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THE LEGAL STATUS OF CHURCH PEWS IN CERTAIN CIVIL LAW JURISDICTIONS

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Abstract. Objects of common use in various houses of worship, one of which is a place in a church (church pew), suggest that parishioners have the right to use them, often for quite a long period of time. However, do parishioners have property rights to a place in a church? How can disputes about the inheritance of a place in a church be resolved? In what area of legal regulation does this issue lie? The historical judicial practice of different countries around the world is quite rich in such examples, with the oldest surviving in collections dating back to the 16th century. Moreover, courts have come to quite varied conclusions about the legal status of a place in a church, property rights to it (if any, and whether recognised by law or custom), issues of its inheritance, the right of the church leadership to seize a place in a church from the previous owner and transfer it to other parishioners, and other disputes. It should be noted that in the historical judicial practice of the Republic of Lithuania – namely in judgment of the Supreme Tribunal of the Republic of Lithuania No. 107 (1927) – the issue of the possession and inheritance of a place in a synagogue was also raised. The historical jurisprudence of various countries shows a very rich range of sources of law being applied in such disputes – from customary and proprietary to civil and ecclesiastical law. The authors primarily use the historical-legal method within this article, including the method of interpreting legal norms relating to legal status and proprietary or inheritance rights regarding church pews.

Keywords: church pew, ecclesiastical law, law of custom, proprietary rights, church customs.

Introduction

Among the objects of common use in houses of worship, the most famous that stands out is the pew – or, simply speaking, a place in a church. Based on the definitions of J.-N. Guyot (1784, p. 121) and P.-A. Merlin de Douai (1825, p. 423), the pew is the place where everyone has the right to sit down to listen to a church service. This implies many different interrogations relating to the legal status of a place in a church: Do parishioners have property rights (or other rights) to pews? Who manages and who provides the use of church pews to parishioners? Is it possible to bequeath a church pew to one's heirs? There may be many similar issues, and history has preserved a number of legal cases of disputes concerning a place in a church in which the norms from various branches of law were applied by the courts. This article will attempt to answer these questions.

In legal and historical science, questions concerning legal status, property rights, inheritance, and other complicated legal issues regarding a place in a church (church pews) have been covered relatively infrequently. Nevertheless, legal literature from France – where disputes over places in churches were well known both during and after the *Ancien Régime* era, i.e., in the 19th and 20th centuries – left a rather interesting legacy. For example, we may cite the repertoire of the jurisprudence of the French lawyer, legal adviser, prosecutor and politician

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Comte Philippe-Antoine Merlin de Douai (1754–1838) and its 1825 reprint, which considered the legal status of a place in a church taking into account various sources of law – from customs to ancient court cases (Merlin de Douai, 1825, pp. 423–424). Authors from the *Ancien Régime* era are also relevant – for example, the repertoire of the jurisprudence of French lawyer, attorney and magistrate Joseph-Nicolas Guyot (1784, pp. 121–124). Moreover, various questions regarding legal status and rights to a place in a church can be found, for example, in the collections of the French lawyer and prosecutor Jean-Baptiste Denisart (1711–1765), known for publishing collections of French judicial practice, who also devoted a section of his encyclopaedia to issues of places in churches (reprint of 1784; Denisart, 1784, pp. 159–181). Disputes over questions of places in churches also occurred in the collections of other authors – for example, the French ecclesiastical lawyer Pierre Lemerre (1771, pp. 655–656). One of the oldest sources in history which relates to legal regulation concerning a place in a church is a collection of judicial practice of the Parliament of Paris[3] by the lawyers Ivlien Brodeau and Georges Loüet (1665), who mentioned the judgment of the Chamber of Inquiries[4] of the Parliament of Paris in 1574 (which is discussed in the article below). A number of even more ancient legal cases dating back to the 1560s (Loüet & Brodeau, 1665, pp. 398–399) consider this issue, and it is also notable that Joseph-Nicolas Guyot mentioned a 1570 judgment of the Parliament of Paris in his treatise (Guyot, 1784, p. 123). In the English-language literature, we should outline the work of American lawyer W. S. Schley in 1880 on property rights to places in churches, market stalls, and also plots for burial in a cemetery, where the author gives an example of the legal positions of the courts of England and the United States of America concerning property rights to a church pew (Schley, 1880). German lawyer Karl Meidinger (1891, pp. 1–76) highlighted the legal status and legal regulation of the use of church pews in Old German Catholic and Protestant church law in his doctoral thesis, which was defended at the University of Göttingen. Jurisprudence plays a great role in understanding the peculiarities of legal relations (including disputed ones – that is, where the dispute was resolved in court) on issues of the right to a place in a church. For example, the judgments of the Court of Cassation of France of 1836, 1838, 1855, 1879 and 1906 are very significant for French law in the context of defining legal status and the right to a place in a church, embracing different legal disputes (Cour de Cassation (France), 1836, p. 1144/399; 1838, p. 348; 1855, pp. 269–271; 1879, pp. 465–466; 1906, pp. 21–22). In a historical context, the practice of French parliaments in the *Ancien Régime* era is also concordant. Judicial practice is very important in such cases, since any dispute in court reflects a real-life situation in which the disputed legal relations arose. Accordingly, after having analysed the court judgment, we can thus comprehend exactly how the norms of law (customary, civil, or other branches of law) were applied in relation to the right to a place in a church in certain situations. Undoubtedly, an important source for this article is judgment of the Supreme Tribunal of the Republic of Lithuania No. 107 of 31 January 1927 which demonstrates the existence of judicial practice concerning the right to a place in a house of worship in the Republic of Lithuania (in the context of that case – a place in a synagogue; Vyriausiasis Tribunolas, Sprendimas Nr. 107, 1927, pp. 35–37). The jurisprudence of the German states of the 19th century shows the tangible influence of Roman law: disputes over the restoration of the possession of a church pew or the withdrawal of its use from the defendants, which occurred in the practice of the German states of the 19th century, demonstrate a widespread use of the legal institutes of Roman law, as well as different sources of ecclesiastical law (Tribunal zu Celle, 1862, pp. 44–48). It should be noted that all of the legal cases which are cited and discussed in this article were sought out and commented upon by the authors of this article exclusively *themselves*. For a comparative analysis of the legal status of a church pew in civil law jurisdictions, the authors selected the following states: the Republic of Lithuania, France, Belgium, the Netherlands, and two historical jurisdictions – German states of the 19th century, as well as Austria-Hungary (1867–1918). The legal systems of all of the aforementioned jurisdictions derive from

[3] The *Parliament* (in French: *Parlement*) was a court of appeal in France during the *Ancien Régime* era. In the 18th century, there were 13 parliaments in France. Historically, the Parliament of Paris was the first established parliament; other parliaments were created in its image. In many ways, the jurisprudence of the French parliaments has survived to the present day, owing to case law collections, case reference books and legal encyclopedias created by the French lawyers of that time. The judgments of the Parliament of Paris are known through a number of case collections devoted to its practice, as well as many legal reference books and encyclopedias. The French parliaments, resolving disputes, were guided both by customs (which were one of the main sources of law in France during the *Ancien Régime* era) and by the laws, ordinances and regulations that existed at that time. Judicial practice also played a significant role as a source of law. Nevertheless, the judgments of the French parliaments in cases with similar circumstances could sometimes differ significantly.

[4] The *Chamber of Inquiries* (in French: *Chambre des Enquêtes*) was a chamber in the parliaments of France during the *Ancien Régime* era, which was responsible for conducting investigations entrusted to it by the Grand Chamber of Parliament (in French: *Grande Chambre*).

Roman law, and the estimation of the legal status of a church pew is conducted according to the legal institutes which originated from Roman law.

The purpose of this article is to describe and interpret the legal status of a place in a church (church pew) in civil law jurisdictions on the basis of legal doctrine, civil and other branches of law, legal acts and codes as well as jurisprudence. To achieve the aim of this article, the authors set the following tasks:

1) to highlight the legal position of the Supreme Tribunal of the Republic of Lithuania in judgment No. 107 (1927) in a dispute over the inheritance of a place in a church, and the significance of the application of customs in the legal system of the Republic of Lithuania in the 1918–1940 period;

2) to consider notable court judgments in different civil law countries, which will enable the estimation of the nature of disputes over church pews, the inheritance of a place in a church, its acquisition, etc.

It is also significant to assess the sources of law which are applied by the courts when considering disputes relating to church pews, to find similar and different legal positions of courts in disputes regarding church pews, and to consider various court judgments regarding disputes relating to seats in churches in the countries of Europe.

1. Judgment of the Supreme Tribunal of the Republic of Lithuania No. 107 (1927)

Customs were applied quite widely in the Republic of Lithuania during the 1918–1940 period, having taken a rather firm place in the system of sources of Lithuanian law in the 1920s, and had found their application mainly in inheritance disputes, as well as some other branches of law which will be discussed in this chapter. The Supreme Tribunal of the Republic of Lithuania, reviewing cases in cassational order, had repeatedly considered the application of customs in various civil disputes in its practice. It should be noted that custom, as a source of law, was applied where the law allowed it, and quite clear rules were established regarding the application of custom:

1) Neither the litigants nor the court hearing the case on the claim of one of the parties had a duty to be guided by custom. At the same time, at the request of one of the parties to the dispute, the court was obliged to be guided by custom (Vyriausiasis Tribunolas, 1926, pp. 105–107), and only those who could themselves claim inheritance could impugn someone's inheritance rights according to custom (Vyriausiasis Tribunolas, 1925, pp. 192–193). It is also significant to note that only those people in whose living environment it was used could use the custom. As follows from the practice of the Chief Tribunal of the Republic of Lithuania, local customs were applied mainly by citizens who came from rural areas. Thus, citizens who had previously belonged to the nobility in pre-war times could not apply a custom which was used by the inhabitants of the countryside (Vyriausiasis Tribunolas, 1930, p. 4).

2) If a custom has not been applied in one case, this does not mean that this custom is no longer valid and cannot be used in the arguments of one of the parties in a similar case where one of the parties to the dispute would refer to the existence of a custom. Accordingly, this custom may well be applied in other similar cases where one of the parties would refer to it (Vyriausiasis Tribunolas, Sprendimas Nr. 743, 1927, pp. 219–220).

3) It was necessary for the litigants to prove the existence of the custom to which they referred when the custom was unknown to the court that considered the case. In practice, it was possible to prove the existence of such a custom by calling witnesses, as well as, for example, the decisions of village gatherings (Vyriausiasis Tribunolas, Sprendimas Nr. 453, 1927, p. 121; Vyriausiasis Tribunolas, Sprendimas Nr. 609, 1927, pp. 173–175) and the affidavits of the county council (Vyriausiasis Tribunolas, 1931, p. 145). If a local custom was known to the court, for example, from judicial practice, the court was not obliged to require proof of the existence of this custom (Vyriausiasis Tribunolas, 1928, p. 32–33).

Based on the practice of the Supreme Tribunal of the Republic of Lithuania, we may conclude that the largest part of the court cases that considered the application of a custom were inheritance cases (for example, according to the authors' research, the practice of the Supreme Tribunal of the Republic of Lithuania featured more than 20 inheritance cases where the application of a local custom was considered). It becomes clear from the practice of the Supreme Tribunal of the Republic of Lithuania that customs also retained their effect in the sphere of trade.

In private labour relations in the field of trade, the use of customs was allowed: for example, the parties to the dispute had to follow what they had agreed to earlier – regardless of whether the contract contained provisions about what the parties had stipulated before; moreover, even the mere existence of an employment contract in such a situation was not mandatory (Vyriausiasis Tribunolas, Sprendimas Nr. 341, 1927, pp. 103–104). The law of 2 December 1921 abolished the special order of inheritance among the inhabitants of rural areas; however, these citizens did not lose the inheritance rights that they had acquired on the basis of local customs until that moment (to be precise, the law entered into force on April 20, 1922) (Civilinių įstatymų pakeitimas ir papildymas, 1922). For example, in its judgment No. 444 (1927), the Supreme Tribunal of the Republic of Lithuania set aside the judgment of the district court because of its refusal to apply a local custom in an inheritance case where the plaintiffs' father had died in 1921 – that is, when a special order of inheritance among the inhabitants of the countryside was still in force at that time (Vyriausiasis Tribunolas, Sprendimas Nr. 444, 1927, pp. 119–120). Later, in judgment No. 52 (1928), the Supreme Tribunal of the Republic of Lithuania indicated that there was no procedural period during which citizens litigating in inheritance disputes could invoke local customs (Vyriausiasis Tribunolas, 1928, pp. 32–33).

Judgment of the Supreme Tribunal of the Republic of Lithuania No. 107 (1927) shows that customs, in addition to the hereditary and commercial sphere, also operated in the religious sphere of public legal relations. Thus, as mentioned earlier, the majority of court cases in the cassation practice of the Main Tribunal of the Republic of Lithuania in 1918–1940, in terms of the application of a local custom, were hereditary cases. Some of the most notable hereditary cases in the cassation practice of the Supreme Tribunal of the Republic of Lithuania were recently discussed by the authors of this article (Machovenko and Lytvynenko, 2023, pp. 8–20). The subject of the dispute in this case was a place (pew) in a synagogue. It should be noted that there were no ecclesiastical courts in Lithuania; hence, all disputes relating to places of worship were resolved by courts of general jurisdiction. The jurisdiction (subject matter) of the case which was heard in courts of general jurisdiction was not disputed by any of the parties of the case. It is also notable that the Supreme Tribunal also referred to religious customs in case No. 581 (1929), where the Court decided that the Christian marriage customs of believers representing the denominations of Old Believers and others should be respected, and hence they could not be compelled to marry in the presence of representatives of the clergy, whom they did not recognise owing to the peculiarities of their faith (Vyriausiasis Tribunolas, 1929, pp. 167–169)

The facts of case No. 107 (1927) were the following. The plaintiff demanded that a place in a synagogue, which was located in the town of Rokiškis, was withdrawn from the defendant, and that this place was transferred to her for use. The Justice of the Peace of Rokiškis, in his judgment of 14 November 1923, dismissed the claim of the plaintiff; however, the Kaunas District Court, in its judgment of 4 February 1925, ruled to quash the judgment of the Justice of the Peace of Rokiškis, considering that the plaintiff had inherited a place in the Jewish synagogue from her father, and the acquisition of the pew by the defendant without the plaintiff's knowledge was not legitimate. In his appeal in cassation, the defendant stated that: 1) the right to use a place in a synagogue is movable property, which cannot be inherited from the possession of another person; 2) the Kaunas District Court, incorrectly, did not allow the defendant to refer to the Jewish customs that govern this type of legal relationship in the synagogue; and 3) the lawsuit (if it had been already filed against him) should have been filed not only against him (that is, the defendant), but also against another congregant of the synagogue from whom the defendant had previously bought the disputed place. Thus, the defendant demanded that the judgment of the district court should be quashed and the case be sent for retrial. The Supreme Tribunal of the Republic of Lithuania established that the house of the synagogue constituted the property of the members of a religious organization, and the places assigned to the members of the organization did not give property rights to any part of that property. The right to use a pew at a synagogue does not create a proprietary right, but is of an *easement* nature – that is, a right to use someone else's property in a certain way, or a *sui generis* easement right to use someone else's property. The Supreme Tribunal also added that by the *jus ad rem* principle, immovable property belonging to another person may be reclaimed from a person who has illegitimately taken possession of it.

At the same time, specific easement for a place in a Jewish synagogue, which was the subject of dispute in this case, concerns the sphere of relations of a religious community, and the legal relations in this sphere did not lie in the sphere of state or public relations that may relate to the state, or to every citizen of a state, where property can be transferred from one citizen to another in the general legal sense of inheritance law. Instead, they were within the framework of the norms of the Jewish religious community. This easement, the court notes, is not one that

every citizen may use, but is available only among the Jewish religious community, and is regulated by the norms that are adopted in it. The Supreme Tribunal of the Republic of Lithuania explained that civil law in the general sense (that is, civil law that governs inheritance relations) could not be applied in this dispute; that is, the inheritance of such an easement must be determined by the norms that operate in the everyday life of the Jewish religious community. Thus, the court noted, the district court should have considered the customs in force in the Jewish religious community that regulated these legal relations, and thus the district court incorrectly expanded the scope of civil law in the field of social communication, which, by its nature, is very special. As regards the defendant's arguments that if a lawsuit had already been filed then one should have been filed not only against the defendant, but also against the person from whom he bought the place in the Jewish synagogue, the Supreme Tribunal of the Republic of Lithuania noted that this the argument was expressed by the defendant only in the appeal in cassation (authors' note: which apparently belonged to the factual part of the case, whereas the Supreme Tribunal could quash and remand cases only upon the fact that the lower courts had incorrectly applied the norms of either material law or the law of procedure). Since the case was sent for reconsideration to the district court, the defendant could justly express this argument there. Therefore, the Supreme Tribunal of the Republic of Lithuania ruled to quash the judgment of the Kaunas District Court and referred the case to the Panevezys Regional Court for reconsideration (Vyriausiasis Tribunolas, Sprendimas Nr. 107, 1927, pp. 35–37).

2. The legal status of a church pew in the law of France: doctrine and jurisprudence

French law and legal doctrine are quite rich in cases concerning the legal status of a pew, as well as various disputes regarding pews. In addition, French legal encyclopaedias and collections of judicial practice from different centuries have preserved many court judgments, thanks to which we may learn a lot about the nature of legal relations concerning church pews, as well as what sources of law were used at different times in such disputes.

According to the works of J. B. Denisart (1784), J.-N. Guyot (1784) and P.-A. Merlin de Douai (1825), there were many disputes over places in churches during the *Ancien Régime* era – from the right to inherit a place in a church to its assignment and withdrawal from the use of parishioners, for different reasons. From the works of F. A. Merlin de Douai (1825), it becomes known that this area was regulated both by customary law (that is, by established customs) and by judicial precedents, as well as by certain legal acts. One of the most important customs used in this area was that churchwardens (Fr. *Marguilliers*) handled the distribution of church pews for the use of parishioners (Merlin de Douai, 1825, pp. 423–424). Church elders, in fact, owned the pews: this was so not only according to custom – which, incidentally, is repeatedly mentioned in judicial practice (see below in this chapter) – but also in accordance with Art. VIII of the Declaration of the King of France Louis XV of 15 January 1731, upon which monks, canons, regulars of the abbeys and priories and other beneficiaries were allowed to continue to sing in the canonical office and in the choir, as well as to own pews and graves in churches, if they peacefully and from time immemorial belong to them (Declaration du Roy Louis XV, 1731, pp. 395–401). According to Guyot (1784), there was another custom regarding the placement of parishioners in churches: if the church was under patronage, only the patron of the church had the right to use a permanent church pew; judges could also use various special rights to places in churches, as well as seniors, who could also have their own pews (Guyot, 1784, pp. 121–122). However, this custom did not survive the French Revolution, as described in the commentary on the judgment of the Court of Cassation of France in 1855 (Cour de Cassation (France), 1855, p. 269–271). According to the Decree of the National Assembly of 13 April 1791, Art. XVIII, all honorary rights associated with the powers of the judge-lords and the patrons were abolished, and it was decided, *inter alia*, to remove all patron and seigneur-owned pews from the choirs of public churches (Décret de l'Assemblée Nationale, 1791, p. 9). Abbé Michel André (1803–1878) in his 1853 work on canon law mentions that, earlier, the patrons of churches and judges of the high courts had a number of honorary rights in churches – over the pew, incense, as well as holy water and bread. In 1791, all of these privileges were completely abolished (André, 1853, p. 489). It should be noted that this Decree did not cancel the rights to a place in a church for those citizens who had not received them via the title of their ancestors, who belonged to certain categories of nobility in the era of *Ancien Régime* and acquired this right by virtue of privileges (Cour d'Appel de Caen, 1901, pp. 211–212).

The legal status of church pews, perhaps for the first time in French law, was determined by the judgment of the Parliament of Paris of 22 May 1574, where the court stated that pews could not be rented indefinitely, and that the right to use them was personal and ended with the death of the person to whom it was given. The right to

dispose of the pews belonged to the elders of the church and its leadership (it should be noted that in the *Ancien Régime* era, the legal entity of the church was called *Fabrique*, i.e., *enterprise*, which later passed into the Decree of 30 December 1809; this name was used until the beginning of the 20th century), and the only case in which the right to use a church pew could be inherited was if the parishioner was a descendant of the founder or patron of the church (Parlement de Paris, 1574, p. 399). In the judgment of the Parliament of Paris of 23 February 1606, a husband and wife, parishioners of the Church of Saint-Jacques-la-Boucherie, sued the churchwardens for their right to continue to own the church pew which they had rented to the deceased mother of one of the plaintiffs (precisely who was not specified). The court allowed the couple to continue to own the pew. The commentary to the case states the following: "And in truth, it would be shameful to put pews and places in the church into commerce, and make them go [in trade] in pair with purely worldly and profane things." (Parlement de Paris, 1606, p. 398). This sentence indicates that pews were considered as *res extra commercium* in French law in the *Ancien Régime* era.

In the French law of the *Ancien Régime* era, the right to use a pew, according to judicial practice, directly depended on the fact that the person who used it lived in the district where the church was located, of which they were a parishioner, and the absence of a parishioner at the place of residence could lead to the termination of this right. Such a case, which was decided by the Parliament of Paris on 29 January 1641, is indicated by P.-A. Merlin, Merlin de Douai (1825, pp. 423–424); references to this case can also be found in the works of other well-known authors: in the work of the French archdeacon and vicar general of the municipality of Noyon, Pierre Gohard (1765, p. 819); and in the encyclopaedia of the French lawyer José-Nicolas Guyot (1784, pp. 121–122). This judgment was published in the *Journal of the Principal Audiences of the Parliament of Paris* by Michel du Chemin (Parlement de Paris, 1641). The circumstances of the case were as follows. The leadership and churchwardens of the church in the city of Senlis gave a pew for use to a man (the father of the defendant), his wife and his family. After the death of his wife, the man, his daughter (the defendant) and her daughter left for the city of Compiegne because of a plague which was raging in the town of Senlis. The family was out of the town for 9 years, during which time the church leadership gave the church pew used by the defendant's family to another parishioner, who paid 6 livres for the right to use the pew. Nine years later, the daughter returned to the city, and wanted to take her usual place in the church, which had previously belonged to the family, but the parishioner did not want to return the place in the church to her, which he had acquired after her departure from the town. By the decision of the bailiffs of the town of Senlis, the parishioner should have undertaken to return the woman's place in the church, with which he did not agree, and he filed an appeal to the Parliament of Paris, arguing that the churchwardens of the church could dispose of the pews as they found it necessary and distribute them to those parishioners for use as they found it proper, and that the defendant had been out of town for a long time. The defendant countered the parishioner's arguments by claiming that she left the town of Senlis because of the plague. The Parliament of Paris decided in favour of the defendant (Parlement de Paris, 1641, p. 96).

As was mentioned earlier, the laws of 1789–1791 abolished a number of privileges for representatives of the nobility (although not all were aristocrats in principle, but feudal lords, seniors and patrons), and this also affected, among other things, the honours that they had in churches, including their places. In the 19th century, as French jurisprudence shows, the descendants of the nobility of the *Ancien Régime* era had disputes with the leaders of churches over their ownership of pews (and sometimes other property) on the basis that their ancestors, being representatives of the nobility, had privileges in those churches during the *Ancien Régime* era. In some cases, the lawsuits were won by representatives of the church, whilst sometimes the parishioners prevailed in action. To illustrate the situation in real terms, let us observe several important French court judgments adjudicated in the 19th and early 20th centuries in disputes over the ownership of church pews. French jurists Rodolphe Rousseau (1849–1922) and Laisney, in their *Dictionary of the Theory and Practice of Procedural Law* (1879), note that 19th-century French jurisprudence showed that churches and chapels were objects out of commerce (*res extra commercium*), and could neither be subject to prescription nor become the object of a possessory claim, as long as they retained their purpose (i.e., to be a house of worship) (Rousseau & Laisney, 1879, p. 285). In fact, the Court of Cassation of France came to this conclusion in its judgment of 1 December 1823 (Cour de Cassation (France), 1823, p. 161–164). What can be said about the objects that are inside the church, and which are used by parishioners who come to the church to pray and listen to the church service? This chapter of the article considers these issues.

The judgment of the Court of Civil Cases of Colmar on 12 May 1834 and of the Court of Cassation of France on 8 March 1836, which confirmed this judgment, are significant both because they determined the status of church pews, as church property, and because they concerned places in a Jewish synagogue, which entailed certain features of their use. The circumstances of the case were rather unusual, and concerned the issue of the legitimacy of taxing a synagogue for receiving payments for renting pews to its congregants. In 1738, a Jewish patron donated a synagogue to the Jewish community in the town Ribeauville. The increase in the Jewish population in the city of Ribeauville, accordingly, led to the fact that there was not enough space in the synagogue for all the congregants, and therefore, the Jewish community decided to reconstruct the synagogue. Long before this case, the members of the community had argued about how the reconstruction should be carried out, and the dispute was heard before the Court of Colmar, by the judgment of which in 1821 it was decided that places in the reconstructed house of worship would be transferred to the property in accordance with the rules of the community management. The reconstruction of the synagogue was successfully completed, and, 10 years later, according to the act of 4 March 1831, the communities moved to the distribution of seats in the synagogue for a certain amount of money, depending on the number, position and convenience of the seats. So, places were taxed at 80, 100, 200 and 300 francs. It is important to note that this act also provided that a member of the Jewish community could not transfer this place to any other person who did not practice Judaism. At the time of registration of the act, tax was collected from the sale, as from the sale of real estate. The notary who registered the act of 4 March 1831 argued that this civil law transaction could not be considered a sale of immovable property (seats in the synagogue), but a distribution of the right to use movable property. With this, he applied to the Court of Civil Cases of Colmar, which decided the case in his favour. The court of Colmar determined that the Jewish community in the city of Ribeauville had taken possession of the synagogue for worship, without the possibility of changing the purpose of the building. Taking into account the conditions under which the synagogue was transferred into the possession of the Jewish community of Ribeauville, it should be concluded that all members of the Jewish community of this city had an inseparable right to these places in the synagogue. In addition, this right was given only to members of this Jewish community, and could not be transferred to anyone else. Accordingly, this right was a permanent right of use in favour of the Jewish community of Ribeauville: it was inalienable and could not be transferred – in the understanding that no member of the Jewish community could sell or give away this right for free to another person who was not a member of this community. The Court also noted that all members of the Jewish community of Ribeauville were entitled to seats in the synagogue, which was indivisible, and held seats in it not from 1831, when certain proportions of the distribution of seats in the synagogue were established as a result of the act, but from much earlier – from 1738, when the synagogue was donated to the Jewish community of the city of Ribeauville. Thus, the contract contained in the act of 4 March 1831 *does not* effect a sale (in the property context of this word), and the act of 4 March 1831 can be considered a way of using common law. Therefore, the right remained the same as it was before, since the Jewish community of Ribeauville continued to own (at the time of the proceedings) the building of the synagogue the same way that they had before, and the building itself retained its original purpose. The Court also took into account another concordant point: not all members of the community could, due to lack of financial resources, afford the payment for places in the synagogue, but at the same time, they also retained the right to have a seat in the synagogue, which remained *joint property*. Simply put, seats in the synagogue did not belong exclusively to anyone in the Jewish community, and everyone had the same rights there. The court also pointed out that if the seats in the synagogue were given for different payments and the money received from the giving away of the seats in the synagogue were to be used for the reconstruction of the structure of the synagogue, as well as for its decoration, then this was also *not a sale*, because the rights of the parishioners of the synagogue *had not ceased to be equal*. For these reasons, the Court of Civil Cases of Colmar ruled in favour of the plaintiff. The Administration of the Tax Service impugned this judgment, and the main task of the appeal in cassation was to prove that the civil deed (i.e., the act of 4 March 1831) was a *sale*. The representative of the Administration argued that the Jewish community was a moral person (apparently, by analogy with the legal concepts of an individual and a legal entity) whose interests differed from the people who made it up, and it should be considered, in this case, a corporation in the manner of a church enterprise, as it was a religious congregation recognised by law. Moreover, when a community sells its property to one of its inhabitants, this should be understood not as a bargain, but as a sale. In this case, the representative of the plaintiff asked (in the cassation judgment, the Administration was indicated as the plaintiff) whether this should not be the case with the act (meaning the act of 4 March 1831) by which a religious corporation alienated property in favour of one of its members? From this statement it followed, in his opinion, that if the Jewish community, being the owner of the synagogue, considered it necessary to alienate any property and give its members the exclusive right to use it (in addition, independently of the building of the synagogue itself), then this

should be considered a sale, since the subject of the dispute was not divided in equal parts between all Jewish residents of the city of Ribeauville, but belonged to the Jewish community. In addition, the plaintiff's counsel argued that the seats in the church were real estate. They had to be legally considered as such, since they were part of the property of the synagogue itself, and they should be considered immovable property, since they were attached to other immovable property (i.e., the synagogue itself). The Court of Cassation of France, however, did not agree with these arguments, considering that the Court of Civil Cases of Colmar in its judgment correctly determined that the act of 4 March 1831 did not contain a sale, but only distributed the use of a joint object that left the property at the disposal of the Jewish community. Thus, the complaint was dismissed (Trib. civ. de Colmar, 1834, pp. 395–397; Cour de Cassation (France), 1836, p. 399).

The judgment of the Royal Court (Court of Appeal) of Limoges of 22 August 1838 (at that time, the courts of appeal in France were called *Cour royale*), is also important for determining the legal status of a place in a church in French law. This judgment states that neither the church, as a building, nor the pew are subject to prescription.[5] Thus, as mentioned earlier, the laws of 1789–1791 that were adopted in France abolished privileges for various representatives of the nobility of the *Ancien Régime* era, and they, *inter alia*, abolished privileges regarding places in a church. In 1834, the ecclesiastical enterprise of Sainte-Feyre filed a lawsuit against the defendant, demanding that she relinquish her exclusive ownership of the two chapels of the church, as well as a church pew which had previously belonged to the defendant's ancestors who, at one time, had invested significant funds for the construction of the church during the *Ancien Régime* era. One of the defendant's ancestors, having the title of *sieur*, was a patron, and having invested in the construction of the church, he reserved the exclusive possession of two chapels and a church platform for himself, where the latter was later replaced by a church pew. After the *Ancien Régime* era had ended, they continued to own parts of the church on the basis of being its patrons. However, this situation did not suit the church enterprise, who believed: that patronage should not have anything to do with the right to property; that their rights were a kind of easement; that the chapels were parts of the church which were public property, and which, accordingly, could not be an object of private property; and that the rights of the founder (patron) were reduced to various privileges which were abolished by laws that terminated the privileges of representatives of the nobility of the *Ancien Régime* era. The defendant, however, argued: that her ancestors owned all of the above-mentioned property on the basis of patronage and by virtue of the right of private property; that it had nothing to do with the privileges that the founder of the church had (for example, they could appoint a priest and carry out family burials); and that the laws adopted in 1790–91 left in force the rights of patrons in terms of property rights. The Court of Bourganef decided in favour of the plaintiff, and the defendant filed an appeal. Based on a script dated 1 November 1729, the court of appeal concluded that the church was built at the expense of representatives of the nobility (they were distant ancestors of the defendant), who at that time owned estates around the house of worship, and they, as patrons, had various privileges there: in particular, they owned two chapels as well as a pew in the church (not to mention the fact that during the *Ancien Régime* era they were the owners of the city where the church was located), they provided this church with funds by paying tithes, and they carried out the funerals of deceased family members in the church. The laws adopted in 1789–1790 abolished all honorary privileges, and the Law of 4 August 1789 abolished the tithe which was used to maintain churches, and also prohibited burials in churches. Moreover, on the foundation of the Decree of 2 November 1789, representatives of the nobility lost all their property rights in chapels. As for the pew, due to the fact that the defendant's ancestors used it by virtue of their title (which was cancelled on the basis of Articles 18, 19 and 20 of the Decree of 13 April 1791), the rights to it were also lost. Accordingly, the appeal was dismissed (Cour royale de Limoges, 1838, pp. 154–156).

It should be noted that at that time there were also disputes as to where a claim for possession of a church, or one of its constituent parts, was filed on behalf of those citizens whose ancestors in the *Ancien Régime* era retained possession of these parts and buried deceased relatives in churches (which, as we remember from the commentary to the previous case, was prohibited by the Decree of 2 November 1789). In this case, the defendant was the church enterprise itself. For example, in a case in which the Court of Cassation of France ruled in the last instance

[5] Regarding the fact that the churches and chapels in which services were held were not acquired by prescription, see also other court decisions listed in the repertoire of French lawyer Maurice Desire Garnier (1814–1896) as confirmation of this thesis (Garnier, 1891, p. 38/§§66–67).

on 18 July 1838,[6] the plaintiffs wanted to take possession over a chapel adjacent to a parish church from the church enterprise. The chapel's side doors overlooked the courtyard of a castle which belonged to the plaintiffs, the plaintiffs had their own key to these doors, and they also owned chairs and pews in the church. They sought to take ownership without paying compensation to the church enterprise. The plaintiffs had retained titles and deeds, which confirmed that, in older times, the chapel belonged to the lord, who was their ancestor; also, there was a family crypt under the chapel. The court of first instance satisfied the claim of the plaintiffs; the appeal was won by the church enterprise (judgment of the Royal Court (Court of Appeal) of Riom of 16 April 1837). In addition, the appellate court came to a number of rather interesting conclusions, which are worth pointing out in more detail – namely, on the issue of the existence of property rights in church buildings in the *Ancien Régime* era. The appellate court permitted the closing of the door that connected to the courtyard in the plaintiffs' castle, and this judgment was based on the fact that the titles and other documents filed by the plaintiffs, which confirmed that their ancestors once owned this chapel, could not be the basis for confirming the right of ownership to it, nor could the very fact of the prescription of possession. The Court pointed out that, even under the laws in force during the *Ancien Régime* era, the patron or founder of a church did not have ownership of it; that what was due to them were certain honours which *did not* assign them property rights; and that the patron could not take away anything once donated to the church. The court pointed out that, obviously, the plaintiffs retained the title of patron of the church as a legacy from their ancestors, but this, at the time of the consideration of the case, had already lost its force by virtue of the Law of 12 July 1790 and the law adopted by the Decree of 13 April 1791 which cancelled private chapels as well as various kinds of privileges. The plaintiffs, as the court clarified, could not refer to possession from time immemorial, since churches were *res extra commercium*, and prescription did not apply to them. Then, the plaintiffs filed a complaint with the Court of Cassation of France, arguing that: the chapel was not the same building as the church, and therefore should be considered as private property; based on the facts established by the court of first instance, in the opinion of the plaintiffs, it came to be obvious that they owned property rights to the chapel; the abolition of the patronage did not cancel their rights, since this was not a question of ownership but a question of property; and §72 of the Decree of 30 December 1809 allowed the concession of the chapel in favour of its founders or benefactors, which should be considered as a property right. The Court of Cassation of France did not agree with these arguments of the plaintiffs. Firstly, the Court pointed out that, on the basis of the established factual circumstances of the case, the chapel in dispute was inherently dependent on the church itself; churches consecrated for worship were *res extra commericum* and could not be subject to property rights. Although the plaintiffs did not document that they were the patrons of this church, the Court said that, one way or another, the judgment (of the lower court) was based on the fact that the laws which were in force in France (moreover, they were in force for more than 40 years from the date of filing the claim) abolished the rights associated with the title of patron. The court also pointed out that the provision of the Decree of 30 December 1809, to which the plaintiffs referred, referred only to the future, and therefore the Court of Cassation of France decided to dismiss their complaint (Cour de Cassation (France), 1838, pp. 348–349).

The judgment of the Court of Cassation of France of 20 January 1879 discusses another difficult legal question: may a parishioner who has rented or received a church pew from another parishioner compensate for losses in the case of a violation of their right to use this pew? The plaintiff filed a possessory claim against the defendant regarding the ownership of a place in a church in the city of Bords. Moreover, the plaintiff himself did not have the exclusive right to use this pew, but rented it. The Court pointed out that in such a case, the right to file a complaint (claim) should concern the one who has the exclusive right – the right of inheritance, the right of easement, or the right of use. From the point of view of law, one who rents church property does not exclusively own the thing (i.e., as it is called in Roman law – *animus domini*). The court clarified that things that are in the public domain may be the object of the chattel right of easement, or use, but if the plaintiff is only a tenant of the thing (i.e., a church pew), then they have only a personal right to use, as a tenant. Thus, the plaintiff's complaint was dismissed (Cour de Cassation (France), 1879, pp. 465–466).

