaintiff was a woman, whose son was hospitalized to the defendant's clinical traumatology hospital with a preliminary diagnosis of acute pancreatitis. Within the medical examination, the physician informed the son, that there was a perforation in the duodenum requiring an immediate surgical intervention. Being in severe pain, the man signed the consent to the performance of the operation, but after the operation, the after-operational diagnosis was changed, which determined the condition as acute edematous pancreatitis, which, under the Order of Ministry of Healthcare of Ukraine No. 279 (2010) presupposed conservative treatment. Plaintiff claimed that by such acts, the physician did not provide correct information to the patient relating to his state of health; the son had already been operated because of acute pancreatitis several months before the operation, wherein the post-operative period lasted with complications, and had he received correct information relating to his state of health, he would have foregone the operative information. Plaintiff also stressed that the consent to a surgery, signed under the condition of severe pains should not be considered as valid. According to the facts of the cases, provided in the judgment,

the plaintiff's son died several days after the operation was performed; the plaintiff additionally demanded repayment damages for funeral expenses and the installation of a monument. The court of first instance found in favor of defendant, finding that there was no infringements of plaintiff's rights and there was no causal link between the defendants' acts and the demise of plaintiff's son. The court of appeals affirmed the judgment of the lower court. The Higher Specialized Court on Civil and Criminal Cases of Ukraine held to dismiss the appeal in cassation. The Court found, that according to the case facts, the plaintiff's son was brought to the defendant's hospital in urgent order, where he was hospitalized for medical examination and was preliminarily diagnosed with the condition as mentioned above; the roentgen of the abdomen found free gas in the abdomen cavity, and the physicians diagnosed the patient with a pre-operative diagnosis of a perforated ulcer of the duodenum, which required an urgent surgical intervention, to which the consent of the patient was given. The Court also established, that as of the facts of the case, the patient was provided with explicit information on his health condition from the side of the physician, that the condition required a surgical operation including absolute indications for this operation, and in the course of the talk by the patient and the doctor, they both came to a conclusion in terms of the types of surgical procedures. According to the established facts of the case, during the revision of the bowel, no perforation was found indeed; but instead, suppurative processes on the pancreas were found, after which medication treatment was prescribed. The Court also denoted, that according to the Order No. 279 of the Ministry of Health of Ukraine (April 2, 2010), the existence of free gas in the abdomen was an absolute indication for an urgent surgery. So, the Court found, that the plaintiff did not prove the fault of the defendants, and dismissed the appeal in cassation (Higher Specialized Court of Civil and Criminal Cases of Ukraine, 2016).

One of the most recent cases on informed consent was heard before the Supreme Court of Ukraine (in the panel of judges of the First Judicial Chamber of the Civil Court of Cassation in the composition of the Supreme Court of Ukraine) in 2021. The facts of this case were the following. The plaintiff was the mother of the daughter, who was vaccinated from poliomyelitis on February 23, 2016. After vaccination, plaintiff's daughter became ill, and was diagnosed with acute flaccid paralysis, which is a side effect of the poliomyelitis vaccine, and was recorded as an adverse event, which had happened after the vaccination. An official inspection, which was conducted on March 25, 2016 by the commission, which was established in accordance with the Order of the Department of Health of the Rivne Regional State Administration of March 16, 2016 No. 33, as well as the medical records, a multitude of vaccination procedure violations by the defendants were found. Plaintiff demanded to compensate pecuniary damages deriving from her daughter's medical treatment, as well as the moral damages, which was caused by the defendants' acts, because of which her daughter's health condition deteriorated, as well as procedural costs. The court of first instance, the District Court of Sarny, Rivne oblast dismissed the plaintiff's claim, holding that the plaintiff did not prove defendants' fault, the illegality of defendants' acts, and the causal link between the acts of the defendants with the damages suffered. The Rivne Court of Appeals did not uphold the plaintiff's claim, finding that the court of first instance correctly dismissed the plaintiff's claim, as there was no direct and undisputed evidence of the causal link between the vaccination and the damage to the plaintiff's daughter's health; the evidence basis was contradictory, which does not give legal grounds to establish the said fact. The plaintiff lodged an appeal in cassation, and claimed, that the courts of first and second instances erred in dismissing her lawsuit, and did not consider that her daughter's health was damaged because of the violations of the vaccination procedure, namely: 1) the said vaccination was carried out without a room for vaccination; 2) there was no medical examination of her daughter by the physician; 3) the thermometry was not conducted; 4) there was no permission of the doctor for vaccination; 5) there was no individual vaccination plan for the minor (the plaintiff's daughter), who had a breach of the vaccination graphic and the vaccination calendar; 6) there was no informed consent from the side of the forbearers, which was not lodged to them. The Civil Court of Cassation in the composition of the Supreme Court of Ukraine has established, that by dismissing the claim of the plaintiff, the lower courts did not properly establish the circumstances of the case, and did not conduct a proper legal assessment of the evidence provided by the litigating parties, and did not check whether the vaccination of the plaintiff's daughter was performed in accordance with the law. The Civil Court of Cassation in the composition of the Supreme Court of Ukraine held, that the conclusions of courts, in particular, concerning the assessment of evidence relating to the causal link, contained assumptions, which is forbidden under Part 6 of Article 81 of the Code of Civil Procedure of Ukraine.

According to the law, the procedure of vaccination shall include a number of components:

- The medical staff are obliged to provide information concerning the procedure to the patient, or his, or her forbearers;
- The medical staff are obliged to conduct a medical examination of the person undergoing prophylactic vaccination;
- The medical staff, who are conducting vaccination, are obliged to ascertain the presence, or the absence of contraindications;
- The medical staff must abstain from prophylactic vaccination in case there are such contraindications;
- The medical staff, who conduct vaccination to patients under age fifteen, are obliged to receive the consent of the forbearers.

According to the established case facts, that priorly to vaccination, the paramedic did not conduct a thermometry of the plaintiff's daughter, and no data relating to the medical examination was entered into the plaintiff's daughter's medical record. The Civil Court of Cassation in the composition of the Supreme Court of Ukraine also held, that the lower courts did not consider that the paramedic, who had performed the vaccination to the plaintiff's daughter, was also obliged to provide the minor's forbearers with objective information concerning the vaccination, and obtain their consent to it. According to the certificate of official inspection (dated March 25, 2016), the members of the commission found that the form of informed consent and assessment of the health of a person, or a minor by one of the forbearers, or other legal representative of the minor for vaccination or tuberculin testing (Form No. 063-2/o), is submitted not in accordance with the form, which is approved by the Order of the Ministry of Health of Ukraine of December 31, 2009 No. 1086. So, the informed consent of the forbearers was not obtained. The Civil Court of Cassation in the composition of the Supreme Court of Ukraine held, that the informed consent form was not contained in the materials of the case, and the plaintiff denied signing a consent form at all. The Civil Court of Cassation in the composition of the Supreme Court of Ukraine held, that the courts of lower instances did not consider the circumstances referred above, and, referring to lack of proof of the causal link between the procedure of vaccination of plaintiff's daughter, and the deterioration of her health condition, as plaintiff did not exercise her right to forensic examination during the court proceedings, in violation of procedural law, the arguments of the plaintiff, who was relying on the fact of the negative reaction of her daughter to the vaccination, was not considered by the courts of lower instances; the courts of lower instances did not give an assessment of the evidence, upon which the plaintiff substantiated the causal link between the vaccination, and the damages, that were suffered. The Supreme Court of Ukraine ruled to annul the contested decisions, and remanded the case for reconsideration to the court of first instance (Civil Court of Cassation in the composition of the Supreme Court of Ukraine, 2021).

To sum up, cases involving the issue of informed consent are mostly quite recent in Ukrainian case law. The two judgments of the Civil Court of Cassation in the composition of the Supreme Court of Ukraine illustrate, that such cases are medical malpractice claims for damages, which involved some malpractice from the side of the medical practitioners. Both afore-mentioned cases involved the issues of providing specific medical information (in the first case, it was proved, that plaintiff's son was provided necessary information relating to the forthcoming surgery, and in the second, no informed consent to vaccination from the minor's forbearers was obtained). Henceforward, the issue of the patient's informational rights was involved in both cases, which were observed above. The explanation of the institute of informed consent by the Higher Specialized Court on Civil and Criminal Cases of Ukraine in the 2016 judgment, and the Civil Court of Cassation in the composition of the Supreme Court of Ukraine, has notoriously enriched the Ukrainian case law relating to the protection of patient's rights, medical malpractice and issues of vaccination.

3. The Institute of Informed Consent in Latvian Legislation and Case Law

In Latvian law, the patient's right to choose for himself, or herself of what medical treatment is better, or rather what medical treatment is more available, from treatment and diagnostic options offered by the medical practitioner, has considerably increased from the view of legislation and case law. Currently, informed consent is a concept that plays an important role in the relationship between a doctor and a patient, as it forms an essential part of medical ethics and human rights (Center for Disease Prevention and Control of the Republic of Latvia, 2019). There is no doubt today that patients' rights are based on the principle of human dignity, which in turn is closely linked to other fundamental human rights, including integrity and autonomy. Integrity refers to physical and mental integrity of the patient's body, unless the patient has given his or her consent or there have been

legitimate grounds for doing so. In the legal framework, the protection of this principle is usually ensured at the same time as the protection of human autonomy and self-determination. Informed consent of a patient within the meaning of the European Court of Human Rights, may be disclosed in the context of the right to self-determination and autonomy, which underlies the principle of informed consent (Birģelis, 2014, Jurista vards, Nr. 16). The authors A. Lytvynenko and T. Jurkeviča claimed in their recent article, that the institute of informed consent amounts a considerable quotient of a contract for healthcare services (Lytvynenko, Jurkeviča, 2022, p. 33-42). In Latvian contemporary jurisprudence in relation to medical malpractice, informed consent is understood as a process, within which the medical practitioner provides the patient with explicit information relating to the patient's treatment in a conceivable form to the patient, in result of which the patient provides informed consent (Administrative District Court (Rezekne), 2022). The Recommendations for Healthcare Institutions on Informed Consent, Version 1.2, March 2019 (in Latvian: Ieteikumi ārstniecības iestādēm par informētu piekrišanu. Versija 1.2. 2019. gada marts) presuppose, that informed consent encompasses each medical procedure; and the principle of the patient's free will means that the patient provides informed consent without any impact from the side of medical staff, relatives or friends. Informed consent is presupposed to be relevant at the time of treatment, and had any circumstances, as risks, or alterations in the treatment plant changed, in such case the informed consent must by repeated (Center for Disease Prevention and Control of the Republic of Latvia, 2019). The Recommendations provide that informed consent should be reached in writing (mostly to various surgical operations and medical manipulations, that may constitute a certain risk for the patient's health, or are conducted under general, or local anesthesia, or when the treatment is conducted as a part of a clinical trial), in some cases – verbally, or non-verbally, for instance, to minor medical examinations or laboratory tests (Center for Disease Prevention and Control of the Republic of Latvia, 2019).

The concept of informed consent presupposes an absolute prerequisite of the patient's consent to treatment. The Oviedo Convention stipulates that any activity relating to health may be carried out only with the voluntary and informed consent of the person concerned (Oviedo Convention, 1997). The Law on Patients' Rights stipulates that treatment is permissible if the patient has given informed consent (Law of the Republic of Latvia "On the Rights of Patients", Art. 6 (1)); and that the patient's right to information about his or her state of health is also proclaimed, ie the patient has the right to ask questions and receive answers before giving informed consent (Law of the Republic of Latvia "On the Rights of Patients", Art. 6 (1)). By asking a medical practitioner questions the patient exercises his or her right to information, as the explanation of the definition of informed consent provided in the Law of the Republic of Latvia "On the Rights of the Patients" states that the patient consents to treatment based on timely information on the purpose, risk, consequences and methods of treatment (Law of the Republic of Latvia "On the Rights of Patients", Art. 1 (2)). The said information should be provided in a form that is comprehensible to the patient, explaining the medical terms and taking into account the patient's age, maturity and experience (Law of the Republic of Latvia "On the Rights of Patients", Art. 4 (5)). The explanation of the term "informed consent", as of Art. 1 (2) of the Law on The Rights of Patients should be understood, as a consent, which the patient gives 1) in writing; 2) orally; 3) by actions which clearly establish, that the patient opts to submit to a certain medical procedure; the informed consent should be provided freely, after the explanations, provided by the medical personnel, which includes the following: 1) the purpose of treatment; 2) the risks of treatment; 3) the consequences of treatment; 4) the methods of treatment. Technically, informed consent is not mandatory to be given in writing, but only if request by the patient himself, or the attending physician (in legislation: Art. 6 (2) of the Law on the Rights of Patients, in jurisprudence, see: Judgment of the Vidzemes Regional Court, 2018).

This legal framework is in line with the case law of the European Court of Human Rights. According to the judgment of the European Court of Human Rights of 15 January 2013 in the case of Csoma v. Romania, in cases where there is a risk to the patient's health, it is especially important to inform the patient so that the patient can assess the situation and make appropriate decisions (European Court of Human Rights, Csoma v. Romania, 2013, para. 42). However, it should be noted, that the structure of informed consent is still unclear: its rationale, its structure and consequences. Several theorists and practitioners define informed consent as a fundamental private human right, but this perception points to the fault of medical practitioners, rather than to fundamental human rights. Others emphasize that patient autonomy is part of a fundamental right, but is not seen as a new fundamental right (Hondius, 2010, p. 173). In Latvian law, any medical procedures without the informed consent of the patient are prohibited, unless the cases, when: 1) the denial in conducting the necessary medical procedure endangers the patient's health, and there is no possibility to obtain the patient's consent, or the consent of the patient's representative (Art. 7 (8) of the Law on the Rights of Patient); 2) within surgical or otherwise intrusive medical

procedure the treating physician has a right to provide non-planned treatment without the consent of the patient in case the patient necessitates urgent medical help, or a non-performed medical procedure would cause more damage to the health of the patient (Art. 7 (9) (Law on the Rights of Patients, Art. 7 (8)-(9)). The jurisprudence shows, that the latter provision could be proved only in case the circumstances of urgency, or the fact that the non-performance of the medical procedure could cause aggravated damage to the health, are enclosed to the respective medical records (Administrative District Court (Rezekne), 2022).

The institute of refusal of medical treatment also received its reflection in the law of Latvia, namely the aforementioned Law on the Rights of Patients, Art. 6 (4)-(7). Upon Art. 6 (4) of the Law on the Rights of Patients, the patient has a right to forego medical treatment in various different occasions, which include: 1) before the start of medical treatment; 2) from a certain method, which is used in the medical treatment; 3) refuse treatment during the conduction of it. In case the patient opts for refusing medical treatment, the mechanism for certifying such decision is very similar to the one in the legislation of Ukraine: the refusal (relating to the decision to refuse, or terminate treatment, or forego a certain method) should be provided in writing, indicating that the patient had received all necessary information (Art. 6 (5); the physician, at the same time, owes a duty to encourage the patient to visit a different doctor; if the patient denied the refusal in a written form, then two adult, and fully legally-capable witnesses need to certify the patient's refusal in writing (Art. 6 (6). According to Art. 6 (7) of the Law on the Rights of Patients, the patients have to inform the healthcare institutions in case they have authorised another person to consent/refuse (in overall, or to a method) to the proposed medical treatment (Law on the Rights of Patient, 2009, Art. 6 (4)-(7)). An outstanding historical case relating to the patient's refusal of treatment after a working casualty will be reviewed by the authors below.