The Court of Appeal of Caen, in its judgment of 3 July 1901, made a significant point regarding the inheritance of the right to use a place in a church if such a right lasted from the *Ancien Régime* era in the family of the parishioners. As was already mentioned in this chapter above, the Decree of 13 April 1791 abolished a number of privileges for representatives of the nobility of the *Ancien Régime* era, among which (Art. XVIII) was the right to

[6] Please note that the judgment of the Royal Court (Court of Appeal) of Limoges of 22 August 1838 is not relevant to this case, although they were heard at almost the same time.

own a place in a church. Does this norm mean that if the ancestors of parishioners who were *not* representatives of the nobility (feudal lords, seigneurs, patrons) during the *Ancien Régime* era owned a place in the church, it could then be held that their descendants would also lose this right to these places in the church? The court came to the conclusion that they would not lose their rights in such a case. The Court of Cassation of France, which considered this case, also agreed with the conclusions of the Court of Appeal of Caen, ruling on this case on 22 January 1906. The case facts were as follows. In 1614, a philanthropist, a *sieur* by title, built a chapel, leaving a place in the church for his family, for which a respective agreement was signed. The municipality of Montuchon applied to the court of Coutances for the transfer of ownership of the chapel built by the ancestor of the plaintiff, stating that he had neither the right of easement nor any other property right to the building (this demand was satisfied). The plaintiff claimed to renounce any rights to the chapel, but demanded to maintain his place in this chapel, since it belonged to him by inheritance (as evidenced by a contract dating from 1614 – its legitimacy was fully confirmed by the Court of Appeal of Caen, and then by the Court of Cassation of France). The court pointed out that the right to a place in a church is a personal right; it is not connected either with land or with any dwelling, and therefore it cannot be withdrawn. The court also explained that, indeed, the Decree of 13 April 1791 abolished the privileges of representatives of the nobility of the *Ancien Régime* era, but they did not apply to everyone – namely, only to feudal lords, seigneurs and patrons. The plaintiff's ancestor, being a *sieur*, held a title of common law, and had no connection with the *Ancien Régime*. That is, if in 1789 the chapel passed into municipal ownership, then this fact did not affect personal rights. Thus, the court decided that the plaintiff had the right to maintain their place in the church, the contract for the use of which was concluded by the plaintiff's ancestor in 1614. The municipality of Montuchon filed a complaint with the Court of Cassation of France, which affirmed the judgment of the Court of Appeal of Caen, also noting the importance of the fact that the ancestor of the plaintiff signed a contract for the use of the place in the church in 1614, and the contract did not lose its force, which meant that the plaintiff was in full right to be placed in this place in the church. It should be noted that the judgment in this case shows how important it was to obtain documents for the use of a place in a church, even in those days (Cour d'appel de Caen, 1901, pp. 211–212; Cour de Cassation, 1906, pp. 21–22).

The Court of Civil Cases of Lyon, in its judgment of 31 March 1926, concluded that the pew must be considered as real estate from the point of view of civil law, but whose estate it is, and who can own it, can only be found from the judgment. In this case, the plaintiff sued his daughter-in-law, demanding 1,000 francs in damages as well as her expulsion from the church pew which he had long enjoyed. Much earlier, on 1 January 1864, the leadership of the church enterprise of the parish of the Loire (Rhone) provided this place to his father, and the plaintiff used it all his life (although, as it becomes known from the circumstances of the case, his ex-wife had occupied two places on this pew for more than 30 years with his consent). Now, the plaintiff's daughter-in-law denied him the exclusive use of this place in the church, demanding the right to occupy two places on the pew. The Justice of the Peace rejected the plaintiff's claim, arguing that the law separated the state from the church and the Decree of 30 December 1809 does not give private rights; therefore, the plaintiff could not appeal against the actions of the daughter-in-law. The plaintiff appealed to the Court of Civil Cases of Lyon. The court pointed out that the pew, which was located in the choirs of the church, was *real estate*, and what the plaintiff called his property right was the right of use (§625 of the Civil Code and further). In France, church enterprises ceased operating in 1903 and were replaced by religious associations. The Court reiterated that the Law of 2 January 1907 established that, in the absence of a religious association, both houses of worship and the furniture inside them remained at the disposal of confessors and parishioners, while the Law of 13 April 1908 transferred church furniture to the property of municipalities. Based on all of the above, the court concluded that there was no exclusive use of the church pew, which the plaintiff claimed earlier: each parishioner had equal rights to use this furniture (i.e., church pews). In addition, the fact that the plaintiff had signed an earlier agreement with a church enterprise was technically fulfilled; then, the church enterprises had ceased to exist, and the agreement had accordingly ceased to operate. For these reasons, the appeal was rejected (Trib. civ. de Lyon, 1926, p. 48).

3. The judgment of the Court of Cassation of Belgium of 1907

History has preserved quite an interesting judicial precedent, where the Court of Cassation of Belgium dealt with the issue of the taxation of places in a church, which turned out to be taxation for an actual stay in a church during services. The Decree On Church Enterprises, adopted in France on 30 December 1809, continued to operate in independent Belgium. A number of provisions of this normative act dealt with the issues of pews in churches – for example, the rent for them and certain issues of disposing of them.

A rather curious case was considered by the Court of Cassation of Belgium in 1907. The plaintiff was a parishioner of a church in the city of Odister, where the leadership of the house of worship adopted a resolution on 1 April 1906, one of the provisions of which prescribed to collect a tax in the amount of five francs from those parishioners who came to worship, taking a place in the church but not sitting on the pews. It was also known that such a decision was made due to the fact that some parishioners who attended Mass in this church stayed in the church corridor, and were not accommodated there properly. The plaintiff had a conflict with the priest. The plaintiff refused to pay this tax twice – the priest told the plaintiff: either the plaintiff pays the fee, or he will be obliged to leave the church. Then, the confessor told the plaintiff that his unwillingness to pay the tax would be regarded by the priest as an attempt to interrupt the service, and at the end of March 1907 the priest did just what he promised. As a result, the plaintiff was not only convicted of a misdemeanour under Art. 143 of the Belgian Criminal Code for interrupting church services, but was also expelled from the church. The Prosecutor General spoke on the matter, and supported the position of the plaintiff. Regarding the situation of the conflict between the plaintiff and the priest, the Prosecutor General noted that the very fact that the plaintiff did not want to pay tax for standing in the church during the service could in no way interfere with the conduct of the divine service, and apart from the fact that the plaintiff stayed in the church, he did not undertake any action which could interfere with the church service. In addition, it would be impossible to even imagine how the norms of criminal law could be applied to the plaintiff if he did not carry out the demands of the priest by simply ignoring the decision of the leadership of the church, which, in itself, could not be considered legitimate, as it deviated from the applicable legislation. The plaintiff did not violate public order in any way, and the priest himself acted unlawfully in expelling the plaintiff from the church. According to §1 of the Decree of 18 May 1806 On Church Services and Funeral Processions (this decree was also adopted in France, and continued to operate in independent Belgium), public churches were open to the public free of charge. Because the church where the plaintiff went was public, he had the right to be there. The same was also stated in the Circular of the Belgian Ministry of Justice of 29 October 1879. Moreover, §65 of the Decree of 30 December 1809 stated that fees may be charged for the use of pews in churches, which implies that a place in a church (i.e., a pew) would be reserved for this parishioner. Thus, the decision adopted by the leadership of the church was clearly at odds with the acting legislation, since it dealt with the collection of a tax from those who *do not* use church pews, because the church ran out of places for those who were unwilling or unable to pay. That is, the church resolution violated the norms of the acting legislation. The Court of Cassation of Belgium ruled in favour of the plaintiff. The court stated that according to §65 of the Decree of 30 December 1809, it was forbidden to collect any money, except for payment for the use of church pews, and §68 of the same decree, which provides for the transfer of a place in the church for the use of other parishioners, did not provide for any taxation of the places occupied by those parishioners who did not occupy pews or chairs in the church, but listened to the church service while standing. The court also explained that §30 and 65 (2) of the Decree of 30 December 1809 gave grounds to assert that the priest was entitled to indicate the place where parishioners who were not going to pay the rent of the church pew could be located; however, neither the wardens of the church nor the management of the church enterprise had the right to receive any monetary reward, as prohibited by the Decree, for occupying a place other than that previously determined by the leadership of the church, nor to demand the payment of an illegitimately established tax on a place that was not the object of a concession. The plaintiff's refusal to comply with the (as it is becoming obvious, illegitimate) resolution adopted in the church could not be considered a manifestation of the plaintiff's violation of law and order, and based on the circumstances established by the lower court, there was also nothing to indicate that the plaintiff's refusal to pay was accompanied by any wrongdoing on his part. Accordingly, the Court of Cassation of Belgium set aside the lower court's judgment, referring the case to the Brussels Court of Appeal (Cour de Cassation (Belgique), 1907, pp. 37–39).

4. The Netherlands: theory and case law, judgments from the 19th and early 20th century

The approach to the legal status of a place in a church in Dutch law differs from that in French law. This section will try to reconstruct the situation from the point of view of civil law and other branches of law in the Netherlands, starting from the 18th century. During the time of the County of Zutphen (since 1814 this has been the province of Gelderland in the Netherlands), as the Dutch lawyer and attorney Joost Schomaker (1685–1767) pointed out in a treatise of 1754, the legal concept of the ownership of church pews had already existed. It follows from the aforementioned text that pews were considered, by default, to be the property of the church, and were legally church property; the rules of churches provided that these pews could be given to parishioners for free use. J. Schomaker also mentioned that when purchasing a house with all of its accessories, the church pew did not

belong to this group, unless there was an old custom in the city or a church order was given in this regard (Schomaker, 1754, pp. 249–251). Since the 19th century, the situation with the legal status of a place in a church, based on the provisions of the norms of the Civil Code which was enacted in the Netherlands in 1838 (*Burgerlijk Wetboek*), had gradually passed into the sphere of civil law, which is well evidenced by the judicial practice of that time. As Dutch lawyer S. Asser (1872, p. 288) pointed out in his work on judicial practice on the application of the norms of the Civil Code of the Netherlands (*Burgerlijk Wetboek*), church pews were not excluded from trade as *res extra commercium*, and they could be sold or transferred as property to other people – here, however, S. Asser indicated that this happened if the pews were attached to the church building in one way or another. Where does this statement come from? The answer to such a difficult question lies in a court case that was considered by the District Court of Tiel in 1854, an interlocutory judgment on which was delivered on 19 July 1854 (Arrondissements-Regtbank te Tiel, 1854, p. 2/pp. 403–411), and a final judgment on 8 December 1854 (Arrondissements-Regtbank te Tiel, 1854, pp. 2–3). Fortunately, both of these judgments are preserved in the collections of Dutch case law. In this case, the District Court of Tiel clarified the legal status of a pew and what rights parishioners may have, both in terms of Dutch civil law and in terms of Roman and canon law. It should be noted that there were quite a few judgments of the courts of the Netherlands in disputes over the ownership of a place in the church. Thus, for example, the Provincial Court of Drenthe in its judgment of 25 June 1853 and 4 February 1854 indicated that in a dispute between the congregation and parishioners over possession of a pew, it should be considered that the pew should belong to the church congregation until the parishioners (in that case, they were the defendants) would provide material evidence in court that the church pew belonged to them (Provinciaal Geregthof van Drenthe, 1853 and 1854, pp. 513–516).

Let us consider the judicial practice of the Netherlands in disputes over the right to a place in a church in more detail. The facts of the case of the District Court of Tiel in 1854 were as follows. Two plaintiffs, who were neighbours, and their families owned two pews in a Reformed congregation church in Zoelmond, which were located one behind the other on the south side of the altar. It is important to note that these pews were locked with keys that were kept by each of the plaintiffs – accordingly, other parishioners would not have been able to sit on the pews. However, two other parishioners (the defendants in this case) decided to take possession of these pews on New Year's Eve of 1854: the first defendant broke the lock in the pews, and then installed other locks (to fit his own keys). As a result, from that moment on, the two defendants began to use the pews. Because these parishioners also changed the locks on the pews, the plaintiffs did not have access to the pews at all, and therefore sued the two defendants. The defendants, however, prepared for these proceedings, and denied any guilt in taking possession of the plaintiffs' pews in the church. Thus, the first defendant stated that a church pew cannot be an object of civil law-based property and cannot become the subject of a possessory claim, and the second defendant argued that he was not the owner of the church pew which he took possession of. Since the legal issues raised by this lawsuit over church pews appeared to be complex, the Tiel District Court decided to consider each of the issues in order: 1) Are the pews objects that may be sold? 2) Is it possible to file a possessory claim regarding a place in a church? 3) Is the evidence of the plaintiffs sufficient to satisfy the claim in their favour? The first question and its interpretation by the court are of great importance in determining the legal status of pews in Dutch law. The Court explained that in Roman law, churches and other consecrated objects were outside the concept of trade (we may recall that in Roman law this concept was called *res extra commercium*) due to the fact that they were consecrated, and, accordingly, became not secular, but sacred objects (*Iuris Divini*). However, the District Court of Tiel pointed out that pews were not included in this category, and they should be considered church goods, as follows from the orders of the Emperors of the Roman Empire Leo I (c. 401–474) and Anthemius (?–472) and according to canon law, based on the letters from Pope Alexander III (c. 1105–1181) to the Archbishop of York, Roger de Pont l'Évêque (1115–1181). Therefore, concluded the court, upon Dutch civil law, a church pew may well belong to specific people and may be transferred by its owners, and it followed that a possessory claim, the subject of which was a church pew, was quite possible, and to argue that the church pew was excluded from trade as *res extra commercium* would be wrong. It was then necessary to clarify (and, as it transpired, this moment played a significant role in the case) what kind of property a place in the church was – movable or immovable (in addition, this had to be determined and proved). The court pointed out that pews were considered immovable property in the works of earlier Dutch legal scholars, but since church pews were not mentioned in §562 and §563 of the Civil Code of the Netherlands, they were considered to be movable property unless they were in some way attached to the church building (meanwhile, this is exactly what the plaintiffs had claimed earlier). Therefore, the court indicated that the plaintiffs had to prove this fact (that the pews were attached to the building of the church) with the help of witnesses, and ordered the plaintiffs *ex officio* to prove this fact – had they

proved the fact that the pews were attached to the church building a certain way, then, accordingly, they might have won the lawsuit. Answering the third question, the court indicated that the arguments of the plaintiffs were quite sound, and the plaintiffs would then need to prove the events indicated by them with the help of witnesses. Thus began the interlocutory judgment of the Tiel District Court of 19 July 1854 (Arrondissements-Regtbank te Tiel, 1854, p. 2/pp. 403–411). After hearing the witnesses, the District Court of Tiel, in a judgment of 8 December 1854, decided to dismiss the claim. Thus, as pointed out earlier, the court indicated to the plaintiffs the significance for them of proving that the pews were attached to the church building. Based on the evidence, none of the witnesses confirmed that the pews were in any way attached to the church building – there was no evidence that the pews were attached to the floor or walls (although the plaintiffs claimed otherwise). Thus, the court points out, the pews in this case be should considered from the point of view of movable property in the sense of §611 of the Civil Code of the Netherlands. The Court pointed out that, by law, a separate tort claim relating to movable property was not allowed, although the plaintiffs' complaint in such a case would be fairly well founded if it were a claim for damages due to the actions of the defendants. Thus, the claim was dismissed (Arrondissements-Regtbank te Tiel, 1854, pp. 2–3).

The judgment of the Breda District Court of 6 September 1870 is very important from the point of view of the legal status of a pew and the right to own it. The plaintiff (and earlier her deceased father) ascertained that they had owned a pew in the Reformed Church in the town of Zevenbergen for more than 30 years. However, the leadership of the church (church board) where this pew was located decided to give the pew to other parishioners for use at the end of 1868. The plaintiff filed a lawsuit against the church board. The Court, in its judgment, pointed out that if the church (or rather, its building) should be considered as *Divini Juris* by virtue of its consecration, then it would be wrong to assert the same about certain objects that are necessary for public worship and are used only for the convenience of parishioners who are attending the church – among which are the pews. The Court also observed that it is common knowledge that although the church building itself should legally be considered a *Divini Juris*, at the same time, places in the church are often reserved by parishioners as private property; on this basis, the church pews should not be considered *res extra commercium*, and accordingly, there was no reason to believe that in this case, possession of a church pew was not acquired by prescription. However, the very fact that one or another parishioner occupies a certain place on a pew should not be considered as a manifestation of possession (*pro domino*) if this does not come from any other facts; the court also clarified that pews were most often intended for the use of all parishioners as visitors in Reformed churches, and that the purpose of the place in the church, due to the peculiarities of its nature, could not be considered as anything else (except for placing parishioners during worship). Based on the circumstances of the case, the plaintiff failed to prove the existence of real ownership of this church pew, and the court rejected her claim (Arrondissements-Regtbank te Breda, 1870, pp. 2–3).

The judgment of the District Court of Assen of 12 March 1923 shows new features of the ownership of seats in the church. The plaintiff was the owner of two pews (each containing five unnumbered seats) in the Dutch Reformed Church in the village of Koekange, in the province of Drenthe. The plaintiff claimed that he and his ancestors had owned these pews for over 600 years, or at least 30 years prior to 11 February 1923, and had always used them free of charge, and sometimes rented them out to other parishioners. For a long time, the church elders had no claims that these pews were the property of the plaintiff and his ancestors, but in 1887 the church elders offered to pay money to the plaintiff for his refusal of further use of the pews in their favour. In 1921, the plaintiff offered to cede the pews to the church elders for 5 years for rent with a respective fee payment. Nevertheless, the plaintiff did not intend to part with the pews. As a result, the church elders resolved this situation in their own way: on 11 February 1923 or around this date, they approved that from now on the pews would be used by two other parishioners who had previously rented pews from the plaintiff, and they themselves had driven nails through the doors that gave access to the pews, damaging the seats. The plaintiff demanded that the churchwardens, as the defendants in the case, restore the pews to the condition they had been in before they had damaged the pew doors; the plaintiff argued that he, as a landlord, must guarantee the parishioners who rented places in the church from him the peaceful and quiet use of them. Taking into account what happened, the court decided in favour of the plaintiff, ruling that on the day after the defendants were notified of this judgment, the pews should be brought to the state that they were in before the doors of the pews were damaged. In addition, the court instructed the defendants to pay the plaintiff 100 guilders for each church service during which the pews were not restored to their previous condition, and thus the use of them by the plaintiff and his heirs was complexified (Arrondissements-Rechtbank te Assen, 1923, pp. 6–7).

The judgment of the Court of Winschoten of 28 October 1931 shows that the possession of a pew by prescription, especially as an inheritance right, is not recognised without weighty supporting documents. The plaintiff, a member of the Protestant Reformed Church in the municipality of *Onstvedde* in the province of Groningen (since 1 January 1969, a part of this municipality has been merged with the municipality of *Veendam*, and the other part with part of the municipality of *Wilderwank*, thereby forming a new municipality – the *Staadskanal*), sued the local church community due to significant damage to a pew during the repair of the church building, where he claimed to own four seats (at the same time, the plaintiff did not claim that he owned the entire pew). From the factual part of the case, it becomes known that two of the four seats on the pew were sold, and the plaintiff took possession of the remaining two, according to him, by virtue of a testamentary disposition. While the defendant generally denied any rights of the plaintiff to these places, the plaintiff himself declared that he did not claim the entire pew, but only four separate places, because of which the dispute arose, and considered that the right given to him allowed free use of these places and allowed him to forbid other parishioners from staying there. The plaintiff also believed that these places were subject to sale and inheritance. The court of Winschoten excluded that the acquisition and succession of church pews was possible overall. Accordingly, it was necessary to establish how the right which the plaintiff had claimed was proved. No documents were able to confirm this. The plaintiff provided two receipts and proof of receipt of tokens for the purchase of seats in the church, but the court found that these documents did not have a separate probative force. The plaintiff argued that his right appeared around 1865, but the court noted that it would be wrong to speak of the emergence of this right on the foundation of presumptions, and the defendant also did not confirm his statements. The plaintiff tried to prove that he and his ancestors owned this pew for more than 30 years on the basis of the testimony of witnesses, but the court indicated that, based on the facts presented in the case, the plaintiff was unable to prove that he had the right to use the seats in the church pew on the basis of prescription. Therefore, the plaintiff's claim was dismissed (Rechtbank Winschoten, 1931, p. 8).

5. Legislation and jurisprudence of the German states of the 19th century

Until the end of the 19th century, the main source of German (or Old German) law was the code adopted in 1792, called *Allgemeines Landrecht für die Preußischen Staaten* (in court judgments, the name of the code was mainly abbreviated as A.L.R., which was published in two parts, each of which was divided into chapters; in the first part there were 22 of them, in the second there were 20). This code contained more than 18,000 provisions, and was a codification of civil, criminal, administrative, family, church and other areas of law in one act. In addition, in some German states other legal systems were also in force – for example, the French Code of Napoleon. This A.L.R. code did not directly determine the legal status of places in churches, although in Chapter 11 of the second part, several norms refer specifically to them. Thus, according to §684, church pews which were transferred to the use of a person by virtue of a rank or position could not be transferred to other parishioners. It is said in Article 685 that church pews permanently attached to the house or to the parishioner's estate pass into the property of each owner, even if the person belongs to another confession. Art. 588 also states that the patron of the church has a right to their pew in the church (Allgemeines Landrecht für die Preußischen Staaten, Thl. II, Tit. 11, §§588, 684, 685). Thus, a system of patronage and privileges was preserved in the manner of that which was present in the *Ancien Régime* era in France. Judicial practice of that time shows that, from the point of view of the law in force, a place in a church should be considered as an *easement* (Preußische Obertribunal, 1856, pp. 40–47), and it is not a thing excluded from trade (*res extra commercium*) in the sense of Part 1, Chapter 9, §581 A.L.R., according to which a thing excluded from trade cannot be acquired by prescription (Allgemeines Landrecht für die Preußischen Staaten, Thl. I, Tit. 9, §581). The judicial practice also points to other sources of law in relation to church pews (Tribunal zu Celle, 1862, pp. 44–48) which will be discussed in the comments on court cases. Karl Meidinger (1891) points out that in Old German law, church pews had never been withdrawn from civil circulation as *res extra commercium*, and, accordingly, private rights to a place in a church cannot be considered a legal chimera. Moreover, neither Catholic nor Protestant church law had considered church pews to be withdrawn from civil circulation. Speaking about the ownership of a pew (i.e., a place in a church), Meidinger points out that the pew itself belongs to the owner of the church, even if the church itself was built by a particular person. Meidinger also mentions that in older Catholic and Protestant church law there were quite different approaches to whether parishioners were supposed to have exclusive rights to use one or another place in the church. In Catholic churches, it was accepted that this issue could be decided by the church ordinary, who had the right to both allow and prohibit the provision of the right to the exclusive use of the church pew to parishioners, and decided whether it would be paid or given for free (the fee was considered, rather, as a contribution to the maintenance of the

church). At the same time, in most Protestant churches, parishioners were given the exclusive right to use certain pews (Meidinger, 1891, pp. 14–19). Meidinger also says that the acquisition of the right to use a pew could be carried out both free of charge and for a fee – under an agreement. In the first case, he notes that such a civil law deed might need to be considered a *donation* (pp. 47–49). In addition, Meidinger mentions that the practice of maintaining registers of ownership of church pews by parishioners of the church, which was called "*Kirchenstuhlordnung*", appeared relatively long ago, but these documents, according to Meidinger, were not considered legally significant (pp. 50–51). However, the Bavarian High Land Court, in its decision of 15 February 1875, resolving a dispute over the protection of a church pew from the use of other parishioners, mentions the "*Kirchenstühlordnung für protestantische Kirchen*" of 8 October 1813, citing it as an example in matters of the distribution of seats in a church (Oberste Landesgericht für Bayern, 1875, pp. 892–894). From this case, we can conclude that even if they were not considered as a source of law, as distinct civil law deeds, or as administrative orders, then, in any case, they could be considered as an advisory source of law. In a number of judgments of the courts of the German states of the 19th century, we may also find statements that church pews are considered to be *property of the church* (in fact, K. Meidinger later wrote about this in his doctoral thesis), even though parishioners acquired rights to use pews (Oberappellationsgericht zu Darmstadt, 1856, pp. 415–416; Oberste Landesgericht für Bayern, 1875, pp. 892–894). It should be noted that some issues of the status of pews and the possibility of their inheritance were also considered by the German lawyer Justus-Henning Böhmer in his work *Jus parochiale* (1738 edition), where he compared the right to use pews with the *usufruct* and argued that this right ends with the demise of the one who used a pew, and in such a case, the pew again became the property of the church. At the same time, he allowed the possibility of inheriting this right if the testator officially owned this right, and in this case, the right would belong only to the heir (Böhmer, 1738, pp. 272–274)

Now, let us consider how disputes relating to church pews were resolved in practice. For the purposes of this article, let us observe two judgments of the Supreme Tribunal (Preußische Obertribunal) of 1856 and 1868, and the judgment of the Tribunal of Celle (Tribunal zu Celle) of 1862.

In the judgment of the Supreme Tribunal of 1856, the issue of the legitimacy of acquiring personal easements in the form of a church pew as hereditary rights by prescription is considered. The church in which the dispute concerning the pew took place was a house of worship for the Reformed and Lutheran congregations at the same time until 1820. In 1820, these communities united. At that time, the fathers of the defendants used a church pew there (the families of both defendants were apparently well-acquainted for a long time), and they declared their right to use it, i.e., be placed on it during worship. However, the community did not want to officially provide them with this pew for use (in addition, according to the defendants, the pew was used not only by their fathers, but also by their grandfathers, and then by the defendants themselves), and in 1854, the community decided to deprive the defendants of the right to use this pew by filing a lawsuit. The defendants, however, decided not to accept this situation, and stated in court that their families had been using this pew for more than 60 years. The district court of Wesel, in a judgment of 6 March 1855, on the basis of the evidence presented, recognised the right of the defendants to use this church pew on the basis that they and their ancestors had owned this pew for 44 years. The church community, however, filed an appeal and won. The Hamm Court of Appeal, in its judgment of 20 September 1855, stated the following: the exclusive private right to use the pew, as in the case of other limited property rights (*jus in re aliena*), can be acquired in two ways – as a competent (i.e., legally capable) person, or as a competent person-owner. The defendants did not claim the latter justification. According to the court, this could not have been a case of personal easement, since in that case the defendants would have had to have owned the pew personally for the same 44 years, whereas the defendants were much younger in age than this. However, according to the Court of Appeal, if the judgment of the court of first instance was based on the fact that the defendants received the right to use the pew as an inheritance, in this case, a *personal hereditary easement* could not be acquired by prescription. If the family used a certain church pew, then the right of *personal easement* could be transferred only to individual family members, but not to the whole family at once; a personal easement may also arise from an individual natural person. The Supreme Tribunal considered the appeal in cassation of the defendants to be justified, but affirmed the judgment of the Court of Appeal on the merits of the case. The Supreme Tribunal points out that Court of Appeal had determined that personal easements, as personal rights, could not be the subject of inheritance rights. However, at the same time, the law did not explicitly state that non-property rights could not be acquired by prescription, like inheritance rights. The Court recalled that in Part 2, Chapter 21, Art. 1 A.L.R. it is indicated that the right to use other people's property (i.e., *easement*), as well as the right to receive fruits and benefits from it (i.e., *usufruct*) can be justified by the following: 1) will; 2)

directly provided by law; and 3) prescription. If we transfer this rule to the question of whether the inheritance right can be acquired by prescription in relation to a pew in a church, then the court indicated that in the opinion of Böhmer (whose position was mentioned earlier), this is quite acceptable; on the other hand, Böhmer points out that a title should have been added to the prescription. This question was not settled directly in Part 2, Chapter 11, §§681–682 of the A.L.R. Therefore, the Court said that an answer must be sought in the rules for acquiring property based on prescription (the duration of which, as previously established, was 44 years). At the same time, the court pointed out that the judgment of the appellate court was based only on the fact that a personal hereditary easement cannot be acquired by prescription, but not on the fact that hereditary rights to use a church pew concern individual people (and not the whole family), nor the norms relating to church pews. This position, in the opinion of the Supreme Tribunal, was erroneous; in addition, there was another important point which was not considered in the judgment of the court of appeal. A place in a church should not be understood as the acquisition of a negative right in relation to the church community, or the leadership of the church, because according to Part 1, Chapter 7, §82 A.L.R., the subject's statement or circumstances must clearly indicate that they have the right to the possession of a negative right. Based on the evidence, it appeared that the families of the defendants had been using the pew for over 60 years; moreover, the fact that the exclusive right to use the pew belonged to the defendants for 44 years was not supported by evidence. Simply put, it transpired in such a way that the fathers and grandfathers of the defendants were parishioners of the Lutheran church, and for many years they used the same pew. There was no evidence that they had the right to the exclusive use of this pew. Therefore, the plaintiffs, in fact, could withdraw the pew from the use of the defendants. As a result, as mentioned earlier, the judgment of the Court of Appeal was affirmed (Preußische Obertribunal, 1856, pp. 40–47).

In the judgment of the Tribunal of Celle (Court of Appeal) of 9 April 1862 the plaintiff sued representatives of the city church in Celle for the return of two church pews to his possession. The plaintiff claimed to be the owner, or actual owner, of two pews in the city church in Celle, which his distant ancestor had taken possession of from that church in 1643. However, due to the fact that the plaintiff refused to pay for these pews, the leadership of the church decided to confiscate both pews from him, and their locks were replaced. The plaintiff could no longer use these pews himself, and could not rent them out – earlier, the plaintiff had rented them out, about which no questions were asked from the side of the defendant. The plaintiff filed a lawsuit, demanding that the defendants be found guilty, and on the basis of a possessory claim and an *interdictum quod vi aut clam* (authors' note: in ancient Rome, this was the name of a court order requiring a person who took someone's property to return it to its rightful owner in its original state) to stop the violation of property rights and compensate for the damage incurred. The representatives of the church did not contest that they had seized the pews from the plaintiff's possession, but argued that they had acted legally on the basis of Chapter XIII of the Lüneburg Church Ordinance of 1643 (*Lüneburgischen Kirchenordnung*) – it is quite remarkable that the plaintiff's ancestor received the church pews in that year. The High Court of Celle dismissed this action in a judgment of 13 July 1861, considering it unacceptable to combine the possessory action and the *interdictum quod vi aut clam* into one complaint, and also because real possession (*corporis possessio*) in relation to part of the church in general would be, according to the court, unthinkable, just as it could not be *juris quasi possessio* (i.e., personal easement). This is because, based on Chapter XIII of the Lüneburg Church Ordinance of 1643, private law in relation to church pews should not have gone further than the right to rent, and based on the essence of the lease legal relationships, the plaintiff's claim could not concern possession of the pew, but could only be a personal claim. The Tribunal of Celle set aside the judgment of the Celle High Court, indicating how, from the point of view of law, private rights in the pew should be considered. First of all, the court explained that the evangelical church was not guided by the principles of ancient Roman *res sacrae* law, and considered the structure of the church as the property of the church. There are distinct property rights to the objects that make up this structure, and since they were compatible with the purpose of the latter, then the private rights of parishioners to pews may arise. Due to the presence of such quasi-possession *in rem*, a possessory claim was therefore a quite suitable manner of legal protection in this case. The court also pointed out that, in fact, the *Lüneburg Church Ordinance* in no way contradicted said principles, because it would be wrong to consider those private rights that the parishioners of the church acquired once acquiring a pew as merely renting this pew, but rather as a property right *in rem* – quite similar to a *personal easement*. Based on these considerations, the court found the plaintiff's complaint to be fully justified. In addition, proof of the facts of the lease of the plaintiff's pews existed, which confirmed the plaintiff's ownership of them (in addition, the defendant never had objections to this lease before, as already indicated above). Thus, the Tribunal of Celle overturned the judgment of the Celle High Court, ruling in favour of the plaintiff (Tribunal zu Celle, 1862, pp. 44–48).

In the judgment of the Supreme Tribunal of 12 June 1868, a dispute was considered regarding whether there could be hereditary possession of a church pew by a parishioner who did not belong to the religion of the church. The Court was of the opinion that it could not. In this case, the pew was owned by the parishioner's relative, despite the fact that the religion of both belonged to the Protestant confession, albeit to different denominations. The legal justification for the withdrawal of ownership was quite complex, and is considered below. The first husband of the mother of the defendant – with whom the leadership of the Evangelical Reformed church community was litigating in order to seize the pew from her – used to be an elder in this church, as well as being a merchant, and he was allocated a pew for the use of him and his descendants. After the demise of her first husband, the defendant's mother married a merchant, out of which the defendant was born. However, the defendant, by her religion, belonged to the Evangelical Lutheran congregation, which existed in the same city; she owned a locked and barred pew in an Evangelical Reformed church that the church community had decided to seize. The Court of First Instance (Herford District Court), in its judgment of 27 March 1867, ruled in favour of the defendant, holding that she was entitled to own the pew by prescription, and on the fact that the defendant belonged to another denomination, the court held that there was a union between the two aforementioned denominations, and saw no obstacle to the defendant's possession of the pew. The Padeborn Court of Appeal, in its judgment of 12 July 1867, however, decided in favour of the plaintiffs, acknowledging that the fact that the defendant belonged to the Evangelical Lutheran denomination, not the Evangelical Reformed denomination, was significant, although the court did not deny that, in principle, places in the church, as such, could be acquired by prescription. The Supreme Tribunal rejected the defendant's complaint, and gave a sufficiently detailed explanation. The court noted the peculiarity of the circumstances of the case in that the defendant did not belong to the denomination in whose church she owned a pew. The standing pews, according to the court, belonged to the parishioners of the church; the church community granted parishioners a personal right to use these pews during worship. It follows that these pews could only be given to those people who were related to the denomination of the church community. The Court pointed out that the community itself would not invite anyone other than its co-religionists (that is, those parishioners who belonged to the same denomination as the church community) to the church. At the same time, how should the norm of Part 2, Ch. 11, §677 A.L.R., according to which "A place [in the church] may be given to the use of the parishioners, and others, but the former have precedence," be interpreted? Then, what should be understood by the word "others" (the original German word is pronounced "*Fremde*", which may be translated as "strangers")? Incidentally, this issue had already been considered in the judgment of the court of appeal: there it was pointed out that the wording of this norm should be understood as "strangers in relation to the parishioners." The Supreme Tribunal considered that such an interpretation was correct, and other legal norms spoke in its favour: according to Part 2, Ch. 11, §239 A.L.R., a parish is formed where all believers are assigned to a common church; and according to Part 2, Ch. 11, §293 A.L.R., citizens who do not belong to a parish will have to choose the church of the denomination that they would like to join. Moreover, Part 2, Ch. 11, §39 A.L.R. contains a postulate regarding the parishioners of the Protestant communities of the Augsburg creed, according to which these communities should not deny their members mutual participation in their religious practices if they do not have a single church of their denomination nearby (Allgemeines Landrecht für die Preußischen Staaten, Thl. 2, Tit. 11, §§39, 239, 293, 677). Then, noted the High Tribunal, we can conclude that it is possible to accept parishioners of other denominations *only in individual cases*. It follows from this that it would be wrong to argue that religious communities should be allowed to take part in worship for all who wish, regardless of what denomination they actually belong to. As to what is to be understood by "*Fremde*", the court said the following. In relation to a closed community (i.e., a community of parishioners of a certain church that belongs to a certain religious confession and denomination), a "stranger" is anyone who does not belong to it, and the judgment of the appellate court emphasises that the word "stranger" refers to those parishioners who live outside the geographical area where the parish is located, but not those parishioners who differ from the others in regard to religion. The court also pointed out that it did not matter in this case to determine the fact of how important the union of evangelical churches could have been earlier, since there were no remarks in the defendant's complaint on this matter. Thus, the High Tribunal decided to dismiss the defendant's complaint, and affirmed the judgment of the Court of Appeal (Preußische Obertribunal, 1868, pp. 210–218).

6. The jurisprudence of Austria-Hungary (1867–1918)

Austro-Hungarian law also contained a number of legal disputes over the ownership of church pews. In most cases, these were disputes between parishioners of churches and confessors. It is interesting that in the Austro-

Hungarian judicial practice the term "*Kirchenstuhlrecht*" ("the right of the church pew") was known (K.K. Obersten Gerichtshof, 1884, pp. 128–131), which, seemingly, was a kind of legal neologism in those days.

In the judgment of the Supreme and Cassation courts of Austria-Hungary of 6 March 1884 (case No. 2627), the question of the legitimacy of the ban of a parishioner from using their pew, as well as the right of a priest to sell this place to other parishioners, was considered. The dispute arose because of a conflict between a parishioner and a representative of the church administration. Twenty years before the dispute, the parishioner, the plaintiff, bought a pew in the parish church at an annual cost of three florins; since then, he had been using this pew. However, one day the plaintiff received an angry letter from the parish provisory, who stated that he did not want the plaintiff to continue to use this pew, and that the provisory intended to complain if the plaintiff continued to use his pew in the church. The plaintiff, in response, filed a lawsuit against him, arguing that he would not allow the defendant, especially with the help of a letter, to prevent him from using his church pew. In response, the defendant argued that this dispute could not be resolved in court, since this dispute, in his opinion, was within the jurisdiction of the church administration. The plaintiff countered the defendant's argument by saying that the pew was not a thing excluded from trade (that is, *res extra commercium*), and therefore, the owner of the pew must be protected from its loss even if there was no actual obstacle to possession of it (judging by the circumstances of the case, nothing indicated that the pew had been dismantled or that the plaintiff was in any way restricted from accessing the pew, for example, by locking it with a key, changing the locks on the doors, etc.). The court of first instance decided the case in favour of the plaintiff, having heard witnesses, indicating that the defendant violated the plaintiff's right to own the pew (and to subsequently resell the pew), and also indicating that the resolution of such disputes was within the competence of the court, since two former pharmacists, who acted as witnesses in the case, stated that places in the church were sold or leased out in perpetuity, which means that they could not be spoken of as things excluded from trade (*res extra commercium*). The Court of Appeal left the judgment of the court of first instance unchanged, and the Supreme Court of Cassation of Austria-Hungary dismissed the defendant's complaint. The Court: agreed that the courts had jurisdiction to decide disputes of this nature; agreed that the right to own a particular pew was in general held by many parishioners, and did not apply to limited matters (which, apparently, could only be considered by church administration, as previously pointed out by the defendant); and noted that the plaintiff actually owned the right to use this pew, although the dispute did not raise the issue of whether the plaintiff could lose the right to own the pew if, for example, he violated the church discipline or refused to pay an increased annual fee for the pew (K.K. Obersten Gerichtshof, 1884, pp. 128–131).

The judgment of the Supreme Court of Cassation of Austria-Hungary of 26 January 1893 (case No. 861) represented a dispute between a parishioner and the pastor of a church, who removed the doors that were attached to the church pew owned by the plaintiff. The conflict between them was obviously much older. The plaintiff once owned a pew in a church pastored by the defendant. One day, the defendant removed the plaintiff's pew, for which he sued, and as a result, the pastor had to put up a new pew for the plaintiff. In addition, doors were installed in the old church pew, which had a lock. For the first 2 years, the plaintiff's new church pew stood without them; however, on 23 September 1892, doors were attached to the pew on both sides, in the same manner they had been in the old pew. When the defendant saw the doors the next day, he ordered the doors to be removed from the church pew and taken to the sacristy. The plaintiff sued the defendant for trespass. The Court of First Instance granted the plaintiff's claim. However, the Court of Appeal came to a somewhat different conclusion. The dispute was not about whether the plaintiff could attach the doors to the church pew, but about whether it could be said that the defendant arbitrarily changed the conditions of the plaintiff's actual ownership of the church pew by removing doors from it (as was known, the doors to the pew were installed without the consent of the defendant). Also, as it was known from the past conflict between the plaintiff and the defendant regarding the old pew, it was agreed that in place of the old one, which was equipped with doors (which could be closed), a new pew would be installed, but without doors. Additionally, the plaintiff used the church pew which had no doors for some time (until 23 September 1892, when they were installed). The fact that the pastor removed the doors from the plaintiff's pew the day after they were installed should be considered the restoration of the previous state of legal relations that existed from the moment the new church pew was installed for the plaintiff (which, as the reader remembers, did not originally have doors). Therefore, in the opinion of the court, it was impossible to reasonably argue that the plaintiff could mount the doors without the consent and without the knowledge of the pastor. Moreover, possession is acquired when a person, using the thing of another person, uses said thing with the person's consent and for their own benefit, according to §§312 and 313 of the Civil Code of 1811. The Supreme Court of Cassation did not agree with this conclusion and decided to reinstate the judgment of the court of first

instance. Thus, the Court pointed to an important point in the possession of church pews: if the use of the pew is exclusive, it is such that no other people can use this pew; for this, doors were installed, which, in addition, were equipped with a lock, with the help of which the exclusion of the church pew from general use became recognisable. The court explained that if the plaintiff had the right to use the pew, then he could, at his discretion, make changes to the design of this pew, especially since the old pew of the plaintiff also contained doors. If the old pew of the plaintiff was replaced by a new one (which did not have doors), this did not affect the rights of the plaintiff to own the old pew – only now, this was already in the guise of a new pew. The fact that the doors to the pew did not appear immediately, but only 2 years after the establishment of the new pew, did not limit the plaintiff's rights. Based on these conclusions, the Supreme and Cassation Courts of Austria-Hungary decided to restore the judgment of the first-instance court, which had previously ruled in favour of plaintiff (K.K. Obersten Gerichtshof, 1893, pp. 44–46).

Conclusions

The right of parishioners to a place in a house of worship is recognised differently in different civil law countries, and has been for a long time. At the same time, having reviewed the relevant jurisprudence, the reader may observe the casuistry of disputes regarding the ownership of church pews, the inheritance of a place in a church, the removal of pews from the use of the plaintiff/defendant, the distribution of these places among all parishioners, etc. To sum up the findings of this article, the authors have come to the following conclusions:

1) Judgment of the Supreme Tribunal of the Republic of Lithuania No. 107 (1927) of 31 January 1927 has considerable significance for the law of Lithuania in regard to places in houses of worship. Firstly, the Supreme Tribunal established the legal status of a pew, the right to sit on which was found to be an *easement*, but not the property of the person who is entitled to this place; moreover, this easement may be used only by the members of the Jewish religious community. Next, the Supreme Tribunal said that the process of transferring pews in a synagogue should be regulated by the norms and customs which are in effect within the Jewish religious community (Vyriausiausis Tribunolas, Sprendimas Nr. 107, 1927, pp. 35–37). Some similarities to this judgment can be found in the judgment of the Court of Civil Cases of Colmar in 1834 (which was confirmed by the Court of Cassation of France in a judgment of 1836), although this situation concerned the taxation of the allocation of seats in a synagogue, for which a fee was paid by the congregants. Therein, the court established that the seats in the synagogue were the joint property of the Jewish community of Ribeauville, and these seats, among other things, may also be owned by members of the Jewish community who are unable to pay for their use (Trib. civ. de Colmar, 1834, pp. 395–397; Cour de Cassation (France), 1836, p. 399).

2) The authors reviewed the legal doctrine and a number of notable court judgments from several European jurisdictions, some of which were historical (i.e., German states of the 19th century and Austria-Hungary). The findings of the authors, with the analysis of the legal doctrine, legislation and case law of the afore-discussed jurisdictions, are as follows:

- The oldest legal cases discussed in the article originate from France in the *Ancien Régime* era and date back to the 16th century. In these cases, one can feel the influence of customary law, characteristic of French law in the *Ancien Régime* era. The fact is that at that time, representatives of the nobility owned a considerable number of privileges, among which was the ownership of places in the church with the right to bequeath them. Patrons who donated funds to churches could own them, own places in the church, and bury their deceased relatives in the pantheon of the church. In the laws which were adopted in France in 1789–1791, the privileges of certain categories of noblemen were abolished. Subsequently, the sources of law in judicial disputes on church pews have gradually changed, constituting laws adopted after 1789 (i.e., the laws of 1789–1791, the Decree of 30 December 1809, etc.) and the norms of the Civil Code. As such, churches were recognised as *res extra commercium*.

- In the judgment of the Court of Cassation of Belgium of 18 November 1907, the Court indicated that the church cannot decide on the payment of tax for a place in a church that was not the object of a concession (the plaintiff did not own a place in a church, as such), since the law of such powers is nowhere established. Moreover, the plaintiff's refusal to comply with an illegitimate church decision could in no way be considered an offense (Cour de Cassation (Belgique), 1907, pp. 37–39).

- Old German law quite clearly defined the right to a place in a church as a personal easement (see descriptions of the judgments above), but pews were not recognised as *res extra commercium* in the understanding of Part 1, Chapter 9, §581 of the A.L.R., and the system of patronage in the 18th and 19th century was still preserved. The legal cases discussed in this article featured disputes on: the issue of hereditary rights to church pews (Preußische Obertribunal, 1856, pp. 40–47); possession of a pew in a church when the denomination of parishioners differed from that of the defendant (Preußische Obertribunal, 1868, pp. 210–218); and a dispute between a church patron's ancestor and the church board, which desired the removal of pews from his possession (Tribunal zu Celle, 1862, pp. 44–48).

- Dutch law, in turn, showed a slightly different approach to the legal status of the pew: judicial practice determined that parishioners may have property rights to a pew (Arrondissements-Regtbank te Tiel, 1854, p. 2/pp. 403–411; Arrondissements-Regtbank te Breda, 1870, pp. 2–3). At the same time, the courts of the Netherlands indicated in various cases that the existence of such rights must be clearly documented, and such a right is not acquired by prescription without substantial documentary evidence of it (Rechtbank Winschoten, 1931, p. 8).

- Austro-Hungarian law also did not recognise that a church pew was a thing excluded from trade (*res extra commercium*), and in a judgment of 26 January 1893 the Supreme and Cassation Court of Austria-Hungary stated that if a plaintiff has an exclusive right to use a pew, then they have the right to make those changes to its design (in that case, doors) that they deem necessary (K.K. Obersten Gerichtshof, 1893, pp. 44–46).

Thus, the doctrine and case law which was analysed by the authors indicate that the right of parishioners to a church pew is real, although, at first glance, it is difficult to determine it from the point of view of law, and it may cause disputes between parishioners and the leadership of the church, or church communities. The authors express the hope that the material presented in this article turns out to be interesting and useful for the reader, and also suggest that this topic may be the subject of further research concerning, for example, the issue of determining the legal status of a church pew and the rights of parishioners to own and inherit a church pew in common law jurisdictions.

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THE BEST INTERESTS OF THE CHILD IN THE CASE LAW OF THE EUROPEAN COURTS: EXPERIENCE FOR EU MEMBER STATES AND CANDIDATE COUNTRIES[1]

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Abstract. The protection of the rights of the child is a universal, global issue in the modern world. In a democratic society, a certain minimum standard of children's rights protection must be warrantied and ensured regardless of national specificities. A number of international mechanisms have been created by the United Nations, the Council of Europe, and the European Union. The EU Member States jointly respect the universal values of human dignity, freedom, equality, solidarity, and democracy as adopted in the Charter of Fundamental Rights of the EU. An integral part of this standard is being developed through the relevant EU legal acts and caselaw. They form part of the general principles of EU law and should also be considered binding in the acceding countries. The role of the European Court of Human Rights, as well as the Court of Justice of the European Union, is essential in the interpretation of child rights in Europe and in raising the standard for their protection. The purpose of this article is a comparative study of the practice of two European courts on child rights, as well as the child rights protection system in Lithuania, a Member State of the European Union, and Georgia, a potential candidate country. This research provides conclusions as to what similar and different approaches exist in the two European courts and what is important for Georgia when approaching these standards in the process of European integration.

Keywords: Child Rights, European Law, European Court of Human Rights, Court of Justice of the European Union, Best Interests, Georgia, Lithuania

Introduction

Protecting the best interests of the child is an important principle of international (United Nations Convention on the Rights of the Child, 1989) and European law (Charter of Fundamental Rights of the European Union, 2000). The European Union (EU) promotes the observance of this principle both in the Member States of the EU and in its neighboring countries in the process of European integration. In this context, Article 78 of the Constitution of Georgia (1995) is important, which defines the duty of the state institutions of Georgia to implement integration into the EU. First of all, in the process of legal integration, it is important to share the practice of European courts in order to bring the national legal system closer to EU law. Georgia has implemented important legislative reforms in this direction. The second chapter of the Constitution of Georgia is devoted to basic human rights, where it is mentioned in the second paragraph of Article 30 that the rights of mothers and children are protected by law. According to this, the State recognizes its positive obligation in undertaking the necessary measures to create mechanisms to protect the rights of the child. This is further coupled with the obligations Georgia has under the international acts it has acceded to, including UN Convention on the Rights of the Child (hereinafter – the UNCRC), ratified by Georgia in 1994. Based on this, the Parliament of Georgia adopted the Juvenile Justice Code (2015) and the Child Rights Code (2019). The goals of both normative acts were to prioritize the best interests of the child, protecting their dignity, safety, life, and health, and realizing their education, development, and other interests. In this regard, it is important to mention the specific ways in which these 2 codes envisioned ensuring that the best interests of children are achieved. First of all, the Child Rights Code gives priority to the best interests of the child in Article 5 (Giving priority to the best interests of the child): "The child has the right to have his or her best interests given priority in any decision concerning him or her..." This wording is consistent with Article 1 and Article 3 of the UNCRC (1989). It is also important to mention Article 5, part 4 of the Child Rights Code

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(2019), which stipulates that "when defining a legal norm, the definition that corresponds to the best interests of the child should be used."

On the other hand, the Juvenile Justice Code of Georgia (2015) defines that its purpose is to: protect the best interests of minors; re-socialize and rehabilitate minors who are in conflict with the law; protect the rights of minor victims and witnesses; prevent the secondary victimization of minor victims and minor witnesses and avoid the re-victimization of minor victims; and prevent new crimes and protect public order in the process of administration of justice. The Juvenile Justice Code provides for the protection of the best interests of the child based on principles such as: the priority of the best interests of minors; the prohibition of discrimination; the right of minors to harmonious development; proportionality; the priority of applying the most lenient remedies and alternative measures; detention as a last resort; the participation of minors in juvenile justice procedure; the inadmissibility of delays in the juvenile justice procedure; the previous convictions of a minor; the protection of the privacy of minors; an individual approach to minors; and the procedural rights of minors.

After the above-mentioned legislative changes, the legal mechanisms for the protection of children's rights are still in the process of implementation. Today, when the Europeanization of law is actively underway in Georgia, as well as the research of related issues, the use of European judicial practice is very important when considering a broad interpretation of Article 78 of the Constitution of Georgia. The court's interpretations create a legal basis for Georgia's correct convergence with European standards. In Georgia, discussions on the European standards in the field of human rights are mainly based on decisions of the European Court of Human Rights (hereinafter – ECtHR). This is understandable because Georgia is a contracting party to the European Convention on Human Rights (hereinafter – the ECHR), and the jurisdiction of the ECtHR extends to Georgia. According to Article 4 of the Constitution of Georgia (1995), an international treaty of Georgia shall take precedence over domestic normative acts unless it comes into conflict with the Constitution or the Constitutional Agreement of Georgia. On the rights of the child in Georgia, the judgments of the ECtHR are mainly used in cases, and the national courts ensure the enforcement of these judgments. Following the recommendations of the European Commission in 2022 (Directorate-General for Neighborhood and Enlargement Negotiations, 2022), on October 18, 2023, the Parliament of Georgia amended 11 laws, including the legislation of civil, administrative, general courts and the Constitutional Court, and determined the practical application of the decisions of the ECtHR. For example, according to the change in the law of the Constitutional Court, when determining the issue of disputed importance, the Constitutional Court can also take into account the definitions given in the decisions of the ECtHR on similar legal issues (Organic law of Georgia, 2023). Along with this, there are already decisions of the ECtHR on the previously submitted complaints of Georgia (*N.Ts. v. Georgia*, 2016; *G.S. v. Georgia*, 2015).

However, after Georgia signed an association agreement with the EU, the goal of the country became to join the EU, hence the decisions of the Court of Justice of the European Union (hereinafter – CJEU) gained special importance. The practice of the CJEU in Georgia has not been thoroughly studied, nor are Court decisions available in the Georgian language. As for research, there are publications that mainly present small excerpts of Court decisions on the main principles of the EU or about economic freedom (Gelashvili & Kamarauli, 2010) or personal data protection (IDFI, 2022), less so about children's rights. The European Convention on the Rights of the Child was also developed and published in Georgian – both the 2015 edition and the 2022 edition (European Union Agency for Fundamental Rights and Council of Europe, 2021, 2022) are available. Thus, the present article will contribute to developing the existing knowledge in the field of child rights protection in Georgia.

It is important for Georgia, on the one hand, to introduce European law and European standards, and on the other hand, to share the experience of the Member States of the EU. From this point of view, this research explores the experience of an EU Member State – Lithuania, which, after the restoration of independence, had to go down the same road, implementing the same reforms in the field of protection of children's rights that Georgia is implementing today. Thus, this article presents a comparative analysis of the child rights protection systems of Lithuania and Georgia, which is important for Georgia. The following paragraphs of the article will be devoted to the discussion of the practice of the CJEU, and also the ECtHR in the field of children's rights, as ECtHR case law is part of EU law (ECtHR, n.d.).

Thus, the main objective of this article is a comparative study of the practice of two European courts on child rights, as well as the child rights protection system in Lithuania, a Member State of the EU, and Georgia, a candidate country. The main questions of the research are: What standards are established by the European courts for the protection of the best interests of the child? How are they implemented by the Member States? What should EU candidate countries do to move closer towards these standards? Various methods are used in this research, such as case studies, an analysis of legislative acts, a comparative legal analysis, and quantitative and qualitative research methods. This research provides conclusions as to what similar and different approaches exist in the two European courts and what is important for Georgia when approaching these standards in the process of European integration.

1. Children's Rights in European Law

Children's rights in European law are comprised of the primary sources of law established by the EU on the one hand and the Council of Europe on the other – treaties, conventions, secondary legislation, and court decisions. Together, they form the basis of European law on the rights of the child. An important source of children's rights in Europe is also the UNCRC (1989), which states in its first Article that "a child means every human being below the age of eighteen years" and which is used as a standard for the protection of the concept and rights of the child in Europe.

From the perspective of the development of child rights law in Georgia, it should be noted that there is no single formal definition of the concept of a "child" in EU law, treaties, legislation, or jurisprudence. In EU legal documents, a child is mainly defined as a person below 18 years of age. The EU legislation in the field of free movement of EU citizens and their family members defines children as "direct descendants who are under the age of 21 or are dependent" (Directive 2004/38/EC). In other areas, such as labor rights, the definition of a child is related to their age. This definition is also used in the field of social security, immigration, and education. In these contexts, the definition of the UNCRC is generally adopted (European Union Agency of Fundamental Rights, 2010, pp. 6–7).

As for the law of the Council of Europe, the ECHR does not contain a definition of a child, but its Article 1 obliges states to secure rights under the Convention to "everyone" within their jurisdiction, which also includes children. Article 14 of the ECHR guarantees the enjoyment of the rights set out in the Convention "without discrimination on any ground," including grounds of age (*Schwizgebel v. Switzerland*, 2010). In its jurisprudence, the ECtHR has accepted the UNCRC definition of a child, endorsing the "below the age of 18 years" notion (*Güveç v. Turkey*, 2009; *Çoşelav v. Turkey*, 2012).

It was known that for a long time that the EU did not have a valid universal document in the field of human rights. The introduction of the Charter of Fundamental Rights of the European Union (hereinafter – the Charter) in 2000 and the entry into force of the Treaty of Lisbon in 2009 created new instruments for the protection of children's rights in the EU. The Charter includes detailed guidelines on the rights of the child, including: the recognition of children's right to receive free compulsory education (Article 14 (2)), the prohibition of discrimination on the grounds of age (Article 21); the prohibition of any child work and exploitative labor of young people (Article 32); the right to such protection and care as is necessary for their well-being (Article 24 (1)); the right to express their views freely and to have their views taken into consideration in accordance with their age and maturity (Article 24 (1)); the right to have their best interests taken as a primary consideration in all actions relating to them (Article 24 (2)); the right to maintain on a regular basis a personal relationship and direct contact with both parents, unless that is contrary to their interests (Article 24 (3)); and the right to private and family life (Article 7).

The Treaty of Lisbon (2007) announced the "protection of the rights of the child" as a general stated objective of the EU (Article 3 (3) of the Treaty on EU). The Treaty on the Functioning of the European Union (2012; hereinafter – the TFEU) also contains a special reference to the rights of the child regarding combating sexual exploitation and human trafficking (Article 79 (2) (d) and Article 83 (1)). In addition, norms on the rights of the child are contained in the directives of the EU – for example, the Directive on combating child sexual abuse, child sexual exploitation and child pornography (Directive 2011/93/EU); the Directive on preventing and combating trafficking in human beings and protecting its victims (Directive 2011/36/EU, 2011); the Directive establishing minimum standards on the rights, support and protection of victims of crime (Directive 2012/29/EU); and the

Directive establishing procedural safeguards for children who are suspects or accused persons in criminal proceedings (Directive 2016/800/EU).

In addition to the legislation regarding the rights of the child, a significant document was passed in 2021 – the EU Strategy on the Rights of the Child, where the European Commission defined priorities in the following areas: child participation in political and democratic life, socio-economic inclusion, health and education, combating violence against children and ensuring child protection, child-friendly justice, digital and information society, and the global dimension. In this strategy, the European commission invites Member States to: establish, improve and provide adequate resources for new and existing mechanisms of child participation at the local, regional and national levels, including through the council of Europe's child participation self-assessment tool; increase awareness and knowledge of the rights of the child, including for professionals working with and for children, through awareness campaigns and training activities; strengthen education on citizenship, equality and participation in democratic processes in school curricula at the local, regional, national and EU levels; and support schools in their efforts to engage pupils in the school's daily life and decision-making (European Commission, 2021). The European Strategy for a Better Internet for Children (European Commission, 2023) includes the digital rights of the child. As we know, the EU does not have legislative powers in all areas. Currently, the EU can legislate on child rights in areas such as: consumer protection (Directive 2011/83/EU); asylum and migration (Regulation (EU) 2021/2303); cooperation in civil and criminal matters (Regulation (EU) No 1215/2012); and data protection (Regulation (EU) 2016/679).

Unlike the EU, one of the founding mandates of the Council of Europe is the protection of human rights. For this reason, the Council of Europe has adopted as one of its key treaties – the ECHR (1950) – which has been ratified by all Member States of the Council of Europe and contains special instructions regarding children's rights (for example: Article 5, paragraph 1, subparagraph d; Article 6, paragraph 1; Article 2 of the Additional Protocol; Article 8, which defines the right to respect for private and family life; Article 3, which prohibits torture, inhuman or degrading treatment or punishment; all of which can be deemed to equally apply towards children, as well). In addition to the ECHR, the European Social Charter (ESC) is noteworthy within the framework of the Council of Europe and contains special records on children's rights (for example, Article 7 establishes the obligation to protect children from exploitation, Article 17 on the care, support and education of children, protection from violence and exploitation). In this context, the treaties of the Council of Europe should be also mentioned, which regulate many issues related to children's rights: the Convention on the Protection of Children against Sexual, Exploitation and Sexual Abuse (2007); the Convention on the Exercise of Children's Rights (1996), the Convention on the Legal Status of Children Born out of Wedlock (1975), the Convention on the Adoption of Children, revised in 2008; the Convention on Contact concerning Children (2003); and the Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention; 2011). The EU is not a part of these Conventions, but most of them (except the European Convention on the Exercise of Children's Rights) have been ratified by Georgia. They form part of the general principles of EU law, and from this perspective are significant for the protection of child rights in Georgia.

It is impossible to talk about the European law of children's rights without mentioning the UNCRC (1989). The EU is not a state party to the UNCRC, although the EU relies on "general principles of European Union law," and the decisions of the CJEU confirm that it interprets this international convention in such a way that EU law derives from international human rights law. An amendment to the EU Charter of Human Rights was prepared based on the international convention, and Article 24 of the Charter refers to the best interests of the child and other principles.

Thus, the UNCRC is an important source of European law on children's rights, as the Member States of the Council of Europe and the EU are also parties to the UNCRC. That is why this Convention indirectly imposes legal obligations on European states in the field of children's rights.

2. The Role of European Courts in Protecting the Rights of the Child

Both national and international courts play an important role in protecting children's rights in Europe. In this case, it is interesting for us to consider the role of the European courts – the CJEU and the ECtHR. These courts have different jurisdictions and different historical experiences in the field of child rights protection.

2.1. The Court of Justice of the European Union

The CJEU ensures that the principles of law are respected in the interpretation and application of the EU Treaties (Decree of the Government of Georgia, 2020). These decisions have a very important practical purpose, as EU treaties and existing legislation may not always fully convey the content of legal norms. The main aspects of the activity of the CJEU are the so-called "filling up of deficiencies," "creative jurisprudence" and defining measures to ensure their effectiveness (Decree of the Government of Georgia, 2020). CJEU decisions have an important role in the Member States, and the implementation of EU directives, regulations and other legal acts is determined to some extent by these decisions. Decisions interpret the specific provisions of legal acts, verifying the correct implementation of EU legislation in national legislation by Member States. Decisions of the CJEU are binding and are considered sources of EU law (Decree of the Government of Georgia, 2020).

At the same time, it should be noted that European judges use the ECHR in the interpretation of human rights, helping to deepen integration processes (Scheeck, 2005). Since the early 1970s, the CJEU has borrowed the rights guaranteed under the ECHR to protect fundamental rights and (hence) its own role (Scheeck, 2005). Today, the CJEU is seen as the guardian of European integration (Boin & Schmidt, 2021). The CJEU has a clear mission to develop Europe, and the Court is committed to the ideal of "permanent close association" and has shown itself to be the guardian of the Treaties (Boin & Schmidt, 2021). The Court acts in the resolution of disputes in the process of crises and European integration (Azoulai & Dehousse, 2012), and plays an important role in the process of democratization in the EU (Wincott, 1994). The Court directs Member States to protect the best interests of the child (Klaassen & Rodrigues, 2017), and has introduced strong procedural safeguards in the field of child protection (Fenton-Glynn, 2021). The Court has considered a number of cases related to the rights of the child.

In children's rights cases, the CJEU mainly deals with preliminary appeals (Article 267 of the TFEU). Under this procedure, a national court or tribunal applies to the CJEU for clarification of the primary (e.g., Treaties) or secondary (e.g., decisions and legislation) EU sources used by the national court or tribunal in the current case. However, unlike the ECtHR, the CJEU is relatively limited in considering cases related to children's rights. Until now, the CJEU has made decisions related to the rights of the child mainly in relation to the issues of citizenship and free movement in the EU. These are areas where the EU has historically had competences. The Court delivers judgments concerning children's rights in various areas, such as free movement, EU citizenship, migration, foster care, habitual residency, family life and non-discrimination. The case law of the CJEU is based on the interpretation of Articles 20 and 21 of the TFEU to ensure the rights of free movement and residence to a child. Thus, the decisions of the CJEU are important not only for legal interpretation but are often considered to have a political impact in the EU and Member States (Blauberger & Schmidt, 2017). The mentioned issues will soon be relevant for Georgia as well, and the country's legal system should be properly prepared.

The CJEU relied on the UNCRC in establishing its practice on the best interests of the child to determine how EU law should be interpreted – for example, in the *Dynamic Medien Vertriebs GmbH v. Avides Media AG* (2008) case in which the Court referred to Article 17 and Article 3 (1) of the UNCRC on the best interests of the child. In other cases, the Court has also developed general children's rights principles based on the UNCRC provisions (the child's best interests, the right to be heard) (Jose*ba Andoni Aguirre Zarraga v. Simone Pelz*, 2010). As the Court noted regarding the application of the UNCRC, such international instruments are among those concerning the protection of human rights which it takes account in applying the general principles of Community law (*European Parliament v. Council of the European Union*, 2006, para. 37; *Dynamic Medien Vertriebs GmbH v. Avides Media AG*, 2008). After the adoption of the Charter of Fundamental Rights of the European Union, the Court refers to its articles on children's rights, but relies on the UNCRC and gives their provisions the same meaning.

The case in which the Court first considered EU citizens' right to move and reside, contained in Articles 20 and 21 TFEU, was *Zambrano*, which represented "the genuine enjoyment of the substance of one's EU citizenship rights" (*Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, 2011, para. 45). Below are depicted some of the most relevant CJEU decisions where the Court developed the child's best interests. The first family reunification cases which mentioned the child's best interests were *O and S v. Maahanmuuttovirasto and Maahanmuuttovirasto v. L* (2012). These cases concerned two female third-country nationals residing in Finland. The main issue in this case was whether EU citizenship provisions preclude a Member State from refusing to

grant a residence permit to a third-country national based on family reunification, where he wished to live with his third-country national spouse and his child, and where the wife was legally resident in the host Member State and was the mother of the child, an EU citizen, from a previous marriage. The Court found that there was no legal, financial, or emotional relationship between the minor EU citizens and the third-country national for whom the right of residence was sought (para. 56). Accordingly, the Court found that Article 20 of the TFEU did not exclude the possibility for Member States to refuse to grant a residence permit to a third-country national in the situation at hand (para. 58). The Court followed the opinion of the advocate general, delivered on 27 September 2012 (1). The Court concluded that the national court was obliged to "make a balanced and reasonable assessment of all the interests in play, taking particular account of the interests of the children concerned" (*O and S v. Maahanmuuttovirasto and Maahanmuuttovirasto v. L*, 2012, para. 81).

The second case where the Court considered the principle of the best interests of child was *Alfredo Rendon Marin and C.S.*, where the Court stated that Article 20 TFEU has to take into account the child's best interests, recognized in Art. 24(2) of the Charter (2000). The case concerned the question whether Article 20 TFEU precludes a Member State from expelling from its territory a third-country national due to their criminal record, where the third-country national is the parent and the primary carer of a child who is an EU citizen. In this case, the Court found that, unlike O., S. & L., the situations in *Rendon Marin and C.S.* were within Article 20 TFEU, which automatically implies the application of the Charter (*Alfredo Rendón Marín v. Administración del Estado*, 2016).

The next case on the best interests of child was *Chavez-Vilchez and Others.* In this case, the Court reiterated the importance of interpreting Article 20 TFEU considering the existence of a dependency between an EU citizen child and a third-country national parent, which implies the principle of the best interests of the child. The question raised by the national courts in the case was whether third-country national mothers could obtain a right of residence under Article 20 TFEU, on the basis of which they could receive social assistance or child benefits under Dutch law (*Chávez-Vílchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others*, 2017). In the same case, the Court explained that the right of residence of the EU citizen child in the EU could be violated even if the child was theoretically not forced to leave the EU, since only one parent was entitled to stay. According to the Court, this could happen in a situation where the child would be practically forced to leave the EU due to the child's legal, financial and/or emotional dependence on the third-country national parent.

The best interests of child were considered by the Court in *K.A. and Others v. Belgische Staat*, which concerned seven third-country nationals who were subject to an order to leave Belgium based on national legislation implementing the Return Directive 2018/115 Transport, which lays down common standards and procedures for Member States to return illegally resident third-country nationals. The judgement of the CJEU followed the advocate general's opinion (*K.A. and Others v Belgische Staat*, 2018), and the Court found it incompatible with Art. 20 TFEU. At the same time, according to the Court, in cases where an EU citizen is an adult, dependency is conceivable "only in exceptional circumstances," where the separation of an EU citizen and the third-country national family member is not possible (para. 76). In addition, the Court explained that the relationship of dependency "must be based on consideration, in the best interests of the child, of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties to each of his parents, and the risks which separation from the third-country national parent might entail for that child's equilibrium."

To conclude, based on the cases considered above, the case law of the CJEU on the rights of the child is important for the candidate countries of the EU, including Georgia, from the point of view of the integration of their legal systems with the law of the EU. These cases represent significant fundamental principles that should be widely studied and used in the future to protect children's rights at the national level in Georgia.

2.2. The European Court of Human Rights

As mentioned above, the ECtHR makes decisions in cases about children's rights on the basis of the ECHR. The Court mainly issues decisions based on individual complaints submitted in accordance with the requirements of Articles 34 and 35 of the ECHR (1950) after all recourse to national measures has been made. The jurisdiction of the ECtHR extends to the application and interpretation of the ECHR and its Additional Protocols. Therefore, the scope and practice of the ECtHR in relation to child rights is wider than that of the CJEU. If we look at the case

law, we can see that the ECtHR has reviewed many cases on the grounds of violation of the right to respect for private and family life protected by Article 8 of the Convention. However, in practice there are cases that extend beyond child rights – for example, regarding the prohibition of torture (*Aksoy v. Turkey*, 1996, para. 64), degrading or inhuman treatment and punishment (*Bouyid v. Belgium* [GC], 2015, para. 81) or the right to a fair trial (*V. v. the United Kingdom* [GC], 1999, paras. 85–86).

2.2.1. The Case Law of the ECtHR on Child Rights

The case law of the ECtHR regarding the rights of the child is based on Article 1 (obligation to respect human rights) of the ECHR: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in ... this Convention." The best interests of the child appear as a fundamental *interpretative legal principle* which work as a tool for the interpretation of a legal provision (Takács, 2022). The ECtHR deals mainly with complaints regarding the best interests of the child in relation to violations of Article 8 of the ECHR on the right to respect for private and family life. Compulsory childhood vaccination, family reunification rights, the right to know one's origins and actions to establish a legal, parent-child relationship, and the protection of property have all been addressed (Protocol 1 to the European Convention, 1952).

One such case was *Chbihi Loudoudi and Others v. Belgium* (2014). This case concerned the procedure for the adoption by the applicants in Belgium of their Moroccan niece and the refusal of the Belgian authorities to approve the adoption, to the detriment of the best interests of the child. The Court held that there had been no violation of Article 8 (right to respect for private and family life) of the ECHR concerning the refusal to grant the adoption, and no violation of Article 8 concerning the child's residence status. It found in particular that the refusal to grant adoption was based on a law which sought to ensure, in accordance with the Hague Convention of 29 May 1993 on the Protection of Children and Co-operation in Respect of Intercountry Adoption, that international adoptions took place in the best interests of the child and with respect for the child's private and family life, and that the Belgian authorities could legitimately consider that such a refusal was in the child's best interests by ensuring the maintaining of a single parent-child relationship in both Morocco and Belgium (i.e., the legal parent-child relationship with the genetic parents; *Chbihi Loudoudi and Others v. Belgium*, 2014).

In the practice of the ECtHR, the question of the interpretation of the best interests of the child is also found in the cases concerning children born as a result of surrogacy treatment. Two such cases where the Court explained the best interests of the child were *Mennesson and Others v. France* and *Labassee v. France*. These cases concerned the refusal to grant legal recognition in France to parent-child relationships that had been legally established in the United States between children born as a result of surrogacy treatment and the couples who had had the treatment. The applicants complained in particular of the fact that, to the detriment of the children's best interests, they were unable to obtain recognition in France of parent-child relationships that had been legally established abroad. The Court held that there had been no violation of Article 8 of the ECHR concerning the applicants' right to respect their family life and their private life. The Court observed that the French authorities, despite being aware that the children had been recognized in the United States as the children of Mr and Mrs Mennesson and Mr and Mrs Labassee, had nevertheless denied them that status under French law. It considered that this contradiction undermined the children's identity within French society (*Mennesson v. France*, 2014; *Labassee v. France*, 2014).

The Court considered the best interests of the child in the case of *A.L. v. France* (2022), which concerned the compatibility with the right to respect for private life of the domestic courts' refusal to legally establish the applicant's paternity *vis-à-vis* his biological son – who had been born in the framework of a gestational surrogacy contract in France – after the surrogate mother had entrusted the child to a third couple. The applicant submitted that the dismissal of his application to establish his paternity in respect of his biological son amounted to a disproportionate interference with his right to respect for his private life, lacking any legal basis. The Court held that there had been a violation of Article 8 of the ECHR, on account of the French State's failure to honor its duty of exceptional diligence in the circumstances of the case.

The ECtHR considered the best interests of the child in the case of children born as a result of surrogacy treatment in *D.B. and Others v. Switzerland* (2022), which concerned a same-sex couple who were registered partners and had entered a gestational surrogacy contract in the United States under which the third applicant had been born.

The applicants complained that the Swiss authorities had refused to recognize the parent-child relationship established by a US court between the intended father (the first applicant) and the child born through surrogacy (the third applicant). The Court held that there had been a violation of Article 8 (right to respect for private life) of the ECHR in respect of the applicant child and no violation of Article 8 (right to respect for family life) in respect of the intended father and the genetic father (*D.B. and Others v. Switzerland*, 2022).

The Court has also considered the issue of the best interests of the child in connection with compulsory childhood vaccination. For example, the case of *Vavřička and Others v. Czech Republic* (2021) concerned the Czech legislation on compulsory vaccination and its consequences for the applicants, who refused to comply with it. The applicants all alleged that the various consequences for them of non-compliance with the statutory duty of vaccination had been incompatible with their right to respect for their private lives. The Court held that there had been no violation of Article 8 (right to respect private life) of the ECHR in the present case. The Court concluded that the impugned measures could be regarded as being "necessary in a democratic society." The judgment emphasized that in all decisions concerning children, their best interests must be of paramount importance (*Vavricka and Others v. Czech Republic*, 2021).