The Senate's judgment No. SKC-216/2013 is of utmost concordance of the explanation of the institute of informed consent in the Republic of Latvia. In this case, in December 2010, the plaintiff lodged a lawsuit to recover damages against a psychoneurological hospital. He claimed, that since March 2009, he stayed at the State Center of Social Help (in Latvian: Valsts sociālās aprūpes centrā), but when he left the Center upon his own will in June 2009, he was forcibly returned and hereinafter placed in an isolator; and since he was able to open the door of the isolator, he was apprehended again, and was forcibly brought to the psychoneurological hospital. Plaintiff was hospitalised against his will, being in a recumbent position and confined in handcuffs; then, plaintiff stayed in a closed ward for a week, when a physician visited him, though not telling the terms he had to stay there, nor discussing any aspects of treatment. Plaintiff later claimed in his talks with the doctors, that his health was deteriorating, as he thought, because of wrong application of medicines; plaintiff also had no knowledge of what medicines he consumed. When plaintiff was released from the hospital in August 2009, no physician council assembled in order to assess his health condition or decide on necessity of forced treatment; that day, a member of medical staff, giving no explanations, asked plaintiff to sign the documents which would affirm his consent to treatment. Plaintiff later complained to the Healthcare Inspection, which conducted an examination, finding a violation of Art. 67 of the Medical Treatment Law, as forced hospitalisation is not provided by a council of doctors, and the council of doctors had to gather three days after plaintiff was brought to the hospital at latest; moreover, the physician on duty did not receive the plaintiff's written consent to hospitalization, as provided in Art. 68 of the Medical Treatment Law; there was also proof that plaintiff was forcibly apprehended and maintained, and was given medicines to control his behavior. Hence, the examination displayed that the defendant's acts violated the law, and the plaintiff had sustained considerably moral damage and humiliation. Plaintiff sued the defendant hospital on basis of Art. 92 and 94 of the Constitution, the Art. 1632 and 2352 of the Civil Code, as well as the provisions of the Medical Treatment Law, namely Art. 20, 21, 65, 67 and 68. The court of first instance (District Court of Valka) partially upheld the plaintiff's claim, however the Vidzemes Regional Court, hearing the appeal from the side of both plaintiff and defendant, dismissed the claim. Foremostly, Court held, that the norms of the Patient's Rights Law, where the concept of informed consent considerably enlarged, could not be applied, as it was not yet in force at the time when the disputable legal relationships took place. Next, the plaintiff did not prove the existence of a legal foundation to claim damages because of the defendant's acts, upon which plaintiff was deprived of freedom (being confined at the psychoneurological hospital). The conditions under which the plaintiff was maintained were not disputed; the Healthcare Inspection had established, that in June 2009, the psychiatrist physician had justifiably decided that plaintiff's state of health required hospitalisation, as at that time, the plaintiff behaved aggressively, and his health condition displayed such impairments, which could seriously deteriorate the plaintiff's health. So, the psychiatrist acted in compliance with Art. 68 (1) (2) of the Medical Treatment Law, which presupposed provision of psychiatric medical assistance without the consent of the patient. It was not

disputed that the physician on duty did not obtain the plaintiff's informed consent, but since more than four months passed since the violation occurred, the Healthcare Inspectorate held to refuse to open the case upon and administrative misdemeanor committed by the physician. It was also not disputed that plaintiff signed the consent to hospitalisation in his medical record, though there was a dispute relating to the date of such signature (whether it was when plaintiff was admitted to the hospital – in June 2009, or when plaintiff was released – in August 2009). According to the testimony of one witness, plaintiff signed the consent form soon after hospitalisation (the same day he was hospitalised, when his condition was stabilized); plaintiff also did not manage to prove that he signed the consent form before he was released from the hospital, fearing he would remain confined in the hospital unless he had signed the said consent form. According to the afore-mentioned facts, the court came to a conclusion that the plaintiff had signed the consent form in June 2009 the day he was hospitalised, and there was no deprival of freedom from the side of defendant in the sense of Art. 2352 of the Civil Code. The appellate court also did not find any negligence from the side of the defendant, and the mere fact that plaintiff's consent was obtained after plaintiff had calmed down, did not toll to negligence; plaintiff did not prove that he was not provided information regarding his treatment; the medical record featured the therapy, which was prescribed to the plaintiff, and his complaints were also briefly written; the physicians, who acted as witnesses in the proceedings, also confirmed they provided information to the plaintiff. Plaintiff decided to lodge an appeal in cassation, which was reviewed by the Supreme Court of the Republic of Latvia (Senate's Department of Civil Cases), and the Court decided to annul the judgment of the Vidzemes Regional Court, remanding the case to the appellate court for a new review. The Court came to the following conclusions. Firstly, the Court held, that people, who are suffering from psychiatric ailments, possess a considerable amount of rights, provided in international-legal instruments, and any deprivation of liberty must be conducted only with strict compliance with the law; at the same time, the people, who were deprived of freedom, have a right to sue, and the court has to determine the legitimacy of the confinement, and order to release the person, who was confined, has such decision been illegitimate; the victims of illegitimate confinement should have a right to compensation. The Supreme Court denoted, that the norms of the Medical Treatment Law, the hospitalisation to a psychiatric hospital could be voluntary; without the consent of the patient; after a court judgment in a criminal case as a forced medical measure. No doubt was cast relating to the confinement of plaintiff – as a matter of fact; thus, the question at stake was to determine of whether such confinement was conducted in accordance with the law. The Court discussed the provisions of Art. 67-68 of the Medical Treatment Law, as well as the Regulation of the Cabinet of Ministers of the Republic of Latvia No. 1046 (December 19, 2006, in the edition acting from August 2, 2008 to August 31, 2009), according to point 112.3, the emergency brigade should provide urgent medical assistance to a victim (or a sick person) on the place of a incident, while transporting the patient to a healthcare institution, in case an acute illness, or an exacerbation of a chronic illness, which threatens the life of the patient – acute mental disorders, which are characterized by the patient's aggressive behavior, or suicide attempts. Hence, the Supreme Court designated, that the psychiatric medical assistance should be provided in association with the principle of voluntariness, and such medical assistance conducted without the consent of the patient should be provided in exceptional cases, when the mental disorder 1) threatens the patient's life; 2) when the patient, due to this mental disorder, behaves aggressively, or there are suicide attempts. Then, the Court explained, that the psychiatric medical assistance without the consent of the patient must also be conducted in strict provision with the law: namely, a doctor council has to examine the patient in 72 hours – to treat the patient without the patient's consent, or to terminate the psychiatric medical assistance. In the former case, the healthcare institution is obliged to inform the district court on this fact, and the judge, after having assessed the facts of the case, may decide, whether to order the maintenance of the sick person in the psychiatric hospital, or to release the sick person from the hospital. The decision of the council of doctors must be assessed by the court, as the possibilities of confined persons to protect their legal interests are considered to be quite restricted. The Senate had outlined, that there is no exceptions to the legal procedure, described above, and established, that the order, provided by Art. 68 of the Medical Treatment Law, was not fulfilled, as it was determined by the Healthcare Inspection. Hence, the Supreme Court (Senate) held that the appellate court erred in interpreting the provisions of Art. 68 of the Medical Treatment Law, erring in establishing that the plaintiff was hospitalised voluntarily. Analyzing the legal nature of the patient's informed consent, the following most important legal aspects are noted, the Supreme Court denoted, that the patient's consent is the constituent, which makes the treatment legitimate, unless it concerns involuntary medical treatment, and the patient's consent is conditional on basis of the patient's ability to express his, or her will, that the patient is sufficiently informed (the patient is informed concerning the treatment, its risks, alternatives etc.), and the voluntariness of the patient (informed consent is free and is not given under any coercion from the side of any third persons). Hence, the Senate held, that in case a medical procedure is performed to the patient without the patient's consent with no

objective reason, then it should be regarded, as a violation of the law, upon which civil liability is imposed under Art. 1635 of the Civil Law and Art. 92 of the Constitution of the Republic of Latvia. Hence, the Supreme Court held to annul the judgment of the appellate court (Supreme Court of the Republic of Latvia, 2013).

The principles, outlined by the Senate of Latvia in the judgment No. SKC-216/2013 are the core contemporary aspects of informed consent. This approach could be also found in modern literature on medical law and ethics (Montgomery, J. 1997, p. 227; Kennedy, I., A. Grubb, 1998, p. 110-112, Pattinson, S.D., 2006, p.p. 100-101; Justickis, V., 2010). The principle of informed consent, which provides for fulfilling an obligation of providing the patient sufficient information on his further medical treatment, firmly corresponds This statement of provision on necessary information fully corresponds to what Latvian medical practitioners and medical institutions offer to their patients (Center for Disease Prevention and Control of the Republic of Latvia, 2019), and, of course, is enshrined in the Law on the Rights of Patients (2009), namely: the patient has the right to receive information from the treating physician about his, or her health condition, including diagnostics, medical treatment, examination and rehabilitation plan, prognosis and consequences, including functional limitations, caused by the disease, prevention options, as well as the patient's right to receive information on the results of treatment, unforeseen outcome and reasons (Law of the Republic of Latvia "On the Rights of Patients", Art. 4 (3)).

The structure, significance and place of informed consent in legal relations in the field of medical treatment in the legal sphere of Latvia can be judged by analyzing the rulings of the Supreme Court of the Republic of Latvia, the Senate. The facts and the judgment of the Department of Administrative Cases of the Senate of the Republic of Latvia of March 24, 2020 in the Case No. A420172018, SKA-790/2020 are provided as follows.

In October 2015, the plaintiff, a woman, applied to a hospital, complaining on abdominal pain and an abnormal weight gain. The surgeon, to whom she applied, advised a gastric reduction surgery, and referred plaintiff to a number of pre-operative examinations. The operation was conducted in mid-January 2016, and unfortunately the plaintiff suffered from bleeding in the isolated part of the stomach as well as several other post-operative complications; the plaintiff stayed in the hospital until early February 2016. Next, the plaintiff went to the gynecologist, complaining of lower abdomen pains, and the examination showed an ectopic pregnancy in the left fallopian tube, and the said organ was removed shortly thereafter. Later, the plaintiff was also diagnosed of having spleen problems, and in April 2016, plaintiff underwent an laparoscopic abscess drainage so as to prevent abscess. Plaintiff considered that the surgeon did not provide professional treatment and caused damages to plaintiff, complained to the National Health Service, claiming compensation from the Medical Risk Fund with a demand to recover damages for deterioration of health, as well as moral damages. Plaintiff received compensation in accordance with the decision of National Health Service dated July 13, 2017, however, plaintiff was refused compensation in terms of the medical expenses, which plaintiff sustained concerning the prophylactics of the abscess. However, plaintiff did not consent to such compensation, and applied to the Ministry of Health with a complaint, demanding a substantially larger compensation than it was actually received by her, and demanded the reimbursement of medical expenses of the abscess prophylactics procedures, as well as moral damages in terms of violation of Art. 16 of the Law on the Rights of Patients because of a non-compliance with the terms of reviewing the complaint (as of Art. 16 (6) of the Law on the Rights of Patients). However, the decision of the Ministry of Health dated January 18, 2018 rejected her complaint, and so the plaintiff decided to lodge an administrative lawsuit in order to obtain compensation for the damages sustained, however plaintiff lost the lawsuit on the first and second instance. The Administrative Regional Court, joining the findings of the Administrative District Court found, that, the physician did not determine of whether the patient had an endocrinological disease, which could be the reason for obesity, no conclusions from the endocrinologist, the gynecologist and the family physician were obtained, the reasons for obesity were not examined in complex, nor were any alternative methods of treatment observed). According to the facts that were established hereinabove, the court found that decision of the National Health Service had correctly determined the violations occurring during the provision of medical care, since: 1) the surgeon did not thoroughly conduct the health condition of the patient; 2) the contraindications to the operation were not established; 3) the alternative methods of treatment were not assessed. One more violation of medical care was also established in terms of post-operative control in the first day after the operation – at the first day after the operation, it was prescribed to control the patient's pulse, pressure, temperature and the blood analysis, which was not conducted (except temperature control). At the same time, the other post-operative complications, as it was held further, were not a consequence of medical errors, or negligence. It was also established, that the damages due to the afore-mentioned medical treatment violations

were not very severe, for instance, they did not cause disability to the patient, or negatively affect the patient's quality of life, or survival. So, the plaintiff's appeal was rejected, and the plaintiff lodged an appeal in cassation. The Supreme Court of Latvia, having reviewed the case, decided to annul the judgment of the Administrative Regional Court, and to remand the case to the Administrative Regional Court for a new judgment.

The part of the judgment relating to informed consent can be divided into three parts:

1. First of all, the Senate emphasizes that medical treatment is always associated with a certain risk. Damage to a patient's health can also occur if the doctor has done everything in good conscience and no faulty action has been identified. Reasonably chosen treatment can also cause unavoidable consequences, as well as side effects and complications independent of the physician's acts (Para. 8 and 9 of the Judgment);
2. With regard to the consequences of the treatment (the consequences of the operation, including the possible consequences in the case of professional surgery) and the non-professional conduct of the doctor, account must also be taken of whether the treatment was given with the patient's informed consent. Namely, when assessing whether such treatment (surgery) would have been performed at all, the patient's ability to give informed consent must also be assessed. Pursuant to Art. 1 (2), Clause 2 of the Law the Republic of Latvia "On the Rights of Patients", informed consent is the patient's consent to medical treatment, which he or she gives orally, in writing or by such actions, that explicitly confirm consent, and gives it freely on the basis of timely information on the purpose of treatment, the risks, consequences and methods to be used ("Informed consent is the consent of a patient to medical treatment which he or she gives in oral or written form, or by such activities which explicitly certify the consent, moreover, it is given freely on the basis of the information provided by a medical practitioner in a timely manner regarding objectives, risks, consequences and methods used for medical treatment"). Pursuant to Art. 6 (1) of the Law of the Republic of Latvia "On the Rights of Patients", treatment is permitted if the patient has given informed consent. The patient has the right to ask questions and receive answers before giving informed consent. ("Medical treatment shall be permitted if the patient has given informed consent thereto. The patient has the right to ask questions and receive answers prior to giving informed consent.") In its turn, in accordance with Art. 4 (3) of the Law of the Republic of Latvia "On the Rights of Patients", a patient has the right to receive information from the attending physician about his or her health condition, including the diagnosis of the disease, treatment, examination and rehabilitation plan, prognosis and consequences, as well as functional limitations and prevention options. ("A patient has the right to receive information regarding his or her state of health from the attending physician, including regarding the diagnosis, the plan for medical treatment, examination and rehabilitation of the disease, the prognosis and consequences, the functional restrictions caused by the disease and opportunities for prophylaxis").
   Thus, a doctor who decides on a particular method of treatment, as the competent medical practitioner, must be responsible for providing the patient with informed consent and not base his treatment uncritically on the patient's unwillingness to receive information relating to specific medical treatment. (Paragraph 12 of the Judgment). This leads to the conclusion that the decision on the choice of treatment is nevertheless made by the doctor as the most competent person and is responsible for this decision, while the doctor is also responsible for the extent to which information about this treatment is provided to the patient, i.e. the doctor is responsible to providing the patient with information that ensures that informed consent is obtained. In general, then, it can be concluded that informed consent is ancillary to, and not essential to, the choice of treatment. The Senate points out, that even if a patient wishes to receive specific treatment, and comes to the doctor with a wish to perform surgery, it does not release the doctor from the obligation to examine the indications and contraindications, if necessary – to consider psychological factors and obtain informed patient consent.
3. If the court concludes that, in the particular circumstances, given the medical indications and contraindications and the patient's informed consent to the treatment, the operation would not have been performed, it could be a ground for non-professional treatment of the consequences in the case of an operation performed, however, would not have occurred if the operation had not been performed at all (Paragraphs 12 and 13 of the Judgment). This reference to liability of a medical practitioner for the damages, caused by the treatment of a patient on the basis of the patient's informed consent also demonstrates that informed consent is only an element in the choice of treatment, not an only or leading one. (Supreme Court of Latvia (Senate), 2020).

The recent Latvian case law relating to cases on informed consent, or the physician's duty to inform the patient relating to the risks of certain medical procedures have also increased in their amount. A number of such cases have been heard both in the Supreme Court of the Republic of Latvia (Senate), as well as by other lower courts. Such cases were claims for damages originating from various medical malpractice. In the recent case of the Supreme Court of the Republic of Latvia (Senate), SKA-790/2020, the Senate has provided a substantial explanation on the institute of informed consent, which augmented the Senate's position in the civil case SKC-216/2013, which related to an unconsented hospitalization of a patient to a psychiatric hospital. These two cases of the Senate have created valuable legal precedents in the field of medical law and especially, the institute of informed consent.

4. Corollary and a Comparative Analysis

Having reached to the corollary chapter of the paper, the authors conducted a comparative analysis of the institute of informed consent in Ukraine and the Republic of Latvia. In both states, the liability for conducting an unconsented medical operation tolls to civil liability (i.e. a civil lawsuit for recovering damages). In both Ukraine and the Republic of Latvia, in medical malpractice cases, the courts carefully assess the validity of informed consent given by the patient in terms of its actual compliance with the principles, laid down by the legislation. For instance, in the case of the Higher Specialized Court of Ukraine on Civil and Criminal Cases (2016), the plaintiff had argued that her son's consent to surgery could not be considered as valid, as it was provided during the time when the man was in a deplorable health condition; and in the case of the Supreme Court of Latvia No. SKC-216/2013, the dispute lasted around the issue of plaintiff's provision of informed consent to psychiatric medical treatment. The legislative provisions of informed consent in Ukraine are contained in the Fundamentals (1992), the Civil Code (2003), as well as a number of other legal acts, whereas the main legislative framework for the institute of informed consent in the Republic of Latvia is the Law on the Rights of Patients (2009), and before it was enacted, the consent to medical treatment was enshrined in the provisions of the Medical Treatment Law (1997).. Apparently, informed consent is viewed not only in the sense of patient's consent to medical treatment, but as the physician's duty to inform the patient on possible risks of the future medical treatment, explain its peculiarities, discuss the alternatives in treatment, if any, and so on. In such view, both of the plaintiffs in the case of Higher Specialized Court of Ukraine on Civil and Criminal Cases (2016) and the Supreme Court of the Republic of Latvia (2020) alleged a lack of information provided to the patient (in the former case – the plaintiff's son, in the latter case – the plaintiff herself), and in both cases, the courts had to examine whether the physicians had complied with their duty to inform the patients; in the first case, it was established, that the patient was provided with all necessary information regarding the future surgery and agreed to undergo it, whereas in the second case it was established, that the surgeon did not obtain the conclusions of plaintiff's health conditions from other physicians, and the contraindications to the operation, or the other methods of treatment were not assessed. Both situations actually display how complex may be the institute of informed consent in the sense of the patient's information rights. In terms of foregoing medical treatment, the legislative provisions of Ukrainian and Latvian laws are very similar. In Ukraine, the institute of refusal of treatment had received an extensive coverage in a 2018 judgment of the Lypova Dolyna District Court of Sumy Oblast. The Latvian legislation is very detailed in terms of refusing medical treatment, though the jurisprudence upon this subject is very rare: one old case has been discussed by the authors in this paper. To sum up, the legislation of Ukraine and the Republic of Latvia provide strict requirements for the fulfillment of this principle, and a multitude of legal issues, such as the provision of medical information for patients under eighteen years of age, as well as information relating to vaccination, the discussion of the overall theory of informed consent in modern medical law and its application by the European Court of Human Rights were reviewed by the authors. The authors observe, that the legislation of Ukraine and the Republic of Latvia corresponds to the high standards of contemporary medical law, and the principle of informed consent remains the key principle between the patient and physician both in Ukraine and the Republic of Latvia.

Conclusions

The concept of patient's rights is becoming more and more topical nowadays. Far more lawsuits regarding violations of patient's rights, which are of relatively recent origin could be beheld worldwide, and claims regarding unauthorized medical procedures are also becoming more frequent. The institute of informed consent is called to

protect the patient's body integrity, as well as his, or her right to choose the appropriate medical treatment, which is necessary upon his, or her view, as well as to withstand the undesired treatment. Lawsuits regarding unconsented medical procedures, as well as the breaches of physician's obligation to inform the patient relating to forthcoming treatment have recently become more frequent both in Ukraine and the Republic of Latvia. In both states, the acting legislation provides a framework for the appropriate functioning of the institute of informed consent. The Ukrainian legislation in terms of informed consent is built upon the Fundamentals (1992), as well as a number of legislative provisions in other laws and bylaws, whereas the Latvian legislation in terms of informed consent in founded upon the Law on the Rights of Patients (2009) and the Medical Treatment Law (1997). The recent case law of both states has shown a number of claims for damages for unconsented medical procedures, which were heard by the cassational courts of Ukraine and the Republic of Latvia: these cases were commented upon in detail. The increase in the amount of case law in both Ukraine and the Republic of Latvia also tends to show the topic of protecting patient's rights is becoming more concordant in Ukraine and the Republic of Latvia.

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REMOTE CRIMINAL TRIAL – FAIR TRIAL?

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

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

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Lithuanian legislature also opted for the discussed concept of remote oral criminal proceedings. Article 8^2 of the CCP provides that "in exceptional cases where it is not possible to ensure the hearing of cases in accordance with the ordinary procedure established by the CCP, the hearing of cases and the participation of participants, witnesses, experts, interpreters and other persons in court may be ensured through the use of information and electronic communication technologies (via video conferencing) where it is reasonably believed that the case will be dealt with more expeditiously, will not interfere with a thorough and objective examination of all the circumstances of the case and will guarantee the rights of the participants" (Article 8^2 (2) of the CCP). The fact that this form of oral proceedings is of an exceptional nature is evident from the regulation: the consent of not only the accused but also the other participants in the proceedings interested in the outcome of the proceedings is required (Article 8^2 (2) of the CCP). Such a right, unlike persons involved in civil and administrative proceedings, is reserved exclusively for participants in criminal proceedings. Lithuanian regulation in this sense is stricter than international standards, according to which only the position of an informed accused is usually assessed - in this

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

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

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

In Lithuania, as already mentioned, no laws on the organization of court proceedings in the context of Covid - 19 have been adopted, except for the Recommendations of the Council of Judges. However, the courts, having assessed the importance and complexity of the case or the procedural issue to be resolved, the negative consequences of its adjournment and other important circumstances, decided on an ad hoc basis on the necessity of an oral hearing with the parties. Prior to the entry into force of Article 8^2 of the CCP, the courts also ruled on an ad hoc basis on remote criminal proceedings. 3,865 remote court hearings were organized in Lithuanian courts in 2020 (2,612 in 2019 and 1,500 in 2018) (Lithuanian courts. Results of the activity, 2020, p. 87).

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

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

2. Remote Criminal Trial: the Requirements of Due Process

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

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

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

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

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

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

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

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

2.2. Ensuring the right to defense

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

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

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

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

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

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

2.3. Publicity and openness of court proceedings

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

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

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

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

2.4. Judicial evidence

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

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

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

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

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

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

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

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

A similar regulation has been established in Lithuania. Article 8^2 of the CCP stipulates that a criminal case may be heard remotely only if it is reasonably believed that the case will be dealt with more expeditiously in that way, this will not preclude a thorough examination of all the circumstances of the case and will guarantee the rights of the parties (Article 8^2 (2) of the Lithuanian CCP). The legislator of Lithuania also stated that if it becomes clear during the remote trial that the direct participation of persons is necessary (in order to exercise their procedural rights or to thoroughly investigate the circumstances of the case), they are summoned to court (Article 8^2 (4) of the CCP). A court that decides to hear a case remotely is obliged to ensure reliable identification of the participants, objective presentation of evidence, access to procedural rights and publicity of the court proceedings (Article 8^2 (5) of the CCP). In a similar way, the issue is regulated by the legislator of Ukraine (Art. 336 of the CPC). As mentioned earlier, the Ukrainian legislature does not yet detail the possibility of conducting the entire criminal proceedings remotely. In practice, only some actions in the courts are carried out at a distance.

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

Conclusions

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

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

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

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

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

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

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

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

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A COMPARATIVE ANALYSIS OF INFORMED CONSENT LEGISLATION IN UKRAINIAN AND LATVIAN LEGISLATION AND CASE LAW

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Abstract. The paper is dedicated to the comparative research of the views of the students representing the universities of three countries in terms of usefulness (necessity) of studying the criminalistic disciplines for future legal professionals. The core of this research is a coordinated and unified questionnaire study of 758 students from three Universities in Lithuania (Mykolas Romeris University), Ukraine (Yaroslav Mudryi National Law University) and Poland (University of Wroclaw). Modern pedagogics considers students to be not only future professionals, but likewise active participants in improving the didactic process. In recent decades, criminalistics has become increasingly important. This paper is a fragment of a broader study that is aimed not only at investigating the current situation in the criminalistic didactics of these countries in the run-up to the creation of a single European criminalistic space, but it is likewise aimed at future professionals, educators and managers of educational institutions, who are to implement this idea. The paper is not only a presentation of law students' views on expediency and necessity of studying criminalistics and other disciplines of criminalistic orientation important for their future professional activities, but it should likewise become a kind of guide to action for teachers and administration of universities, i.e. to improve substantive and organizational as well as methodological aspects of criminalistic didactics. The given technique of research of students' views can be successfully applied when addressing the problems of teaching other disciplines..

Keywords: criminalistics, legal sciences, criminalistic didactics, students' views.

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Audiatur et altera pars.

Introduction

The issues related to the improvement of legal professionals training are relevant for most countries, as the place and importance of the lawyers' activity in the current context are constantly being enhanced. Considering various aspects of this issue, the authors more and more often focus on the need to involve students in the didactic process (Mitrofanov, 2019, p. 114-123).

This paper is dedicated to a comparative research of the students' views in three countries (Lithuania, Ukraine and Poland) on the usefulness (necessity) of teaching a mandatory course in criminalistics to future legal professions. It is an interim stage (fragment) of a broader study (Kurapka, Malewski, 2019, p. 57-72) planned and aimed not only at investigating the current situation on the threshold of the creation of a single European criminalistic space, but is alternatively focused on future professionals who are expected to implement this idea. The usefulness of teaching criminalistics to law students has always been given consideration to; it was dealt with by the famous legal scholar Franz von Liszt, as well as the founder of scientific criminalistics Hans Gross and others back at the turn of XIX and XX centuries. Nevertheless, already at the second stage of criminalistics development (after the First World War) different theoretical concepts as for the content and structure of criminalistics began to appear in the main schools of criminalistics (German, Roman, Anglo-Saxon and East-European), along with frequent opposing views on didactics and the necessity of teaching it to law students. Quite strong was the concept of criminalistics as a purely police discipline, the echoes of which can be observed in some countries to this day. Therefore, in many of them, criminalistic disciplines are given close attention in law enforcement training, with a special emphasis on applied technical and criminalistic methods and techniques of detecting and collecting traces and other evidentiary information, as well as on traditional and natural-technical expert possibilities of their investigation. After the Second World War, European Universities increased their attention to civil law disciplines in legal training, which in itself is a natural result of the need to intensify economic processes and and thus reduce the academic hours for the disciplines of the criminal law cycle. Some of the disciplines previously included in the legal training curricula were eliminated, while others became optional or studied only by students of criminal law specialization (Textbook of Criminalistics. Volume 1:General Theory, 2016, P. 416-451).

An exception was the countries of the Eastern European school of criminalistics, where these disciplines were taught not only in higher and special secondary schools that trained professionals for law enforcement agencies, but also in the law departments of universities. It should be noted that in these countries in the last decades of the twentieth century reforms were likewise initiated, which gradually displaced criminalistics and other disciplines of criminalistic focus from the legal training curricula. These trends were often explained by the existing practice in the West.

It is, however, to be noted that in the last few decades these negative trends have not only been suspended, but criminalistics has become more in demand as an academic discipline. In the meantime, the following questions began to arise: "What is the essence, content, structure and levels of criminalistics? Who should be the "consumers" of criminalistic knowledge? What kind of criminalistics should be taught to lawyers? What should be the structure and scope of criminalistics course for lawyers? Is criminalistics a required course for all legal specialties?" These questions created a need to verify the established in the XX century paradigms and seemingly unshakable conceptual guidelines of criminalistics and its didactics, as well as to harmonize them with rapidly changing realities of the modern global world, which requires a permanent research. Issues related to criminalistic didactics at the national level, especially in the countries of the Eastern European School of Criminalistics, have been raised and are being raised at different levels and in different contexts all the time.

Undoubtedly, this paper should serve as a stepping stone in a broader international integrated research of theoretical and applied issues of criminalistic didactics, establishing further prospects for its development, defining the general content and system of applied training models for different consumer groups (Waszkiewicz, Worek, 2021, p. 805-817). Such research should fit into the activities targeted at the creation of a single European criminalistic space. For the sake of objectivity, it should be noted that scientists of the Eastern European School

of Criminalistics study these problems to a greater extent. A well-known representative of the German school of criminalistics, Professor Rolf Ackermann (Ackermann, 2009, 2010), has repeatedly drawn attention to the above. We have likewise begun to study the views on these issues of the teaching corps, and in further research there will be made an attempt to establish certain correlations between the views of both the students and the teaching staff, to identify the overlapping vectors and the existing differences, as well as their causes.

The purpose of this paper is aimed not only at presenting the law students' views on the usefulness and necessity of studying criminalistics and other disciplines of criminalistic orientation so important for their future professional activities, but also the perception of these expectations by the teachers and managers of universities as a guide to action, i.e. to improve the content and organizational as well as methodological aspects of criminalistic didactics. The paper should become a kind of memorandum calling for the convergence and harmonization of the criminalistic didactic process, which will undoubtedly serve to create a single European criminalistic space. In addition to theoretical research, survey and comparative analysis methods were widely used.

1. A Brief Review of the Research on the Problems of Criminalistic Didactics in Lithuania, Ukraine and Poland

Each of the above countries has its unique history, culture, science and experience with its neighbors. Education, including criminalistic didactics (after the third partition of the Rzeczpospolita in 1795 and until 1918, these countries did not only lack the statehood of their own, but the issues related to law enforcement and especially to the investigation of crimes were under the authority of the millitary-occupation structures. Therefore, one cannot speak of national models of criminalistics and its didactics in these countries before 1918), likewise possesses its own specificity. The history of creation and development of criminalistics is most closely connected with the functioning of law-enforcement and judicial bodies, which are necessarilly important elements of the state mechanism. The authors seek to present to the reader in a very brief form the main features and some peculiarities of teaching criminalistic disciplines in the legal curricula of universities in Lithuania, Ukraine and Poland at stake.

1.1 A brief sketch of criminalistic didactics in Lithuania

Eugenijus Palskis (Palskys, 1995) wrote in his monograph about the process of law enforcement bodies development, formation of criminalistics and criminalistic didactics in Lithuania after the restoration of its independence in 1918. The Soviet period of development of criminalistics and its didactics in Lithuania, by and large, did not differ from similar processes in other Soviet republics. However, after restoration of independence in 1990, cardinal changes occurred in all spheres of the country's life. Lithuania, which had chosen the Western vector of development, had not only to restructure its political, administrative, institutional and economic, but likewise the legal system.

During this reorganization of all aspects of the state's functioning, the reforming of law-enforcement bodies and the training of experts to work in these institutions played a major role. During this period, Lithuanian criminalists faced both applied problems related to the process of detection, investigation and prevention of crimes and theoretical problems related to the choice of the development model for country's criminalistics, as well as no less important issues of training professionals for law enforcement and judicial bodies. In 1990, the Lithuanian Police Academy developed the concept and created a curricula of complex step-by-step training of professionals for police and other law enforcement bodies. It fit in and, in certain aspects, was even ahead of some guidelines of the Bologna process (Kurapka, Malevski, Justickis, 2005, p. 245-250). This three-tier innovative carricula provided for the training of law students (professionals) for law enforcement bodies with not only relevant legal, specialized and criminalistic knowledge, but alternatively skills. The novelty and originality of the carricula was that each stage presented a certain holistic completed cycle, allowing immediately after its completion, to occupy a certain law enforcement post and was (could have been) a "pass" to the next level of education (Malewski, 1996, p. 80-82; Kurapka, Malevski, 2001, p. 144-153; Juškevičiūtė, Kurapka, Malevski, 2002, p. 55-59; Malewski, 2004, p. 73-83; Kurapka, Malewski, Burda, 2004, p. 32-39; Kurapka, Malevski, 2005, p P. 47-50). The first stage of training (the first course) was completed by a set of examinations that provided basic competence and primary qualification for law enforcement officers. The successful completion of the first training course made it possible to compete for the second-level training. Upon the completion of this level of education, the graduate was

conferred a bachelor's degree in the appropriate specialization and the right to assume an officer's post. The bachelor's degree made it possible to participate in the competition for the relevant master's degree programmes. Specialized bachelor programs "Law and Police Activities", "Law and Customs Service", "Law and Penitentiary Activities" were developed in response to practical needs, etc. These programmes included not only basic criminalistic courses but also a number of related criminalistic disciplines. The traditional law studies programme of Mykolas Romeris University (Mykolas Romeris University initially enjoyed the status of the Lithuanian Police Academy, which became the Lithuanian Academy of Law and evolved into the Lithuanian University of Law) has undergone many changes in recent decades (including the elimination of criminalistics from a number of compulsory subjects), although in recent years criminalistics has again become a mandatory subject for lawyers of all specializations. New disciplines for criminal law officers have likewise emerged, broadening the content of the basic course in criminalistic science. These disciplines are "Criminalistic Tactics" for bachelors, "Criminalistic Methodology" and "Criminalistic Science" for masters. Since 2020, the Mykolás Romeris University has opened a new specialization of the undergraduate law program "Law and Criminalistics", which has already been mentioned above (Malewski, Kurapka, Tamelė, 2021, p.10-38).