In the practice of the ECtHR, the best interests of the child were discussed in relation to family reunification rights. Such was the case in *Berisha v. Switzerland* (2013), which concerned the Swiss authorities' refusal to grant residence permits to the applicants' three children, who were born in Kosovo and entered Switzerland illegally, and the authorities' decision to expel the children to Kosovo. The Court held that there had been no violation of Article 8 (right to respect of family life) of the ECHR, considering in particular that the applicants were living in Switzerland because of their conscious decision to settle there rather than in Kosovo, and that their three children had not lived in Switzerland for long enough to have completely lost their ties with their country of birth, where they grew up and were educated for many years. The Court concluded that the Swiss authorities had not overstepped their margin of appreciation under Article 8 of the ECHR in refusing to grant residence permits to their children (*Berisha v. Switzerland*, 2013). The same issue, in connection with the best interests of the child, was also considered by the Court in 2014 in *Sami Mugenzi v. France*, *Tanda-Muzinga v. France*, and *Senigo Longue and Others v. France*, concerning the difficulties in granting refugee status or lawfully residing in France when obtaining visas for children so that families could be reunited. The Court held that there had been a violation of Article 8 of the ECHR in the latter case (ECtHR, 2014).

Parental authority, child custody and access rights are some of the most important issues in the practice of the ECtHR. The Court considered these issues in the context of the best interests of the child in, for example, *N.Ts. v. Georgia* which concerned proceedings for the return of three young boys – who had been living with their maternal family since their mother's death – to their father. The first applicant claimed that the national authorities had failed to thoroughly assess the best interests of her nephews and that the proceedings had been procedurally flawed. The Court held that there had been a violation of Article 8 (right to respect for private and family life) of the ECHR. The Court found that the boys had not been adequately represented before the domestic courts. Moreover, the courts had made an inadequate assessment of the boys' best interests, which did not take their emotional state of mind into consideration (*N.Ts. v. Georgia,* 2016).

The best interests of the child are considered by the Court in cases that are related to the right to know one's origins and actions to establish a legal parent-child relationship. For example, the case of *Mandet v. France* (2016) concerned the quashing of the formal recognition of paternity made by the mother's husband at the request of the child's biological father. The applicants – the mother, her husband and the child – complained about the quashing of the recognition of paternity and about the annulation of the child's legitimation. The Court held that there had been no violation of Article 8 (right to respect for private and family life) of the ECHR. The Court said that the child's best interests had been duly placed at the heart of their considerations. The Court had found that, although the child considered that his mother's husband was his father, his interests lay primarily in knowing the truth about his origins (*Mandet v. France*, 2016). The Court also considered the best interests of the child in relation to the same issue in *Paparrigopoulos v. Greece* (2022), which concerned proceedings for the judicial determination of the paternity of the applicant's daughter. The applicant claimed that domestic law had not afforded him the opportunity to acknowledge paternity voluntarily and that this had had the consequence of limiting his parental responsibility in respect of his daughter. The Court held that there had been a violation of Article 14 (prohibition of discrimination) read in conjunction with Article 8 (right to respect for private and family life) of the ECHR,

finding that there was no reasonable relationship of proportionality between the preclusion of the applicant's exercise of parental responsibility and the aim pursued, which had been to protect the best interests of a child born out of wedlock **(***Paparrigopoulos v. Greece*, 2022). The Court also held that there had been a violation of Article 8 (right to respect for private and family life) of the ECHR in the present case (*Paparrigopoulos v. Greece*, 2022).

The Court also linked the best interests of the child to the protection of property (Article 1 of Protocol No. 1) in the case of *S.L. and J.L. v. Croatia*, which concerned a deal to swap a seaside villa for a less valuable flat. In this case, the Court considered whether the state took the best interests of the children into account in accepting the property swap. Additionally, it raised the question of whether compliance with the constitutional obligation of the state to protect children was ensured. The Court held that in the applicants' case there had been a violation of Article 1 (protection of property) of Protocol 1 to the ECHR, as the domestic authorities had failed to take the necessary measures to safeguard the proprietary interests of the children in the real estate swap agreement or to give them a reasonable opportunity to effectively challenge the agreement (*S.L. and J.L. v. Croatia*, 2015).

3. The Child Rights Protection Systems in Lithuania and Georgia

International and European experience has had a significant impact on the development of the child rights protection system at the national level in different countries, in Europe and beyond. For the purposes of our article, a comparative analysis of the protection of children's rights in Lithuania and Georgia shall be made. Given that the purpose of this study is the issue of the protection of children's rights in Georgia and the impact of European law on it, the experience of Lithuania is more important than that of Georgia. Lithuania joined the EU in 2004, and Georgia is currently a candidate country for EU membership and may follow the path that was already implemented in Lithuania, including the introduction of European standards at the level of national legislation and institutional arrangements. That is why we took the experience of Lithuania for comparative analysis.

3.1. The Child Rights Protection System in Lithuania

Article 73 of the Constitution of the Republic of Lithuania (1992) declares that the complaints of citizens about abuse of authority or bureaucratic intransigence by state and municipal officials (with the exception of judges) shall be examined by the Seimas Ombudsman, who shall have the right to submit a proposal before a court for dismissing the guilty officials from office. In order to ensure the provisions and obligations enshrined in the Constitution of the Republic of Lithuania and other laws and international agreements, other laws of the Republic of Lithuania were prepared and adopted by the Parliament (Seimas). The main purpose of these laws is to create legal preconditions which would ensure the implementation of the UNCRC and other child rights-related legal acts in Lithuania, and to monitor the activities of organizations and individuals that may violate the rights and legitimate interests of the child (Office of the Ombudsperson for Child's rights, 2023).

The legal basis for protection of children's rights in Lithuania are the Constitution of Lithuania, the UNCRC, and the ECHR. The Constitution of Lithuania (1992) protects family, parenthood, and children (Articles 26, 38, 39). In addition, international treaties are part of Lithuanian legal system. The UNCRC should be implemented directly by the decision-makers as it is referred to in Article 4 of the Convention. In addition, the case law of the CJEU on the rights of the child has been an important source for the protection of child rights in Lithuania. For example, the Constitutional Court of Lithuania applied case law on child rights (Ruling of the Constitutional Court of Lithuania, 2019), and the Court has also used the case law of the CJEU as a source for the interpretation of law (Decision of the Constitutional Court of Lithuania, 2017).

An important act of child rights in Lithuania is the Law on Fundamentals of the Protection of the Rights of the Child (1996). According to Article 4, parents, other representatives of the child according to the law, state and municipal institutions and establishments, non-governmental organizations, and other natural and legal persons must follow the best interests of the child. Article 58 of the law defines Institutions for Protection of Rights of the Child and Organization of Their Activity. In Lithuania, the protection of the rights of the child is ensured by three types of institutions: the state and its institutions; municipal institutions; and public organizations, whose activity is linked to protection of the rights of the child. State and municipal institutions shall encourage and support voluntary activity by public organizations and by traditional and state-recognized religious communities in the

sphere of the protection of the rights of the child. In addition, state and municipal institutions shall establish and fund institutions (services) for the protection of the rights of the child and organize their activity.

In Lithuania, state institutions have a significant role in the protection of children's rights, but Article 61 of the law introduces the public protection of the rights of the child. Public protection of the rights of the child shall be implemented through the cooperation of public organizations with state and municipal institutions while observing the provisions of this Law as well as of other legal acts which regulate the protection of the rights of the child. In this context, it is important to note that councils for the protection of the rights of the child of municipal communities shall function under the municipal councils in Lithuania. These councils shall, within the scope of their competence, present proposals to municipal institutions concerning the formation of a policy of and a strategy for the protection of the rights of the child of the municipal communities as well as the setting of their priorities concerning the preparation and implementation of the measures designed to protect the rights of the child and to prevent violations of the rights of the child. Thus, the councils of municipal communities have significant powers to protect the rights of the child at the local level over the full territory of the state (Law of the Republic of Lithuania, 1996).

Lithuania has a special state institution – the Ombudsman For Children (hereinafter – the Ombudsman). This institution shall, within the scope of its competence, be responsible for the control and supervision of the enforcement of the laws and other legal acts regulating the protection of the rights of the child (Law on the Ombudsman For Children, 2000). According to the law, the Ombudsman shall base their activities on the principles of lawfulness, impartiality, publicity, priority of the rights of the child and their legal interests, and independence in adopting decisions. The Ombudsman has significant powers for protecting the rights of children in the country. The Ombudsman shall: examine the complaints of natural and legal persons against the rights, actions or omissions of state and municipal institutions or organizations and their officers; control how the provisions of the Constitution of the Republic of Lithuania, the conventions ratified by the Seimas, the laws of the Republic of Lithuania, and other legal acts regulating the protection of the rights of the child and their lawful interests are implemented; supervise and control the activities of institutions related to the protection of the rights of the child and their legal interests due to which the rights of the child or their lawful interests are or may be violated; provide information through the mass media to the public about the protection of the rights of the child and their legal interests in the Republic of Lithuania; and implement other powers for the protection of child rights in Lithuania. The Ombudsman must submit to the Seimas an annual written report on the activity of their institution for the previous calendar year (Law on the Ombudsman For Children, 2000).

3.2. The Child Rights Protection System in Georgia

The basis of the child rights protection system in Georgia is the Constitution of Georgia. Article 30 of the Constitution, granting the "right to marriage, rights of mothers and children," specifies that "the rights of mothers and children are protected by law" (Constitution of Georgia, 1995). Article 5 of the Constitution on the "Social State" also establishes that "the state takes care of the development of sports, the establishment of a healthy lifestyle, the physical education of children and young people and their involvement in sports." In addition, the adoption of the Code of Children's Rights of Georgia (2019) was one of the most important steps in the legislation of Georgia which contributed to the wellbeing of children, childcare and their legal protection. On the basis of the Code, the manual comments of the Code of Children's Rights were prepared and published, which are some of the most important publications in Georgian scientific literature.

Article 10 of the Code of Children's Rights (2019) states that every child has the right to quality and inclusive education and equal access, and the state ensures equal access to the inclusive education system for all children. Chapter 5 of the Code is entirely devoted to the child's right to education and equal access to it. The state ensures equal access to quality early, preschool, general, professional, and higher education for all children by implementing an inclusive system of education and harmonizing the country's educational system with the international educational space. It is also important that Georgia, years later, adopted the Law of Georgia "On Early and Preschool Education and Education" (2016), approved the State Standards of Early and Preschool Education and the Child Care Standards, Article 8 of which (Standard No. 8) enshrines the child's right to education (Resolution of the Government of Georgia, 2017). By the resolution of the Government of Georgia, an

interdepartmental commission working on the implementation of the UNCRC and working on children's rights issues was also established (Resolution of the Government of Georgia, 2016).

In the field of the protection of children's rights, the documents of international law on the protection of children's rights are actively used in Georgia, where all the necessary conditions for the perfect, happy and free life of a person are clearly defined. The Universal Declaration of Human Rights of the UN (1948) is particularly noteworthy – due to its universal character, the state is obliged to ensure the realization of the rights affirmed in the Declaration in citizens' lives. Another important document is the ECHR, adopted on November 4, 1950, which was the first act to give binding force to the rights provided by the Universal Declaration of Human Rights. The UNCRC and the Convention on the Rights of Persons with Disabilities of December 13, 2006, are also applicable for Georgia. In Georgia, the practice of the ECtHR on the rights of the child plays an important role in the protection of the rights of the child by courts, public defenders and human rights organizations. Among these judgments cited, in particular, are: *Timishev v. Russia* (13 December 2005); *Folgero and Others v. Norway* (29 June 2007 [GC]); Hass*an and Aylem Zengin v. Turkey* (9 October 2007); *Ali v. the United Kingdom* (11 January 2011); Ka*tani and Others v. Republic of Moldova and Russia* (18 October 2012 (Grand Chamber)); *Mansur Yalcin and Others v. Turkey* (16 September 2014); *Memlika v. Greece* (6 October 2015); and *Papageorgiou v. Greece* (31 October 2019) (ECtHR, 2023).

An important institution for the protection of children's rights in Georgia is the Public Defender of Georgia. According to Article 3^2 of the Law of Georgia "On the Public Defender" (Organic Law of Georgia, 1996), the Public Defender of Georgia supervises the protection of children's rights and the implementation of child support programs in accordance with the Code of Children's Rights. According to Article 14^2 of the Law, the Public Defender of Georgia is obliged to reveal violations on their own initiative or on the basis of the appeal of another person in the cases defined by the Code of Children's Rights. In the cases determined by the Code of Children's Rights, the Ombudsman issues appropriate recommendations when the activities of the state government body, the relevant body of the municipality and the legal entity of private law are found to be non-compliant with the legislation of Georgia (Organic Law of Georgia, 1996).

The Department of Children's Rights operates in the Office of the Public Defender of Georgia, which has been operating since 2001. The statute of the Department of Children's Rights stipulates that the activities of the Department are based on the principles of the UNCRC. The main tasks of the department are: monitoring the implementation of the UNCRC, the implementation of existing national and other international acts in terms of the protection of the rights of the child; monitoring children's institutions and preparing relevant reports; identifying, studying and responding to individual cases of child rights violations; considering citizens' statements and complaints about the alleged violation of children's rights; preparing recommendations and proposals for legislative and administrative bodies; and implementing educational activities to popularize the basic rights and freedoms of the child and raise the civil awareness of society in this field. Regarding the rights of the child, any person or minor can apply to the Office of the Public Defender. The department prepares special reports and recommendations regarding the rights of children.

Currently, Georgia is not a Member State of the EU, but the country has concluded an association agreement and Children's rights are part of the Georgia-EU Association Agenda (2014), where attention is focused on: appropriate measures to protect children and strengthen legal cooperation; protecting children from all forms of violence; strengthening the role of the public defender in working on children's issues; the practical implementation of child protection conventions; and ensuring the right to education (2017–2020 Association Agreement, n.d.). Although the Association Agreement does not directly provide for the obligation to bring European legislation closer to the practice of EU judicial law, since the Court explains and specifies the meaning of specific provisions, it is recommended to study this practice so that the national legislation can be developed in accordance with it (Decree of the Government of Georgia, 2020). The proof of this is that in the EU questionnaire which was submitted to Georgia in the process of granting EU candidate status, one paragraph refers to the rights of the child (Questionnaire, Part I, 2022). The second part of the questionnaire, which consisted of 2,300 questions, also has 54 items on the rights of the child (Questionnaire, Part II, 2022). In the coming years, Georgia should ensure the compatibility of Georgian legislation with EU legislation in the field of children's rights. In order to achieve this goal, it is important to share the practice of the CJEU, which is the competent institution in the interpretation of child rights standards, when developing national legislation.

Conclusions

Protecting the best interests of the child is a universal principle recognized by the UNCRC and other international instruments. The UNCRC and the interpretations based on it are an important source for various countries, including EU Member States, candidate countries, and EU neighboring countries.

Various international courts have a special role in protecting the rights of the child and ensuring the best interests of the child – including, first of all, the ECtHR, as well as the CJEU. The jurisdictions of these courts and their scope in the field of the protection of the best interests of the child are different; however, their activities create effective mechanisms for the protection of the best interests of the child.

Regarding the child rights protection system in Lithuania and Georgia, it can be said that in both cases the country's constitution, special laws (code) on child rights, the UNCRC, the ECHR, and the precedents of the ECtHR represent important legal bases for the protection of children's rights and decisions in the field of child rights. A unique characteristic of Lithuania is that, unlike in Georgia, there is a special institution for this purpose – the Office of the Ombudsperson for Child's Rights.

Sharing the jurisprudence of the EU Member States with the candidate countries is important, since joining the EU will be a significant challenge. From this point of view, an important role can be played by dialogue between the courts, which has recently become relevant globally. However, it can be said that dialogue between the judges of EU member and candidate countries is weak, which should be intensified so that candidate countries have thorough knowledge of the case law of the CJEU.

Courts in Georgia do not directly apply the decisions of the CJEU to the rights of the child, although this has been applied by the courts of Lithuania. For example, the Constitutional Court has used the case law of the CJEU as a source of interpretation of Lithuanian law in cases related to child rights and the court. On the other hand, in the process of granting EU candidate status to Georgia, considering the recommendations of the European Commission, the use of the decisions of the ECtHR was introduced in the legislation when making decisions on cases.

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THE CONCEPT OF A JUDGMENT UNDER THE BRUSSELS IBIS REGULATION

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Abstract. The Brussels Ibis Regulation (hereinafter – the Regulation) established the free movement of judgments and mutual trust in civil and commercial matters among Member States. However, the Regulation does not provide a clear answer as to whether all decisions of the courts of Member States fall within the scope of this regulation. Although the Regulation introduces the concept of a judgment, it provides only a list of exemplary court documents, which is not exhaustive. This article analyzes the criteria by which the decisions of Member States must be evaluated to ensure their enforceability is recognized across borders. The article also suggests one broad interpretation of the requirement for a court decision to be rendered in adversarial proceedings in order to also include default judgments, court orders and court settlements therein. The author submits that only such a wide interpretation meets the goals of Regulation and is aligned with the political will it enshrines. Finally, the article analyzes whether the decisions of Member States made based on the decisions of third States or in matters of their recognition fall within the scope of application of the Regulation.

Keywords: the concept of judgment, Brussels Ibis Regulation, non-recognition and enforcement, court order, default judgment, court settlement, third country judgments.

Introduction

The Brussels Ibis Regulation (hereinafter – the Regulation), which replaced the Brussels I Regulation, reformed the system of recognition and enforcement of judgments in civil matters in the European Union (hereinafter – the EU). One of the essential innovations of the Regulation was abolishing exequatur and strengthening the mutual trust between EU Member States (hereinafter – Member States). The abolition of exequatur allows the principle of free movement of judgments in the EU to be effectively implemented. This novelty ensures one of the main goals set by the EU: the creation of an area of freedom, security and justice without internal borders, which cannot be implemented without the mutual trust and cooperation of Member States in civil cases (Article 3 of the Treaty on European Union). The concept of mutual trust was the leading idea throughout the whole process of changing the law to create conditions for the free circulation of judgments (Grajdura, 2016, p. 1).

However, the rules of the Regulation on the recognition and enforcement of judgments leave unanswered questions regarding how the principle of free movement of judgments shall be secured. One such question is: What falls under the concept of a judgment under the regulation? A uniform understanding of the word *judgment*

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across Member States is crucial for the application of the provisions of the Regulation. Though Article 2(a) of the Regulation provides the definition of a judgment, it leaves a lot of room for interpretation and discussion as to the judgments from the courts of the Member States that fall under this concept. The notion of a judgment has crucial importance since the principle of free movement of judgments namely concerns the recognition and enforcement of judgments to which this special EU law regime is applicable.

The lack of clarity in the definition of a judgment is rooted in the different procedural rules that apply in each of the Member States, given that the EU has not been given conferral to regulate this matter. Those differences therefore raise various questions, such as: Do all judgments rendered by the courts of the Member States fall under the scope of the Regulation? Does the definition of judgment in the Regulation include judgments rendered in summary proceedings in which the court renders a final decision without substantive analysis of the relevant factual circumstances? Are default judgments granted without the presence of the defendant and without raising any objections also intended to be within the scope of application of the Regulation?

Furthermore, the Regulation regulates only some aspects of the settlement of cross-border disputes including third States, and does not regulate the recognition and enforcement of judgments rendered by the courts of third States.[4] It is therefore questionable whether the Regulation also includes the judgments of the courts of the EU Member States which recognize such third-State judgments. Does such a judgment of the court of an EU Member State also enjoy the same treatment as other judgments, or are its effects limited only in that state? These questions have been addressed to the CJEU, whose position on these issues is analyzed in this article, but they still raise various disputes regarding the extension of the principle of mutual trust and free movement of judgments to such decisions.

The aim of this article is to analyze the notion of a judgment under the Regulation. To achieve this goal, the first part of the article analyzes the concept of a judgment and discloses the criteria by which it is assessed whether a specific court decision falls into the aforementioned category. The second part of the article evaluates whether a default judgment, a court order and a court settlement fall into the category of a judgment under the Regulation. In the third part of this article, it is analyzed whether third-country court decisions recognized by Member States should be considered a judgment under the Regulation, and whether the EU principle of free movement of judgments applies to them.

This article uses the following legal methods that are common for such studies: analytical, descriptive, comparative, and historical.

1. The Definition of a Judgment Under the Brussels Ibis Regulation

The Brussels Convention defined a judgment as any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court (Article 25 of Brussels Convention). The same definition of a judgment was established in Article 32 of the Brussels I Regulation. Article 2(a) of the Regulation establishes that a judgment means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court. The same article also establishes that, for the purposes of Chapter III, a judgment includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation have jurisdiction as to the substance of the matter. This does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement. Thus, in the definition of a judgment, court decisions regarding the application of temporary protective measures are distinguished.

[4] Article 71(2)(b) of the Regulation establishes that, with a view to its uniform interpretation, paragraph 1 shall be applied in the following manner: judgments given in a Member State by a court in the exercise of jurisdiction provided for in a convention on a particular matter shall be recognised and enforced in the other Member States in accordance with this Regulation. According to Article 73(3) of the Regulation, this Regulation shall not affect the application of bilateral conventions and agreements between a third State and a Member State concluded before the date of entry into force of Regulation (EC) No 44/2001 which concern matters governed by this Regulation.

The Regulation establishes the rules of the free movement of court judgments, authentic documents and court settlements throughout the EU. Although the Regulation abolished exequatur, the grounds for non-recognition of court judgments, authentic documents and court settlements remained. The grounds for non-recognition of court decisions are regulated in Article 45 of the Regulation. The conditions for non-recognition of authentic documents and court settlements are set out in Articles 58 and 59 of the Regulation. Unlike court judgments, authentic documents and court settlements can only be non-recognized if such enforcement is manifestly contrary to public policy (*ordre public*) in the Member State addressed (see Articles 58(1) and 59 of the Regulation). Meanwhile, Article 45(1) of the Regulation establishes six grounds for non-recognition of a court judgment, including its manifest contradiction to public policy (*ordre public*) in the Member State addressed.

The different grounds for non-recognition applicable to judgments make it necessary to determine what judgments of the courts of Member States fall within the concept of a judgment under the Regulation. This is also determined by the differences in the procedural laws of Member States, which lead to different guarantees of the right to a fair trial in such processes. If a judgment of the court of a Member State does not fall within the concept of a judgment defined in the Regulation, the principle of free movement of judgments is not applicable for such a judgment, and the evaluation of the grounds for non-recognition of the decision also becomes irrelevant. Thus, it is important to apply the concept of a judgment set out in the Regulation in a uniform manner that truly achieves the goals of the Regulation.

In essence, the definition of a judgment in Article 2(a) of the Regulation is similar to the concept of a judgment in the previous regulation and the Brussels Convention. The only new wording in this definition is related to the provisional and protective measures which can be recognized and enforced under the Regulation. Thus, the notion of a judgment must, in general, be understood in the same way as under the Brussels I Regulation and the Brussels Convention (Dickinson & Lein, 2015, p. 94), and the case law of the Court of Justice of the EU (hereinafter– the CJEU) interpreting the Brussels Convention and Brussels I Regulation remains relevant.

Although the Regulation also uses an exemplary list of documents that fall into this category when defining the concept of a judgment, the list provided in the Regulation, like its predecessors, is not exhaustive. In the absence of an exhaustive list of documents, the question arises as to the interpretation of the mentioned concept and the criteria by which it is to be assessed whether a specific document of the court of a Member State falls under the concept of a judgment under the Regulation.

The definition of a judgment in the Regulation stipulates that it is an autonomous EU law concept. Thus, the notion of a judgment shall be interpreted not according to the national laws on civil procedure in individual Member States, but the goals and objectives of the Regulation. This definition of a judgment serves two purposes.

Firstly, it gives a general definition of judgments which benefit from the principle of free movement of decisions (Dickinson & Lein, 2015, p. 93). This definition shall be interpreted broadly. A restrictive interpretation of the concept of a judgment would be incompatible with the system established by Articles 39, 45 and 46 of the Regulation, which provides for the automatic enforcement of judgments and rules out the possibility of reviewing the jurisdiction of the courts of the Member State of origin by the courts of the Member State in which recognition is sought (*Gothaer Allgemeine Versicherung and Others*, 2012, para. 31; *J v. H Limited*, 2022, para. 31).

Secondly, it concerns the application of special procedural interim measures which are coupled with coercive actions to secure the smooth execution of the judgment. Although the previous regulations and the Regulation itself establish the concept of a judgment, the question of whether a particular decision falls within the definition of a judgment often arises, especially when dealing with issues of the non-recognition of such judgments.

The legal doctrine distinguishes three basic conditions according to which it must be assessed whether a specific decision falls within the concept of a judgment in the context of the Regulation. The decision must be: i) a judgment; ii) issued from a court or Tribunal; iii) of a Member State (Dickinson & Lein, 2015, p. 94). The requirement for a certain decision to be a judgment means that the decision must derive sovereign power from the State to settle the dispute in the society. Nevertheless, these criteria do not exactly answer the question of which judgments of the Member States fall under the concept of a judgment. For instance, do they cover judgments made in non-adversarial proceedings, such as proceedings for the issuance of a payment order?

The Regulation does not explicitly require that a judgment should be rendered in adversarial civil proceedings, in which both parties would have the right to submit arguments, contest the arguments of the other party, and provide an assessment of the evidence. The right to a fair trial, which derives from Article 6 of the European Convention on Human Rights, establishes that the adversarial principle and the principle of equality of arms, which are closely linked, are fundamental components of the concept of a fair hearing within the meaning of Article 6 (1) of the Convention. They require a "'fair balance' between the parties: each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent or opponents" (*Regner v. the Czech Republic*, 2017, para. 146). The Regulation also emphasizes that in cross-border civil proceedings, including the recognition and enforcement of a judgment, the procedural guarantees of the right to a fair trial shall be ensured (Recital 38 of the Regulation). Thus, one may argue that the requirement for adversarial civil proceedings in the courts of the State of origin is a fundamental aspect for a proper exercise of the right to a fair trial.

The case law of the CJEU shows that a necessary requirement for a judgment to be qualified as a judgment under the Regulation is that it was rendered in adversarial civil proceedings. Pursuant to the relevant case law, the following judgment-defining criteria can be distinguished: i) it is rendered in the course of adversarial process; ii) it is rendered by the judicial authority in the exercise of the powers granted to it; iii) the decision is given by the court of a Member State; and iv) the decision is enforceable in the Member State of origin. An additional requirement applies to provisional, including protective, measures: the decision on their application must have been made by a court that has jurisdiction to resolve the dispute on its merits. It could be argued that this follows from the requirement that the judgment be made in an adversarial process. However, in terms of the effectiveness of the application of temporary protective measures, this requirement can be seen as essentially redundant.

As can be seen, the CJEU practice in defining a judgment under the Regulation focuses on categories such as adversarial proceedings and enforceability.

The requirement that a decision was made in adversarial proceedings was confirmed in the case of *Denilauler v. SNC Couchet Frères*, where the question arose as to whether a court decision on the application of interim measures made without informing the other party about the process or serving that decision to the defendant is considered as a judgment within the meaning of the Brussels Convention. The Court found that a decision authorizing provisional or protective measures which are delivered without the party against which they are directed having been summoned to appear and which are intended to be enforced without prior service does not fall under the notion of a judgment under the Brussels Convention (*Bernard Denilauler v. SNC Couchet Frères*, 1980, para. 18).

The CJEU held that the all the provisions of the Brussels Convention express the intention to ensure that, within the scope of the objectives of the Convention, proceedings leading to the delivery of judicial decisions take place in such a way that the rights of the defense are observed (*Bernard Denilauler v. SNC Couchet Frères*, 1980, para. 13). Although the Court noted that enforcement proceedings may be unilateral, the fact that in the State of origin both parties have either stated their case or had the opportunity to do so is one of the guarantees justified by the enforcement procedure of the Brussels Convention. This conclusion allows it to be argued that one of the requirements for a decision to be a judgment in the context of the Regulation is that the process in which it was rendered was adversarial. It can be considered that the process was adversarial even if the process became one-sided only because the other party did not fulfil its procedural obligations, such as in cases of default judgment.[5]

However, in terms of the effectiveness of the application of temporary protective measures, this requirement can be seen as essentially redundant. In practice, the requirement that the process was adversarial – especially considering provisional, including protective, measures – gives rise to some questions. Firstly, provisional measures that may be ordered by a court or tribunal without the defendant being summoned to appear are not considered a judgment under the Regulation, unless the judgment containing the measure is served on the

[5] In accordance with recital 34 of the Regulation, the Regulation repeals and replaces the Brussels I Regulation, which itself replaced the Brussels Convention. Thus, the CJEU's interpretations of the provisions of the latter legal instruments also apply to the Regulation whenever those provisions may be regarded as equivalent (see *BMA Nederland*, 2022, para. 27). In *J v. H Limited*, the CJEU stated that Article 32 of the Brussels I Regulation is the provisional equivalent to Article 2(a) of the Regulation (see *J v. H Limited*, 2022, para. 24).

defendant prior to enforcement. This means that *ex parte* judgments on provisional, including protective, measures fall outside the scope of the Regulation. However, the application of *ex parte* provisional, including protective, measures becomes ineffective in cross-border civil proceedings because such measures cannot be directly enforced in another Member State. Moreover, if the defendant is informed about the question being considered by the court regarding the application of provisional, including protective, measures, there is a threat that they may transfer or delay the available assets before the application of provisional, including protective, measures and make those measures ineffective.

In the opinion of the authors, this situation contradicts the purpose of interim measures, which is to ensure the execution of a future court decision when there is a real threat that if these measures are not taken then the court decision may not be executed due to the dishonest actions of the other party. Recognizing judgments on the application of temporary protection measures as judgments in the context of the Regulation only when the court notifies the other party before their application, and thus ostensibly ensures an adversarial process, may make the purpose of this institute unfulfillable, as the debtor can hide, sell or otherwise transfer their assets before the application of interim measures.

It can be argued that the application of temporary protection measures without notifying the defendant of their application may cause negative consequences for them in another Member State, especially when such a decision is challenged in the Member State of origin. However, this argument should not be emphasized when it comes to temporary protection measures. This is because informing the defendant of the intention to impose interim measures may result in the defendant transferring or otherwise encumbering the assets to be seized and rendering the imposition of interim measures substantially ineffective. It can be assumed that the practice of the CJEU could be relevant in this aspect, which explains that if a decision becomes unenforceable in the Member State where it was adopted, it cannot be recognized as enforceable in the country where its enforcement is requested (*Prism Investments BV v. Jaap Anne van der Meer*, 2011, para. 38). The enforceability of the judgment in question in the Member State of origin is a precondition for its enforcement in the Member State in which enforcement is sought (para. 23).

These CJEU interpretations were given when interpreting the Brussels Convention and the Brussels I Regulation, when exequatur had not yet been abolished in the EU. Nevertheless, these interpretations are relevant and applicable in the interpretation of the Regulation. This means that if a court decision applies temporary protective measures without notifying the other party of their application, which is later annulled after the defendant contests their application, this should be an independent basis for not enforcing such a decision because it is no longer enforceable in the Member State of origin. However, the mere fact that temporary protective measures were applied without prior notification and without giving the other party the opportunity to comment on their application should not be a reason not to consider such a decision as a judgment in the context of the Regulation.

Secondly, considering that certain court decisions would be rendered in adversarial proceedings, the question arises as to how this requirement should be understood in practice. Should the adversarial nature of the court proceedings be assessed according to the actual circumstances of the specific situation, or according to the legal assumption of adversarial proceedings without considering the specific circumstances? This issue is further analyzed in the second part of this article when assessing the recognition of specific court documents as judgments under the Regulation.

To sum up, it can be stated that the concept of a judgment should be interpreted broadly, but when assessing whether a specific court decision is to be considered a judgment within the meaning of the Regulation, it must be assessed whether the specific decision is made: i) in an adversarial process; ii) by the judicial authority in the exercise of the powers granted to it; iii) by the court of a Member State; and iv) in a manner enforceable in the Member State of origin. For a decision on provisional, including protective, measures, it must be determined that such a decision was made by a court that has jurisdiction to resolve the dispute on its merits and their application must be notified to the other party, giving it the opportunity to speak on the application of such measures. Thus, it can be concluded that one of the essential elements of the concept of a judgment is that it was made in an adversarial proceeding, which is analyzed in the next part of this article.

2. Certain Types of Decisions of the Courts of Member States

As already mentioned, the Regulation defines the category of a judgment broadly. Although the Regulation harmonizes certain issues of international civil procedure, differences in the legal regulation of Member States often raise questions as to whether a specific court decision of a Member State falls into the category of a judgment. The requirement that a specific court decision was made in an adversarial process raises questions about decisions such as default judgments, court orders and court settlements.

2.1. A default judgment as a judgment

In the most general sense, a default judgment is a court decision issued in favor of the plaintiff when the defendant fails to respond to a court summons or does not appear in court. The specifics of default judgment requirements and rulings can vary across jurisdictions. For example, in Lithuania a default judgment may be made in cases where one of the parties, who has been duly notified of the time and place of the hearing, does not appear at the preliminary or court hearing; a request to consider the case in their absence has not been received from them; and the attending party requests a decision by default. This can also occur when a party does not submit a response to a claim or produce a preparatory document within the set deadline, and when the other party has requested a default judgment in its response to the claim or preparatory document (see Article 285(1) of the Civil Procedure Code of Lithuania, 2002). The possibility of adopting a default judgment is not a legal sanction for a party who has failed to appear at a court hearing or has failed to file a defense, but only one of the measures to implement the principle of procedural fairness. Therefore, the aim of ensuring procedural fairness by obliging the parties to civil proceedings to take care of the expeditious hearing of the case and by providing for the consequences of non-compliance with that obligation, one of which is the possibility of adopting a default judgment, should be reconciled with the fundamental aims of the civil procedure – the just hearing of the case and the principle of judicial defense (Ruling of the Supreme Court of Lithuania of 27 April 2005 in civil case No. 3K-3-167/2005).

In terms of scope, this means that the court must formally assess the factual elements submitted by the applicant and the factual elements that may be submitted by the other parties to the proceedings. In granting a default judgment, the court shall, within the scope of the investigation, assess all the evidence in the case, but shall not be obliged to call for further evidence. If the court considers that the circumstances of the case are complex and contradictory, so that it is not possible for it to rule on the substance of the case by granting or rejecting the claim by default, it shall not be obliged to give a default judgment and may deal with the case in the normal way in the event of the failure to appear of part or the majority of the persons involved in the case. An ordinary hearing would involve an examination of the substance of the case, rather than a formal examination of the case, which, in terms of its scope, means that evidence may be required to overcome any fragmentation, contradictions, inaccuracies or other fundamental defects in the evidence in the case or any lack of clarity of the facts of the case which would prevent the court from reaching a decision on the merits. A formal inquiry into evidence does not involve a full examination of the facts of the case, as witnesses are not examined in court and evidence is not disclosed. The court takes note of the content of the means of evidence and assesses them in order to confirm what each person claims (Ruling of the Supreme Court of Lithuania of 8 April 2008 in civil case No. 3K-3-227/2008).

As mentioned, the CJEU in practice has not provided an answer as to how the adversarial process should be understood (*de facto* or *de jure*). This question is especially evident when we talk about default judgments.

Some authors also argue that whether a decision will be considered as a judgment under the Regulation also depends on whether the court assesses the validity of the claim (Magnus & Mankowski, 2007, p. 786). On the one hand, when a court makes a judgment regarding the adversarial process (after hearing all the parties), this can be equated to a part of the adversarial process. On the other hand, it can be an exercise of the powers of judicial authority (assessing the validity of a claim regardless of whether the other party has presented its arguments).

This question arose in the case of *Gambazzi v. DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company*, where the CJEU had to assess whether the default judgment made by the United Kingdom courts was a judgment in the sense of the Brussels Convention. The court held that judgments made *in absentia* fall within the scope of the Brussels Convention, as follows from Article 27(2) of the Convention, which refers expressly to default of appearance by the defendant (*Gambazzi v. DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company*, 2009,

para. 24). Nevertheless, the CJEU did not clearly indicate whether all decisions made *in absentia* should be considered as a judgment – i.e., whether this was because of their form or the procedure *de jure*.

The question of whether judgments of the courts of the United Kingdom[6] made *in absentia* can be considered as judgments is discussed in the legal doctrine. According to some authors, judgments of the courts of the United Kingdom rendered *in absentia* cannot be considered as judgments in the scope of Brussels Convention because, in the event of a default judgment, the court does not check the validity of the claim (Magnus & Mankowski, 2007, p. 788). In the opinion of the authors, the mere fact that one of the grounds for the non-recognition of a court decision is that it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings in sufficient time to enable them to arrange their defense (p. 789), is not enough to make such a conclusion. A judgment *in absentia* means that the court did not assess in essence the subject matter of the case, nor the evidence and the position of the defendant. The lack of a right to a fair trial (in adversarial proceedings) may be a strong indicator that the defendant was not provided with an effective right to defense in the State of origin, and the extension of the legal effects of such a judgment in another Member State may hamper the requirements of the right to a fair trial.