It should be emphasized that the current leadership of Mykolas Romeris University adheres to the chosen vector of development – the university continues to train professionals in such fields as law and management, public safety and others, which are requiered for the country's progressive democratic development (Spurga, Žalėnienė, 2021, p. 228), paying close attention to the issues of security and rights of citizens, which is impossible without serious attention to the development of criminalistic disciplines and their implementation in the didactic process. At Vilnius University, criminalistics is taught to law students (at Vilnius University, lawyers are trained in a single five-year master's program) of all specialties as an optional subject and only students of criminal law specialties have compulsory criminalstics classes. Vytautas Magnus University in Kaunas, established with the support of the Lithuanian diaspora centered in the United States, not only became a successor of the university that had existed between the World Wars, but also implemented a number of innovations characteristic of the American educational system. For the first time in Lithuania, this university implemented a new training programme for lawyers in Lithuania: those who held a bachelor's degree in social sciences could obtain a master of law degree, subject to a one-year compensatory course, during which basic legal disciplines were taught in a concise manner. Issues related to criminalistic didactics in Lithuania (Malevski, 1995, p. 159-168; Malewski, 1996, p. 80-82; Kurapka, Malevski, 2001, p. 144-153; Malewski, 2004, p. 73-83; Kurapka, Malevski, 2005, p. 47-50; Kurapka, Malevski, Justickis, 2005, p. 245-250; Kurapka, Malevski, Kazemikaitienė, 2006, p. 106-115; Kurapka, Malevski, 2006, p. 244-245; Malevski, Juodkaitė-Granskienė, Nedveckis, 2013, p. 48-59; Malevski, 2014, p. 21-63; Malewski, Kurapka, Navickienė, 2018, p. 113-128; Kurapka, Malewski, 2019, p. 57-72; Malewski, Kurapka, Tamelė, 2021, p. 10-38). have been raised at different levels and in different contexts more than once. The authors have repeatedly raised the questions about the levels of criminalistic knowledge required by specialists in one field or another, the need to develop and implement modular training in the process of training professionals, which makes it possible to respond promptly to the needs of practice, has been likewise stressed. The authors tried to draw attention to the necessity of developing the concept of linking the basic criminalistic education with further training programs and acquiring new competences, which is already connected with the problematic of a broadly understood criminalistic policy. They were interested not only in the general problems of teaching criminalistics to lawyers and future law enforcement professionals, but also in particular problems related to the training of professionals (Malevski, Juodkaitė-Granskienė, Nedveckis, 2013, p. 48-59; Malevski, Kurapka, 2019, p. 393-398), including their master's theses, as a kind of element uniting criminalistic didactics and science with practice. This paper does not allow for a broad presentation of these studies and publications based on them, so we only refer to the main sources where they have been published. It should be emphasized that the issues of criminalistic didactics, as one of the main directions, were initially incorporated into conferences (congresses) organized by the Lithuanian Association of Criminalistics since 2000 under the general title "Criminalistics and Forensic Expertise: Science, Training, Practice", as evidenced by the term "training" in its title. Taking into account the importance of academic criminalistics, first, the representatives of Lithuanian Universities, and later, when the conference was held every other year abroad, scientists of leading universities from other countries were always actively involved in the organization of the above conferences.

1.2 A Brief Sketch of Criminalistic Didactics in Ukraine

In modern conditions, the development of Criminalistics can be researched in three main areas: 1) development of University science (science in educational institutions); 2) development of academic science (within the activities of research institutions); 3) development within department subordination (forensic institutions, etc.). Criminalistics is also studied in the structure of the legal doctrine of Ukraine. The development of Criminalistics in Ukraine has European focus. Ukrainian scientists are researched the problem of Criminalistic didactics repeatedly.

History of Criminalistics in Ukraine originates back to 1899-1902, when Prof. H. Gross, who taught the criminal law using the knowledge of criminal psychology and samples from his practice, was employed in Czernowitz University (Austro-Hungarian Empire, now – Chernivtsi, Ukraine).

The introduction of foreign experience by Professor Oleksandr D. Kiseliov should be included in the real attempts to teach Criminalistics in Ukraine. From 1897 Oleksandr D. Kiseliov was awarded a two-year trip abroad, and in 1899 – made a trip to Paris to Alphonse Bertillon to study the method of identification. In 1910, for the first time in the Russian Empire, Oleksandr D. Kiselyov began to read / a course of Criminalistics.

Criminalistics in Ukraine was formed in different directions. The activity of Professor Leonid Ye. Vladimirov related to the forensic psychological and tactical direction. In 1872 he was elected as a professor at the Department of Criminal Law and Judiciary of the Imperial Kharkiv University. Professor Leonid Ye. Vladimirov's scientific interests were quite broad: the study of the nature and effectiveness of the jury trial; development of tactics for conducting defense in criminal cases; study of psychological features of criminals.

A significant contribution to the development of forensic psychology was made by a prominent lawyer, court speaker, Professor Anatoly F. Koni. His research interests: psychology of judicial activity, psychology of testimony of witnesses and victims, psychology of suicide. In 1890, the Imperial Kharkiv University awarded Anatoly F. Kony the degree of Doctor of Criminal Law without defending a dissertation (honoris causa).

An important area was the development of medical criminalistics. The fundamental works by Professor Mykola S. Bokarius laid the foundations for the formation of the subject of Criminalistics in Ukraine. Since 1905, Mykola S. Bokarius was teaching forensic medicine at the Faculty of Law of the Imperial Kharkiv University, conducting such independent courses as «Course of microscopic and microchemical researches of material proofs» (1909-1916), «Practical course of technique of forensic autopsies» (1907-1909). Since 1920, Prof. Mykola S. Bokarius was reading the course “Technique of Crime Investigation”.

Teaching activity in Criminalistics and disciplines of Criminalistics direction is conditioned by the development of science and introduction of separate subjects in educational process.

Ukrainian Universities has traditionally taught different disciplines: “Criminalistics”, “Forensic Psychology”, “Juridical Psychology”, “Forensic Accounting”, “Forensic Medicine and Psychiatry”, “Workshop in Criminalistics”, “Forensic Examination”, as well as other disciplines of Criminalistics, Psychological and other direction: “Crime Investigation Methodics”, “Methodics of Economic Crimes Investigation”, “Methodics of Investigation of Crimes in Economic Activity”, “Methodics investigation of Crime against Justice”, “Investigation of Corruption Crimes”, “Legal information and Computer Technology in Legal Activity”, “Fundamentals of Computer Science and Computer Technology”, “Criminalistic Knowledge in Prosecutor’s Activity”, “Special Knowledge in legal Activity”, “Psychology of Investigative Activity”, “Psychology of Judicial Activity”, “Psychology of Penitentiary Activity”, “Psychology of Investigative and Prosecutorial Activity”, etc.
In Ukraine, Criminalistics is a compulsory subject in the preparation of bachelors. Other criminalistic’ subjects are usually taught in the course of master’s training. At present, the educational process at the Ukrainian Universities in different disciplines of criminalistics direction is carried out in the form of lectures, practical classes and laboratory work.

The Criminalistics Department of Yaroslav Mudryi National Law University (Kharkiv, Ukraine) pays considerable attention to the introduction of new forms and advanced teaching methods, information and computer

technologies into the educational process. The Criminalistics Department has developed computer programs, which are used during practical classes and the independent work of students. Databases have been created for the use of multimedia during lectures in the courses “Criminalistics”, “Juridical Psychology”, “Workshop in Criminalistics” and other educational disciplines, as well as handout illustrative material and test assignments (techniques) for practical training in various educational disciplines.

During the practical classes, students consolidate the theoretical provisions of respective academic disciplines; acquire skills for their practical application. They take place in the form of tasks, tests, panel discussion, simulations, conducting business games, applying scientific and technical tools in the field, and drawing up the necessary draft procedural documents.

The sections of the Criminalistics Department are equipped with modern equipment and provide students with mastery of skills in the application of scientific and technical means, methods and techniques of detection and investigation of crimes, as well as trial of criminal cases. In the computer rooms of the department, they conduct separate practical classes in Forensic Photography, Traseology, Ballistics, and Identification of Person by Appearance.

Innovative products developed by the staff of Criminalistics Department of Yaroslav Mudryi National Law University can include the database "Investigator's Practice" and the information retrieval systems "Investigative Precedent" and "Profile of the killer». Employees of the Criminalistics Department was developed an Automated Workstation of Investigator "Insight". Traditionally, in computer rooms, students are taught to make a computer-based composite using the proper software (the system “RAIPS-portrait”), which was once created by the department’s staff.

Criminalistic laboratory, a photo and video lab, a video center, computer classes, methodological section, Criminalistics Museum and Criminalistics Ground were created at Criminalistics Department for quality education support.

The department has created a teaching and methodological complex on criminalistics: Teaching and Methodological Office (Museum) of Criminalistics, electronic publications (textbooks, dictionaries, directories), and training videos of its own production. In particular, an important methodological function is performed by Criminalistics Ground and Museum, on the basis of which practical classes and laboratory works are carried out. Criminalistics Museum is studying and teaching hall that exhibits objects (physical evidence) according to different types of crimes, unusual weapons of their commission, illustrates the unique ways used by criminals in the commission of crime, offers conclusions (fragments) of expert studies. This museum was created more than half a century ago. It is updated with certain materials and exhibits to the present. The number of exhibits exceeds one thousand units (as an objects of specifics criminal proceedings (cases).

In 2018, Criminalistics Ground of Criminalistics Department with fake crime scenes was equipped and opened, where students can acquire practical skills of conducting crime scene inspection (accident inspection, criminal explosion, railway accident, etc.), corpse examination, physical evidence, traces of the crime, etc. Criminalistics Ground is a specially equipped territory or premises intended for practical and laboratory training in Criminalistics in the field. Criminalistics Ground of Criminalistics Department corresponds to the world level. The total area of the Criminalistics Ground is more than 800 square meters.

Work on Criminalistics Ground is performed in conditions as close as possible to the real ones (field conditions). Students, under the guidance of teachers at Criminalistics Ground, carry out the tasks of practical direction: present investigative leads, search, record and pack physical evidence, detect fingerprints, shoeprints, vehicle tracks, use of weapons or explosive devices. During fieldwork, students draw up protocols of investigative (search) actions, formulate questions to forensic experts, determine the circumstances to be investigated, etc.

Laboratory work in Criminalistics and the workshop in Criminalistics involve the use of the capacity of Criminalistics Ground, visual accessories and equipment, introduction of an individual approach to the students’ tasks performance with the use of criminalistic techniques (scientific and technical means), computer technologies, materials and substances as well as obtaining relevant embodied results. In particular, today,

students studying the course of criminalistics perform twelve laboratory works: "Forensic Photography at the Crime Scene (test shoot)"; "Fingerprint Identification and Fixation"; "Examination of Weapons (Ammunition) and Gunshot Residue at the Crime Scene"; "Investigative Document Examination"; "Fingerprinting of Living Persons"; "Crime Scene Investigation (Training)"; "Interrogation Planning"; "Features of Forensic Experts Involvement"; "Planning a Homicide Investigation"; "Planning of Investigation of Theft"; "Planning of Road Accident Investigation".

Criminalistics training in University education cavers: 1) harmonization of educational programs containing Criminalistics and Forensic Sciences; 2) recognition of Criminalistics and Forensic Sciences as compulsory disciplines at the bachelor's, master's and PhD; 3) conducting classes in specially created conditions and equipping classrooms with appropriate equipment, instruments and technologies; 4) the need for practical training in small groups (5-10 people) and the obligation to perform laboratory work; 5) the possibility of teaching Criminalistics and Forensic Science using the bases of practical institutions.

1.3 A brief sketch of criminalistic didactics in Poland

A brief analysis of the discourse on criminalistic didactics in Poland is advisable to begin with the information about the project of developing a Polish criminalistic bibliography, which is extremely important for both criminalistic science and practice in general. The authors of this idea back in the 1970s were Brunon Hołyst and Hubert Kołecki, but it has been implemented only in this century. As conceived by the organizers, the Bibliography was to consist of five volumes: the first one was to cover criminalistic publications of Polish (mostly) authors in 1918-1959, the second one in 1960-1979, the third one in 1980-1989, the fourth one in 1990-2000, the fifth one in 2001-2008. Based on pragmatic considerations, the authors of the project started work and published volumes 3-5 in 2008 and 2011. In the third volume of Bibliography (1980-1989), 45 items related to criminalistics didactics17 are indicated in the section "Teaching Criminalistics" (Polska bibliografia kryminalistyczna, 2008, p. 68-72). In the fourth volume of the Bibliography (1990-2000), 268 items related to criminalistic didactics (Polska bibliografia kryminalistyczna, 2008, p. 95-113) are mentioned in the section "Teaching Criminalistics". The fifth volume of the Bibliography (2001-2008) mentions 288 items related to criminalistic didactics (Polska bibliografia kryminalistyczna, 2011, p. 116-140) in the section "Teaching Criminalistics"19. In 2018, one book included bibliographic criminalistic sources 1918-1979, which was planned to be published in two volumes. The said book also included a section on "Teaching Criminalistics", in which several dozen publications directly related to didactics were mentioned. However, it should be noted that in a number of other sections, publications dealing with theoretical and methodological issues of criminalistics also mentioned didactics (Polska bibliografia kryminalistyczna, 2018, p. 55-58).

Looking at criminalistic didactics from a historical perspective, it can be stated that Polish criminologists also emphasize the great importance of forensic physicians, chemists and toxicologists for the formation of criminalistics (Janicka, 2016, p. 40). An example of this is the inaugural lecture of forensic physician Prof. Leon Wachholz at the Faculty of Law and Administration of the University of Lviv on October 13, 1894, in which he emphasized the importance of criminalistics for pre-trial investigation and justice institutions. As early as 1924, Wacław Makowski, a legal scholar and politician, proposed that criminalistics be taught as a compulsory course at law faculties. However, his proposals were implemented only after the end of the World War II, when Poland found itself in the Soviet sphere of influence, although in some universities criminalistics was taught as an independent subject already in the 1930s. Such an example is the course in criminalistics taught by one of Poland's leading criminalists, Władysław Sobolewski, not only for police school students, but also for law students at universities in Warsaw and Poznań. In 1946, the training of criminalistics began for law students at the universities of Warsaw, Wroclaw, Poznan and others. It was not until 1956 that the first independent Department of Criminalistics was established at the University of Warsaw (Gruza, 2016, p. 11-21). Its first Head was Professor Paweł Horoszowski, who was also the author of the first, published the year before, textbook on criminalistics. However, during this period, the reform of legal education set in and criminalistics became an optional subject, which could not but affect its advancement. The development of criminalistics at the University of Wrocław is linked to Włodzimierz Gutekunst, who began lecturing there in 1946. The intensive process of development of the Department of Criminalistics at the University of Wrocław began in 1981, when Professor Zdzisław Kegel became its Head.

Criminalistics in Poland is taught at civil governmental and non-governmental higher education institutions, in the system of law enforcement institutions, as well as during in-service training courses, which can be organised by various, including non-governmental, organisations. In Poland, it is not enough to have a law degree to carry out independent activities in certain positions (judges, lawyers, prosecutors, legal advisors and some others), but special professional training is still required, so called aplikacja, which lasts from one to three years, it is organized and delivered by the relevant bodies of legal corporations. One such example is the prosecutor's aplikacja, which is organized by the National School of Justice and Public Prosecution. This training includes 90 academic hours for criminalistics. The courses take a variety of forms: examination of criminal records, practical exercises with forensic experts and visits to forensic laboratories, etc. Judges are provided with training in criminalistics and forensic medicine. Attorneys are allowed hours for interrogation tactics during the pre-trial investigation. However, this area of criminalistic training for lawyers is not optimal and requires serious reform. In general, criminalistic didactics in this element also requires a new strategic approach, the development of relevant curricula and an increase in the number of academic hours.

Basically, it is a course of 30-45 classroom academic hours consisting of lectures and practical exercises. In non-governmental higher educational institutions, it is usually only a lecture course, which is natural, since hands-on classes require appropriate equipment and materials. In civilian institutions of higher education, criminalistics is taught according to the law, administration, and criminology curricula as well as according to the curricula for some areas of public safety, etc. It should be emphasized that the wide autonomy of Polish universities is reflected in a rather wide variety of legal training curricula, in which there is not always a place for criminalistics, which is justified by various reasons. Unfortunately, these negative trends persist for the time being. Although if criminalistics is listed among the subjects for students to choose as electives, interest in it still remains high.
In addition to the basic criminalistics course, universities also teach specialized criminalistics subjects, such as "Criminalistics Expert Examination", "Document Crimes", "Virtual Crime Scene" (practical classes using Virtual Reality technology) and others.

A characteristic feature of Polish criminalistics departments has been and remains the complementary connection of science and didactics with practice. Usually, criminalistics departments have their own laboratories, and the staff is often engaged not only in scientific and pedagogical activities, but likewise in practical activities. It should be noted that the so-called postgraduate one- or two-semester study is common in Poland, which makes it possible for the applicants to obtain additional competencies that may be the basis for inclusion in the list of sworn experts. An example would be the Department of Criminalistics at the University of Wroclaw, which for many years has had training curricula in the "Handwriting Examination", "Questioned Document Examination", "Forensic Vehicle Examination", and "Forensic Archaeology". For graduates of non-legal training programs, the department runs a two-semester Criminalistics program. The laboratories available in the departments make it possible for the scientific and pedagogical staff to conduct forensic examinations (an example is the Department of Criminalistics at Wroclaw University, whose professors were and are sworn experts and conducted forensic examinations (handwriting examinations, technical examination of documents, polygraph examinations, forensic and archaeological examinations) on the instructions of courts and other procedural subjects.

Summarizing a brief sketch of criminalistic didactics in Poland, it can be said that there is no consensus on the need for teaching criminalistics to law students. However, most educators and students recognize that criminalistics is necessary in criminal law, but we should bear in mind that it can be useful in civil and administrative proceedings. The main problem lies in the accessibility of criminalistics to students, which requires the development of an appropriate system of training and professional development. The COVID-19 pandemic has significantly affected various areas of life and has had a particularly negative impact on criminalistic didactics.

The article indicates only the main similarities and differences of forensic didactics in Lithuania, Poland and Ukraine, which were noted by the students of the three universities. This provides a basis for continuing the research on this issue, maybe in the future orienting it towards a common international scientific program.

2. Core research

The process of preparing the instrument, namely an anonymous questionnaire for a collaborative study of the students' views in the three countries was not an easy task. This was due not only to the preliminary study and

comparison of the higher education models applied in Lithuania, Ukraine and Poland, which have significant discrepancies, but also to the need to coordinate not only the basic questions, terminology, but likewise the qualitative preparation of questionnaires in three languages. The questionnaires developed by Lithuanian representatives, who were the initiators of this international study, were taken as the basis. After that, the questionnaires were translated into other languages and their contents were agreed upon. Initially, it was planned that the questionnaire would be conducted by contact method during the classes, which is important, because it makes it possible not only to increase the objectivity of the study (individuality, independence, minimization of extraneous influence, equal time, etc.), but also its quality. Unfortunately, because of COVID-19 pandemic, they had to conduct this study in a mixed version. Both full-time and part-time students took part in the research. These were not only students of classical bachelor's and master's law programs of universities in Vilnius (Lithuania), Kharkiv (Ukraine) and Wroclaw (Poland), but also students of law-related specialties (i.e., in Poland most universities have faculties called Wydział prawa i administracji", which clearly indicates a certain specificity. These faculties have two main curricula: "Law" and "Administration" (which is in the conformity with the Lithuanian legal specialization "Law and Management")). The questionnaire presented a traditional form, with the introductory part containing questions about the respondent, and the main part containing nine substantive questions. For us, the sphere of students' practical activity (real or future) was important, since it allowed them to express with more confidence their opinion about the necessity of criminalistics knowledge for this or that profession. One of the main questions that reflects the essence of this research is the following one: "What is the importance of criminalistics in your daily (future) activities" and another related question "Is criminalistics important in the training program for lawyers"? Specific and detailed questions for this research were then posted: "Is it necessary to differentiate the volume and structure of teaching the basic course of criminalistics depending on the legal specialty"; "Are you satisfied with the volume and structure of the criminalistics course"; "How do you assess the ratio of theoretical and practical components of the basic course of criminalistics being taught to you"? Considering that, in the opinion of the authors of this article, a law graduate should also possess some other specialized knowledge, not only the knowledge of traditional criminalistics, the following questions were also formulated for the respondents: "Is there a need for an independent course in criminalistic science in the law degree program" and "Is there a need for an independent course in forensic medicine in the law degree program"? Given that knowledge tends to lose relevance quickly these days, they posed the question "What are your views on the improvement of professional competence in the field of criminalistics"? The final question was "Are you familiar with the ideas and proposals for the creation of a unified European criminalistic space", which was intended to answer whether we are locked in "national apartments" or whether the idea of the creation of a single European criminalistic space has already become a driving force capable of uniting the efforts of not only representatives of criminalistics academic science, but also of the wider legal community.

The outcomes of the study were the answers provided by 758 respondents of three universities: 197 questionnaires of students from Mykolas Romeris University (Lithuania), 296 questionnaires of students representing Yaroslav Mudryi National Law University (Ukraine) and 265 questionnaires of students representing the University of Wroclaw (Poland). Answers related to topical issues of criminalistic didactics and trends of its development are placed in seven diagrams.

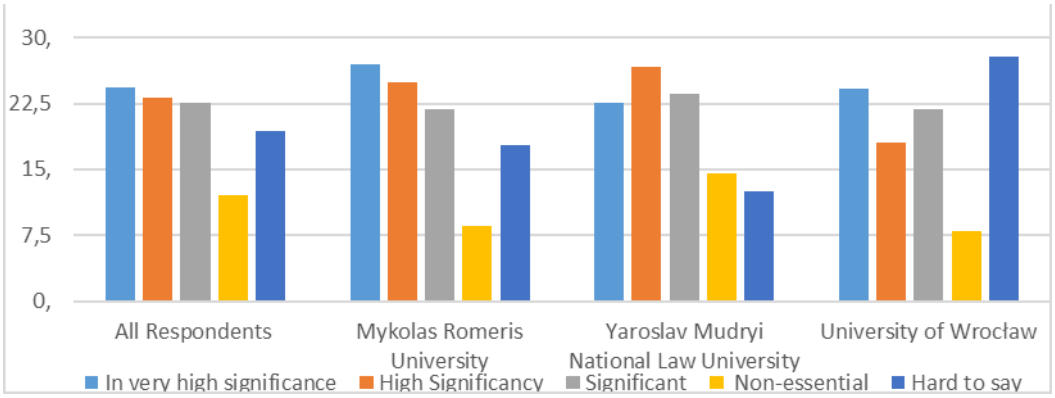

Diagram No. 1. What significance does criminalistics have in your daily future career / activities? (%)

Diagram No. 1 clearly shows a positive assessment of the significance of criminalistics as an important discipline for the future legal profession. This was emphasized by the majority of respondents (70%). The results of the survey showed that there were practically no significant differences in the assessment of the need and importance of criminalistic knowledge for the future legal professional activity expressed by respondents representing universities of the three countries. The study showed that there were likewise no significant differences on this issue among both master's and bachelor's degree students. This is all the more significant since we have similar results among students of classical legal specialization and a number of other areas (law and management, law and customs, etc.).

The answers to the second question about the necessity of criminalist training for lawyers (see Chart 2) clearly showed that 79% of all respondents said that criminalist training should be provided for students majoring in law, 14.5% said that it should be provided only for students majoring in criminal law, and 6.3% had no views about this issue. It can be noted that the opinion of Lithuanian and Ukrainian students on this issue was very close. Respondents from Poland were less categorical about the need to teach criminalistics to all legal specialties, although their result exceeded 68%.

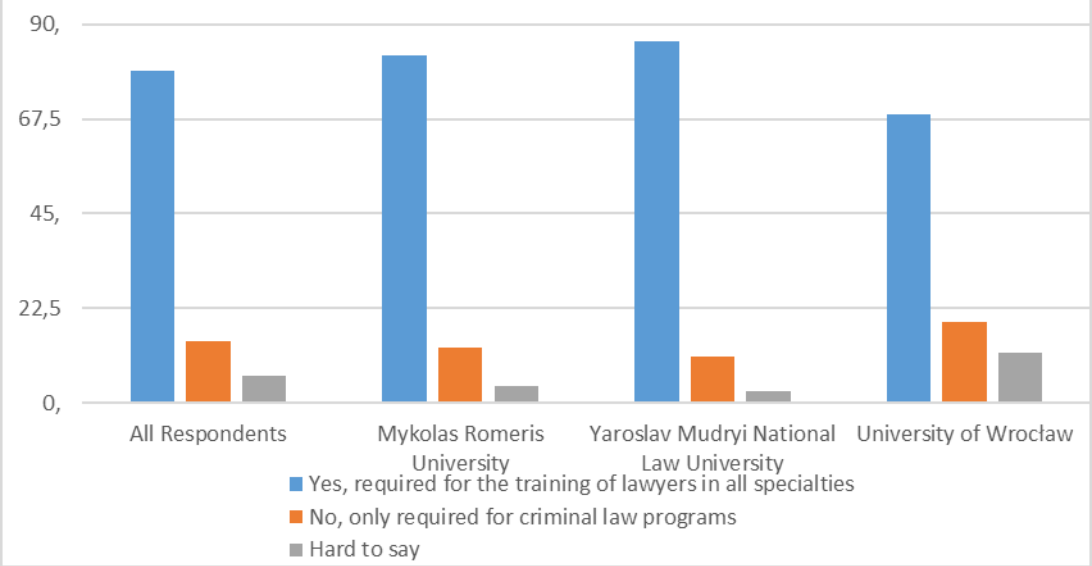

Diagram No. 2. Is criminalistics needed in a lawyer training program? (%)

The third diagram shows the answers to the question "Are you satisfied with the scope and structure of the criminalistics course", to which a total of 52.6% of respondents answered positively. It should be noted that the students of Mykolas Romeris University are satisfied by the situation with the teaching of criminalistics and the students of Wrocław University are least satisfied with it. A reference should be made that about one third of the respondents indicated that the structure and content of the delivered criminalistics course satisfied them only partially, while 2.2% indicated that the course delivered did not satisfy them.

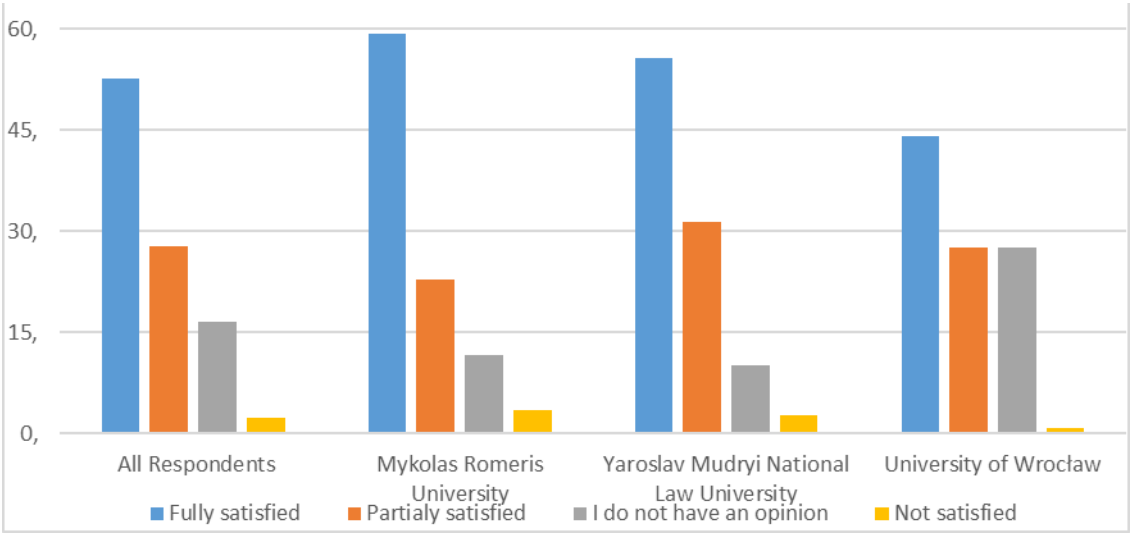

Diagram No. 3. Are you satisfied with the scope and structure of the criminalistics course? (%)

The main concern here is the balance between the theoretical and practical parts of the course (diagram 4). The balance between the theoretical and practical parts of the course delivered was indicated by 35.6% of all respondents, but we already find a significant difference of views on the issue in question, especially between Ukrainian and Polish students. 46.6% of respondents from Ukraine and only 20% of respondents from Poland expressed a positive opinion about the correlation between the theoretical and practical parts of the delivered course in criminalistics. An even greater polarization of views is observed on issues related to strengthening the theoretical component of the delivered criminalistics course, where 39% of students of Mykolas Romeris University expressed a positive opinion on this issue, noting that the implementation of the latest technologies in the didactic process is a complex and costly undertaking. Only 3.7% of Ukrainian and 2% of Polish respondents were in favor of strengthening the theoretical component of the criminalistics course. Accordingly, in these last two universities significantly more respondents support the necessity of strengthening the applied aspects of teaching criminalistics and strengthening the formation of practical skills. In our opinion, such differentiation of views can be related, on the one hand, to the available material resources and technical base at the universities, and to the certain views of the teaching staff on the essence of university education, which should not be limited to imparting practical skills and abilities, but on the ability to form practical skills on the basis of theoretical knowledge obtained in the future. It should be stressed, however, that Mykolas Romeris University is also introducing applied as well as interactive teaching methods. Mykolas Romeris University introduces applied as well as interactive teaching methods. A kind of bonus for Mykolas Romeris University is that it is located in the capital, where the main expert and criminalistic institutions are located. This makes it possible to attract the best trained practitioners to teach hands-on classes to students in master's degree programs, part of which are even held around these institutions.