In the practice of Lithuanian courts, it is recognized that a default judgment can be adopted if the defendant does not submit a response to a claim within the set deadline without justifiable reason, and if there is a request by the plaintiff to accept a judgment by default. However, the adoption of a court decision *in absentia* is not a legal sanction for the party that did not submit the relevant procedural document or did not participate in the court session, but is only one of the means to implement the principle of concentration of the process. Therefore, it must be compatible with the main goal of the civil process – the fair trial of the case (Ruling of the Supreme Court of Lithuania of 2012 February 13 in civil case No. 3K-3-24/2012; Ruling of the Supreme Court of Lithuania of 2013 April 26 in civil case No. 3K-3-251/2013; Ruling of the Supreme Court of Lithuania of 2018 April 4 in civil case No. e3K-3-123-421/2018). According to this, a default judgment can be rendered in cases where the defendant is properly informed about the court proceedings, but behaves passively and does not appear before the court. Thus, a person may be properly informed about the court proceedings initiated against them, but voluntarily refuse to appear before the court.

There is no doubt that the evaluation of the validity of a claim by the court is one of the expressions of the adversarial process. However, the question may arise as to whether it should be assessed whether the decision was made in an adversarial process. Should this be associated with procedural possibilities to make a judgment in an adversarial process, despite the fact that one of the parties can refuse such a process by its actions, or should it be associated with a specific case, the specific circumstances of the case, and the actions of the parties?

It can be assumed that when deciding whether a default judgment was made in an adversarial process, the essential significance is not whether the process between the parties to the dispute was actually adversarial, but that the judgment was made in a process in which the adversarial principle applies – i.e., it is important that the process is adversarial, despite the fact that one of the parties has refused the adversarial process and acted passively. This conclusion also follows from the grounds for non-recognition established in the Regulation, one of which states that the recognition of a judgment shall be refused where the judgment was given in default of appearance if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable them to arrange for their defense, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for them to do so (see Article 45(1)(b) of the Regulation).

The opposite interpretation would be incompatible with the principle of the right to a fair trial, as the circumstances where a specific decision could be enforced in another Member State could depend on the actions of the defendant. This would also be incompatible with an effective right to judicial protection.

If a person has not been properly informed of court proceedings, such a person should be given the opportunity to request a review of the decision in the Member State of origin of the default judgment, otherwise this may lead

[6] Although the Regulation does not apply to the United Kingdom in post-Brexit cases, this case is relevant to the article's inquiry as an exemplary case for revealing the content of the concept of a judgment.

to the non-recognition of such a judgment under Article 45(b) of the Regulation. However, this does not mean that a default judgment does not fall under the category of a judgment under the Regulation.

2.2. A court order as a judgment

A court order is one of the model documents specified in the concept of an *expressis verbis* decision which fall within the content of this concept. Therefore, it can be stated that the court order falls within the category of a judgment under the Regulation.

That the court order falls into the category of a judgment is also recognized in the practice of the CJEU. In *J v. H Limited*, the CJEU noted that if a court of a Member State were able to deny that an order for payment – which a court of another Member State has made on the basis of final judgments delivered in a third State – was a judgment, this would reduce the importance of the principle of mutual trust between the courts of Member States with regard to the enforcement of judgments (*J v. H Limited*, 2022, para. 29–30). The CJEU noted that an order for payment made by a court of a Member State on the basis of final judgments delivered in a third State constitutes a judgment, and is enforceable in other Member States if it was made at the end of adversarial proceedings in the Member State of origin and was declared to be enforceable in that Member State.

As can be seen, the requirement of competition also applies to court orders. However, CJEU case law does not reveal whether the limits of the adversarial process also apply to court orders. The question of the validity of the claim is also important when deciding whether a court order issued in summary proceedings, in which the court does not verify the validity of the claim, should be considered as a judgment under the Regulation.

In legal doctrine, the suggestion that EU lawmakers should exclude payment orders issued under national procedural law from the scope of the Regulation is provided (Hess et al., 2022, pp. 7–8). This is based on the argument that such payment orders are often given in a procedure that does not satisfy the minimum requirements of a fair trial in cross-border settings (pp. 7–8).

For example, in Lithuania the court order procedure (which is essentially analogous to the European payment order procedure) can be issued under the Code of Civil Procedure of Lithuania (2002). When deciding on the issues of accepting a claim and issuing a court order, the court does not check the validity of the creditor's claim (see Articles 433(3) and 435(3)). In such a procedure, the entry into force of such an order and its enforceability is determined by the debtor's activity and will. If the debtor is passive and does not object to the issued court payment order within the time limit set in the law, the court order takes effect and becomes enforceable. It should be noted that in such a process the court does not assess the validity of the creditor's claim, and the debtor's objections may also be unmotivated. Therefore, the question arises as to whether the fact that the debtor has the opportunity to object to the issued court order allows us to conclude that such a process is adversarial.

Summary proceedings for a payment order are also regulated in the Articles 688–703d of the Code of Civil Procedure of Germany (2005). According to Article 699(1), if the debtor does not object to the order in time, the creditor is entitled to apply for a writ of execution. The writ of execution is equivalent to a default judgment declared provisionally enforceable (Article 700(1)).

In the authors' view, the above-mentioned proposal to exclude court orders from the definition of a judgment in the Regulation is controversial and raises certain risks. First of all, a final court order, for example in Lithuania and Germany, is equivalent to a court judgment in terms of the effects it produces[7] – i.e., once a court has issued a court order and it has entered into force, a dispute between the same parties, on the same cause of action, and concerning the same cause of action and subject matter, can no longer be re-litigated in court due to the rule of the identity of proceedings. Removing court orders from the definition of a judgment may adversely affect the

[7] Article 436(4) of the Code of Civil Procedure of Lithuania stipulates that a court order must comply with the requirements for an enforcement document. Pursuant to paragraph 7 of the same Article, the court order shall become final if the debtor does not object to the creditor's application within the time limit set by law. Pursuant to Article 137(2)(4), the court shall refuse to accept an action if there is a final judgment of a court or an arbitral tribunal rendered in respect of a dispute between the same parties, concerning the same subject matter and on the same grounds, or if the court's order accepts the plaintiff's withdrawal of their claim or approves the parties' amicable settlement. On the same grounds, the court shall refuse to accept the creditor's application for a court order pursuant to Article 435(2).

right to an effective judicial remedy, which also includes enforcement proceedings (*Hornsby v. Greece*, 1997, para. 40). In practice, it is possible that at the time when the court order is issued, there may not yet be a need to enforce such an order in another EU Member State because, for example, the defendant does move to another EU Member State after the court order is issued. Therefore, removing court orders from the definition of a judgment would lead to a situation where creditors' claims approved by the court in such a way would fall outside the scope of the Regulation, which would mean that the principle of free movement of judgments in the EU would not be applicable to such court documents. This is particularly important where the parties have an agreement on the handling of disputes in the country concerned. Therefore, the exclusion of court orders from the definition of a judgment in the Regulation could lead to intolerable situations where the debtor could avoid enforcing a creditor's claim confirmed by a court order.

The possibility for the debtor to submit unreasoned objections to the order issued should, in the authors' view, also be considered as a sufficient indication of an adversarial process.

Thus, the authors believe that court orders should remain within the concept of a judgment and that the guarantee of the right to a fair trial in such proceedings could be challenged through grounds for the non-recognition of such judgments, including those contrary to public policy. Whether the proceedings in which the order was issued were adversarial should be assessed in terms of the scope of the procedural safeguards provided for in national provisions in such proceedings and the ability of the other party to avail itself of them, and not in terms of whether the debtor actually availed itself of those safeguards. Thus, the debtor's ability to object to the issued payment should be considered an adversarial process.

2.3. A court settlement as a judgment

A court settlement is defined in Article 2(b) of the Regulation as a settlement which has been approved by a court of a Member State or concluded before a court of a Member State in the course of proceedings. This means that court settlements are excluded from the concept of a judgment and do not fall into it.

The latest sources of legal doctrine suggest that judgments and settlements need better delineation in the Regulation (Hess et al., 2022, p. 5). It is indicated that settlements are often preferred to actual judgments, but their binding effect requires formal approval by the court. Such court-approved settlements should be differentiated from purely contractual settlements and treated as judgments (pp. 5–6). Thus, in a discussion held at the Conference on the Recast of the Regulation at the Max Plank Institute in Luxemburg on 9 September 2022, it was proposed to the European Union law maker to clarify that the approval of a settlement by a court transforms it into a judgment under Article 2(a) of the Regulation (pp. 5–6).

The authors believe that this suggestion is reasonable because a settlement approved by a court in most countries acquires the same force as a court judgment, as well as the power of *res judicata*. Therefore, a dispute resolved by a settlement approved by a court can no longer be re-settled in court. Not treating a settlement as a court judgment can have a negative impact in disputes with an international element. The parties may not be interested in resolving the dispute by making a court settlement, because if the parties conclude such a settlement, the claims arising from the same dispute can be filed again in the courts of another state.

The case of *Solo Kleinmotoren GmbH v. Emilio Boch* (1994) is a perfect example of this. In this case, Mr. Boch sued Solo Kleinmotoren (a German company) in the Milan District Court for breach of a supply contract. The Court of Appeal of Milan ordered Solo Kleinmotoren to pay an amount of over 48,000,000 LIT, with interest, to Mr. Boch. On Mr. Boch's application, an order for enforcement was issued in Germany in accordance with the provisions of the Brussels Convention. Following an appeal brought by Solo Kleinmotoren against that enforcement order, the parties concluded a settlement in the Higher Regional Court of Stuttgart. The parties agreed that all the parties' claims against one another arising from their business relationship were thereby resolved. Mr. Boch undertook not to assert the claims forming the subject-matter of the present legal dispute against Solo Italiana (a company owned by Solo Kleinmotoren). However, the Court of Appeal of Bologna held that Solo Kleinmotoren and Solo Italiana were jointly liable for misuse of the Solo trade name and acts of unfair competition prejudicial to Mr. Boch, and ordered the two defendant companies to jointly pay him damages. The CJEU stated that an enforceable settlement reached before a court of the State in which recognition is sought in order to settle

legal proceedings which are in progress does not constitute a judgment, within the meaning of that provision, "given in a dispute between the same parties in the State in which recognition is sought," which, under the Convention, may preclude recognition and enforcement of a judgment given in another Member State. In the authors' view, this position of the CJEU is debatable and should not apply in the context of the Regulation for the following reasons.

In Lithuania, the parties can settle a legal dispute, prevent a future legal dispute, solve the issue of execution of a court judgment or other disputed issues by means of a settlement (Article 6.983 of the Civil Code of Lithuania, 2000). In civil proceedings, the parties at any stage of the proceedings can end the case with a settlement, if it can be concluded considering the nature of the dispute (Article 51(1) of Civil Procedure Code of Lithuania, 2002). As can be seen, the parties are free to conclude a settlement through mutual concessions, which would resolve the dispute between the parties. Otherwise, the internationally recognized principle of a contract binding in contract law is negated.

In opinion of the authors, a settlement approved by a court or tribunal decision should be considered as a judgment due to the essential feature of such an agreement – the ability to enforce it by means of enforcement. In contrast, an ordinary (out of court) settlement between the parties cannot be enforced without a court decision approving such a settlement.

Thus, a court decision to approve a settlement agreement concluded by the parties should not be distinguished in the Regulation from the concept of a judgment, as such a court settlement has the same consequences for the parties as a court judgment on the merits of the dispute. In addition, before approving the settlement agreement, the court will assess its compliance with the mandatory norms of the law, public interest, etc. This essentially corresponds to the court's assessment of the validity of the claim. The fact that there is no clear conflicting interest of the parties during the conclusion of the settlement agreement from which the adversarial nature of the process follows should not lead the court to not classify the settlement agreement as a decision. As already mentioned, the question of whether the process in which the decision was made was adversarial should not be understood as a requirement to have an adversarial process in a specific case (*de facto*), but should be associated with the existence of legal measures that created the conditions for the adversarial process to take place (*de jure*).

3. Member States' Judgments Recognizing the Court Decisions of Third States

The qualification of a judgment of an EU Member State which recognizes a judgment rendered by the court of a third State raises problematic issues. What is the legal power of a decision rendered by the court of an EU Member State which recognizes and allows the enforcement of a judgment rendered in the court of a third State? Should only the judgments of courts of EU Member States be considered judgments under the Regulation? The answers to these questions depend on whether the judgment of a Member State to recognize a court judgment made in third State acquires the principle of free movement of judgments and should also enjoy the principle of mutual trust.

At first glance, one may argue that the judgments of the courts of EU Member States regarding the recognition of the decisions of the courts of third States do not go beyond the territory of the State in which the court makes the judgment of recognition. However, the relevant case law of the CJEU, such as *J v. H Limited*, reveals that the answer to this question raises problematic issues.

In *Owens Bank Ltd v. Fulvio Bracco and Bracco Industria Chimica SpA*, the CJEU dealt with the question of whether the Brussels Convention applies to proceedings concerning the recognition and enforcement of judgments given in civil and commercial matters in non-Member States. To justify the application of the Brussels Convention in such a case, the defendants claimed that such proceedings involve civil and commercial matters. They argued that a distinction should be made between an order for enforcement *simpliciter* and a decision of a court of a Member State on an issue arising in proceedings to enforce a judgment given in a non-Member State, such as the question of whether the judgment in question was obtained by fraud. Decisions of the second type, they argued, are independent of the enforcement proceedings. The main argument in this case was to preclude as far as possible a situation where a Member State refuses to recognize a decision of another Member State on the ground that it

is irreconcilable with a decision given between the same parties in the Member State in which recognition is sought (*Owens Bank Ltd v. Fulvio Bracco and Bracco Industria Chimica SpA*, 1994, para. 29).

As can be seen, the CJEU analyzed the problems of free movement of decisions on the recognition of the judgments of courts from third States and whether a such situation is compatible with the objectives of the Brussels Convention. This also leads to another question: What is the legal power of the decision of a court of a Member State to not recognize a court decision rendered in a third State – for example, on the grounds of the violation of public order?

The CJEU found that the essential purpose of a decision given by a court of a Member State on the recognition of a judgment of a court of a third State is to determine whether, under the law of the Member State in which recognition is sought, the grounds for non-recognition exist. It is assumed that such a decision is not separate from the question of recognition and enforcement (*Owens Bank Ltd v. Fulvio Bracco and Bracco Industria Chimica SpA*, 1994, para. 29).

The scope and application of the Regulation suggest that the grounds for non-recognition provided for in Article 45 of the Regulation are to be applied only to judgments rendered by the courts of Member States. These grounds shall not be applicable to judgments on the recognition of a judgment of a court rendered by a court of a third State. The answer to the question of whether the Regulation is applicable in such a case depends on whether the enforcement action is based on a Member State's court judgment rendered on the merits of the dispute. A judgment which resolves the issue of the recognition of a judgment given by a court of a third State should not be considered a decision on the merits of the dispute. It is more likely to be considered a decision of a procedural nature, which depends on the possibility of carrying out enforcement actions in the territory of the Member State deciding the issue of recognition and granting the power of *res judicata* in the territory of the third State.

However, the recent decisions of the CJEU in *J v. H Limited* raise the question of whether such an interpretation is correct. The crux of the matter in this case is whether a payment order issued by a court of a Member State, which was based on a judgment of a court of a third State, falls within the scope of the Regulation (*J v. H Limited*, 2022).

In this case, the CJEU dealt with exceptional factual circumstances on the issue of the recognition of a payment order of a former Member State (UK) court. Firstly, Jordanian courts had ordered the borrower, J. S., to reimburse a loan to HSBC Bank Middle East Limited, which presented this Jordanian judgment to the English High Court. The UK court rendered a so-called merger decision (this type of judgment is not a decision on the recognition of a foreign judgment, but a new judgment on the merits, although based on the foreign judgment's payment order). After that, HSBC Bank Middle East Limited tried to enforce the judgment of the English High Court in Austria under the Regulation. J. S. stated that a judgment that is based on a foreign judgment should not be enforced in another EU Member State according to the rules of Chapter III of the Regulation in order not to circumvent the Member State's rules on the recognition and enforcement of third-State judgments.

In the case of *Owens Bank Ltd v. Fulvio Bracco and Bracco Industria Chimica SpA*, the CJEU decided that decisions of the courts of Member States regarding the recognition and enforcement of judgments of third States do not fall within the scope of the Brussels Convention. However, in the case of *J v. H Limited*, the CJEU concluded that a payment order issued by a court of a Member State on the basis of a third-State court judgment falls within the concept of a judgment, as it is understood according to the Regulation. The court took the position that these conclusions do not negate the fact that, in essence, the above-mentioned order was issued in compliance with court decisions issued in a third State, which are not enforceable in Member States (*J v. H Limited*, 2022, para. 33).

In the opinion of the CJEU (in *J v. H Limited*, abovementioned), mutual trust would be undermined if a court of a Member State were able to deny that an order for payment – which a court of another Member State has made on the basis of final judgments delivered in a third State – was a judgment. According to the CJEU, a restrictive interpretation of the concept of a judgment would have the effect of creating a category of acts adopted by courts which, although not included among the exceptions exhaustively listed in Article 45 of the Regulation, could not fall within that concept of a judgment, and which the courts of the other Member States would therefore not be

required to enforce. Such a category of decisions would be incompatible with the system established by Articles 39, 45 and 46 of the Regulation, which provides for the automatic enforcement of judgments and rules out the possibility of the review of the jurisdiction of the courts of the Member State of origin by the courts of the Member State in which recognition is sought (*J v. H Limited*, 2022, para. 30–31).

However, the question arises as to whether this decision did not unreasonably expand the concept of a court judgment, thereby essentially giving the principle of free movement of decisions to decisions rendered by third States. Although in this case there is no doubt that the payment order issued by the former Member State (UK) became an enforceable court decision, such a situation essentially makes it possible to avoid the recognition of third-State court decisions in each Member State separately according to the relevant procedural rules and grounds for non-recognition. It should be noted that the CJEU followed a rather unpragmatic path in this case, indicating that the scope of application of the Regulation is limited only to the jurisdiction of the courts of the Member States and the recognition and enforcement of the decisions made by them, and there are no provisions governing the issues of the decisions made by the courts of third States. Therefore, the Member States are in principle free to determine the conditions and procedures enabling national courts to deal with disputes referred to them. In the absence of harmonization at the EU level, the courts of one Member State, following the applicable national law, can legally make enforceable judgments based on third States' judgments, although in other Member States the requirement of exequatur may continue to apply when considering the same court judgments.

Nevertheless, the CJEU emphasized that the recognition of such an order by a court decision, as understood under Article 2(a) of the Regulation, does not deprive the debtor of the right to object to the execution of this decision, based on one of the grounds for non-recognition mentioned in Article 45. Specifically, based on the public policy clause.

It should be noted that these arguments were criticized by scholars after the opinion of the Advocate General appeared in this case. According to G. Van Calster (2022), the application of the public policy clause in the above-mentioned case is a serious error in the scope of the Regulation and is not justified by arguments such as the need to apply a "safety valve" (fr. *soupape de sécurité*) to maintain the principle of mutual trust. According to him, in *Diageo Brands* the CJEU confirmed the narrow application of the grounds for refusing to recognize a court judgment based on the public policy clause. Allowing the non-recognition of the payment order adopted in the aforementioned case on the ground of opposition to public order would unreasonably extend the application of this clause (Van Calster, 2022).

The court involved in the non-recognition procedure should address objections related to the public policy of a decision made by a Member State. However, it should not handle the non-recognition of a decision made by a third State which served as the basis for a decision made by the court of a Member State. Consequently, doubts arise regarding the validity of the interpretation chosen by the CJEU, particularly concerning the use of public policy as a clause for non-recognition in this specific case.

This is also confirmed by the fact that the Austrian Supreme Court dismissed arguments based on public policy and stated that general considerations could not be regarded when assessing public policy (Judgment of the Supreme Court of Austria of 27 January 2022 in case No. 9 Ob 74/21d). Only the proceedings in question could give rise to public policy infringement – and in the case at hand, the court of first instance had found that the English High Court had given J. S. the opportunity to oppose the claims from the Jordanian judgment (Eichmüller, 2022).

According to Paul Lorenz Eichmüller, if Member States were to invoke their public policy too loosely, the decision of the CJEU would mean a step backwards rather than forwards in the uniform recognition and enforcement of judgments in the EU. *Ordre public* is not and should not be a reason for generally denying the recognition and enforcement of certain types of judgments instead of looking at the specific circumstances and the final outcomes of the individual case (Eichmüller, 2022).

To sum up, it can be concluded that the relevant case law of the CJEU regarding the enforcement of third-State judgments under the Regulation raises more questions than it answers. Therefore, it can be assumed that the Regulation requires, for the sake of clarity, appropriate provisions on the EU-wide enforcement of judgments

issued by third-State courts. This means that the Regulation should be amended in order to include such clarifying provisions. In opinion of the authors, the position of the CJEU in the case of *J v. H Limited* may be criticized because it enables Member States to establish rules favorable to third States, thereby making it possible to avoid the recognition of such decisions in each Member State separately according to international bilateral treaties or the rules of international civil procedure. This could have serious consequences for the mutual trust and recognition of court judgments in the EU – especially considering that in the analyzed case the English High Court explicitly stated that a foreign judgment for a definite sum, which is final and conclusive on the merits, is enforceable by claim, and is unimpeachable (as to the matters adjudicated on) for errors of law or fact (Eichmüller, 2022).

Conclusions

1. The concept of a judgment which is used in the Regulation should be interpreted broadly, and it must be assessed whether a specific decision is made: i) in an adversarial process; ii) by the judicial authority in the exercise of the powers granted to it; iii) by the court of a Member State; and iv) in a manner enforceable in the Member State of origin. In the authors' view, for a decision on provisional, including protective, measures it is necessary that such a decision was made by a court that has jurisdiction to resolve the dispute on its merits, and their application must be notified to the other party, giving it the opportunity to speak on the application of such measures. This would contribute to a more efficient use of interim measures and the development of the legal system in the EU.

2. In the authors' opinion, the requirement that a certain court decision is rendered in an adversarial procedure should be understood as a court process in which the adversarial principle applies (*de jure*) – it is not necessary that the process between the parties to the dispute was actually adversarial (*de facto*). This should mean that default judgments fall into the category of a judgment under the Regulation, despite the fact that the proceedings were not actually judicial. However, although an injunction is clearly defined in the definition of a judgment in the Regulation, due to the limited procedural guarantees in ensuring the right to a fair trial, default judgments should not be equated with a judgment under the Regulation due to the lack of an adversarial process and the court's limited ability to assess the merits of the claim. It is also worth considering whether court agreements should not be equated to the category of a judgment, considering the binding nature of such agreements and the resulting consequences in Member States.

3. It is assumed that a court order should not be excluded from the definition of a judgment in the Regulation. Otherwise, this would mean that the Regulation would not apply to court orders, which would have a negative impact on the right to an effective and efficient judicial remedy for the violation of rights by allowing debtors to avoid the enforcement of a creditor's claim in other Member States.

4. The authors consider that the decisions of a court of a Member State on the recognition of a judgment of a court of a third State cannot be equated to the category of a court judgment under the Regulation, and do not acquire the principle of free movement as they resolve a question of a procedural nature and not a dispute in substance. The same principle should be applied to situations where one Member State has issued an enforceable document, such as a payment order, based on another third State. This is because when dealing with the issue of non-recognition of such judgments under the public order clause, the evaluation of a judgment of a court of a third State does not fall under the subject of such a procedure.

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THE IMPORTANCE OF WELL-ADJUSTED PUBLIC REGULATION AND THE IMPACT OF DEFICIENCIES ON THE FUNCTIONING OF THE STATE IN CRISIS SITUATIONS – THE EXAMPLE OF THE CZECH REPUBLIC IN THE EUROPEAN CONSTITUTIONAL CONTEXT

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Abstract. This article is dedicated to the importance of well-adjusted public regulation and the impact of deficiencies on the functioning of the state in crisis situations, using the example of the Czech Republic. The present article focuses on those parts of the constitutional system of the Czech Republic (in comparison with other comparable countries) which regulate special procedures in ensuring the security of the state and the fulfilment of international obligations, for example in the field of common defence against attack. Some of the provisions analysed have not yet been applied, while others have and there is sufficient evidence from their daily application and practice. The first group of cases includes the procedure for declaring a state of war, which is a legal condition for the application of a number of measures necessary for the defence of the state and the support of treaty allies. The second group includes in particular the issue of sending the Czech Armed Forces abroad, which is closely related to the Czech Republic's obligations towards NATO and its VJTF forces. The constitutional procedure for the approval of flights of foreign armed forces over the territory of the Czech Republic is not feasible in its current form. A legal comparison shows the importance of balanced constitutional and legal regulation on the one hand. On the other hand, the potential problems that, under the rule of law, inappropriate legal regulation can bring not only for the state itself, but also for its partners in the international community are highlighted. The article presents, through comparative legal methods, the notion that that although most European states with a parliamentary form of government are rather restrained players in the use of armed forces outside their territory, a significant proportion of them do give the executive the possibility to dispose of these armed forces. This can only occur if necessary, with subsequent parliamentary control, and not under the full control of the parliament through its consent given in advance.
Possible proposals to address the problems described are also offered. The analysis shows that, in comparison with other states with similar sizes, power, history and needs, political representation in the Czech Republic is in a kind of mental trap. This could even complicate the fulfilment not only of the security interests of the state, but also of its obligations to its partners in the international community.

Keywords: Constitution, Czech Republic, security, NATO, VJTF, flights, transfers, armed forces.

Introduction

One of the main and traditional tasks of the state is to provide security for its population. This issue is more pronounced in times of acute security threats, such as those we now face. Every state performs a security function, and it can be said that this is one of the reasons leading to the establishment of states (Jellinek, 1906; Maršálek, 2018). Security can be understood as the absence of threat. Threats can be of many kinds, and the concept of security can be understood in both a broader and narrower sense.

In a broader sense, security would also involve ensuring, for example, a socially or environmentally safe area in which the individual is not exposed to distress or threats to life and health from a polluted environment (Víšek et al., 2023).

In a narrower sense, the concept of security is often interpreted as relating to ensuring the undisturbed existence of the state, including the preservation of its sovereignty and territorial integrity, together with the stability of the existing political regime. These are the basic prerequisites for the functionality of the state and the fulfilment of

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its other tasks, which may include ensuring public order and security within the state, including the protection of the life, health and property of its inhabitants.

Usually, matters of ensuring the defence of the state are enshrined to varying degrees at the constitutional level. The conceptual need to enshrine and limit defence issues at the constitutional level emerged with the onset of constitutionalism. This line of legal philosophy is based on the premise of individual liberty, with the state being established to protect it. Therefore, the state is supposed to be limited and controlled to prevent the abuse of power and, above all, the deprivation of the freedom of the population. Then, of course, there must necessarily be an answer to the problem of how to provide sufficient instruments to maintain and restore public order and security even in emergency situations, on the one hand, and how to ensure that a temporary emergency does not become permanent, on the other. In other words, it is crucial that the freedoms hard won under a monarch, often absolutist, should not be removed again in the name of the need to restore the security of the state. For this reason, there is a move towards constitutional regulation (Garlicki, 2000; Lee, 2009), parliamentary control and the proportional use of power – even in cases of the defence of the state. Regarding proportionality, international obligations are expressed, for example, in Article 4(1) of the 1966 UN International Covenant on Civil and Political Rights, which speaks of "the extent required by the exigencies of the situation". Similarly, the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) stipulates, in Article 15, provisions "to the extent strictly required by the exigencies of the situation".

A definition at the constitutional rather than statutory level implies a certain stabilization of the rules if this definition is regulated by a rigid constitution. At the same time, this means that constitutional rules such as guarantees of human rights and freedoms or rules of separation and control of powers are suspended by a rule of the same legal force as the one under which they were established.

Placing the promulgation, or at least abolition, of emergency measures in the hands of parliament ensures control over the executive, which is strengthened and partially freed from control in emergency situations. It also means greater legitimacy for decisions, as parliament is a more representative body than the government.

In any case, however, the regulation of these issues should not endanger the defence of the state. From this point of view, it may be interesting to think about constitutional regulation and its development using the example of the Czech Republic as a member state of the European Union and NATO. As will be shown below, legal regulation in the Czech Republic is not only not comprehensive, but in some respects is not fully functional and could complicate the fulfilment of the international obligations of the Czech Republic and its defence interests.

When we talk about a state's international obligations, it is obvious that a state's internal affairs may also affect its treaty partners. In this respect, the description of this issue also has an international legal and political aspect. This is also worthy of comparison.

In the present article, a number of methods will be used, first among which is a description and analysis of the existing legislation – especially, but not only, in the Czech Republic. In the overwhelming majority of European states, the constitutional system is based on the so-called parliamentary form of government. Individual cases with certain modifications exist, but these do not go beyond the basic division of power between the supreme constitutional bodies, as is typical of the parliamentary form of government.

At the same time, most European states are not military powers with great weight in the international community, which would (co-)shape this community and its rules through their active foreign policy and possibly with the usage of armed forces. Thus, as will be shown using comparative methods, although most European states with a parliamentary form of government are rather restrained players in the use of armed forces outside their territory, a significant proportion of them do give the executive the possibility to dispose of these armed forces. This can only happen with subsequent parliamentary control, if necessary, and not under the full control of the parliament through its consent given in advance. As will be shown, the Czech Republic is one of those states which, on the one hand, is aware of the necessity of operational procedures, including the fact that these procedures are both in the state's interest and in the interest of compliance with international obligations. On the other hand, its politicians have so far been unwilling to initiate a serious discussion on changing the restrictive rules, whatever the outcome.

The present topic may therefore be of interest to the reader in the context of, among other things, the current crisis in which states are searching for or re-examining the role they should play.

A legal comparison can show the importance of a balanced constitutional and legal regulation on the one hand. On the other, it can point out the potential problems that, under the rule of law, inappropriate legal regulation can bring not only for the state itself, but also for its partners in the international community.

1. On the Czech Republic's constitutional arrangements

The constitutional regulation of ensuring the defence and security of the state in the Czech Republic is incomplete and, in some respects, even unclear. Even the term "armed forces" needs complex interpretation (Skoruša et al., 2022). The Constitution of the Czech Republic (1993) regulates matters directly related to the defence of the state in its Article 43. Its rather extensive provisions regulate the declaration of a state of war and the participation of the Czech Republic in the defence systems of international organisations to which the Czech Republic entrusts a part of its armed forces under direct command. Furthermore, the article regulates the procedural conditions for sending Czech armed forces abroad and for receiving foreign armed forces on the territory of the Czech Republic. As a special matter, the article also regulates the conditions for flights and transfers of foreign armed forces above and through the territory of the Czech Republic.

In addition to the above-mentioned provisions of the Constitution of the Czech Republic, there is also the Constitutional Act on the Security of the Czech Republic (1998). This act regulates the state of national emergency and the state of emergency, both of which may be used in certain situations related to threats to the security of the State and which were not included in the original wording of the Constitution (Grinc, 2019).

The next part of this article will describe the shortcomings of each part of the constitutional regulation and possible solutions to these problems in the future.

2. The vagueness and incompleteness of the constitutional regulation of the state of war in the Czech Republic and its comparison with the constitutions of other European states

If we focus on the specific legislation and its formulation, then, with regard to its structure, the first thing to pay attention to is the question of the constitutional regulation of the state of war. This is mentioned twice in the Constitution of the Czech Republic (1993) – in Article 43(1) and Article 39(3). The first provision determines when a state of war may be declared and by whom; the second specifies the procedure.

A state of war is declared in the Czech Republic by Parliament if the Czech Republic is attacked or if it is necessary to fulfil international treaty obligations on common defence against attack. The declaration requires a supermajority of all members of both houses of Parliament. This much is clear from the constitutional provisions. However, some matters are open in Czech law – for example, the question of on whose initiative the Parliament can declare a state of war. In this respect, both the constitutional and statutory provisions are silent. This is contrary to a state of national emergency, the declaration of which is clearly described in Art. 7(1) of the Constitutional Act on the Security of the Czech Republic (1998). This provision states that a state of emergency is declared by the Parliament on the (exclusive) proposal of the Government. Presumably, the declaration of a state of war should be also done on the proposal of the Government. This conclusion is supported by the fact that the Government is responsible for ensuring the defence of the state by virtue of the Act on the Provision of Defence of the Czech Republic (1999). Furthermore, it is the Government – or rather individual ministries, typically the Ministry of Foreign Affairs and the Ministry of Defence – which is equipped with the powers and tools to give clear information on whether one of the two situations envisaged in Article 43(1) of the Constitution of the Czech Republic (1993), under which a state of war can be declared by Parliament, has occurred. Alternatively, the analogy with the declaration of a state of national emergency, where the Government is clearly designated as the initiator, can also be used in this interpretation.

The ambiguities associated with the current legal regulation of a state of war can therefore perhaps be overcome by interpretation. However, certain reservations can be outlined regarding the way in which a state of war is declared. The current mechanism in the Czech Republic requires a decision of the Parliament, taken by a majority of all its members in both chambers. This mechanism may prove to be rather cumbersome in certain circumstances, especially if there are time pressures. It should be noted that a number of measures to ensure the defence of the State are linked to the formal declaration of a state of war, without which they cannot legally be implemented. These may include general mobilisation, which is linked to a declared state of war by Art. 23(3) of the Act on Conscription (2004), or certain economic measures, which are also linked to a declared state of war, in this case by Art. 23 of the Act on Economic Measures for States of Crisis (2000).

If a situation were to arise in which the Parliament of the Czech Republic could not meet – such a limitation of state bodies action could arise through conventional warfare, hybrid warfare (Havlík, 2022), cyberattacks (Filipec & Plášil, 2021), psychological operations (Mlejnková, 2022; Modrzejewski, 2018), or influential activities in cyberspace (Divišová, 2022) – it would not be possible to declare a state of war because Czech law does not provide any alternative.

Therefore, it would be worth considering an alternative way of declaring a state of war in the event that there was a risk of a time delay before Parliament were to meet, as the extra-legal approaches are not generally accepted (Ondřejek, 2020). An alternative method, as is also known to other constitutional arrangements, could consist of the declaration of a state of war by the President of the Republic on the proposal of the Government, with the understanding that Parliament would confirm such a measure at the earliest opportunity and, if it failed to do so, the state of war would immediately be repealed.

The constitutions of many European states place the task of ensuring the defence of the state directly in the hands of the head of state in cooperation with the Government (under the control of the parliament). Other European states count on the top executive bodies in cases of emergency, when the standard working procedures of the parliament are not possible. Both solutions are based on the presumption that a smaller or even monocratic constitutional body is more capable of maintaining the ability to react, even in case of unexpected danger, and acting quickly in the area of legal regulation. Such a capability should be preserved – especially if the legal procedures and law as a whole are to be kept consistent in different kinds of states of emergency, as is supposed by international treaties protecting human rights, for example. In other words, if the rule of law principle is to be binding in all situations, including extreme ones, then an alternative way in which to ensure the capability of the state to work in the area of law has to exist – especially if the standard procedure is very strict, as in the Czech Republic.

The Polish constitutional arrangement even provides for the declaration of a state of war by the President of the Republic on the proposal of the Council of Ministers as a standard procedure. The Constitution of the Republic of Estonia of 28 June 1992, in its Article 128(2), gives the President of the Republic the power to declare a state of war in the event of aggression against the Republic without waiting for a decision by Parliament. Similarly, the Constitution of the Republic of Lithuania of 25 October 1992, in its Article 142(2), offers the same provision. The Constitution of the Republic of Latvia of 15 February 1922, re-promulgated on 6 June 1993, in its section III, point 44, echoes this. To leave the Baltic area, we can draw on the example of the Constitution of the Republic of Romania of 21 November 1991, specifically Article 92(3) thereof, which again provides for this power. The conferral of the power to declare states of emergency on the President of the Republic is not surprising in the case of the Russian Federation, whose Constitution of 12 December 1993 provides for this matter in Article 87. The Constitution of the Republic of Albania of 28 November 1998 establishes this power in Article 162(1). The President of Belarus does so on the basis of Article 84(29) of the Constitution of 15 March 1994. The President of Bulgaria is endowed with such power by virtue of Article 100(5) of the Constitution of 12 July 1991. The Constitution of the Republic of Macedonia of 17 November 1991 also opts for a similar solution in Article 124(3). The case of Slovenia, whose Constitution of 23 December 1991 contains an alternative mechanism for the declaration of states of emergency and the use of armed forces in Article 92, is similar.

However, it is not only the constitutions of Central and Eastern European countries that contain similar solutions. The strong role of the President of the Republic is not surprising in France, where the Constitution of 4 October 1958 addresses the matter in its Article 16. However, the German Federal Constitution of 23 May 1949, although making very strong provisions for the approval of emergency measures by the Bundestag and the Bundesrat, also provides for a decision to be taken by the Joint Committee in the event of difficulties in convening them. The Dutch Constitution of 17 February 1983 provides, in Article 100, for the deployment of the armed forces by decision of the Government (within the limits of the law) and with the consent of Parliament, but in cases where prior approval would not be possible, the provision is made for a subsequent hearing. The Italian Constitution of 22 December 1947 also provides, in Article 77(2), for the possibility for the Government to issue decrees with the force of law in cases of necessity, subject to the subsequent approval of Parliament. According to Art. 167 of the Constitution of Belgium (originally adopted in 1831, as amended until today), the King commands the armed forces; he states that there exists a state of war or that hostilities have ceased. The King of Belgium acts in cooperation with the Government.

Among the new constitutions, reference may be made to the Republic of Finland and its Constitution of 11 June 1999. Article 23 of the Constitution provides that states of emergency shall be proclaimed by Government decree, which shall then be submitted to Parliament for approval. Furthermore, although the Finns have made a major shift from a semi-presidential to a parliamentary system, Article 129 of their constitution provides that the mobilisation of the armed forces is to be declared by the President of the Republic on the proposal of the Government. Similarly, the Swiss Constitution of 18 April 1999 entrusts the mobilisation of the armed forces to the Federal Council in Article 185 and the subsequent consideration by the Federal Assembly. Similarly, we can point to the Republic of Hungary and its Constitution of 25 April 2011, which provides for the delegation of the power to declare the necessary measures to avert aggression to the President of the Republic in its Article 48(3).

However, we should not forget the Constitution of the Slovak Republic of 1 September 1992, which, in Article 102(1)(m), confers the power to declare states of emergency and mobilisation, following a proposal by the Government, on the President of the Republic.

It can be summarised that the alternative method of declaring states of emergency or taking decisions to avert them is neither unknown nor exceptional in the constitutions of European states.

3. The constitutional mechanism of allowing flights over the territory of the Czech Republic and its infeasibility

When evaluating other parts of Article 43 of the Constitution, it can be said that the establishment of a special mechanism for approving the Czech Republic's participation in the defence systems of an international organisation of which the Czech Republic is a member is useful and functional. Here we are talking in particular about the NATINAMDS system (Korecki & Adámková, 2018).

However, from the point of view of the existing constitutional arrangements, attention should be paid to the mechanism for authorising flights over the territory of the Czech Republic. In this respect, the existing constitutional regulation is fundamentally dysfunctional and has long been outdated in terms of facts.

Permitting flights – in principle, ground transfers need not be problematic, as their number is smaller and they can be planned in advance – over the territory of the Czech Republic is regulated by Article 43(5)(a) and (6) of the Constitution. The decision-making power in this matter is vested in the Government, according to Article 43(5) of the Constitution of the Czech Republic. However, according to Article 43(6), the Government is obliged to inform both chambers of Parliament without delay, and Parliament may annul the Government's decision. The dissent of one chamber, expressed by a majority of all of its members, is sufficient for annulment.

It follows from the Constitution of the Czech Republic that the Government is obliged to inform the Parliament without delay. Although the meaning of "without delay" is often questioned or relativized by politicians, it does not require any special interpretation. The Government is supposed to act without any delay, i.e., not to delay or postpone the transmission of information. The action of the Government must allow the Parliament to exercise its control powers and, potentially, to block this action. The Parliament must have a chance to review and possibly

cancel the decision before it is implemented. This conclusion follows from two arguments. Firstly, it would not make sense for the constitution-maker to want Parliament to decide on and possibly overrule decisions that have already been enacted. Secondly, there is the argument regarding Parliament's function of control over the activities of Government. The author considers the first argument to be decisive because the opposite interpretation leads to absurd conclusions.

However, the difficulty lies in the fact that the above constitutional mechanism is practically impossible to comply with. The reason for this is the very high number of flights over the territory of the Czech Republic. An analysis titled "Analysis of the existing legal regulation of the current practice of consenting to overflights and passages of armed forces of other states through the territory of the Czech Republic" was prepared in 2015 by the Ministry of Defence, was then on the programme of the Government meeting on 22 July 2015 as governmental document No. 875/15, and was accepted by Government Resolution No. 580 of the same date. The Analysis stated that the number of flights over the country's territory was 500–700 per month, with most being requested or notified by the partner state at very short notice, usually less than 7 days. The Ministry of Defence further stated that some requests for overflights, particularly in crisis situations such as the sudden need to evacuate the armed forces or the population or to transport the wounded, are made only a few hours before the flight takes place.

There are several reasons for this high numbers of flights over the territory of the Czech Republic, certainly including the country's geographical location, but also its membership in various international organisations – first and foremost, the North Atlantic Treaty Organisation – and the resulting commitments in these alliances.

At the same time, it should be noted that the Czech Republic itself has similar interests to its allies or foreign partners, and situations arise when it is necessary to evacuate Czech citizens from abroad (including, e.g., the evacuation of Czech nationals affected by the tsunami in Thailand in 2004) or injured members of the Army of the Czech Republic (in recent years, this has mainly involved evacuations from Afghanistan) or to replace and supply Czech troops abroad.

This means that the principles of reciprocity and alliances, in which the Czech Republic has a clear interest, must be considered. Although the principle of reciprocity does not apply automatically and without exception, its observance nevertheless has an impact on decision-making in individual cases. Similarly, the principle of alliance means that the Czech Republic should not, by its decision-making practice and its mechanisms, make allies uncomfortable – e.g., by making a decision just before a flyover takes place.

As can be seen from the above, the decision-making mechanism defined by the Constitution cannot be fulfilled in practice. In the case of sudden situations requiring an immediate response within hours, it is almost impossible even to obtain the consent of the Government, let alone to hold a debate in Parliament.

In practice, the mechanism proposed by the Ministry of Defence at the turn of the millennium is followed. Each year a list is drawn up of countries whose armed forces are granted Government approval for 1 year for the purpose of transit or overflight through the territory of the Czech Republic. In the case of other states, the procedure is ad hoc. Parliament is then informed of the passages and overflights that have taken place. In some years, the frequency of informing was every 6 months, in others it was quarterly. The first time this procedure was followed was in 2001, under Government Resolution No 1322 of 10 December 2001. A similar procedure has been followed in subsequent years up to the present day.

As far as the countries included in the first group above are concerned, these were originally NATO member states and participants in the Partnership for Peace. However, this division turned out to be inconvenient because the group of states to which ad hoc procedures were applied was very large and a high number of states were important for the Czech Republic in terms of their location for the implementation of its provisions. Thus, the first group was gradually expanded to include the states of the European Defence Agency (EDA), but above all to include states that, "on the basis of reciprocity, operatively issue diplomatic permits for overflights of the Czech Army aircraft". According to the Report of the Government of the Czech Republic to both Chambers of Parliament (2023) in 2023, 78 states belonged to the first group and 123 states belonged to the second group.

To implement the described mechanism, an Agreement on the Authorisation of Flights of State Aircraft (hereinafter – the Agreement) was concluded pursuant to Resolution No. 136 of the State Security Council of 20 November 2000. The current version of the Agreement was concluded on 27 September 2004 pursuant to National Security Council Resolution No. 130 of 13 July 2004. The Agreement is concluded between the Ministries of Defence, Interior, Finance, Transport and Foreign Affairs. The Ministry of Defence is responsible for arranging overflights by the armed forces of other States and does so through the Military Transport Department. Government approval for a period of 1 year is therefore not an unlimited form of permission, either in time or number of overflights by aircraft from the states included in the first group, but a prerequisite for the quick and easy processing of permissions for individual overflights. All of the above-mentioned ministries are involved in this process within the limits of their respective competences.

However, even this practice has not proved to be sufficient for the clearance of overflights from States belonging to the second group. At the same time, as already mentioned above, the principle of reciprocity prevented the operational approach of the partner state when it was not applied by the Czech Republic. Whereas this has been crucial for the Czech Republic many times, even in the second group of states the Czech Republic has used the most operational decision-making procedure.

Therefore, the Ministry of Defence proposed a new mechanism to the Government in 2007, which consisted of the Government giving prior approval to all countries recognised by the Czech Republic for overflights for 1 year, but with the proviso that these countries would continue to be divided into the two groups mentioned above. In the case of the former, permission for a single overflight is issued by the Department of Military Transport without further delay. In the case of the latter, this is subject to further conditions, which are: the absence of objections by the Ministry of Foreign Affairs to carrying out the flight in question; permission can only be of a one-off nature and is valid only for 72 hours; and any permission so issued is specifically marked in the Report of the Government of the Czech Republic to both Chambers of Parliament (2022). There are very few overflights by the armed forces of the countries of the second group. According to the regular semi-annual governmental reports to Parliament, flights in the second group of states represent around 1% of all flights allowed over the territory of the Czech Republic. The described procedure was firstly approved by the Government on 19 December 2007 by Resolution 1437. A similar procedure was followed in the following years.

As can be seen, the authorisation and implementation of flights of foreign armed forces over the territory of the Czech Republic is a very extensive and demanding matter, and practice has repeatedly encountered the limits of existing procedures and rules, which had to be changed. At the same time, the existing constitutional arrangements are unworkable. Although the above analysis asserts that the current practice is consistent with the constitutional order, for the reasons detailed above, this conclusion can be questioned. Government officials are also aware of this, as is evident from the Amendment to the Constitution (2022) that has been repeatedly submitted by Minister of Defence Jana Černochová as a Member of Parliament.

The constitutional mechanism for authorising flights of foreign armed forces over the territory of the Czech Republic should be changed. Given that even the Government's consent is not sufficiently operative in critical circumstances, the Constitution of the Czech Republic should be amended to give the Government the ability to determine the rules for allowing overflights. At the same time, the controlling power of the Parliament should be reformulated, which should not approve overflights, but should assess and control the rules set by the Government for allowing overflights. In this way, the existing practice, which is satisfactory, could be the starting point for the modification of the constitutional order.

4. On some of the limits of the current constitutional arrangements in the event of an expanded role for NATO

In 2002, at its Prague Summit, NATO decided to establish the NATO Response Forces (NRF) (Talbott, 2002). Two years later, it was announced that the NRF had achieved operational capability. The NRF is intended to have the capability to intervene anywhere in the world and to perform a variety of tasks, including civil protection, peacekeeping operations, or the use of force. They are multinational units established on a rotational basis. Thus, each Member State participating in the NRF provides part of its armed forces under NATO command (Zlatohlávek, 2007). At its 2014 Summit in Wales, NATO decided to establish the NATO Very High Readiness

Joint Task Force (VJTF) (Weber et al., 2014). This part of the NRF is expected to be even more capable, with deployment within 48 to 72 hours (Karásek, 2018).

The Czech constitutional arrangements imply fundamental limits for the fulfilment of NATO commitments depending on the task to be performed, especially by the VJTF. The mission of both the NRF and the VJTF implies the deployment of the Czech Armed Forces outside the national territory. Such a move is, depending on the circumstances, subject to either the consent of the Parliament or, in the cases listed in Article 43(4) of the Constitution of the Czech Republic, the consent of the Government.

The above-mentioned Article 43(4) states:

The government may decide to send the armed forces of the Czech Republic outside the territory of the Czech Republic and to allow the stationing of the armed forces of other states within the territory of the Czech Republic for a period not exceeding 60 days, in matters concerning the
a) the fulfillment of obligations pursuant to treaties on collective self-defense against aggression,
b) participation in peace-keeping operations pursuant to the decision of an international organization of which the Czech Republic is a member, if the receiving state consents;
c) participation in rescue operations in cases of natural catastrophe, industrial or ecological accidents.

Parliament's decision may not be sufficiently flexible, especially for the activities of the VJTF and their high operational capability and flexibility of deployment, which are envisaged. Even the Government may find it difficult to meet the 48–72-hour limit, which is a maximum and not a desirable limit for some types of units. In any case, the Government is better-placed to meet and decide on this.

However, the Government is limited by clearly stated constitutional conditions as to when it can make decisions instead of Parliament. It is questionable whether some of the missions that the VJTF could be designed for do not go beyond these limits. Article 43(4)(b), which presupposes the consent of the receiving state, could be a limiting provision. If a VJTF peacekeeping operation were to be envisaged without the consent of the receiving state, then parliamentary approval would be required in terms of the Constitution of the Czech Republic. There may also be a similar situation involving intervention in a so-called failed state, where there is no one to give consent. However, in this case, regardless of the severity of the situation, the participation of the Czech Armed Forces in the VJTF mission would be possible only with the consent of the Parliament.

Parliamentary consent, of course, ensures both greater control and, above all, greater legitimacy for a decision which, in its consequences, has serious political and legal international implications. On the other hand, however, a situation may arise in which the Czech Republic is not realistically able to fulfil its commitments to NATO.

Many European states use more flexible constitutional regulation, allowing wider decisions of the executive bodies. The first example may be the Constitution of Belgium, which in Art. 167 puts decisions formally into the hands of the king, but materially these decisions are transferred by royal decree to the Government. The Constitution of Greece of 1974 states that command of the armed forces is executed by the Government in the way specified by law. According to the Constitution of Poland of 1997, it is the task of the Government to ensure the internal and external security of the country (Art. 146) in the way specified by laws. This also includes the issue of the deployment of Polish armed forces abroad. The same legal situation exists in the Constitution of Portugal of 1976 (Art. 275), in the Constitution of Spain of 1978 (Art. 8), in the Constitution of Slovenia of 1991 (Art. 124), and in the Constitution of Romania of 1991 (Art. 92). A very specific and traditional constitutional situation exists in France and Britain, where the usage of the armed forces is in the hands of the president of the republic in France and the Government in Britain.

The Constitution of the Czech Republic should also be amended in the above-mentioned direction to allow, in specific urgent situations, the Government to make a decision under supervision by the Parliament. The top political representatives of the Czech Republic are aware of this. The above-mentioned draft amendment to the Constitution of the Czech Republic submitted by the Minister of Defence to the Parliament includes the modification not only of the procedure for approval of military flights over the territory of the Czech Republic, but also of the constitutional conditions for sending the armed forces of the Czech Republic abroad. At the same

time, it is obvious that this is a highly sensitive and potentially controversial issue, as many interventions on the territory of a foreign state without a UN mandate threaten to violate the UN Charter, specifically the principle of non-interference in the internal affairs of a Member State. On the other hand, public international law does not consider the use of force to protect a country's own citizens in the territory of a foreign state as illegal, even without its consent (Shawn, 2008, pp. 1143–1146). This should make any discussion more thorough. However, the current constitutional arrangements do not allow for the full implementation of the Czech Republic's obligations towards its allies.

Conclusions

As was stated in detail above, the current constitutional arrangements in the Czech Republic contain several shortcomings, both in terms of their design and specific provisions.

The area that deserves change is the regulation of the declaration of a state of war. As far as the procedure for declaring a state of war is concerned, it is necessary to consider the possibility of declaring it in an alternative way. This should be provided for in a situation where a declaration by Parliament is not feasible – for example, because Parliament cannot meet due to ongoing or imminent aggression.

A similar situation arises regarding the mechanism for approving the flights of foreign armed forces over the territory of the Czech Republic. The current constitutional procedure is unworkable. An appropriate solution would be to give the Government the power to prepare rules for the approval of overflights, while at the same time subjecting them to parliamentary control. The approval of specific overflights under these rules should already take place outside Parliament.

The last area that deserves some flexibility and clarification is the Czech Republic's involvement in the NATO Rapid Reaction Force. Here, too, the approval procedures should be relaxed, and the role of the Government strengthened. The current Czech constitutional arrangements are not capable of meeting the requirements arising from its commitments to its allies.

The whole situation described above is even more serious because it is not a recommendation aimed only at a certain improvement or rationalisation of procedures. A substantial part of the problems identified prevent, or at least threaten to prevent, the proper functioning of the state in crisis situations in accordance with constitutional provisions. Others may touch very closely on fundamental principles of public international law and the rules of the international community.

In conclusion, under the current constitutional setup of the Czech Republic, Parliament is empowered to take almost any decision in the matter of ensuring the security of the state. The only limit to its decision-making is Article 1(2) of the Constitution of the Czech Republic, which speaks of respect for the Czech Republic's obligations under international law. The conferral of broad decision-making powers on Parliament ensures the highest legitimacy of the decisions taken and ensures control over the executive. At the same time, however, it must be said that parliamentary decision-making can be cumbersome and time-consuming, and that it may be in direct conflict with some of the Czech Republic's international obligations.

The Constitution of the Czech Republic requires a reassessment in this respect, and the solution lies in making the existing constitutionally established mechanisms more flexible. Specifically, the ideal solution would be to transfer several above-described decision-making powers from the Parliament to the Government. The Parliament would continue to have only to approve the legal framework within which the Government would take its decisions. Naturally, it would also have to continuously monitor the exercise of the Government's powers, with the possibility of intervening at any time. Only in this way can the Czech Republic fully and reliably fulfil its obligations to its allies as a NATO member state.

As has been shown in the comparative passages of the text, especially in part two, there is no reason why it should be systematically impossible for a state with a parliamentary form of Government that is not a military power to have flexible rules for the limited disposition of its own armed forces for use abroad, or for the reception of allied forces on its own territory in an emergency. A significant number of EU and NATO member states in Central and

Eastern Europe envisage such a possibility. It is therefore more a question of a political decision, which is, of course, also defined by a certain legal framework – in particular, the international legal obligations of the state towards its own partners. It can be summarised that the Czech Republic, or rather its political representatives, are in a certain mental trap: on the one hand, they declare their commitment to their partners, especially in NATO; on the other hand, they are aware of the limits of the existing constitutional framework, which significantly complicates the fulfilment of all of their international legal obligations. This could be understood as a symptom of a crisis – especially if examples of good practice exist in states of similar sizes, possibilities and histories, such as Poland, Lithuania, Latvia or Estonia.

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THE LEGALITY OF HUMAN RIGHTS LIMITATIONS IMPOSED BY COVID-19 GREEN PASSES IN LITHUANIA AND THE CZECH REPUBLIC

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Abstract. The aim of this article is to provide a comparative analysis of the regulation of the Opportunity Passport (hereinafter OP – a COVID-19 health status certificate) in Lithuania and an analogous document in the Czech Republic, and the legality of the limitations on human rights that were imposed by such rules. It describes the regulations imposed by the Lithuanian and Czech institutions and their development. Further, the requirement of the legality of limitations on human rights is discussed in the context of its application to the OP regulation, taking into consideration the jurisprudence of the Constitutional Court of Lithuania. The article also analyses the Tečka application, which was used for analogous purposes in the Czech Republic, in terms of its legal basis and problems related to the legality of human rights violations. The critical analytical method allows for an analysis of Lithuanian and Czech legislation on the management of the pandemic, the establishment of so-called green passports, and the relevant jurisprudence of the courts, leading to well-grounded conclusions. This method is also employed in the analysis of scientific literature, which allows concerns to be revealed regarding data protection in the process of the execution of the above-mentioned provisions. The comparative method allows the authors to compare the practice of the selected two states in the management of the pandemic and in the adoption of green passports. The article concludes that both documents regarding health status during the COVID-19 pandemic had similar aims and were introduced at similar times. However, the legal regulation of the Lithuanian OP has not yet been analysed by the courts. In Lithuania, the legality of the OP was questioned based on the fact that the relevant law on the protection of public health contains only succinct provisions on the limitation of human rights in such situations, and the question remains as to whether these provisions were sufficient for such limitations. In the Czech Republic, the concern was raised about the authority of the Ministry of Health to issue such documents as it had no legal basis. Furthermore, questions of privacy in the context of the Czech health passport were also pertinent.

Keywords: Green Passport, COVID-19 health status certificate, human rights limitations, the legality of human rights limitations.

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Introduction

The regulation of the Opportunity Passport (Lith. *Galimybių pasas*) in Lithuania – a COVID-19 health status certificate giving access to certain services and shops during the COVID-19 pandemic if a person was vaccinated or complied with other requirements – raised significant questions about the legality of the limitations that were imposed by such rules. Even though the example was taken from other countries aiming at opening certain activities to the public, such as theatres, concerts, and other events, the regulation raises important legal questions regarding the legal base of the restrictions and the legality of the limitation on human rights. The possession of the Opportunity Passport (hereinafter, OP) could be proven by possession of a printed document, or by a QR code on a phone application. This status could also be proven by providing documents proving immunity or test results, which were not officially called OPs but which served the same purpose. The regulation establishing the OP was outlined by the Government of Lithuania in the same decree where the emergency situation was regulated, and such a document was not foreseen in the laws passed by Parliament.

In the Czech Republic, the Tečka mobile application was introduced, where information about vaccinations, illnesses, or quarantines was uploaded via a central system. This information could be retrieved by the čTečka application, which, when attached to a mobile device, could read QR codes and thus mark an individual infection-free status certificate as either valid or invalid. These certificates had to be presented by individuals in situations where, for example, they wanted to attend a sporting or cultural event, which was limited by the number of participants and the requirement of being infection-free.

The emergency situation brought about by the COVID-19 pandemic is, of course, an important factor in evaluating the justification for the limitations imposed on persons. We remember the beginning of the pandemic, when it was not clear how this virus would behave, how we would treat it, and how we would protect from it. This created a significant burden on the healthcare system. Thus, the sense of urgency might have justified initially strict measures for all citizens, but were these measures still applicable two years after the start of the pandemic? The regulation went from strict measures of quarantine to all citizens, including lockdowns of municipalities, to the distinction of persons who are vaccinated or have had COVID-19 from those who do not have immunity. Were these measures justified in the face of scientific information and pure statistical data? At the same time, some other European states imposed mandatory vaccinations, while some declared the pandemic over. Such variations show that the picture of pandemic containment measures was not as clear-cut as the proponents of the OP in Lithuania presented it to be.

The Czech Republic has often been inspired by neighbouring countries in its approach to the measures it has taken. Measures have been adopted in the form of government regulations or as measures of a general nature. Many have been challenged before administrative courts, and some have even been declared illegal by the courts (both on the grounds of inadequate justification and on the grounds of a lack of competence or an incorrect choice of legal basis).

Therefore, the evaluation of limitations on human rights starts with the question of the legality of human rights limitations imposed by the use of health certificates (the OP in Lithuania and the Tečka in the Czech Republic). The measures taken were based on the conviction that there was a sufficient legal basis for dealing with the COVID-19 crisis, but a more thorough analysis of this conviction is required. Obviously, questions of proportionality also arise, but the question of legality must be addressed prior to the question of proportionality, and is thus the primary focus of this article.

The article aims to provide an analysis of the rules establishing the health certificates used in the context of the COVID-19 pandemic in Lithuania and the Czech Republic in the context of the requirements of the legality of measures restricting human rights.

The critical analytical method allowed an analysis of the Lithuanian and Czech legislation on the management of the pandemic, in particular on the establishment of so-called green passports. The relevant jurisprudence of the courts was also studied, leading to well-grounded conclusions. The critical analytical method was also employed in the analysis of scientific literature, which allowed concerns to be revealed regarding the data protection of persons in the process of the execution of the above-mentioned provisions. The comparative method allowed the

authors to compare the practices of the two selected states in the management of the pandemic and in the adoption of green passports.

Questions surrounding OPs were not extensively discussed in the scientific literature in Lithuania. The legal basis for measures of pandemic containment were analysed by Valutytė et al. (2021), while constitutional aspects of the management of the pandemic were analysed by Birmontienė and Miliuvienė (2022). The OP in Lithuania has, however, been analysed from a different perspective: whether it was an effective measure in encouraging vaccination (Walkowiak et al., 2021). In the Czech Republic, the dynamic development of the situation did not allow for a broad academic debate on the topic. Within the published texts, it is possible to mention papers on the potential consequences of certificate forgery, including criminal law implications. From the point of view of personal data protection, the issue was commented on by the Office for Personal Data Protection (Kuba, 2022). Therefore, the novelty of this paper is in its analysis of the OP as a separate instrument in the pandemic management context, as well as in its use of the comparative perspective from Lithuanian and Czech points of view.

1. The Legality of the Opportunity Passport in Lithuania

1.1. Imposed Limitations

The decree of the Government which established the legal basis for the OP was the 2020 resolution of the Government of Lithuania regarding the declaration of the state-level emergency. The OP was introduced in May 2021, and was presented as a temporary decision during a transitional period intended to open up some of the activities that had been closed due to quarantine (Resolution of the Government of Lithuania, 2021). Publicly, officials stated that the aim of the OP was to learn to live with the COVID-19 pandemic and to enable all persons to participate in various activities without any documents indicating their health status. At that point, the OP was related to a limited number of activities, such as: eating inside the premises of cafes and restaurants; using other services of leisure, such as billiards or bowling; indoor events comprised of up to 500 people, and outdoor events of up to 2,000 people, which were not allowed at the time according to the applicable regime of quarantine (Naprys, 2021); and personal events with no limitations, such as housing services or various other services.

Stricter provisions regarding the use of the OP came into force on 13 September 2021 (Resolution of the Government of Lithuania, 2021). These provisions listed the services that could be provided for persons who did not present certain documents, stating either: their vaccination status; a proven case of COVID-19 (valid for 210 days); an antigen test (valid for 60 days); or a test indicating that a person did not have COVID-19 (valid for 48/72 hours). In practice, this excluded those persons from visiting any cultural or educational event (only allowing them to visit events taking place outside with less than 500 visitors) or visiting shops that sold non-essential goods. For the purchase of essential goods, persons without an OP could visit only smaller supermarkets that had an area of less than 1,500 square metres. Later, an additional limitation was imposed on smaller shops – these shops had to ensure that the area for one customer should be at least 30 square metres; therefore, the flow of customers had to be limited by shop personnel. Persons who did not have an OP could receive services only when the provision of the service was not longer than 15 minutes, excluding any services that took longer (beauty services, consultation services, gyms, etc.). This also prohibited students of higher education institutions who did not have one of the documents mentioned above from attending studies and classes.

It should also be noted that from September 2021 to December 2021, according to the provisions of the legal acts regulating the questions of security during the pandemic, masks and other provisions on personal safety during the pandemic were only recommendatory to holders of an OP, and even the obligation for quarantine after having contact with a person who had COVID-19 was lifted.

The costs of testing to obtain an OP for 24/72 hours for those persons who were not vaccinated or did not have antibodies/proof of illness were borne by individuals, not by the Government. The Government did not provide free testing for persons willing to obtain an OP – in contrast to Denmark, for example, where testing was available for free (Jurčenkaitė, 2021). This is a very important distinction, as in Lithuania if a person did not have antibodies, had not contracted and recently recovered from COVID-19, and was not vaccinated, they could attain the OP only if they took an RT-PCR test, which cost around €70 and was valid for 72 hours from the moment of taking a

sample in a testing centre. Considering that the test only provided an answer after 24 hours, this left only around 48 hours to attend the events or larger shops that the person was previously precluded from visiting.

The provisions governing the OP were abolished by a decision of 2 February 2022, which came into force on 5 February 2022 (Resolution of the Government of Lithuania, 2022). Despite the provisions and prohibitions imposed by the OP, the numbers of persons ill with COVID-19 was significantly larger after the abolition of the OP than at the moment of the establishment of the OP.[5] The provisions on the OP were submitted to the Lithuanian Constitutional Court, but the Court used its discretion to terminate the proceedings due to the abolition of the above-mentioned provisions (Constitutional Court of Lithuania, 2022b). Further decisions of the Court are addressed in Section 1.6. The administrative courts did not raise questions relating to the OP by themselves, as a decision of the Government may be abolished only by a decision of the Constitutional Court of Lithuania. Therefore, the question of the legality of the above-mentioned decision was addressed to the Constitutional Court of the Republic of Lithuania.

1.2. The Human Rights Which Were Affected by the Lithuanian Opportunity Passport

The provisions of the OP imposed limitations on the right to respect for private and family life ensured by Article 8 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter – the ECHR) and Article 22 of the Constitution of Lithuania. These limitations manifested in the limits placed on the choice of a person to choose activities according to their preference and the possibility to take care of their everyday needs. For OP holders, the provisions also limited their right to privacy and to keep information about their health status private. Persons who did not conform to the requirements of the OP had their everyday lives burdened. Moreover, they could not freely receive necessary services – even medical services. They were also unable to freely purchase the necessary everyday commodities, and mostly had to order them online – except for groceries.

Furthermore, the OP limited the right to higher education ensured by Article 2 of the Protocol to the ECHR, which states that "no person shall be denied the right to education" (Council of Europe, 1950). The Constitution of the Republic of Lithuania (1992) guarantees the right to higher education "to every one according to their individual abilities". Students who did not possess the OP could not access the premises of universities and colleges in Lithuania, and could not attend classes that were conducted in person. Initially, for 1 month (September to October 2021), students were able to take tests that entitled them to receive the OP for free, but they later had to pay for tests themselves if they were not vaccinated or had not had COVID-19. One test allowed them to use the OP for 48/72 hours. Thus, if no remote/online option for joining classes was provided by the teaching institution (the approach varied in different institutions of higher education), then students were in practice barred from studies due to their vaccination/health status.

Furthermore, the question of whether the regulation of the OP was discriminatory also arises. Different treatment based on a person's health status was established: persons were distinguished based on whether they had been vaccinated, had recovered from COVID-19 illness, or possessed sufficient antibodies in their blood. The medical research showed that both vaccinated and unvaccinated individuals could spread COVID-19; therefore, the question arises as to whether it was correct to treat those two groups differently. The prohibition of discrimination is established in two articles of the ECHR. Article 14 prohibits discrimination in connection with the rights established in the Convention, and states that

> The enjoyment of the rights and freedoms outlined in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status (Council of Europe, 1950).

Moreover, Article 1 of Protocol No. 12 of the ECHR establishes the general prohibition of discrimination and the prohibition of discrimination against persons, stating that

> The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status (Council of Europe, 1950).

The Constitution of the Republic of Lithuania (1992) also states that

[5] On 2 September 2021, 816 COVID-19 cases were established in Lithuania, and on 5 February 2022 – 12,700 COVID-19 cases.

> All persons shall be equal before the law, the court, and other State institutions and officials. The rights of the human being may not be restricted, nor may he be granted any privileges on the ground of gender, race, nationality, language, origin, social status, belief, convictions, or views.

1.3. The Possibility of the Restriction of Human Rights

The Constitutional Court of Lithuania (1997a) noted in its ruling of 13 February 1997 that conflicts often arise between personal rights and freedoms on the one hand and public interests on the other. Sometimes contradictions arise, and one way of reconciling interests is to restrict the exercise of individual rights and freedoms. The principle of recognizing the inherent nature of human rights and freedoms does not preclude the exercise of human rights and freedoms from being restricted. According to the Constitution, the exercise of human constitutional rights and freedoms may be restricted if the following conditions are met: this is done by law; restrictions are necessary in a democratic society to protect the rights and freedoms of others and the values enshrined in the Constitution, as well as constitutionally important goals; restrictions do not deny the nature and essence of rights and freedoms; and the constitutional principle of proportionality is observed (Constitutional Court of Lithuania, 2004).

Possible grounds for the limitation of human rights are established in the ECHR and in the Lithuanian Constitution. The method chosen by European states in response to the COVID-19 pandemic was either to rely on the exceptions provided for in the relevant articles or to declare a state of national emergency according to Article 15 of the ECHR.

States which chose the first method relied on the fact that most rights are not absolute in character, and states can limit the exercise of these rights for valid reasons, including public health emergencies. Examples include the rights to freedom of expression, freedom of association, freedom of assembly, and freedom of movement (Pranevičienė & Vasiliauskienė, 2020, p. 150). The second method is to make a derogation under Article 15 of the ECHR, which states that

> In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. The examples of exceptional circumstances could be, but are not limited to, armed conflicts, civil and violent unrest, environmental and natural disasters, etc. (Council of Europe, 1950).

In the ECHR system, 10 states notified the Council of Europe regarding the application of such a regime (Council of Europe, 2022), while other countries chose to operate under laws applicable in everyday circumstances when regulating actions in case of a health emergency. Lithuania and the Czech Republic, as well as 35 other states of the Council of Europe, chose the second method and used the derogations foreseen in the laws regarding civil emergencies aimed at coping with the pandemic rather than invoking the regime under Article 15 of the ECHR.

1.4. The Legality of the Restrictions Imposed by the Opportunity Passport

Both international human rights documents as well as the Constitution of the Republic of Lithuania establish the requirement that limitations on human rights have to be established by law.

The legality requirement is established in

> the expressions: "in accordance with the law", "prescribed by law", and "provided for by law" (§ 2 of Articles 8 to 11 of the Convention; § 1 of Article 1 of Protocol No. 1; § 2 of Article 2 of Protocol No. 4 to the ECHR), and the expression "under national or international law" contained in Article 7 of the Convention. In Articles 2 and 3 of Protocol No. 7, the legality requirement has been set forth using such expressions as "governed by law", "prescribed by law", and "according to the law" (Valutytė et al., 2021).

The Lithuanian Constitution (1992) establishes that limitations on human rights must be established by law (Lith. *įstatymas*, a law adopted by Parliament). This is present in all articles listing human rights, either stating that a certain right is "protected by law" (Article 19 "The right to life of a human being shall be protected by law";

Article 21 "The dignity of the human being shall be protected by law"; Article 23 "The rights of ownership shall be protected by law") or that the limitations on certain rights may be enacted only according to the law (for example, Article 20 "No one may be deprived of their freedom otherwise than on the grounds and according to the procedures which have been established by law"; Article 22 "Information concerning the private life of a person may be collected only upon a justified court decision and only according to the law", etc.).

The requirement of legality is established in the jurisprudence of the Constitutional Court of Lithuania. The Court (2004) has stated that

> according to the exercise of the constitutional rights and freedoms of a constitutional person it may be restricted if the following conditions are observed: this is done by law; restrictions are necessary in a democratic society to protect the rights and freedoms of others and the values enshrined in the Constitution, as well as constitutionally important goals; restrictions do not deny the nature and essence of rights and freedoms; the constitutional principle of proportionality is observed.

Furthermore, the Constitutional Court of Lithuania (1997a, 1997b) has stressed that

> the requirement of legality means that restrictions must be imposed only by a law that is made public and that its rules are sufficiently clear. When defining the limits of the exercise of rights by law, it is necessary to take into account the purpose and meaning of the respective right (or freedom) and the possibilities and conditions for its restriction established in the Constitution.

Regarding the ECtHR, there is a difference in this question when it comes to the jurisprudence of the Court. As Valutytė et al. (2021) note:

> As a rule, "law" in European practice would usually mean a written and public law adopted by parliament, which decides whether or not a particular restriction should be possible. However, the case law of the ECtHR shows that this may also include unwritten law as interpreted and applied by the courts, public international law, and various forms of delegated legislation. The interference must, of course, be authorized by a rule recognized in the national legal order.

Therefore, the practice of the ECtHR sometimes foresees a legal act of lesser rank as a suitable legal ground for the restriction of a particular human right.

1.5. The Jurisprudence of the Constitutional Court of Lithuania Regarding the Possibility of Detailing and Concretising Laws in Governmental Decrees

The Constitutional Court of Lithuania has developed its jurisprudence on the possibility to detail and concretise the legal regulation established by the law of Parliament. In its rulings of 7 February 2005 and of 5 May 2006, the Constitutional Court formed jurisprudential provisions on the possibility to detail and concretise the legal regulation established by law by governmental decrees.[6] It stipulated that this may be done in cases when this is objectively determined by the necessity of relying on special knowledge or special (professional) competence in legislation.

In its ruling of 7 February 2005, the Constitutional Court emphasised that the legislator has wide discretion in regulating the relations of social security and social assistance, taking into account various factors (*inter alia*, state and public resources, material and financial possibilities), and has wide discretion in regulating said relations accordingly. Legislators of secondary legislation also have some discretion in this area. However, the Constitutional Court noted that this discretion must be based on the powers of the relevant institutions (officials) enshrined in law; it cannot deny the legal regulation established by law. Governmental decrees have to abide by the principle of supremacy of law established in the constitutional doctrine. This principle is derived from the principle of the rule of law, presupposing the hierarchy of laws. This means, *inter alia*: that governmental decrees may not contradict laws, constitutional laws, and the Constitution; that governmental decrees should be adopted in accordance with the provisions of laws; and that a governmental decree is an act of application of laws – whether this act is a one-time (*ad hoc*) or continuous application. A governmental decree may not contradict the law or change the contents of the norms of the law, and there may not be any legal norms that would compete

[6] Here the term *governmental decree* is used to describe all legal acts that are in the legal hierarchy below the laws of Seimas (Parliament), i.e., adopted by the Government, ministries, or other administrative institutions.

with the norms of the law. Governmental decrees may only establish the order of the implementation of the law: they may establish the procedures of the implementation of the law; and these acts may encompass legal regulation based on the provisions of the law, where the need to concretise and detail the provisions of the law stems from the objective necessity of basing these provisions on special knowledge or special (professional) competence in a certain field. In this ruling, the Constitutional Court emphasised that the conditions for the emergence of a person's right to social assistance, as well as the limits of the scope of this right, may not be established by governmental decrees (Constitutional Court of Lithuania, 2005).