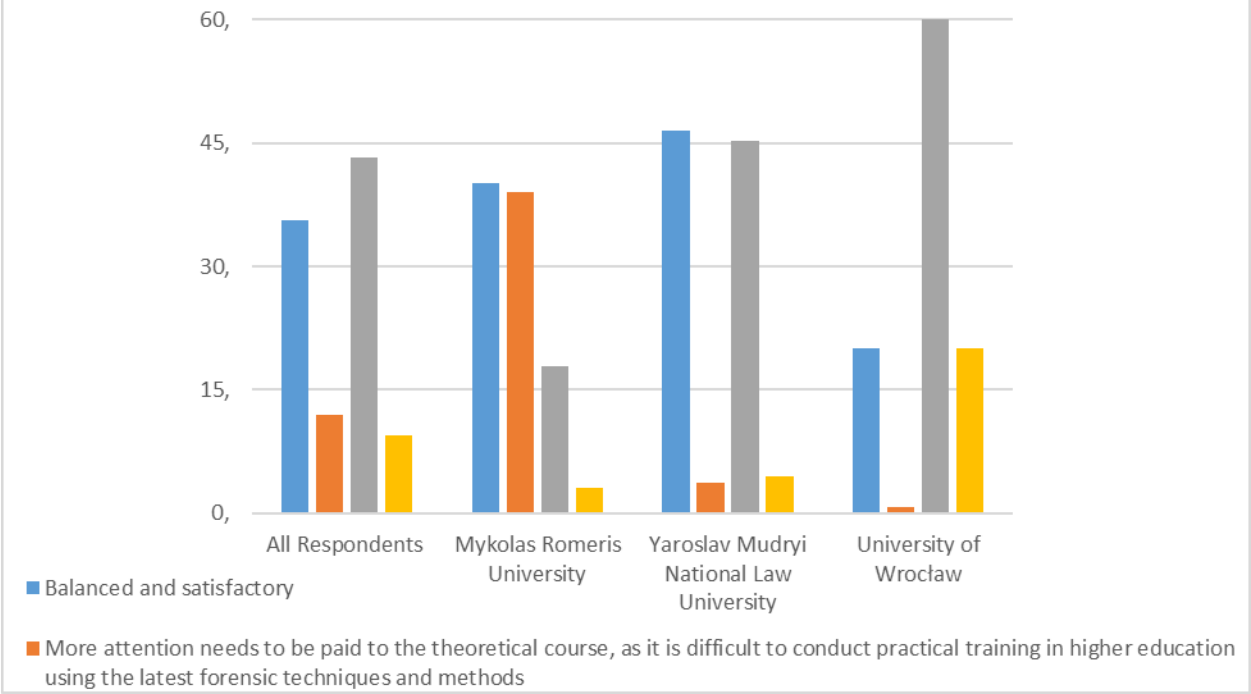

Diagram No. 4. Your opinion about the relationship between the theoretical and practical parts of the criminalistics course taught? (%)

In recent times, many universities, especially those providing training to law students, have likewise developed along with certain criminalistic disciplines specializations aimed at the training of experts, and this is not a matter of fashion but of trends driven by the needs of practice (Texbook of Criminalistics, 2016, p. 435-451). The results of the survey show that our students understand the importance of criminalistic science, support these trends, as we can see in the fifth chart.

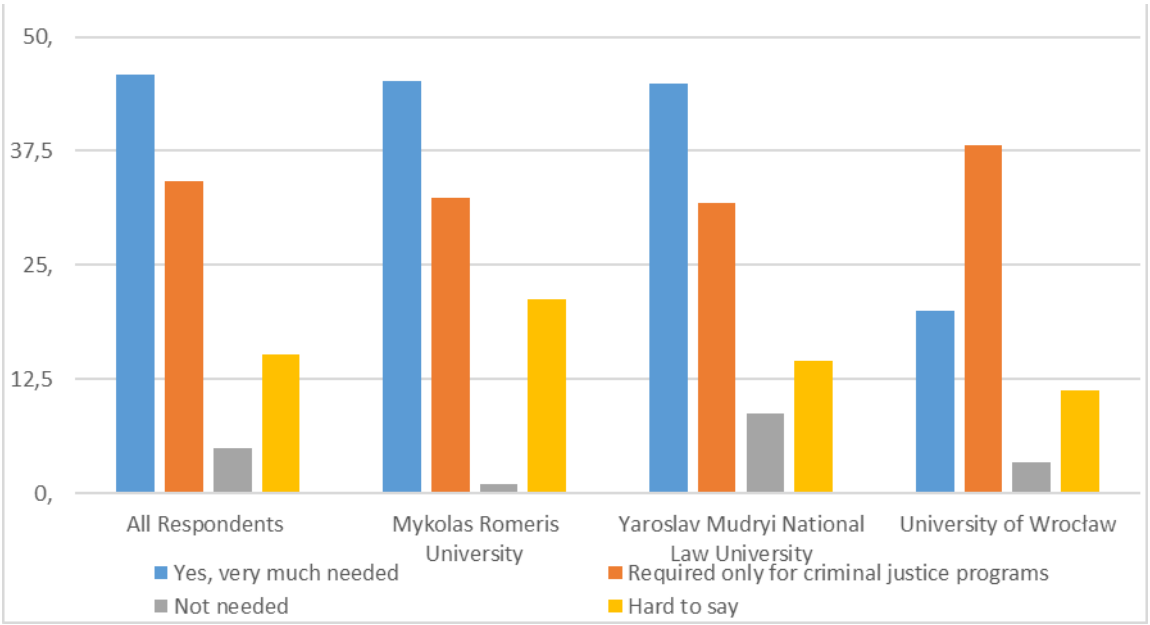

Diagram No. 5. Is there a need for an independent Expertology course in the training of lawyers? (%)

Students expressed positive views about the need to improve their professional competence (Diagram № 6). 53% of the respondents believe that it is necessary to constantly improve their professional level (both knowledge and

practical skills) by participating in various professional development courses, workshops, scientific and practical conferences; 34% believe that this requires a balanced set of activities and only 8.8% of respondents do not see the need for this, the remaining respondents failed to answer this question. Quite a high percentage of statements about the need for permanent professional development may be related to the efforts of the teaching staff of the three universities to involve their students in activities that are not directly related to the didactic process, but which can significantly expand the students' scopes and be useful for the future profession. This includes participation in student scientific societies and other non-governmental associations, inviting students to take part in international scientific and practical conferences, etc. According to the authors of the article, such student participation in such forms of activity is not yet comprehensive, but it makes it possible for them not only to go beyond the programs, but likewise to instill an interest in the independent search for new knowledge.

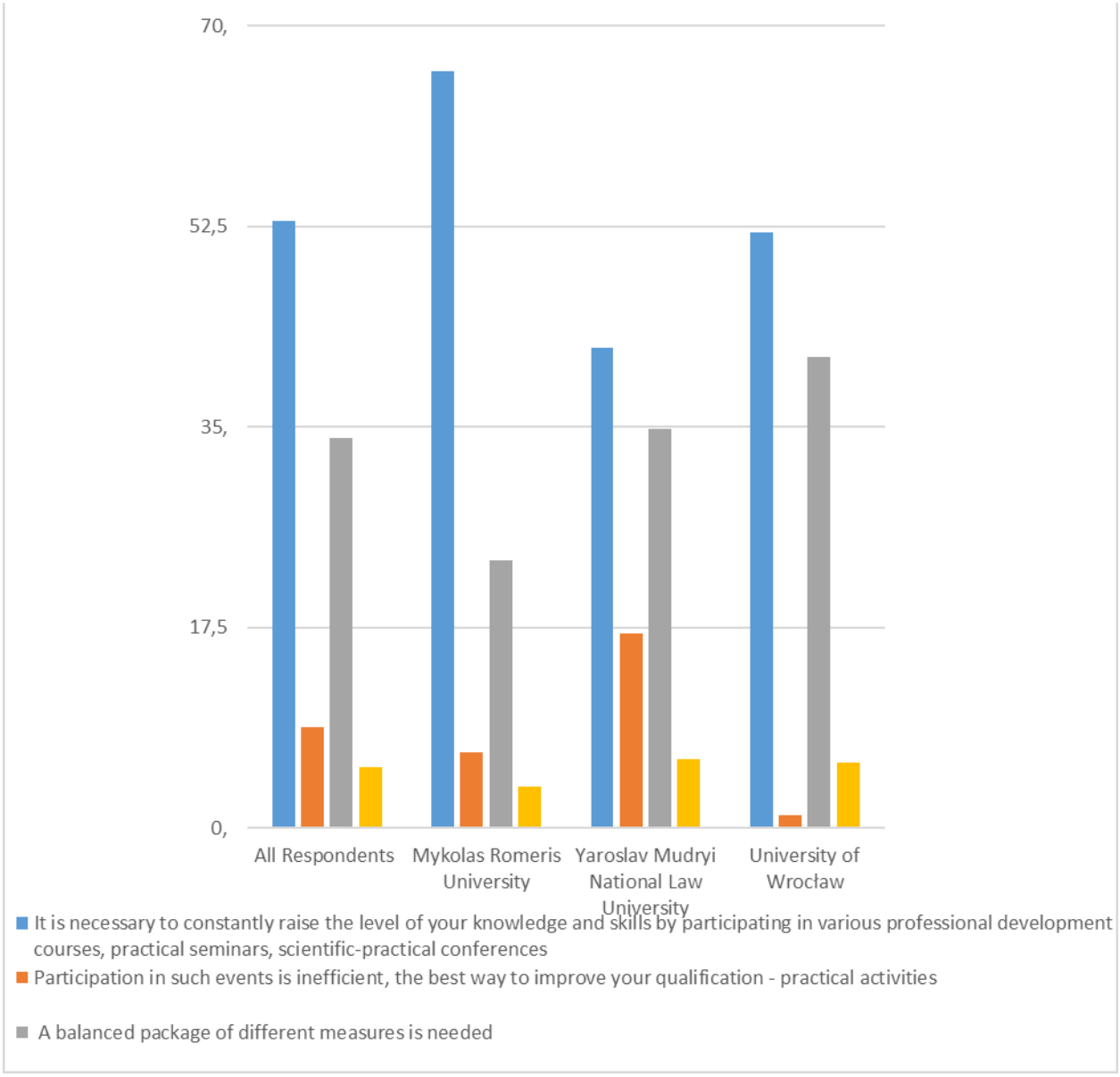

Diagram No. 6. What do you think about improving professional competence in criminalistics? (%)

Some concern may be raised by the information presented in Diagram No. 7, namely, the lack of students' interest in the ideas concerning the creation of a single European criminalistic space. Less than half of the students participating in the survey are aware of the above.

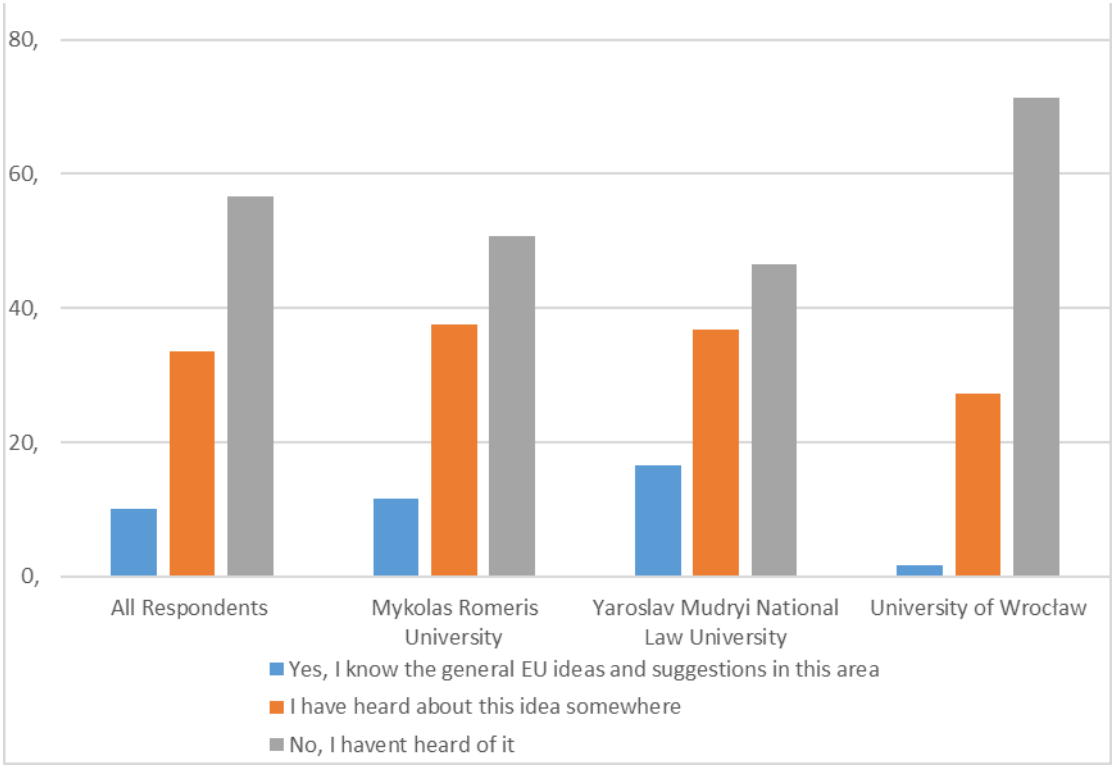

Diagram No. 7. Are you aware of any proposals and/or ideas for the creation of a common European forensic area? (%)

On the one hand, this may witness about the lack of attention to this issue on the part of planners and curriculum developers, and on the other hand, it may be due to a lack of attention to this issue on the part of public authorities and administration (Ackermann, Kurapka, Malevski, Shepitko, 2020, p. 355-366).

Conclusions

1. This paper is dedicated to a comparative study of students' views in three countries (Lithuania, Ukraine and Poland) on the expediency (necessity) of teaching a mandatory criminalistics course for future legal professionals. The empirical component of this research was a coordinated survey of 758 students of the three universities. The paper is an interim stage (fragment) of a more extensive study which is planned and aimed not only at investigating the current situation on the threshold of creating a single European criminalistics space, but likewise focuses on future professionals who are to implement this idea.

2. The paper is not only a presentation of law students' views on expediency and necessity of studying criminalistics and other disciplines of criminalistic orientation important for their future professional activities, but it should likewise become a kind of guide to action for teachers and administration of universities, i.e. to improve substantive and organizational as well as methodological aspects of criminalistic didactics. The given technique of research of students' views can be successfully applied when addressing the problems of teaching other disciplines.

3. The conducted study revealed that the overwhelming number of students – more than 70% – evaluated criminalistics as an important discipline for their future professional activities. Regardless of significant differences in the organization of higher legal education in the three countries, we note that there are no substantial differences in the questions of expediency (necessity) of teaching criminalistics in the answers of respondents representing the three universities.

4. The research showed that only half of the students (52.6%) are fully satisfied with the scope and structure of the delivered criminalistics course. The students of Mykolas Romeris University demonstrated a higher level of

satisfaction in their answers, while the students of the University of Wrocław expressed their views more critically. About one third of the students were only partially satisfied with the scope and structure of the delivered criminalistics course. Significant differentiation of students' views concerned the ratio of theoretical and practical components of the delivered criminalistics course. A sufficient balance between the theoretical and practical parts of the delivered criminalistics course was indicated by 35.6% of all respondents, but we already have a significant dispersion of views on this issue, especially when Ukrainian and Polish students are concerned.

5. There has recently been a growing interest in criminalistic science, which is increasingly taught at universities and not only to law students. The study showed that respondents were positive about this trend.

6. The majority of respondents positively assessed the necessity of constant involvement in improving their competence through participation in theoretical and practical workshops, advanced training courses, as well as scientific and practical conferences.

7. The lack of awareness among students of the processes concerning the creation of a single European criminalistic space may be a matter of concern, as less than half of the participating students are aware of the above.

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THE PATH TO THE INTRODUCTION OF AUTOMATED FUNDS SEIZURE IN UKRAINE: INTERNATIONAL EXPERIENCE AND PROSPECTS FOR ITS IMPLEMENTATION[1]

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Abstract. This article addresses the procedure of the automated seizure of a debtor's funds in Ukraine in the process of enforcement of judgements of all categories. Similar mechanisms provided for in European countries are also studied for the sake of comparison and with a view to using the best international practices to improve Ukrainian law. One of the core drawbacks of the existing mechanism is considered to be the lack of a consolidated register of individuals' bank accounts. This hinders the effective detection of the debtor's account and may lead to the duplication of funds seizure whenever a person holds two or more accounts in different financial institutions. The legal framework for the procedure is aimed at striking a balance between the interests of the creditors and the debtor. In this vein, there are several ways to safeguard the debtor from disproportionate burden. According to existing rules, some of categories of income cannot be seized. However, it might be more effective to set a minimum amount of funds that must be safe from seizure. The other flaw in the operation of the system is the lack of instant communication between enforcement officers and banking institutions.