In its ruling of 5 May 2007, the Constitutional Court further developed its doctrinal provisions on the granting of legislative powers to the Government and on the possibility of the sub-delegation of this power to other administrative institutions. The Constitutional Court emphasised in this case that, according to the Constitution, legal regulation related to the definition of the content of human rights and freedoms and the establishment of guarantees for their implementation may be established only by law, but when the Constitution does not require certain relations to be regulated by law, they can also be regulated by governmental decrees (*inter alia*, procedural or processual provisions for the implementation of human rights, etc.). When the need to elaborate and concretise the legal regulation established by law in governmental decrees may be determined by the necessity of relying on special knowledge or special (professional) competence in legislation, **under no circumstances may these governmental decrees establish conditions for the emergence of a human right, or for limitations on said right; furthermore, governmental decrees may not establish such legal regulation related to human rights and their implementation that would compete with the provisions established by law** (Constitutional Court of Lithuania, 2007). Thus, the legislative powers and discretion of the executive can be exercised only within the limits of the principle of separation of powers, in accordance with the requirements of the hierarchy of law and the doctrine of human rights. **The Constitutional Court emphasised that the legislator may also establish in law that certain relations are regulated by the Government or an institution authorised by it only in cases when the Constitution does not require the regulation of certain relations specified therein by law** (Constitutional Court of Lithuania, 2007).

Regarding the conditions of the sub-delegation of legislative power to administrative institutions, the Constitutional Court has underscored that legislative competence may be delegated to the administrative institutions subordinate to the Government only when, in accordance with the Constitution, the regulation of such relations is not attributed to the exclusive competence of other institutions exercising state power – *inter alia*, the Government (Constitutional Court of Lithuania, 2007).

If the legislator establishes in law a provision that certain relations are "regulated by the Government or an institution authorised by it", this provision means that: the Government has the power to regulate the relations specified in the law itself, or it can indicate by decree which institutions may (and should) regulate the relations indicated in the law. The Government may regulate some of the relations indicated in law by itself, and it may delegate another institution to regulate some relations *expressis verbis* indicated in law and the relations stemming from the relations *expressis verbis* mentioned by law. However, the Government, by authorising any institution to regulate the respective relations, may not instruct it to regulate relations which, in accordance with the Constitution and laws, may be regulated by legal acts of the Government and not by institutions lower in the hierarchy.

During the course of the delegation of the powers of regulation of legal relations to administrative institutions, the constitutional doctrine also requires the presence of special competence in those institutions. If the legislator establishes in the law that certain relations are regulated by the Government or the institution authorised by it, the Government may adopt a decree and delegate regulatory powers only to an institution that carries out functions or has powers related to the relations that are being delegated to it by the Government (or are close to those being delegated). Following the conditions and procedure established by the law, the Government may (if needed) establish an institution and delegate it with the power of regulation of relations foreseen in the law. When the Government delegates powers to regulate specific relations to an institution, this institution must have the special professional competence necessary for such regulation (Constitutional Court of Lithuania, 2007).

1.6. The Jurisprudence of the Constitutional Court of Lithuania Regarding Legal Questions Relating to the Management of the COVID-19 Pandemic

The jurisprudence of the Constitutional Court of Lithuania in the field of the restrictions imposed to counter the pandemic has so far resulted in two decisions on the merits. One of the decisions adopted discussed the ability of the National Public Health Centre to establish a list of employment positions where persons needed to check their health status and complete other indicated procedures to be able to carry out their functions. The Constitutional Court stated that the provisions of the Law on the Prevention and Control of Human Infectious Diseases were detailed enough when indicating the conditions for work that could be established by the National Public Health Centre, as they foresaw that these measures may be taken only in a case where national quarantine was declared due to a contagious disease and in a case where the particular employment place had an outbreak of such a disease (Constitutional Court of Lithuania, 2022a).

The second case where a decision on the merits was taken was the question of the limitation of economic activity at the beginning of the pandemic (March–May 2020). The Supreme Administrative Court of Lithuania argued that the provisions of the decree of the Government that temporarily suspended the activity of beauty service providers and allowed odontology service providers to provide only essential services violated the provisions of the Law on the Prevention and Control of Human Infectious Diseases and the constitutional right to pursue economic activity. The Constitutional Court did not find a violation of the above-mentioned Law, and concluded that the provisions of the Law were detailed enough to allow the restrictions that were imposed (Constitutional Court of Lithuania, 2023). The contested measures, in the opinion of the Court, were part of a set of broader complex measures to counter the threat of COVID-19. Furthermore, the Court indicated that the Government had taken measures to compensate businesses for their losses caused by such restrictions. The Court stated that the aspiration of preventing the spread of infectious human diseases in society, as well as controlling the spread of diseases which create a special situation in the state that threatens the health and life of many people and thus ensures the public interest in health protection, may lead to the need for urgent and effective decisions. Therefore, according to the Constitution, the following legal regulation may be established, according to which the measures for the control of human infectious diseases established in the law of the legislator may be detailed in governmental decrees, which determine the extent and duration of the application of specific selected measures. Such legal regulation, which imposes measures limiting or banning economic activity due to the spread of an infectious disease in society, can also be established in cases where, taking into account the special information available at the time, there is reason to believe that the situation threatens the health and lives of many people, and that it is inevitable that, if effective measures are not taken in time, irreparable damage will be caused to the values enshrined in the Constitution – among other things, to people's health and lives (Constitutional Court of Lithuania, 2023). The Court concluded that the measures taken were not in contradiction with the Constitution of Lithuania.

In other cases brought against the Constitutional Court regarding the decisions of the Government in the declaration of the state-level emergency and the declaration of quarantine, either the decision was taken to reject the complaint or the cases are still pending. In 2020, a complaint brought to the court by a private individual regarding the restriction of movement in Lithuania was declared inadmissible because the complainant did not show that their rights were infringed (they did not try to challenge this prohibition, either by addressing the State Border Guard Service for travelling abroad or trying to enter a different municipality and being prevented from doing so; Constitutional Court of Lithuania, 2020). Some other complaints were dismissed due to insufficient legal argumentation, as the Law on the Constitutional Court (1993) indicates that this is a mandatory part of the complaint to the Constitutional Court (Constitutional Court of Lithuania, 2022c).

Other cases brought to the Constitutional Court by members of Parliament were dismissed due to the abolishment of the disputed regulation (Constitutional Court of Lithuania, 2022b, 2022d). The Court noted in its decisions that the Constitutional Court had previously stated that in cases where a court or a person addresses the Court with a complaint that a certain legal act is not in conformity with the Constitution or a law of Parliament, the Constitutional Court has the obligation to decide on such a case even though the legal act in question is no longer in force (Constitutional Court of Lithuania, 2022b, para. 17.2). There are two cases regarding the regulation of the OP addressed to the Constitutional Court by the courts in criminal cases, both of which have been accepted but are still pending.

1.7. Limitation Set Out by the Lithuanian OP: The Question of Legality

As mentioned above, the detailed provisions on the types of services that may be provided to persons not having an OP or other document amounting to it are regulated in a decree of the Government of Lithuania. The basis for such measures may be found in the Law on Crisis Management and Civil Protection of the Republic of Lithuania (1998), Article 8 ("The limitations of human rights and freedoms while ensuring civil protection"), which states that

> In the performance of rescue, search and emergency works, liquidation of an event, emergency situations and elimination of their consequences, in the cases and following the procedure established by this and other laws, the freedom of movement of a person, the rights to the inviolability of property and housing may be temporarily restricted, and in the event of a state emergency, the freedom of economic activity, the provision of public and administrative services.

Furthermore, Article 9 empowers the Government to enact legislation restricting the freedom of economic activity, to restrict the provision of public and administrative services, and to impose such limitations on citizens, state and municipal institutions, other establishments and subjects of economic activity which are necessary to eliminate the emergency situation and its consequences (Law on Crisis Management and Civil Protection, 1998).

Thus, the provision in the Law on Crisis Management and Civil Protection is very concise, as it establishes only the fact that limitations may be imposed. The mention of the possibility to limit the rights of persons and discriminate against/distinguish between them due to their health status while seeking to contain a pandemic is not mentioned. For a person reading the above-mentioned provision, nothing would be clear: they would not know whether they fell under the category of persons whose rights may be restricted, what types of restrictions may be imposed, nor the cases or public health situations which would invoke these limitations. Therefore, the Law does not provide any details regarding possible limitations of human rights in case of a public health emergency. The legislator does not foresee in the law the conditions for the limitation of human rights. The Constitutional Court has already discussed a somewhat similar situation in the case of the limitations of economic activity by governmental decrees, but here the question is about the limitations imposed on different rights of persons than the right to pursue economic activity. It remains very questionable whether the concise wording of the Law on civil protection conforms to the requirement of legality according to the Lithuanian constitutional doctrine, and whether the decisions taken by the Government in limiting the human rights of persons who did not conform to the requirements of the OP conformed with the requirement of legality.

2. Issues Surrounding the Legality of the Green Passport in the Czech Republic

2.1. The Legal Basis of Limitations in the Czech Republic

Developments in the Czech Republic in this area largely correspond to the Lithuanian situation, and a similar set of problems and legal questions emerged in many areas (Pranevičienė et al., 2021). The Czech Constitution has a polylegal character defined by the constitutional order (Constitution of the Czech Republic, 1992, Art. 112 (1); Gerloch et al., 2022). The fundamental documents are the Constitution and the Charter of Fundamental Rights and Freedoms (hereinafter referred to as the Charter) (Constitution of the Czech Republic, 1992, Art. 3), which complement constitutional laws of equal supreme legal force (Art. 9(1)). The basic rule for the imposition of obligations on citizens by the state is the requirement of constitutional conformity and legality – i.e., strict support in a law or legal regulation of equal legal force. Article 4 of the Charter, which strictly regulates the principle of legality, provides that obligations may be imposed only on the basis of the law and within its limits, and only while preserving fundamental rights and freedoms. Legal restrictions on fundamental rights and freedoms must apply equally to all cases that meet the conditions laid down. The application of the provisions on the limits of fundamental rights and freedoms must respect their nature and meaning. Such limitations may not be abused for purposes other than those for which they were established (Husseini et al., 2021, p. 185).

At the very beginning of the COVID-19 pandemic, in March 2020, when discussing how to proceed with counter-COVID-19 measures, the possibility of using the measures mentioned in Act No. 258/2000 Coll. on the protection of public health was discussed. The second possibility was to apply Constitutional Act (1998) No. 110/1998 Coll. This latter avenue was chosen. It can be noted that the Czech Republic went through the pandemic with a minority

Government, a fact which enhanced public discussions regarding suitable legal grounds and restrictions in general. The chosen legal ground was Constitutional Act (1998) No. 110/1998 Coll. on the Security of the Czech Republic, which was necessary for the management of this unprecedented crisis. A state of emergency, which has been declared in the past in cases of floods or after hurricane-force wind storms, proved to be the most appropriate for managing the COVID-19 pandemic crisis (General Directorate of the Fire and Rescue Service of the Czech Republic, 2022). The declaration of a state of emergency opens up the possibility for the public authorities involved in a crisis to make use of specific limitations on rights for the necessary time and to the necessary extent. In this area, the Government is the dominant authorised entity (Act on Crisis Management, 2000, sec. 5 and 6; Constitutional Act on the Security of the Czech Republic, 1998; Horák et al., 2021, p. 431; Mainclová, 2022, p. 96).

An exhaustive list of fundamental rights and freedoms that can be restricted can be found in Sections 5 and 6 of the Act on Crisis Management (2000; hereinafter – Crisis Act). Although this law was conceived to deal with natural threats, it can be stated that its application to the COVID-19 crisis passed the test successfully, as this pandemic had unimaginable dimensions and a global impact. The principle of proportionality is explicitly contained in Section 39c of the Crisis Act, according to which the crisis management authorities are obliged to act in such a way that any interference with the rights and freedoms of persons does not exceed the necessary degree. Formally, such measures are issued by Government resolutions; materially, according to the Czech Constitutional Court, they may have the nature of a general normative act (Constitutional Court of the Czech Republic, 2020).

The Constitutional Court has commented more generally on the nature of such crisis measures by stating, according to the Crisis Act, that crisis measures that interfere with fundamental rights and freedoms must always be reviewable, depending on their content, either as a legal regulation or as a decision or another act by a public authority (Sova, 2020, p. 298). In order to manage the COVID-19 crisis, the Ministry of Health decided to adopt measures of a general nature (Act on the Protection of Public Health, 2000, Sect. 94a(2)) issued based on the Public Health Protection Act. Emergency measures in the event of an epidemic and the danger of its occurrence are regulated by Section 69 of the Act, where in particular the borderline use (Sivák, 2020) and overuse of a generally and openly formulated measure has been the cause of numerous discussions and annulments by the Czech courts regarding contradictions with the law.[7]

In the context of the COVID-19 crisis, the Czech Republic's legal order provided the executive with relatively limited options for dealing with the crisis management legislation and the existing valid and effective legal regulation in the field of public health protection. For dealing with epidemics and the risk of their occurrence, the legislation allows for a procedure within the framework of the ordinary legal regulation brought about by Act No. 258/2000 Coll. on the protection of public health and on amendments to certain related acts, as amended, which legally regulates emergency measures during an epidemic and the risk of its occurrence. If the legislation does not provide sufficient means to deal with a crisis, it is possible to use special legislation to deal with this situation, which the legislator has created *a posteriori* for situations where the normal mechanisms are insufficient (state of danger in Article 3 of Act No. 240/2000 Coll. on Crisis Management (2000); state of emergency in Articles 5 and 6 of Constitutional Act No. 110/1998 Coll. (1998), state of national emergency in Article 7 of the Constitutional Act No. 110/1998 (1998)).

It is necessary to activate a state of crisis that provides adequate mechanisms, authorisation, and means to resolve the crisis, while at the same time allowing for proportionate restrictions on certain rights defined in exhaustive terms (e.g., the right to the inviolability of the person and the inviolability of the home, the right of ownership and use of the property by legal and natural persons, freedom of movement, the right to assemble peacefully, the right to conduct business, or the right to strike). Following this, the legislator then created Act No. 94/2021 Coll., on emergency measures during the COVID-19 pandemic and on amendments to certain related acts (in force since 27 February 2021), which completes the legal environment so that the pandemic crisis can be effectively managed

[7] E.g., the judgment of the Municipal Court in Prague of 23 April 2020 was annulled by the judgment of the Supreme Administrative Court Senate (Others) in its decision of 26 February 2021. The judgement of the Municipal Court in Prague of 13 November 2020 was adopted. The judgement of the Municipal Court in Prague of 23 February 2021 was annulled by the judgement of the Supreme Administrative Court of 20 July 2021 (Czech Prague Municipal Court, 2020a, 2020b, 2021; Czech Supreme Administrative Court Senate, 2020).

with the backing of the law. The unprecedented scale of the crisis then opened up space for substantive reflection on the potential possibility of managing simultaneous crises with a multiplier, synergistic, or domino effect using existing crisis management tools, while at the same time raising doubts about the sufficiency of the existing legal solution (Kollert, 2021; Dienstbier, 2022, p. 497).

2.2. The EU COVID-19 Pass and the Lack of Czech Legal Regulation

To begin with, it is necessary to focus on the EU COVID-19 digital certificate (also called the COVID Passport, Digital Green Certificate, Digital COVID Certificate, Certificate, or Digital Green Certificate) and its anchoring in the legal order. The legal basis was established by Regulation (EU) 2021/953 (2021) (hereinafter referred to as the Regulation). In particular, the definitional provision in Article 3(2) of the Regulation, according to which Member States or designated entities acting on behalf of Member States shall issue the certificates referred to in paragraph 1 of this Article in digital or paper format or both formats, is of particular importance. Prospective holders are entitled to obtain a certificate in the format of their choice. Such certificates shall be user-friendly and shall contain an interoperable barcode to allow verification of their authenticity, validity, and integrity. The information contained in the certificates shall also be in a human-readable format, and shall be provided at least in the official language or languages of the issuing Member State and in English.

The Czech Office for Personal Data Protection (2022) also commented comprehensively on the proposal in its annual report for 2021. It described the introduction of COVID-19 passports, or the EU COVID-19 European Digital Certificate, as a significant legislative issue with a data protection dimension in the context of the COVID-19 pandemic, as it aimed to facilitate the exercise of the right to free movement within the EU during the COVID-19 pandemic by creating a common framework for the issuance, verification and recognition of interoperable COVID-19 vaccination and testing certificates. During the preparation of the Regulation, joint comments were received from the European Data Protection Board and the European Data Protection Supervisor (2021) on the draft Regulation, which were incorporated into the text. A digital certificate is seen as a verifiable document that can prove the time of actual vaccine administration by a doctor (using a timestamp) or which contains a person's medical history, and which should facilitate the free movement of EU citizens thanks to a common format in all Member States. The Regulation entered into force on 1 July 2021.

In the Czech Republic, obligations were implemented in the form of a digital certificate with a QR code (Covid Portal, 2022) available on the Citizen's Vaccination Portal set up by the Ministry of Health (https://ocko.uzis.cz/). In the Czech Republic, the principle of secure and conclusive proof of certificates is based on two applications: one containing a QR code from the official certificate, called Tečka; and another that reads and displays a code – čTečka or eReader. Both methods show whether the persons concerned have been vaccinated or whether the tests for COVID-19 have been carried out at the required interval, according to the current conditions of entry into shops, establishments, cultural or sporting events, etc. The same shall apply to any history of the disease.

The mobile apps are linked to the Infectious Diseases Information System, where official information about vaccination, passing or testing is stored. Individuals can download them for free to smartphone devices (Covid Portal, 2023). Tečka shows completed vaccination certificates, negative PCR or antigen tests, and disease history. The čTečka application is used by entities verifying compliance with the conditions for individual persons (e.g., for entry into a social event, restaurant, or premises) and can read a QR code from a paper certificate, a certificate downloaded on a mobile phone for example, or from the Tečka application. The QR code of the certificate is equipped with a digital signature that protects it against forgery. When checking the validity of a certificate, the QR code is scanned with the phone's camera to verify the signature – the phone's display lights up green if the certificate is valid, and red if it is invalid. In the details of the certificate, the person's name, date of birth, and the validity of the certificate are displayed (Švihel & Rambousková, 2021).

As correctly pointed out by Jaroslav Kuba (2022; in response to Supreme State Prosecutor's Office, 2021), the only issuer of EU COVID-19 certificates in the Czech Republic is the Ministry of Health, even though there is no legal regulation that explicitly grants such authority to it. Although this situation gives the impression that the

Czech legal order does not have anything like the principle of the enumeration of public law claims,[8] the Constitution of the Czech Republic enshrines in Article 2(3) (together with Article 2(2) of the Charter), at least formally, the rule that state power may be exercised only in cases within the limits and in the manner provided by law. As regards the issue of certificates concerning vaccinations, the legal system is, for the time being, limited to the vaccination certificate, and only the health service provider who administered the vaccination is entitled to make entries in it. **It is therefore questionable whether, in the absence of an implementing regulation expressly conferring the power to issue certificates on the Ministry of Health, the provisions of the EU COVID-19 Regulation can be regarded as a sufficient legal basis in this respect.**

Problems with the Government's bill amending Act No. 258/2000 Coll. on the Protection of Public Health and on Amendments to Certain Related Acts, as amended, also testify to the need for the legal anchoring of EU COVID-19 passports (1231/0 Amendment, 2021). The proposal failed to be adopted in a state of legislative emergency. Due to the nature of European law, the EU COVID-19 Regulation is binding in its entirety, is directly applicable in all Member States of the European Union, and does not need to be implemented in law. However, the Regulation does not cover the whole issue comprehensively and, in particular, the area of procedure and specific competences for public authorities must be accompanied by national law with the force of law conferring competence on a specific public authority. Therefore, it can be concluded that the EU COVID-19 pass is noticeably lacking a separate legal regulation, and no law in the Czech Republic would appropriately implement relevant procedural issues into the legal order. The absence of a basis in national law is, in relation to the principle of the enumerability of public law claims, a violation of the rule of law, and can be found to be constitutionally incompatible.

2.3. The Judgement of the Supreme Administrative Court of the Czech Republic

Concerning the čTečka application, the Ministry of Health's emergency measure No. MHDR 14601/2021-22/MIN/KAN, dated 30 July 2021, was subjected to judicial review. This measure was challenged before the Supreme Administrative Court on 29 December 2021, inter alia, on the grounds of the illegality of Article I(13)(a) and (14)(a). These provisions, with reference to the Public Health Protection Act (2000) and the Act on emergency measures during the COVID-19 pandemic (2021; hereinafter – the Pandemic Act), regulated the conditions for the holding of public or private events where there was an accumulation of persons in one place, so that no more than 20 persons could be present at the same time or, subject to other conditions,[9] no more than 1,000 persons if the event was held indoors, or 2,000 persons if the event was held exclusively outdoors.

The contested measure imposed an obligation on the event organiser to check that the conditions for checking infection-free status were met, and the participant was thus obliged to prove infection-free status. These were events at which entry was typically regulated by, for example, using a ticket. In case a person failed to prove compliance with the conditions of infection-free status, the event organiser was prohibited from allowing such a person to attend the event. Another condition of participation was the obligation to maintain a minimum of 2 sq. m spacing. If entry to the event was not regulated, the person had to be prepared to demonstrate compliance on the spot, at least to the public health authority (The Health Ministry of the Czech Republic, 2021, Part II). At the same time, the measure also interfered with the right of assembly, regulated in Act No. 84/1990 Coll. on the Right of Assembly, as it set a limit of 20 participants in assemblies outside the interior spaces of buildings, with mandatory two-metre spacing. From the point of view of this paper, it is crucial that the emergency measure also imposed an obligation on the organisers of group tours or events to check the participants for compliance with the condition of being infection-free using the čTečka application.

As regards standing to bring an action before the Supreme Administrative Court, it should be noted that the contested emergency measure was amended by another emergency measure of the Ministry of Health (2022) with effect from 17 January 2022, which no longer contained the contested regulation. Nevertheless, under the provisions of Article 13(4) of the Pandemic Act, if an emergency measure has elapsed during the proceedings for

[8] The principle allowing the application of public power only *secundum et intra legem*, i.e., only on the basis, in the manner, and within the limits of the law.

[9] The condition was that the participant did not show clinical signs of COVID-19, or had a negative PCR test no more than 7 days ago, or had a negative antigen test no more than 72 hours ago. Another possibility was that the person had been vaccinated against COVID-19, and documented this with a national certificate of vaccination or a national certificate of completed vaccination.

its annulment, that does not preclude further proceedings. Therefore, if the court concludes that the emergency measure or parts of it were contrary to the law, it will state this conclusion in its judgement. It follows from the foregoing that the Supreme Administrative Court had jurisdiction to review the expired emergency measure and to give a declaratory judgement determining its possible illegality.

In its application, the appellant argued that compliance with the obligation under the emergency measure is technically difficult and staff-intensive for organisers of events with larger numbers of visitors. If a visitor did not produce proof of infection-free status, the organiser could not admit them to the event. This would, however, be a breach of the contract that they had previously concluded with the visitor. The appellant itself had organised such events and, according to the appellant, its legal sphere could have been infringed as a result of that obligation. According to the appellant, the control of the infection-free čTečka applications by the organiser could have constituted an interference with the exercise of the right to conduct business and economic activity under Article 26(1) of the Charter of Fundamental Rights and Freedoms, since under the conditions set, they would not have been able to actually organise the events or exhibitions in question.

In adopting the measure, the Ministry of Health did not consider whether the imposition of the specific obligation was proportionate to the stated purpose. The fulfilment of the obligations imposed by the emergency measure should therefore have been monitored by the public authorities. The defendant, the Ministry of Health, argued that the čTečka application guaranteed reliable verification of the authenticity and validity of the infection-free documents, and can be installed on any smart device. According to the Ministry, the check is simple, reliable and does not impose any significant burden on the person checking.

The appellant responded to this argument with a rejoinder to the effect that employees of social event organisers are not normally equipped with service devices on which the čTečka application should be installed. They cannot be forced to use private devices under the current legislation, and the purchase of dozens or hundreds of smart devices would be burdensome for the organisers. The appellant stressed the disproportionality of such regulation to the purpose pursued.

The Ministry of Health responded that it had chosen the obligation to check for infectiousness using the čTečka application because it is a method that guarantees reliable verification of the authenticity and validity of the document containing the QR code. This method of control was an attempt by the Ministry to reduce the use of false or fraudulent certificates to prove that a person was free of infection.

In this case, the Supreme Administrative Court confirmed that it did not doubt the legitimacy of the objective that the measure imposed on the organisers of the events was intended to achieve. The documents certifying that the infection-free conditions had been met could be falsified by persons who did not meet those conditions. A simple visual inspection of the document by the event organiser may not have been sufficient to detect the falsification. On the other hand, by checking the document via the čTečka application, the validity and authenticity of the document could be verified by scanning and evaluating the QR code on the relevant document. Thus, according to the Supreme Administrative Court, the effective check itself constituted an undoubtedly legitimate aim of the contested regulation. At the same time, the Court did not find that obligation to be disproportionate. The applicant's rejection of that obligation was quite general, and it failed to specify the technical and personnel costs referred to in its application. According to the Court, it was legitimate to expect that the organiser or their employee would have a smartphone or tablet. At the same time, according to the current Labour Code (2006, sec. 190), it is possible to agree with an employee that they will use private devices for control purposes.

A Comparative analysis of Lithuanian and Czech Regulation

A comparative analysis of Lithuanian and Czech legal regulation allows one to state that both Lithuanian and Czech authorities chose a similar legal path for the legal basis of pandemic management measures. The chosen legal basis constituted the laws regulating the protection of public health, as well as the legal acts for civil protection. In the case of health passes, analogous documents (the Tečka application in the Czech Republic and the OP in Lithuania) were introduced to the legal systems of both countries at similar times. The main conditions of application of both measures were similar in their content. The list of rights limited by the above-mentioned documents were also similar. Furthermore, similarly, in both states the documents were established by measures

of the executive branch of the Government. However, the Czech Parliament later passed the Pandemic Act, a special act tailored for this specific situation.

The comparative analysis also revealed some differences in the situation in Lithuania and the Czech Republic. The legality of the OP has not yet been analysed in the jurisprudence of Lithuanian courts (neither the administrative courts nor the Constitutional Court), whereas the Czech Courts have ruled on the legality and proportionality of the Tečka application and on other measures of pandemic management.

The jurisprudence of the Constitutional Court of Lithuania had already formulated rules on the extent of the delegation of the powers to establish rules for a specific field in executive, governmental decrees as opposed to laws of Parliament, and this doctrine was upheld by the Lithuanian legislative and executive powers. Therefore, it is regrettable that the present pandemic management situation differs from the doctrine formulated by the Constitutional Court of Lithuania and sets out limitations on human rights not foreseen in the legal acts adopted by Parliament. This allows serious doubts to be raised regarding the practice of the Lithuanian authorities in imposing far-reaching limitations on human rights by governmental decrees and the possible infringement of the principle of legality of human rights limitations.

In the Czech Republic, the issue of use of the čTečka application has raised important questions regarding the subject issuing the document and its authority to do so. In its review, the Czech Supreme Administrative Court confirmed that checking compliance with infection-free status using the čTečka application was proportionate, as it pursued legitimate objectives set by the public authority. Furthermore, the analysis revealed concerns about data protection in the Czech Republic in the context of the right to privacy, and it can be concluded that information about the presence or absence of vaccination against COVID-19 is to be held confidential in any case.

Conclusions

The analysis of the relevant legal provisions applicable in Lithuania and the Czech Republic regarding health certificates, or so-called green passports, reveals many important issues regarding the legality of said provisions. The urgency of the situation with COVID-19 might have justified far-reaching measures regarding the limitations on human rights during the first days or weeks of the pandemic, limiting the right to movement and to private life, but the limitations imposed later, when knowledge about the disease had increased, must undergo strict scrutiny both at the level of the legality of the measures as well as regarding their proportionality.

The question of legality revealed that, in Lithuania, only a succinct provision in the Law on Crisis Management and Civil Protection would doubtfully amount to a sufficient legal basis for such far-reaching limitations on human rights. Even though the legislative power – the Seimas (Lithuanian parliament) – has the power to delegate certain questions and aspects of any given field to the Government, this does not deny the requirement to set out the basis for human rights limitations in the law adopted by Parliament.

At the moment, the Constitutional Court of Lithuania has ruled on a different question – that is, whether the limitations on economic activity in the beginning of the pandemic were in conformity with the right to pursue economic activity. In this, it concluded that the measures taken by the Government of Lithuania were legal and proportionate. The court has yet to rule on the question of the legality of the OP.

The Constitutional Court of the Czech Republic has commented more generally on the nature of all crisis measures according to the Act on Crisis Management of the Czech Republic, stating that crisis measures that interfere with fundamental rights and freedoms must always be reviewable, depending on their content – either as legal regulation or as a decision or another act by a public authority. Furthermore, the question of the duty to assess whether the čTečka application represents possible interference with the exercise of the right to conduct business and economic activity was analysed by the Czech Supreme Administrative Court, which concluded that the contested legislation was legitimate and proportionate. However, questions remain as to whether such documents infringed other rights of persons, especially the rights of those persons who did not obtain a certificate due to their unwillingness to vaccinate.

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LEGAL PROBLEMS IN THE CLASSIFICATION OF LEGAL ENTITIES OF PUBLIC LAW: A COMPARATIVE STUDY

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Abstract. Since the institution of public legal entities plays an important role in contemporary society, both in the state and in the economic development of countries, there is a need to clear up its legal status and specifics. The lack of a clear, universally accepted classification criterion for distinguishing between legal entities under public law and legal entities under private law leads to difficulties in determining their legal status and resolving civil disputes involving public law entities. An evaluation of the current theoretical provisions regarding legal entities is required for the development of their further improvement, as well as for their adaptation to market relations and free entrepreneurship. This study aims to identify: the specific features of legal entities in public law; the main peculiarities that can be used to distinguish legal entities established under public law from legal entities established under private law; the criteria underlying the selection of legal entities; as well as the status of research on the institution of public law legal entities in France, Germany and Ukraine. The result of this scientific paper is elucidation of the significance of the classification of legal entities under public law as participants in civil legal relations. This research highlights the importance of clearly defining and consolidating legal entities under public law in regulatory documents to streamline litigation processes, using the notion of their purpose as a comprehensive classification criterion and drawing on the benefits observed in the exhaustive lists of public-law entities in France and Germany.

Keywords: public legal entities, state institutions, classification of legal entities, legal doctrine, territorial communities, state.

Introduction

As the present issue has not been sufficiently studied, it is necessary to draw attention to the experience of other European countries in dealing with the classification of public law legal entities to consider the legal doctrine and to identify a more appropriate criterion that will form the basis for dividing legal entities into types. The category of a legal entity occupies a prominent place in civil law and in the legal doctrine in general (Andreev, 2018). There are many views on the concept, legal nature and content of a legal entity that are enshrined in the laws developed by states, in social norms, as well as in legal and political systems. Under the conditions of a modern market

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economy, a legal entity is an active participant in civil law relations (Chochowski, 2019). It has therefore become necessary to develop a new approach to defining the nature of a legal entity and dividing it into types.

Particular attention should be paid to the category of a legal entity under public law. Determining the place and role of a legal entity under public law is relevant today, since in both Ukrainian and Western European literature there is an insufficient number of scientific papers which fully and reasonably define the legal status of a legal entity under public law. The purpose of this study is therefore to identify the characteristics that legal entities under public law have, and to clearly distinguish them from legal entities under private law. There will also be a discussion of what subjects of civil law are considered to be legal entities under public law in Ukraine, France and Germany. In order to gain a better understanding, examples of representatives of public law and areas where legal entities under public law play the most significant role will be given. Furthermore, the purpose of the study is to define the specifics of the liability of legal entities under public law as participants in civil relations. The object of the study is the investigation and analysis of a legal entity of public law as a category of civil law. The relevance of the problem of defining the concept and legal status of legal entities under public law is stipulated by their strategic significance in state development, since it is they who direct their activities to ensure comfortable living conditions for the population. The literature on this issue does not provide an unambiguous solution to the issue of the classification of legal entities. Nor does it address the definition of the criterion that should be the basis of this division – legal status – which causes difficulties in practice. It is therefore necessary to develop new approaches to addressing this issue and to review and investigate the experience of France and Germany.

This study is based on theoretical methods, chiefly the study of the scientific literature of global authors and regulatory legal documents. In particular, the civil codes of Ukraine, France and Germany and the charters of organisations, partnerships and enterprises were considered in order to understand the status of the investigated problem and the gaps that need to be addressed. Among the basic theoretical methods that were used, the most significant were analysis, comparison and modelling. These techniques enabled the characterisation of: the conceptual and terminological apparatus; the peculiarities of determining the essence of legal entities under public law in Western European countries and in Ukraine; and the features that help to distinguish legal entities under public law from private ones. Synthesis was used to summarise the state of the problem in Ukraine, France and Germany. Equally important was the systemic method, which was used to conduct a full analysis of the terminology of the topic. Finally, the method of historical analysis and the dialectic method were used when examining regulatory legal acts and statutory documents which reflect how the status of public law legal entities has changed in different countries.

Special methods were also used, including the following:
1) the method of legal interpretation, which was employed when revealing the content of the regulatory legal and statutory documents that stipulate the status of a legal entity under public law as a participant in civil legal relations and determine its place in the system of civil law;
2) the method of legal prediction, by which it was possible to predict the consequences of implementing the experience of France and Germany in regulating the status of legal entities under public law in the civil law of Ukraine.

The result of this scientific paper is the elucidation of the significance of the classification of legal entities under public law as participants in civil legal relations. The theoretical significance of the paper lies in the fact that a clear distinction between the types of legal entities enables a deeper understanding of the essence of the category of a legal entity under public law. Thus, it will be easy for a public law legal entity to identify special features, the specifics of liability, the extent of rights, as well as the differences from a legal entity of private law. The practical significance of this work lies in facilitating the determination of the legal status of legal entities, and in resolving civil disputes that arise with the participation of a legal entity under public law in an unproblematic and comprehensive manner.

1. Theoretical Background

There are many different views of scientists regarding the definition of the principal criterion that should be the basis of division in this area, as well as regarding the justification of the need for such a classification. Scholars from all over the world define several classification criteria: according to the nature of the legal act which is the

basis for the formation of a legal entity; according to the method of formation; according to the legal personality; and according to the specific features of the legal systems of different countries (Joy, 2018; Buell, 2018). The most common classification of legal entities, which is used in Ukraine and in many other countries of the world, is their division into two large groups: 1) legal entities under public law; and 2) legal entities under private law (Gahdoun, 2018; Masalab, 2020). Article 81 part 2 of The Civil Code of Ukraine (2003) stipulates that the criterion for the classification of legal entities is the order of their creation. There are differing views among scholars on this issue. Some believe that enshrining a single classification criterion is not sufficient to fully understand the nature of legal entities' activity, legal regime and status (Lerner, 2017). Scholars reinforce this opinion by pointing to the fact that legal entities of private law, as well as legal entities of public law, can be established by administrative means – i.e., by the state or local authorities (Hannigan, 2016). It is argued that such a criterion for dividing legal entities is unable to clarify the difference between the two types of legal entities comprehensively and reasonably (Viagem, 2019). Some note that it is not necessary to define a specific criterion because legal entities under public and private law have much in common (Oglezneva, 2019).

There are three approaches to defining the type of legal entity in Western literature:
1) it is determined by which regulations the emergence of a legal entity is governed by;
2) it is determined by whether the entity of public law to be created belongs to an organisation established by public authorities;
3) it is determined by what purposes a legal entity of public law has and what functions it performs (Arimbi, 2020).

The regulatory legal framework of this study covers legal acts that enshrine the main attributes of a legal entity under public law as a participant in civil relations, and the status and scope of its legal personality. Thus, the authors analysed such legal documents as the French Constitution (Constitution du 4 octobre 1958, 2008), the Civil Code of Ukraine (2003), the French Civil Code (1804), the German Civil Code (1900), the Ukrainian Law on Public Private Partnership (2010), the Charter of Ukrposhta (2021), the Charter of Ukrzaliznytsia (2015), the Charter of Ukroboronprom (2011) and the German Act Against Restraints of Competition (1998). The papers of many academics were also analysed. Thus, Abuselidze and Katamadze (2018) underlined the importance of the existence of the institute of legal entities, including legal entities under public law, as participants in civil legal relations. Akhundov (2020), Ashtaeva et al. (2015) and Matsopoulou (2002) indicated that all legal entities, including legal entities under public law, are civilly liable for breaches of statutory provisions, which have rather specific characteristics. Andreev (2018) and Joy (2018) explored in their works the structure of legal entities of public law, which is important in understanding the essence of the legal nature of their activities. Barlaug and Atle Gulla (2020) noted that there should be a partnership between legal entities of public and private law, as it helps to achieve goals in a certain field of activity. Chochowski (2019) explored the concept of the term *legal entities of public law* and explained the reasons for the origin and spread of this institution. De Lamy and Segonds (2018) explained the specific features of the liability of legal entities under public law in France. Dluzik (2019) examined the types of legal entities of public law in Germany, characterising them and identifying their most important features. Gahdoun (2018) analysed the ramified system of legal entities under public law in France as participants in civil relations.