Keywords: foreclosure on the debtor's non-cash funds, identification of the debtor's bank accounts, automated seizure of funds, forced write-off of funds, an executor.

Introduction

On 27 February 2015, Ukraine, by concluding the Memorandum of Economic and Financial Policies (hereinafter – Memorandum; 2015) with the International Monetary Fund, undertook to introduce automated seizure of funds in bank accounts. The main purpose of this requirement was to improve the existing procedure for debt collection and improve the level of enforcement of court judgments in general by enshrining these procedures in special laws.

In pursuance of the Memorandum, the Ministry of Justice of Ukraine together with the Administration of the President of Ukraine drafted a Bill of Ukraine on Amendments to Certain Legislative Acts of Ukraine on Introduction of Automated Seizure of Funds in Civil and Commercial Proceedings (Law of Ukraine No. 3768, 2016), but despite the positive conclusions of the relevant committees of the Verkhovna Rada of Ukraine the Bill was withdrawn from consideration. All subsequent attempts to regulate this procedure at the level of a special law were also unsuccessful.

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At the same time, this requirement is currently being implemented at the level of subordinate legislation (Resolution of the Board No. 163, 2022), which establishes the relevant procedure for automated seizure of funds. Therefore, this article introduces new approaches to encumbering bank accounts as one of the defining conditions for reforming the enforcement system, together with a detailed analysis of the achievements and problems in the implementation of this mechanism as of today, and for meeting the requirements of the collector at their expense and ensuring actual execution of the judgments of property nature.

The objectives of this article are to identify the drawbacks in the legal framework that hinder the efficacy and expeditiousness of the automated seizure of funds in Ukraine; to outline best practices developed in international jurisdictions; and, on the basis of comparative analysis, to offer solutions that would improve legal regulation of the procedure in Ukraine.

In order to achieve the objectives, in particular we evaluate the results of the pilot project on the introduction of automated fund seizure in enforcement proceedings for alimony recovery and highlight its achievements (based on the results of two years of application). These achievements give reason to believe that extending the procedure onto the enforcement of judgements of other categories might prove apposite.

In carrying out this study, a comparative method was used to compare the provisions of the legislation and the corresponding draft laws at various stages of the introduction of automated seizure of funds in Ukraine in the context of revisions of previous special acts in the field of executive proceedings. This method of analysis was used in studying the international experience of the functioning of similar systems in other leading countries, as well as the dialectical, systemic-structural, normative-logical methods of scientific knowledge.

1. The Development of Mechanisms for the Functioning of Automated Funds Seizure based on International Experience and Conditions for its Launching

During this time, the representatives of the Ministry of Justice of Ukraine and the state executive service as well as the community of private executors continued to work on developing the mechanisms for automated seizure of funds and setting up procedural algorithms by actively studying various similar systems in other advanced countries. This also included the tools and innovative technologies used by them, including their results and other performance indicators of the implementation thereof.

For instance, the leading Croatian financial intermediation company – the Financial Agency of Croatia (FINA), through which electronic seizure of debtors' bank accounts began on 1 January 2011 – has become one example of developing a Ukrainian mechanism. Due to this fact, just a few years after the introduction of electronic seizure of funds in the World Bank's Doing Business 2017 ranking, Croatia rose from 52nd to 7th place (Oliynyk, 2018), confirming the effectiveness and usefulness of such mechanisms.

FINA has information on all accounts of both legal entities and individuals, which is updated daily and guarantees the implementation of funds blocking in bank accounts within the amount of penalty within minutes (Oliynyk, 2018).

In Ukraine, on the other hand, the State Tax Service of Ukraine receives data on opening accounts only for legal entities and individuals-entrepreneurs, and provides them to executors in electronic form through the automated system of enforcement proceedings (hereinafter – ASEP) (Order No. 2483/5/436, 2020), but no systematization in another form is envisaged. However, the accounts of individuals are still not accounted at all, *which is recognized by experts as the main obstacle to application of such practices in Ukraine*.

Portugal's experience in borrowing the best mechanisms for collecting funds from debtors' accounts in electronic form was also taken into account. It is established that today in Portugal the whole process is reduced to three stages: 1) periodic filling by commercial banks of the database of all accounts of individuals and legal entities held by the Central Bank of Portugal; 2) communication of executors with the Central Bank representatives to obtain information on debtors' accounts; and 3) communication of executors with commercial banks in which debtors' accounts are opened for the write-off of funds from them (Oliynyk, 2018).

In general, the whole process of funds write-off in Portugal takes 5–7 days, and the amount required to execute a court judgment on the debtor's account is blocked for 2–3 days upon the date of the executor's request to the Central Bank, which guarantees its further write-off in favour of the collector (Oliynyk, 2018).
In Ukraine, this process takes much longer, because detecting accounts by sending paper inquiries to banks by mail can take several weeks or more. Contrary to the general rules of the Law of Ukraine on Enforcement Proceeding (Law No. 1404-VIII, 2016), the resolution to seize the property (funds) of the debtor is delivered by the executor not later than the next business day after the identification of the property. Some ingenious executors have forwarded seizure resolutions to all Ukrainian banks immediately after the commencement of an enforcement proceeding. This could therefore lead both to encumbrance of the same amount under the same enforcement document simultaneously in several banking institutions and the violation of the principle of proportionality of enforcement measures and scope of demands according to the decisions. Therefore, this is a manifestation of encroachment on the right to ownership and peaceful possession of property. According to the constitutional principles, no one can be unlawfully deprived of the right to property. The right to private property is inviolable. Therefore, the analysis of this situation confirms the need to introduce a register of accounts of individuals for their exact identification and the prevention of such negative consequences.

Taking into consideration these difficulties, executors have often tried to apply in person to a particular bank to seize non-cash funds in order to ensure their prompt blocking, and sometimes to accelerate achievement of such results they are even forced to use fast and expensive means of transportation – for example, when the main branch of the bank is located in another executive district. In this regard, it is necessary to emphasize the justification of changes which already allow these documents to be delivered to the bank in addition to the executor, and the private executor's assistant or another representative. This will allow the executor to focus on more serious aspects of execution of the decision and not pay attention to the organizational aspects of these activities (Resolution of the National Bank No. 22, 2004; Resolution of the Board No. 163, 2022).

However, executors should not abuse the right to seize funds in bank accounts and should adhere to the principle of proportionality of enforcement measures and the scope of claims. After all, whether all funds or only a part of them is to be seized depends on how the document on seizure of funds is executed. Thus, if the executor has indicated the amount and there are enough funds in the account, only this amount will be seized. If the funds are insufficient or the executor failed to specify the exact amount to be seized, the funds may be seized in all accounts of the debtor (Ministry of Justice of Ukraine, 2021), which is allowed by banking law (Resolution of the Board No. 163, 2022). Therefore, such approaches should be reviewed, and the experience of colleagues in bringing executors to disciplinary responsibility in similar cases should be a deterrent for them to issue seizure resolutions without specifying the amount of the encumbrance. Moreover, the lack of accounting of the accounts of individuals leads to the consequences of the seizure of accounts in several banks, and thus a violation of the corresponding principle.

Thus, the defining condition for the effective operation of the automated seizure system is to *create a register of open bank accounts for all entities in order to avoid unnecessary communication by the executor with all banks in different ways at the stage of identifying property to ensure interaction directly with the place of location of the debtor's accounts.* Otherwise, the emergence of an automated system will simply be reduced to the transfer of information exchange with banks in the electronic plane, which of course is also a step forward for Ukraine. This is because until recently cooperation with banks in this way has only been declared at the level of resolutions of the National Bank of Ukraine (Resolution of the National Bank No. 22, 2004; Resolution of the Board No. 163, 2022) and has not actually been implemented. This, in turn, slowed down the execution of decisions and, conversely, assisted the debtor in withdrawing funds while the executor was trying to identify their property in this way.

At present, such a format is the basis for the development of the normative legal base that initiates the electronic seizure of funds in Ukraine, which is essentially incomplete as it still involves the need to apply to each bank separately. Albeit, this is accomplished with the help of ASEP online without sending inquiries by mail to establish the existence of the debtor's open accounts (primarily the accounts of individuals) instead of receiving such information from the sole source (such as in the case of accounts of legal entities and other business entities).

Nevertheless, even such changes within our jurisdiction deserve positive assessment and support, and demonstrate promising forecasts for improving the domestic model of seizure of funds and its adaptation to international counterparts, taking into account the best global examples.

2. The Commencement of Automated Seizure of Debtors' Funds in Ukraine and its Procedural Aspects

As a pilot project, Order No. 1203/5 of the Ministry of Justice of Ukraine of 16 April 2019 approved the Procedure for automated seizure of debtors' funds in bank accounts within enforcement proceedings for alimony recovery.

The approved Procedure determined the procedure for automated seizure of debtors' funds in bank accounts within enforcement proceedings for alimony recovery with the help of the ASEP through information interaction between public or private executors and banks.

Automated seizure of debtors' funds in bank accounts within enforcement proceedings for alimony recovery provides for the imposition/removal of seizure by the executor from the funds by issuing resolutions on seizure or lifting seizure of debtor's funds in the form of an electronic document using a qualified electronic signature and their implementation by banks. At the same time, the Resolutions on seizure of funds were available for download by banks on the day of their formation and signing in the ASEP.

The information system of banks (hereinafter – the ISB), with the help of the application's software interface, makes a request once per hour during working hours with regard to the availability of the resolution of an executor on seizure of funds for its enforcement.

Upon receipt of the resolution on seizure of funds by the ISB, a notification on adoption of the resolution on seizure of funds for enforcement by the bank is immediately formed and sent to the ASEP. The responsible person of the bank must execute the resolutions on seizure of funds in the order of their receipt and notify the executor of the result of their implementation.

However, during the validity period of this Resolution, only around seven banking institutions registered in our country joined with executors in this way, but this procedure proved its effectiveness and efficiency, which served as a basis for extending this practice to other categories of cases.

The legal basis for this was the amendments of 23 March 2021 to the abovementioned Order of the Ministry of Justice of Ukraine, which is now entitled "On Approval of the Procedure for Automated Seizure of Debtors' Funds in Bank Accounts" (Order No. 1203/5, 2019).

Currently, it stipulates that the executor, with the help of the ASEP, also creates a requirement to obtain information on the availability and status of the debtor's accounts (hereinafter – requirement), which must meet the requirements established by the current legislation. It should be noted that these innovations have significantly improved the interaction between banks and executors in terms of obtaining this information. Moreover, these innovations were previously included in the Rules for storage, protection, use and disclosure of banking secrecy, which provides information on the availability and/or status of the debtor's accounts, the numbers of the accounts opened by the debtor in the bank, as well as the amounts of funds available on such accounts, and actually removed the problem of evasion by banks from disclosing such data at the executors' requests (Resolution of the Board No. 267, 2006).

Thus, upon receipt of the request in the ISB, the relevant notification is formed after no more than one hour of working time, and such a notification provides information on availability and status of the debtor's accounts, which is immediately sent to the ASEP. The executor then, with the help of the ASEP, issues a resolution on seizure of funds and puts a qualified electronic signature to it. Banks also use the application software interface once per hour during business hours to request the availability of the executor's resolution on seizure of funds for its execution. In turn, the responsible person of the bank executes the resolution on seizure of funds in the order of their receipt. On the result of the execution of such a resolution and the availability/absence of funds on the debtor's account for its execution, the relevant notification is formed in the ISB, which then is sent to the ASEP.

The new procedure is reduced to acceptance by banks of the requirements of the state executive service/private executors to obtain information on the availability and status of the debtor's accounts and the executor's resolutions on seizure of funds in electronic form. Meanwhile, the further actions of the executor to write off the funds are outside the electronic plane and are in fact still carried out "manually" in paper form with the prior approval by the executor of the payment request in their bank in accordance with the current legislation. This is because this procedure was at the stage of completion, which delayed the entry into force of the Order of the Ministry of Justice of Ukraine with updated content.

3. Problematic Aspects of Automated Seizure and Write-Off of Funds and Ways to Solve Them

Pursuant to Part 3 of Art. 13 of the current Law of Ukraine on Enforcement Proceeding (Law No. 1404-VIII, 2016), payment requests for forced write-off of funds are sent no later than the next business day after seizure and no later than the next business day from the date of receipt of the information on the accounts. To do this, the executor submits the payment request to the bank, serving it together with two copies of the register of payment claims in the appropriate form.

The payment service provider of the payer accepts for execution the payment instruction in paper form, which is delivered by the debt collector themselves (by a representative/attorney, assistant of a private executor, representative of the supervisory authority) or which arrives by registered letter, the sender of which is the debt collector (Resolution of the National Bank No. 22, 2004). Therefore, this process is not automated today and is again carried out in documentary form, which slows down achievement of the final result.

The purpose of the introduction of automated seizure of funds is to start the process of online transfer of the entire cycle of recovery of the debtor's non-cash funds, including the next de facto final stage of this procedure – write-off of funds. Therefore, interaction with banks should be transferred to the electronic mode not only to obtain information about the debtor's accounts and their seizure, but also for the further write-off of non-cash funds found in them.

The new Order of the Ministry of Justice of Ukraine, which is analysed in this study, defines the procedure for automated seizure as a separate stage of proceeding to recover the debtor's property and can be used in the execution of decisions to secure the claim by seizing the debtor's accounts as a separate procedure. Its provisions should be extended to subsequent enforcement actions to write off the funds that are actually used to enforce a decision of property nature.

In addition, despite the progressive changes, there are still a number of issues that need to be resolved to ensure full and proper functioning of automated seizure of funds in Ukraine.

First of all, as already mentioned, this concerns the need to introduce accounting of all accounts opened in banks, including individuals, because the lack of systematic information creates the need for the executor to contact all banks to obtain information on open accounts, including individuals, in one or another bank.

Of course, interaction of executors with banks on these issues will be faster than when the executors could only send such inquiries by mail or deliver them to the branch in person. Cases when the executor sends seizure resolutions to all banks at once in order to speed up the process of finding accounts should be minimized, as it takes a long time to send relevant inquiries in paper form. However, if there is an account in a particular bank, the funds are immediately encumbered without prior notice to the executor of the availability of accounts and their status, and since the debtor could have accounts in several banks, such accounts were blocked at the same time at the request of the executor in the abovementioned way. As we have already noted, this violates the principle of proportionality; therefore, the stage of accounts identification is very informative and plays an important role. This is the defining stage of enforcement proceeding for the recovery of any type of property or its seizure as security and must be a priority because, as a general rule, seizure of property is imposed only after its identification.

Therefore, given the described consequences, the transfer of the exchange of such documents between executors and banks in the electronic plane will ensure the efficiency of these enforcement actions and the protection of the rights of the parties. In particular, it will prevent bank employees from abusing their clients' notifications of the receipt of such requests and thus withdrawing funds from debtors to respond to them.

Moreover, this is a significant boon even for debtors, because the amount determined by the executor in the resolution will be encumbered by the amount of debt once in one place, and not in parallel in other banks where they are served. In addition, it will be much easier and faster for them now to lift the seizure imposed by the executor in case of its write-off.

As I. Izarova (2016, p. 57) aptly points out, the idea of introducing a simplified and effective system of automated seizure of funds should be implemented through a perfect mechanism that takes into account the interests of both the applicant and the debtor and ensures achievement of the purpose for which it is created and serves, rather than creating additional mechanisms for the abuse of procedural rights.

The fact that today in Ukraine only 18 out of 68 (Chepurnyi, 2022) registered banks have joined the cooperation with executors in this form hinders the implementation of these innovations, but still there is no doubt about the requirement to bring online all banking institutions in terms of enforcement of seizures and payment. Meanwhile, during the transition period, debtors are tempted to move to banks that have not yet had time to switch to a new format and thus continue to evade obligations, taking into account all the above negative factors of paperwork. Therefore, given such risks, it is necessary to speed up the process of joining the other banks to interact with the executors through the ASEP. Moreover, banks themselves should be interested in establishing such cooperation, as they not only provide for the seizure and forced write-off of funds, but also often act as debt collectors, who also seek full and timely implementation of the decision.

The last Bill on Enforcement of Judgements No. 5660 of 14 June 2021 submitted to the Verkhovna Rada of Ukraine (Draft of Law No. 5660, 2021), and which has already been taken as a basis, contains the provisions of Part 2 of Art. 99, according to which the recovery of debtors' funds in bank accounts is carried out using an automated system of enforcement proceedings through information interaction between executors and banks in the order prescribed by the Ministry of Justice of Ukraine. This justifiably has a separate reservation that the involvement and participation of banks to (in) the information interaction(s) provided for in this article is mandatory.

Also unresolved at the legislative level is the risk of blocking accounts intended for crediting salaries, pensions, scholarships or other social benefits in the presence of restrictions on the amount of their recovery and the list of funds in Art. 73 of the Law of Ukraine on Enforcement Proceeding (Law No. 1404-VIII, 2016), which cannot be levied at all.

Thus, according to Part 2 of Art. 70 of the Law of Ukraine on Enforcement Proceeding (Law No. 1404-VIII, 2016), 50 percent may be charged from the salary of the debtor on the basis of enforcement documents until full repayment of debts in case of recovery of alimony, compensation for injury, other damage to health or death due to loss of a breadwinner, property and/or moral damage caused by a criminal offense or other socially dangerous act, and 20 percent may be charged for other types of penalties, unless otherwise provided for by the law. Moreover, such recoveries are made through the employer by deductions in the appropriate amount from salaries directly to the accounts of law enforcement bodies. However, as the Law does not contain separate prohibitions on seizure of such accounts and does not assign the need to verify the purpose of the debtor's accounts opened with banks to the competence of the executor, and the latter in turn does not identify them independently, such accounts may be subject to encumbrance.

Pursuant to para. 2 of Part 2 of Article 59 of the Law of Ukraine on Enforcement Proceeding (Law No. 1404-VIII, 2016), the executor is obliged to lift seizure of funds on the debtor's account no later than the next business day from the date of receipt from the bank of documents confirming that the funds on the account are prohibited from being seized.

However, since in this case there is no specific prohibition, as a result, the debtor usually has to act independently to unblock them, relying on established litigation in such cases, including the Supreme Court's position that notifying a private executor of non-seizure accounts is the task of the bank and the debtor (Resolution of the Supreme Court No. 905/361/19, 2020).

The Supreme Court, as part of the Administrative Court of Cassation in the Resolution of 17 January 2020 in case No. 340/1018/19, noted that "Accounts provided for payment of salaries and taxes, fees and mandatory payments to the State Budget of Ukraine are accounts with a special regime, which the executive service in accordance with the law is not seized, and the separation of such accounts belongs to authority executive service".

However, the recent vision of the higher instance is the most optimal, because the cancellation of such orders on seizure is not motivated by the presence of prohibitions or the special status of such funds, but by the existing restrictions on the amount of their recovery (Resolution of the Supreme Court, 2022). A further justification can be indicated in the specific procedure of their deduction directly by the employer when paying wages, and not by collection through the bank.

Today, this problem has partially receded into the background, because in martial law a ban was introduced on recovery of salaries, pensions, scholarships and other income of the debtor (except for decisions to recover alimony) (Resolution of the Supreme Court No. 340/1018/19, 2020). However, the identification of accounts from which such funds come, when their detection is still not carried out, continues, and therefore situations with their seizure may occur; hence, this issue remains open and needs to be resolved.

Therefore, it is positively assessed to resolve this problem in Bill No. 5660 on Enforcement of Judgements of 14 June 2021 (Draft of Law, 2021) by establishing a direct ban on seizure of funds in the accounts of the debtor – an individual – for crediting salaries, pensions, scholarships and other funds, the recovery of which is prohibited in accordance with this Law. This also includes funds in other accounts of the debtor, seizure and/or recovery prohibited by law and imposition on the bank, other financial institution, or central executive body implementing state policy in the field of treasury service of budget funds. In case of receipt of the executor's decision on seizure of funds in such accounts, the obligation exists to notify the executor of the intended purpose of the account and return the decision of the executor without execution in terms of seizure of funds in such accounts, justifying the reason for return.

In addition, a justified innovation of this bill is the ban on seizure of funds in the amount of the minimum protected amount (one minimum wage set by the Law of Ukraine on the State Budget of Ukraine for the year) within a calendar month necessary to ensure the debtor's livelihood. Whether such an amount is fair and provides the debtor's basic needs is difficult to answer unambiguously in all cases.

In many European countries there is now the institution of "protected amount" that is untouched for seizure and write-off of the amount of funds in bank accounts of debtors. In Finland, seizure can be imposed on only 1/6 of income, in Malta this cannot be levied on wages and benefits less than €700, and in Estonia the amount of the minimum wage is protected (Panasiuk, 2021). The experience of leading European countries is worth taking into account in domestic legislation.

Nonetheless, the proposal to introduce a minimum amount of funds can be an alternative solution to the problem concerning seizure of salary accounts, because when setting a limit on recovery, a debtor will have a certain amount of funds as a guarantee of proper living conditions every month, which the enforcer will not be able to use for debt repayment. At the same time, the possibility of partial enforcement of the decision in favour of the debt collector remains.

Similar restrictions are also being introduced today in connection with the imposition of martial law on the territory of Ukraine. Thus, if the amount of recovery under the executive document for such a person does not exceed 100,000 hryvnias, individuals may carry out expenditure transactions from accounts whose funds have been seized (Law No. 2129-IX, 2022). However, this approach is criticized for the large amount of funds under immunity and it is preferable to introduce a minimum protected amount that is not recoverable and will guarantee the debtor the right to live on a monthly basis within this amount, but the decision remains enforceable in favour

of the collector. However, it is precisely in the conditions of martial law that there is a need to increase such an amount with the proposed one minimum wage to three in order to strengthen the support of debtors in a difficult situation, and the corresponding suggestion has already been submitted to the legislative body.

4. The Procedure for Automated Seizure and Write-Off of Funds Abroad: Effective Examples to be Borrowed in Order to Improve the Domestic Model

Even in the form in which there is now automated seizure of debtors in Ukraine, its functionality is quite remotely distant from international counterparts. After all, in some countries the mechanism of seizure of funds is as automated as possible in order to eliminate the human factor.

PLAIS, the Lithuanian enforcement system which helps to automate recoveries, is considered to be the most innovative example of such a system in the world.

The system can determine for itself whether the debtor has a bank account or not. The decision to seize the PLAIS debtor's funds can be sent to all banks in the country, as well as other financial institutions (credit unions, electronic payment systems). This then debits funds and transfers them to the bailiff's accounts in the required amount, and ensures proportionality with the distribution of the amount of enforcement between the various bank accounts of the debtor. If the funds in one of the debtor's accounts are enough to satisfy the claimant's claims, the seizure is automatically removed from the remaining accounts. There is an option to prevent the opening of new accounts or the outflow of funds and to protect a limited amount of social security from enforcement (Vitkauskas, 2020; Avtorgov, 2020). Thus, if the debtor has funds in the accounts in the banks, PLAIS allows the executor to execute a court judgment in one day, while all public and private executors are forced to overcome bureaucratic obstacles in finding funds and seizing them within a reasonable time.

It is also worth analysing the situation in our jurisdiction when, during the validity of the seizure document, the bank receives other documents on seizure of funds during the transaction day. Unlike the procedure described above, in this case they are executed in the order of receipt, because funds seized on the client's account are prohibited from being used under the enforcement document, for execution of which the seizure was imposed. The bank then returns the settlement document without execution, if it was received by the bank under another enforcement document than the one for the execution of which the seizure was imposed, and there are no other (except seized) funds in this account. Therefore, blocking the same account to meet the requirements of different debt collectors should be carried out in view of the order of receipt of seizure resolutions issued in the execution of their enforcement documents. That is, funds may be written off in full from one account of the debtor under the first document on seizure received by the bank, depending on the amount available, and subsequent decisions will be executed within the balance of the funds on it – or, in case of their absence, will be kept for further enforcement after replenishment of the account. Despite the fact that such an approach violates the priority of satisfaction of claimants' claims set forth in Article 46 of the Law of Ukraine on Enforcement Proceeding (Law No. 1404-VIII, 2016), in case of insufficiency of the collected amount to satisfy the claimants' claims, the Supreme Court confirms this position in Resolution No. 904/7326/17 of 5 December 2018. This is because the rules for distribution of the funds collected from the debtor and the order of satisfaction of debtors' claims envisaged by Art. 45, 46 of the Law of Ukraine on Enforcement Proceeding (Law No. 1404-VIII, 2016) are subject to application within one specific enforcement proceeding, and not in general to all enforcement proceedings against the debtor.

However, there is currently a problem in communicating with banks to bring information to the executor about the receipt of new funds in the accounts to complete seizure of funds in the amount specified in the seizure resolution for its full enforcement. After all, the Law of Ukraine on Enforcement Proceeding does not specify the methods of obtaining such information, and according to the Instruction of the Resolution of the Board of the National Bank of Ukraine (Resolution of the Board No. 163, 2022), banks should inform only about the insufficiency or lack of funds after receiving the seizure resolution – the obligation to notify the executors of further new receipts of the funds on the debtor's account is not imposed on them, and they do not do it. Therefore, in this case, the executor is forced to perform repeated actions and send inquiries again to a specific bank or immediately proceed to seizure resolutions. However, the previous inquiry is in fact still valid, after deducting the partially paid amount, and some even send a payment request to speed up the forced write-off of funds. Given

this, it is appropriate to specify in this instruction the need for banks to notify the executors and on receipt of the funds by the debtor, if before that only a part of the amount determined by the resolution was written off or there were no funds on the account at all (Maliarchuk, 2019, p. 143), and of course to also ensure implementation of such provisions electronically.

Therefore, in order to quickly and efficiently enforce court judgments, a similar system of automated seizure and write-off of debtor's funds as described above must be fully operational in the country. Such perspectives are aimed at aligning with the European Union's policy in this area, in particular the European procedure for seizure of funds in a bank account set out in Regulation (EU) No. 655/2014 of 15 May 2014. This introduced the procedure for issuing a European order for securing claims to facilitate the collection of debts in civil and commercial cases of a cross-border nature, which is carried out in accordance with the unified European procedure for imposing security on bank accounts established by it. Such rules apply in cross-border cases when the court that would consider the application for the issuance of the Order is located in one Member State and the bank account is in another, or when the creditor resides in one Member State and the court and the bank account to which they have superimposed security are located in another. As a result of the introduction of a free trade zone between Ukraine and the European Union, Ukraine should potentially be ready for the introduction of this type of automated seizure of funds, both technically and at the level of legislative regulation of this type of issue primarily within its jurisdiction, and should have relevant experience. This is because the use of this method is aimed at supporting the proper functioning of the European market and will contribute to the effective protection of the rights of its participants, and therefore similar procedures and additional guidelines in such an area (Recommendation Rec(2003)17; European Commission for the Efficiency of Justice, 2015) should already be studied, and their characteristic features should be implemented.

The current international practice of seizing bank accounts shows that without prompt blocking of funds there can be no question of proper enforcement. Without the automation of individual stages of enforcement proceedings, it is impossible to ensure effective and timely execution of the decision, because it depends primarily on how fast and effective interaction is between the executor and the bank where the debtor's accounts are opened – when funds are detected, seized and enforced from them.

Thus, in order to approach this goal, the leadership of the Department of Justice and National Security of the Ministry of Justice of Ukraine successfully formed a concept which consisted of the following steps:

1) the creation of a single database of accounts of individuals and legal entities (as is known, the database on legal entities and business entities is currently maintained by the State Tax Service);

2) the improvement of electronic interaction between the holder of such a database and the executors on the one hand, and the creation of such communication between the executors and commercial and state banks (Oliynyk, 2018).

However, today the creation of a register of accounts of individuals is not a priority, due to the cost of this project and the high cost of its maintenance (Oliynyk, 2021). Instead, other means to identify the accounts of individual debtors have been covertly offered, namely:

– the obligation of banks on the day of opening/closing accounts of an individual entered in the Unified Register of Debtors to notify the body of the state executive service or private executor specified in the Unified Register of Debtors (part 3 of Article 9 of the Law of Ukraine "On Enforcement Proceedings");

– the executor's obligation no later than the next business day from the date of receipt of notification from banks on the availability of debtors' accounts to decide on the seizure of funds on the debtor's bank accounts (part three of Article 9 of the Law of Ukraine on Enforcement Proceeding) (Law No. 1404-VIII, 2016).

Establishing such rules to provide information on the availability of accounts of individuals does not guarantee its timely receipt and is not always an effective way to detect these accounts. This is because, firstly, not all banks comply with these requirements and report such facts to executors in a timely manner. Secondly, the question of how to find accounts if the debtor became a client of the bank before commencement of the enforcement

proceeding remains open. Finally, what is the purpose of the notice of closing the account if this possibility exists, and is not postponed until contacting the relevant executor, to block such accounts; or why does the movement of funds in them not stop at least (Maliarchuk, 2019, p. 143)?

In addition, private executors emphasize the need to consolidate information on open accounts in one source, and in general the digitalization of the seizure system emphasizes another negative aspect of its current state – namely time and labour costs, including the decision to seize the debtor's funds in ASEP. This can range from a few minutes to several hours and, after receiving information from banks, this figure should be multiplied by the number of responses, as each must be registered in the ASEP, scanned and uploaded to the system. All this time, the private contractor pays out of pocket in the form of salary to the assistant, or experiences inefficient use of their own time, if they carry out such work themselves. Significant costs are also expended on compensation for postal requests and resolutions on seizure of funds/payment claims for their write-off (Skalskyi, 2020). The performed calculations testify to the justification of transforming the document flow between executors and banks into electronic form.

All of this indicates the imperfection of such innovations and the problem of the lack of ability to automatically detect the debtor's existing bank accounts and find out the amount of funds in them. This issue still exists and work to overcome it is needed – in particular, the best option is to create a single medium for debtors by one subject.

Another important point mentioned above is the transfer of debiting funds in automated mode. For this purpose, the Ministry of Justice is developing the Draft of the Order of the Ministry of Justice of Ukraine; the Ministry of Finance of Ukraine on approval of the Procedure for information interaction of bodies and persons enforcing court judgments and decisions of other bodies; and the State Treasury Service of Ukraine for banks in electronic payment. This should provide for the introduction of a mechanism for the creation, transfer and verification of payment claims for the forced write-off of funds during the enforcement of court judgments in electronic form. Adoption of the relevant order will introduce information interaction between the state executive service (private executors), Treasury and banks in the process of transferring payment claims in electronic form, which is an important final step to automate and speed up the process of recovery of non-cash funds of the debtor.

Conclusions

One of the priority tasks for Ukraine is to enhance the effectiveness of enforcement measures. As the European Court of Human Rights put it in the case of *Globa v. Ukraine* (2012), the State is obliged to organize a system of enforcement of court judgments that will be effective both in law and in practice. This includes, in particular, improving the collection procedure with regard to non-cash funds. The conducted research allows us to offer the following suggestions that would improve the efficacy and expeditiousness of the existing procedures with regards to non-cash funds. First, setting up the system of electronic-only interaction between the banking system and enforcement bodies (without the need for bank employee's physical intervention) would allow violations of rights to be avoided and would increase the efficiency of the enforcement procedure. This will become possible only if the full cycle of automated seizure of funds is introduced in Ukraine and all banks are required to connect to the system and interact with enforcement bodies regarding the identification of funds, their seizure and their write-off exclusively in electronic form. Second, a minimum amount of funds protected from seizure shall be established in order to safeguard the debtor's livelihood. Third, an electronic register of individuals' bank accounts shall be established. This would provide quick access to them, simplify the identification of accounts and make it impossible to encumber several accounts of the debtor in different banks at the same time.

The measures offered are vital for guaranteeing the right to judicial protection and the right to a fair trial declared by the European Convention on Human Rights. This is because, as the European Court of Human Rights often reiterates, putting the courts' decisions into life is an integral part of the right to fair trial, without which the latter would be devoid of any practical meaning.

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