Grundmann and Rathner (2021) and Schild and Schultz (2017) determined that the State Bank of Germany is also a legal entity under public law, as this institution has inherently public (state) functions. Hannigan (2016) emphasised the need for close cooperation between groups of legal entities, as he observed that this is the only way to achieve maximum efficiency in any area of activity. Kirste (2017) examined the types of German corporations as representatives of legal entities under public law, along with their specificities, essence and place in the ramified system of legal entities. Lerner (2017) analysed the doctrine of the liability of legal entities under public law, which is widely used in German civil law. Masalab (2020) examined an important civil law issue: the ability for self-regulatory organisations to act as representatives of legal entities under public law. Oglezneva (2019) drew attention to the fact that in modern national law the status of the state as a subject of civil law is not yet fully consistent with the equality of participants in these relations, which is a feature of the method of civil law regulation. Quard (2018) analysed the liability of organisations as one of the main subjects of civil law, paying particular attention to public organisations, the legal status of which currently remains controversial. Saenger (2020) took a more in-depth look at such aspects as forms of public companies, organisations, corporations, foundations, and the need for partnerships between representatives of legal entities. Skoropysova (2021) analysed

the peculiarities that legal entities under public law possess in Ukraine, considering their types, the elements that make up entities, as well as the responsibility that can be incurred by legal entities under public law. Tjio (2021) considered legal entities under public law and their impact on the financial sector, in particular analysing how public entities contribute to the social and economic situation of the country. Finally, Viagem (2019) analysed the causes and consequences of violations of legal provisions by legal entities of public law.

Distinguishing between public law legal entities and private law legal entities is imperative due to a number of significant aspects. Firstly, both types of legal entities pursue different objectives and purposes, where public law legal entities focus on public functions and securing the interests of the state or local government while private law legal entities aim to satisfy individual or corporate interests and promote entrepreneurial activity. Secondly, they are subject to different legal regulators: public law legal entities are governed by public law, which encompasses relations between the state, its institutions, and citizens; while private law legal entities are subject to private law, which establishes the rights and obligations of parties in relation with one another. The third aspect is the difference in sources of funding, as public law legal entities typically receive funding from state or local budgets, whereas private law legal entities meet their financial needs through their own funds, loans, and investments (Olkina, 2014; Karnitis et al., 2022). The fourth aspect is the distinction in management structures. Public law legal entities are characterised by a specific management structure that involves subordination to higher state or local authorities, whereas private law legal entities have a more autonomous management structure, dependent on the owner or shareholders of the company. The fifth aspect is the differences in liability regulation. Public law legal entities are subject to special regulation regarding liability for violations of legislation and administrative and criminal offenses (Kanatay et al., 2019). In the context of private law legal entities, liability is determined according to the norms of civil, commercial, and other branches of law. Finally, public and private law legal entities have different procedures for their establishment and termination. The process of creating and terminating public law legal entities is carried out under special rules, often associated with state regulation and control, while the process of creating and terminating private law legal entities follows other rules, with less state intervention (Yurkevich, 2016).

Differentiating between public and private law legal entities allows for the optimization of the regulation of relations between them, ensures the proper execution of their functions in society, and promotes the protection of the rights and interests of citizens, the state, and other subjects of legal relations. Adequate delineation is a key element for the stability and effectiveness of a legal system that caters to the needs of various sectors of society (Chochowski, 2019; Kostruba et al., 2020).

2. The definition of the concept of legal entities under public law in Ukrainian legislation

The literature on the subject of this study contains a variety of scholars' opinions on the characteristics and features of such a specific institute of civil law as a legal entity of public law. First and foremost, it should be noted that a legal entity under public law has all of the attributes of a legal entity (2018). The first characteristic feature is property separateness. This means that a legal entity owns the property belonging to it, which it disposes of by right of ownership at its own will and within the framework of the regulatory legal acts (2019). The second feature that characterises entities is a clearly established structure that is inseparable and singular. The structure of an organisation/corporation is usually set out in its founding documents (the articles of association or a memorandum of association). Even if a legal entity has branches or representative offices, a clear organisational structure remains, as branches and representative offices are not independent subjects of civil law. Instead, their management is entrusted to managers appointed by the legal entity itself, who act on behalf of and solely in the interests of the entity, but in no way as an independent branch or representative office (Andreev, 2018; Kostruba, 2021). The third specific characteristic of this institution is independent property liability. This means that a legal entity under public law uses only its own assets, being responsible for actions that violate the law. It is only to this entity that creditors can assert their claims (Akhundov, 2020). The fourth key feature is the ability to act in civil law on one's own behalf. Any legal entity must have a name, indicating its organisational and legal form and the nature of its activities, along with its stamps, seals and signatures (Barlaug and Atle Gulla, 2020).

By analysing the regulatory legal acts and the studies of academics, it can be concluded that, apart from its general characteristics, a legal entity of public law also has other specific characteristics that are unique to it. Firstly, a legal entity under public law is formed in a dispositive manner, i.e., by the will of the state or a territorial

community. It is up to these actors to issue a law, decree, order or other administrative act evidencing the need for the establishment of a public entity. Secondly, legal entities perform specific functions. In contrast to legal entities under private law, which function to fully satisfy their own interests and needs – usually to make a profit – legal entities under public law function to satisfy state or public needs. Thirdly, the liability of legal entities under public law has certain specific features. Thus, the responsibility for the unlawful activities of a legal entity under public law lies with public authorities, territorial communities and local governments (Ashtaeva et al. 2015). This is confirmed by the content of Article 96 of the Civil Code of Ukraine (2003), which stipulates that a legal entity is liable for its unlawful acts with all that it possesses. Fourth, legal entities under public law are not owners of the property they possess. In accordance with Articles 136–137 of the Civil Code of Ukraine, legal entities of public law possess their property via limited ownership rights: the right of operational management and the right of economic management. Fifth, a legal entity under public law actively participates in civil law relations. The activities of the latter are subject to the provisions of the civil law of the particular country.

Legal entities of public law in Ukraine, according to the Civil Code of Ukraine, include those institutions, enterprises, and organisations that are established by the state, territorial communities, and local authorities. The state can initiate the establishment of state-owned enterprises or educational and charitable institutions. The territorial community, in turn, has the right to establish communal enterprises as well as various types of institutions: educational, sports, charitable and so on. In particular, this is stated in Articles 167–168 of the Civil Code of Ukraine. In addition to the above-mentioned bodies, legal entities of public law are also central executive authorities, whose legal personality, i.e., the scope of their rights and obligations, is enshrined in the regulatory legal documents (Skoropysova, 2021). A clear and exhaustive list of legal entities under public law should be enshrined in the Civil Code of Ukraine. This would contribute to the normalisation of relations involving legal entities under public law by clearly defining the legal nature of such participants in civil relations. As for state and municipal enterprises, there are diverging opinions among scholars when it comes to recognising them as legal entities of public law. Thus, according to most scholars, state and municipal enterprises can be classified as legal entities under private law, since their activities are aimed at achieving the more traditional objective of civil law – making a profit. Thus, most state enterprises seek to satisfy personal rather than public interests (Oglezneva, 2019; Bielov et al., 2019). In support of this, attention should be drawn to the interpretation of public interest in the civil law doctrine. Thus, public interest is considered as: 1) compliance with the needs and goals of the entire society and the state, including protection by specialised entities (state and public associations) (Tjio, 2021); 2) legitimacy, as the public interest is enshrined in the legislation and corresponds to it (Stonebraker & Ilyas, 2018); and 3) the inadmissibility of the limitation of public interests (Chochowski, 2019). The definition of legal entities under public law may therefore be based on the fact that these participants in civil legal relations are dependent on their founders, which are the state or local government, and the property of these entities is state or municipal property (Kostruba & Hyliaka, 2020).

To better understand the differences between legal entities under public law and legal entities under private law, it is useful to consider a few examples of organisations/societies in Ukraine, namely: the Ukrposhta and Ukrzaliznytsia joint-stock companies (JSCs) and the Ukroboronprom state-owned concern. Thus, the Ukrposhta statutory organisation is a private legal entity, even though it has some features characteristic of a legal entity under public law. For example, one specific characteristic is that the Ukrposhta JSC was founded by the Ministry of Infrastructure of Ukraine. As noted above, legal entities under public law are established by the state, territorial communities and local authorities. However, in this case there are several other features to pay attention to – firstly, the purpose of the association's activities. While analysing the functions of the organisation, it seems that its main activity is aimed at satisfying the needs of society in providing reliable and fast postal services. However, the association's statutory document states that the main purpose of Ukrposhta is to generate income from the performance of the functions stipulated within that document (Charter of the joint-stock company Ukrposhta, 2021). The purpose of a legal entity under public law, on the contrary, is to satisfy public or state interests. Secondly, the Charter of Ukrposhta explicitly states that the company is private, and that all shares belong to the state as a subject of civil law. Thirdly, the company has a certain amount of specific rights and obligations – e.g., it has the right to enter into contracts and to enter into transactions without violating the rules of the legal provisions. Fourthly, a JSC has its own bank account and its own name, seal, stamps and other designations that allow for the identification of a legal entity. Fourth, Ukrposhta has assets in its ownership that it can manage in its interests. Fifth, Ukrposhta is not liable for the unlawful acts of Ukraine, and Ukraine is not responsible for the activities of Ukrposhta. Moreover, the company is responsible for all available property in its possession (Charter

of the joint-stock company Ukrposhta, 2021). Thus, it can be reasonably concluded that Ukrposhta JSC is a legal entity under private law.

However, it is worth noting that in March 2017 the Ukrposhta JSC was recognised as a public joint-stock company. According to Order of the Ministry of Infrastructure of Ukraine No. 611 of December 14, 2018, however, the Ukrposhta public joint-stock company was transformed back into a private company as early as 2018. As for the Ukrzaliznytsia statutory association, it, like Ukrposhta, has the status of a legal entity of private law, although it is owned by the state. Having analysed the Charter of Ukrzaliznytsia (2015), it is possible to identify certain attributes that provide full confidence in the private status of the organisation. Firstly, the main purpose of the enterprise's activity is to meet the needs of the state, individuals and legal entities in providing efficient and safe transportation for both the population of Ukraine and foreigners, as well as generating income from its activities. Secondly, the organisation has its own bank accounts and its own balance sheet, which it can manage for its own purposes and interests. Thirdly, the association can form departments at its own will, including branches, representative offices, associations and various entities, in order to give them functional responsibilities. Fourthly, the company is solely responsible for its actions with all of its assets. Fifth, Ukrzaliznytsia can enter into transactions of its own volition, dispose of its rights, and participate in litigation to resolve disputes. Sixth, the organisation has certain assets granted to it on behalf of the state. It has to dispose of them without violating the provisions of law. Even though the founder of the Ukrzaliznytsia JSC is a state body, the Cabinet of Ministers of Ukraine, this is not a sufficient reason to classify Ukrzaliznytsia as a legal entity under public law.

The state-owned concern Ukroboronprom, unlike Ukrposhta and Ukrzaliznytsia, is an example of a legal entity under public law. This statement is supported by several pieces of evidence. Firstly, as is typical of a legal entity under public law, the concern was created by the state, represented by the Cabinet of Ministers of Ukraine. Secondly, the purpose of the concern is to ensure efficient ownership and management of the economic sphere, which entails the creation of weapons, military supplies and military equipment. Making a profit is not the concern's objective, which is not characteristic of a legal entity under private law. Thirdly, attention should also be paid to the content of Charter of the State Concern Ukroboronprom (2011), which clearly states the type of organisation as being state-owned. Therefore, the Ukroboronprom state-owned concern is a key representative of a legal entity under public law. The main difference with a legal entity under private law is that its purpose is to satisfy the military needs of the state. The concern does not conduct business activities and therefore does not make a profit. However, Ukroboronprom, like Ukrposhta and Ukrzaliznytsia, can open, manage and control accounts to maintain its own balance sheet properly, which it can dispose of, own rights to, and enter into transactions with in accordance with legal regulations. Furthermore, the concern is not responsible for the actions of Ukraine which violate the law to a specific extent, and Ukraine is not responsible for Ukroboronprom's unlawful actions. The concern is in line with the existing assets in its possession. In analysing all of the above attributes, the issue of the concern's legal status cannot be resolved unambiguously.

3. The classification of a legal entity under public and private law in French civil law

The theory of a legal entity under public law originated in French administrative law, which is considered to be based on three pillars: legal entities under public law, public services and administrative justice (Quard, 2018). Under the French Constitution, as well as under the doctrine of French law, all legal entities are divided into public (*personnes morales de droit publique*) and private (*personnes morales de droit privé*) (Constitution du 4 octobre 1958, 2008). In France, it is also not uncommon to find synonyms for the term *legal entity of public law*, such as *administrative legal entity* (Matsopoulou, 2002). This name emerged primarily due to the fact that legal entities under public law are formed on the basis of an administrative act and are subject to administrative law. Public legal entities in France include the state, public institutions, collective governments of regions, departments, communities, communes, public educational institutions, chambers of commerce, charitable and sports organisations, as well as trade unions (Civil Code of France, 1804). They are separated from public administration institutions by their legal regime. Thus, public administration institutions are mainly subject to administrative law rules and their employees usually have the same status as civil servants. These institutions perform the traditional management tasks of ensuring the functional independence of the agencies, regulating their activities, ensuring law and order, etc. At the same time, legal entities under public law are engaged in economic production (De Lamy and Segonds, 2018). In their functioning, they rely mainly on private law, and their personnel are subject to the provisions of the Labour Code and are equivalent to wage earners in the private sector (Code du Travail of

France, 1910). These institutions carry out commercial activities. Furthermore, French scholars note that "local authorities act as legal entities of public law", carrying out activities aimed at ensuring a safe and comfortable life for the population (Gahdoun, 2018).

Having analysed French civil law, one can conclude that a legal entity under public law in France, just like a legal entity under private law, is endowed with its own name, has a certain location, and has a certain scope of legal personality. It is worth noting that a legal entity under public law has in their possession and at their disposal their property and budget, as well as their authorised bodies. State ownership is subject to a specific administrative and legal regime of public property, as there are only two criteria for classifying assets as public property: firstly, their ownership by a public legal entity; and secondly, their public purpose. State-owned property is the basis for the activities of various public services, and is the material basis of public administration. In order to better understand the nature of the subjects of French public law, it is necessary to examine them in more detail. Thus, a state is a legal entity under public law that exercises legislative, executive and judicial power over a defined territory and in the interests of its population. The state is a special legal entity under public law; it has its own sphere of competence which cannot be transferred to other bodies, including local ones. In particular, this is explicitly stated in Article 73 of the French Constitution (Constitution du 4 octobre 1958, 2008). The quality of life of the population depends on the state, which can be defined as a set of institutions that regulate the rules of social life. In particular, the state: establishes a monopoly on the supremacy of statute law; uses public force; makes and repeals laws; and has the power to establish public enterprises, institutions and organisations (Dragos & Przybytniowski, 2022).

Pursuant to Article 72 of the French Constitution, local authorities are also legal entities under public law. Their purpose is to manage and administer the territory allocated to them in accordance with the powers conferred on them by law. The Constitution notes that these communities are responsible for making decisions that can be implemented locally (Constitution du 4 octobre 1958, 2008). Moreover, the state representative is responsible for national interests, administrative control, and law enforcement agencies, and no local authority can supervise or control another one (Matsopoulou, 2002). However, they can coordinate their actions and cooperate with each other when the implementation of a jurisdiction requires the cooperation of several local authorities. In France, local authorities exist in cities, regions, territories with a special status, and overseas communities – such as French Polynesia and New Caledonia (Masalab, 2020). A public institution in France is a legal entity governed by public law with administrative and financial autonomy; its activities are aimed at carrying out tasks in the general or public interest. A special feature of a public institution is that its tasks are carried out under the supervision of an oversight body. A public entity is characterised by specific peculiarities, such as: a) the founder defines and enshrines in a specially created charter the grounds for establishment, the purpose of operation and the functions of the institution. Furthermore, the founder has the right to allocate property that will contribute to the activities of the entity; b) the employees working in the institution receive no profit from the entity and are not in a relationship with it; c) it has no economic purpose and is engaged in charitable, cultural, educational, scientific and other activities; d) the organisation is a civil law participant; and e) it may have certain tax exemptions (Quard, 2018). In France, a public institution has the status of a legal entity, has a specific object, and is subject to comprehensive control and supervision. According to the Civil Code of France (1804), such institutions include public administration institutions (*établissements publics à caractère administratif* – EPA) and public industrial and commercial enterprises (*établissement public à caractère industriel et commercial* – EPIC).

The formation of public interest groups is a very common phenomenon in France. A public interest group is a partnership of several legal entities, one of which is a legal entity under public law, which carries out activities of common (public) interest. The purpose of public interest groups is to promote cooperation between public and private persons to manage activities of common interest. Sometimes, they compete with public institutions (Gahdoun, 2018). Examples of public interest groups in France are regional hospital institutions. The State Bank of France is also a legal entity under public law, as the purpose of the bank's functioning is to provide timely and high-quality financial services to its customers. The bank does not make a profit and does not engage in commercial or entrepreneurial activities. In no case may a public entity grant a loan or earn income through interest. Central banks are therefore legal entities under public law (Duchaussoy, 2016).

4. The experience of distinguishing legal entities in German legislation

Germany also follows the approach of dividing legal entities into two types: legal entities under private law and legal entities under public law. According to the doctrine of German law, legal entities under public law should include the state institutions of the Federal Republic of Germany (*Bundesbehurden*, *Bundesoberbehuxden*, *Zentrale Bundesbehurden*), government bodies, federal banking institutions, the State Audit Office, the Patent Office, the Federal Post Office, the Ministry of Foreign Affairs, other federal ministries and departments, as well as lands, communes, societies, foundations and other entities the activities of which are aimed at meeting public needs and interests rather than making profit (Kirste, 2017). It should be noted that the listed legal entities of public law in Germany are also legally capable: they can dispose of their rights at will, draw up contracts, sign agreements and contract documents, appear as a party in court, and file, plead in and object to lawsuits (Dluzik, 2019). When summarising the system of legal entities under public law, three main types of public legal entities can be distinguished: corporations, institutions, and foundations. This analysis starts by considering corporations. Public law corporations are organisations set up to carry out public tasks. Unlike private law corporations, they cannot arise solely from the decision of individuals to jointly establish a corporation and register it: this requires an act from public authorities. Like legal entities under private law, they must set up a charter and are allowed to run their own business (the so-called right of self-government). In turn, unlike legal entities of private law, they are subject to state supervision (Konecny, 2015).

There are four types of corporations according to the criterion of affiliation:
a) public – such as universities, lawyers' and doctors' associations, churches and parishes;
b) private – membership is defined by certain individual characteristics. Examples include the chambers of lawyers, pharmacists, doctors or craftsmen, and local health insurance foundations;
c) real – ownership or possession of property is decisive for membership of a real corporation. Examples of this include hunting cooperatives;
d) associations – only legal entities may be members. Examples include municipal specialised associations (e.g., waste management associations) (Grundmann & Rathner, 2021; Pētersone et al., 2020).

Furthermore, in Germany, railway companies are also considered to be legal entities under public law. They cannot go bankrupt, as the transportation of passengers within the country is of a vital nature and the railways have to operate in any case. Therefore, the state has taken this over, and since it is not a management function but an economic one, the railway companies have been granted the status of legal entities under public law (Kirste, 2017). Equally important as legal entities under public law are public law institutions, which, according to German legal doctrine, are state administrative institutions and authorities provided with human and material resources. The activities of public legal entities involve performing specific tasks aimed at satisfying general state and public needs. Each institution must draw up its own charter, which sets out the internal structure of the entity. Subjects of public administration are proposed to include organisations that were formed by the state or local authorities or that are empowered to perform public functions in various spheres of society's functioning. Accordingly, the system of public administration includes executive power bodies, local self-government bodies, public law institutions and public law funds, as well as subjects of delegated powers (Pētersone et al., 2021). Public law institutions include state and communal medical institutions, educational institutions, research institutes, state libraries, state and communal enterprises, etc. Examples of public law institutions are the German National Library, the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – BaFin), broadcasting companies, and public television channels (Saenger, 2020). It is also worth noting that public law foundations in Germany are organisations in which the founder transfers assets to carry out certain public tasks. There are no members, users or beneficiaries in such foundations. Public law foundations are similar to private law foundations, but a public law foundation is established by the government sector rather than a private individual. These foundations are usually established for the following purposes: educational, care for the elderly or to assist in the development of the country. Foundations are set up by the government sector through a law, regulation, or administrative act (Caspari et al. 2021).

There are two types of foundations: legally capable and legally incapable. Legally capable public law foundations are established on the basis of a sovereign act, such as a law, and mainly pursue charitable purposes. Public foundations are also public law institutions that govern themselves, but do not have legal capacity. Examples of such foundations are the Berlin Philharmonic, the Berlin Wall Foundation, or charitable universities such as the

European Viadrina University in Frankfurt (Oder) and the Prussian Cultural Heritage Foundation (Caspari et al. 2021). Furthermore, in Germany, the Deutsche Bundesbank (State Bank), municipal savings banks, institutions of public law and religious communities are also considered to be legal entities under public law. They perform public tasks, such as enabling citizens to use accounts and financial services or to have access to places of worship (Schild & Schultz, 2017).

5. Legal entities under public law in entrepreneurial activity

The provisions of the Civil Codes of Ukraine, France and Germany are also applicable to legal entities under public law if they act in civil transactions. Like legal entities under private law, legal entities under public law in Western European countries are generally engaged in entrepreneurial activities. They are not considered entrepreneurs only if they carry out activities solely for the benefit of the state. In the case of commercial activities, they should be considered as commercial enterprises for tax purposes. In such a case, there is an obligation, for instance, to pay sales tax to the tax office. They must also comply with the law on public procurement when conducting government tenders (Tjio, 2021). Moreover, it is worth noting that legal entities under public law are actively involved in the development of sectors of the economy, among which the agricultural sector stands out the most. Currently, agribusiness in Ukraine has a significant natural competitive advantage and is rapidly gaining momentum. First and foremost, the subjects of agribusiness are legal entities under private law. However, public law entities are also of some importance in the development of agribusiness. Among them, the most important are the Ministry of Agrarian Policy and Food of Ukraine, the National Academy of Agrarian Sciences of Ukraine, and the State Service of Ukraine for Food Safety and Consumer Protection, which control the activity of legal entities under private law. Since agribusiness is of strategic importance to the functioning of both the economic and social system of any country, the importance of the interaction between private law entities and public law entities should be clearly defined. Cooperation within the framework of public-private partnership contributes to the further effective development of agribusiness in Ukraine in accordance with the content of the Law of Ukraine "On Public-Private Partnership" (2010). Thus, cooperation is reflected in the fact that the National Academy of Agrarian Sciences of Ukraine is interested in implementing its agro-innovations, and agribusiness is interested in applying the latest developments in production. In the agricultural sector of the Ukrainian economy, the main public legal entities are the Ministry of Agrarian Policy and Food of Ukraine, the National Academy of Agrarian Sciences of Ukraine, and the State Service of Ukraine for Food Safety and Consumer Protection. It should be noted that these public legal entities are not subjects of agribusiness, but they are actively involved in its development.

Thus, public-private partnership in the sphere of agribusiness is one of the key types of interaction between the subjects of public and private law. This form of partnership is fostered in order to implement socially significant long-term projects in the agricultural sector, share risks, obtain productive growth, and implement social responsibility (Borisova et al. 2021; Kostruba and Kulynych, 2020). A clear consolidation of the list of legal entities under public law in the regulatory legal documents will facilitate and expedite litigation where one of the parties is a legal entity under public law. When analysing the attributes of the division of legal entities into types and considering the examples of organisations that cause controversy in defining their type of legal entity, it should be noted that purpose as a criterion for classification is more complete and comprehensible. This study examined the state of the problem in France and Germany, where it is clear that legal entities under public law in both countries include the state as a specific subject of public law. It should be noted that local authorities, public-law entities, foundations, associations, groups, corporations, and state banks all act as participants in civil legal relations, have the right to litigate, have specific rights and obligations, and are responsible for actions that violate state law. Furthermore, it is worth noting that the civil law systems of both France and Germany contain an exhaustive list of legal entities under public law, which harmonises the judicial system.

The distinction between legal entities under public law and legal entities under private law is vital for understanding the legal systems in both France and Germany. Both countries classify legal entities based on their purposes, structures, and the extent of state involvement in their activities. In French civil law, legal entities under public law include the state, local authorities, public institutions, and public interest groups. They often carry out activities aimed at ensuring public welfare, and their employees are usually subject to specific legal provisions. Similarly, in German legislation, legal entities under public law encompass state institutions, local government bodies, and various public organizations such as railway companies, public law institutions, and public law

foundations. These entities are typically established for public purposes and are subject to state supervision. The analysis of both the French and German legal systems reveals that the distinction between public and private law legal entities is crucial for the proper functioning and organization of the legal systems in these countries. This differentiation enables the effective regulation of relationships between various entities and ensures the protection of the rights and interests of the state, its citizens, and other subjects of legal relations.

Conclusions

On the basis of the civil law analysis of the theoretical issues of legal entities, the following conclusions and judgements were made. Firstly, it should be noted that, in today's world, it is necessary to distinguish between important civil law categories such as a legal entity of public law and a legal entity of private law. This is of fundamental importance in determining the legal status of a legal entity, the scope of its rights and obligations, and its activities. Secondly, the specific characteristics of a legal entity under public law should be clearly distinguished. Thus, the most important features of a legal entity under public law are that it: is formed by state bodies, territorial communities, and local authorities; is aimed at meeting national (public) needs; has organisational and legal unity and property separateness; is independently liable for unlawful actions; and has its own name, seal, stamps and other attributes. Thirdly, it is necessary to analyse global experience, where the problem of defining the legal status of a legal entity is more comprehensively studied and explored.

As for Ukraine, the legislation does not currently define a list of legal entities under public law, which makes it difficult to define the type of entity in question. Therefore, the improvement of the legal framework, primarily the Civil Code of Ukraine, is urgent for the country. It is advisable to add a separate chapter to the legislation that would cover the main issues relating to the definition of the legal status of a legal entity. First of all, it is necessary: to establish types of legal entities under public law; to make a clear distinction between legal entities under public law and legal entities under private law; to determine the legal personality of legal entities of public law; as well as to determine the range of actions that the activities of a legal entity under public law may be aimed at. Legal clarity will also be useful for improving public-private partnerships, especially in the agribusiness sector, which is developing rapidly in Ukraine. Thus, in order to fill gaps in the legislation governing the category of a legal entity of public law, it is necessary to supplement the regulatory legal acts, since it is legal entities under public law – the state, local authorities, and various other entities – that can ensure safe and comfortable life for the population of a particular country.

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NAVIGATING INDONESIA'S GOLDEN VISA SCHEME THROUGH COMPARATIVE LEGAL POLICY ANALYSIS

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Abstract. As more governments implement Golden Visa programs to attract foreign investment, this strategy provides countries with economic benefits, as well as risks associated with transnational crime and the legal system. Through comparative benchmarking and case studies, this article tries to bridge the gap in order to establish the optimal Golden Visa system for Indonesia. This study will provide insights into the most suitable scheme that Indonesia can implement by assessing the benefits and problems of different citizenship by investment programs in Portugal, Spain, and Malta. This article will present the best schemes for Indonesia based on a qualitative doctrinal comparative analysis technique, considering many legal and socioeconomic parameters such as investment thresholds, processing time, residence restrictions, and return on investment. This research suggests that Indonesia, demographically, needs more investors to provide more jobs, as Indonesia has a workforce of more than 117 million and maintains its economic stability to grow at a rate of 5% per year. Furthermore, in terms of legal gaps, Indonesia does not have any legal basis to provide visas for more than 5 years, as regulated in Immigration Law No.6/2011. Thus, an additional legal framework is required. Based on these findings, the paper will provide case studies of investors who have successfully navigated the Golden Visa process in Indonesia, shedding insight on the practical aspects of the application procedure as well as how to optimize investment outcomes.

Keywords: Golden Visa, legal framework, immigration, Indonesia, benchmarking analysis.

Introduction

Residency by investment (RBI) programs, also known as "Golden Visa" schemes, have gained popularity among countries looking to attract foreign investment (Scherre & Thirion, 2018). In exchange for a significant investment in the host country, foreign investors and their families can gain citizenship or permanent residency. However, the growing popularity of RBI programs has generated worries about the possible risks involved with such schemes, including money laundering and tax evasion (European Parliament, 2022). Nonetheless, many supporters say that by attracting foreign investment, RBI policies might encourage economic growth and the creation of employment (Hartwig-Peillon, 2021). In some European Union (EU) member countries, the Golden Visa policy (or RBI) is becoming one of the main components of the growth of these countries' Gross Domestic Product (GDP), and assisted national economies by stabilizing them during the COVID-19 pandemic (Nicola et al., 2020). Associated statistics which compare RBI, Foreign Direct Investment (FDI), and GDP in the EU area using World Bank data are presented below (Figure 1).

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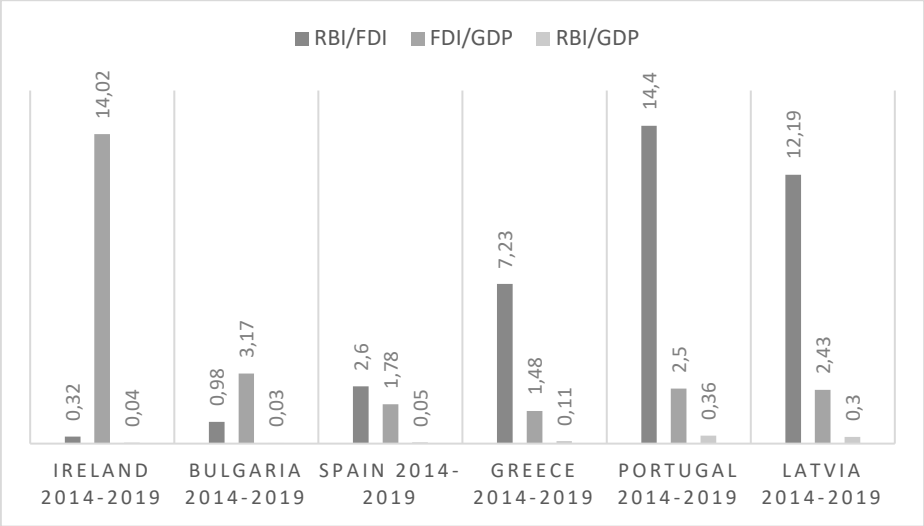


Figure 1. Residence by Investment (RBI) as a percentage of Foreign Direct Investment (FDI) and Gross Domestic Product (GDP)

(Source: Bulgaria: Investment Bulgaria; Greece: Enterprise Greece; Ireland: Department of Justice and Equality; Latvia: Office of Citizenship and Migration Affairs; Portugal: Immigration and Borders Service; Spain: Ministry of Labor and Migration; Eurostat: FDI; World Bank: GDP, 2019)

According to the data in Figure 1, the EU Member States that use Golden Visa schemes have generated significant revenue, to the point that this has become a significant source of income for the respective governments in terms of GDP (Adim, 2017). In Portugal and Greece, for example, the Golden Visa program has surpassed traditional industries such as tourism and manufacturing as the principal source of foreign direct investment (Schacherer, 2022). Despite the fact that the majority of this investment has come from Chinese investors, the Golden Visa program in the United States (US) aided the country in stabilizing its economy throughout the pandemic (Harpaz, 2022). Golden Visa schemes, without a doubt, have been shown to have a favorable overall influence on national economies.

Nonetheless, the easy investment program suggested by RBI has always sparked debate. Despite provoking a global controversy by selling citizenship, which has been dubbed corrupted democracy by some academics, (Bauböck, 2018), Golden Visa programs have also been tied to a number of high-profile examples of financial crime, most notably money laundering-related crimes. For example, in 2019, the Maltese government suspended its Golden Visa program following concerns raised by the European Commission that the program may be a risk for money laundering (Moneyval FATF, 2019). Similarly, in 2020, officials in Portugal initiated an inquiry into possible money laundering associated with a scheme focused on selling real estate to foreign investors (OECD, 2021). In Spain in 2019, 25 people were detained in connection with a money laundering operation involving the sale of Golden Visas to Chinese citizens (Scherre & Thirion, 2018). These cases highlight the potential risks associated with Golden Visa programs and the importance of effective due diligence and oversight. Due diligence checks can help to identify high-risk individuals or transactions, while effective oversight can ensure that these programs are implemented in a transparent and accountable manner. Policymakers must remain vigilant to prevent financial crimes associated with Golden Visa programs, while also promoting the economic benefits that these programs can bring.

Indonesia is set to adopt a Golden Visa program to attract foreign investment, and it will need to perform a benchmarking effort to determine the best schemes for implementation while avoiding the previously indicated concerns. Previously, Indonesia had a similar program known as the second home visa, which allowed investors to obtain permanent residency in the country in exchange for a minimum investment of IDR 2 billion (approximately $111,000) in business, property, or government bonds in exchange for a 10-year visa to stay in Indonesia (Cunningham, 2022). In addition, the Indonesian government stated that the Golden Visa program was intended to attract international investment, generate jobs, and stimulate economic growth (Elo, 2021). The authorities, on the other hand, still face a challenging burden in deciphering the complicated RBI policy landscape around the world and picking the most suitable scheme. Eligibility criteria, investment thresholds, processing times, and advantages of RBI programs differ significantly across nations, making it difficult for Indonesia to

compare and choose (Scherre & Thirion, 2018). Therefore, a comprehensive analysis of the benefits and challenges of different RBI programs worldwide and their applicability to the Indonesian context is necessary.

This paper compares different RBI programs worldwide to find the ideal Golden Visa scheme for Indonesia. It analyzes investment thresholds, processing time, residency requirements, and potential challenges and opportunities. Case studies of successful Golden Visa applicants are used to evaluate the applicability of different policies to Indonesia. The paper offers practical recommendations for potential investors seeking to optimize their investment outcomes.

The research will start by outlining the history and current state of RBI programs, before evaluating the pros and cons of these programs using scholarly literature and government reports. For example, a 2018 study by Hogan Lovells International LLP is used to identify concerns such as due diligence and anti-money laundering measures (Surak, 2022). The paper concludes with practical recommendations for potential investors on how to navigate the Golden Visa process and maximize their investments (Brillaud & Martini, 2018). In conclusion, the correct schemes must be provided to answer these opportunities while at the same time avoiding challenges which may disturb these investments.

1. Method

1.1. Analysis framework

This research was conducted using a qualitative analysis framework. Qualitative analysis can be used to conduct a literature review by identifying and synthesizing qualitative research studies to explore a research question or topic of interest (Kawulich, 2004). This involves searching for relevant studies, evaluating their quality, and synthesizing findings across studies to identify common themes and insights. The method of analysis for assessing Golden Visa policies in multiple countries typically involves a multi-criteria analysis, which is a combination of doctrinal, qualitative, and benchmarking analyses (Dodgson et al., 2009). This process may include the following steps:

a) Doctrinal analysis: This involves a comprehensive review of the legal and regulatory framework governing Golden Visa programs in each country under consideration. The analysis may focus on issues such as eligibility criteria, investment requirements, processing times, and any other relevant factors. This analysis involves a detailed review of the laws and regulations that govern the Golden Visa programs in different countries. The analysis aims to provide a comprehensive understanding of the legal and regulatory framework that governs the different Golden Visa programs. This involves reviewing legal documents, policy statements, and other relevant materials (Bhat, 2020).

b) Literature review: A review of existing academic research, government reports, and other relevant literature is conducted to identify potential benefits and challenges associated with Golden Visa programs. This review may consider issues such as the economic impact of these programs, the potential for abuse and corruption, and the impact on social cohesion and political stability. The literature review is a critical aspect of the analysis as it provides an understanding of the available research on Golden Visa programs. The review helps to identify the key benefits and challenges of these programs and also identifies gaps in existing research (Ramdhani et al., 2014).

c) Benchmarking analysis: A comparative analysis of the Golden Visa programs in each country under consideration is conducted. This analysis may examine program design, investment requirements, processing time, and other factors. Case studies and interviews with relevant stakeholders may provide valuable insights. The benchmarking analysis is an important aspect of the broader analysis as it provides a comparison of the different Golden Visa programs. The analysis compares the different programs based on several criteria such as program design, investment requirements, and processing time (Ibbetson, 2012). This helps to identify the strengths and weaknesses of the different programs.

1.2. Benchmarking sample

The benchmarking countries used for analysis in this study will be based on previous research conducted by Surak and Tsuzuki (2021), which analyzed the separated data of the 26 EU Member States and compared it to the World Bank EU GDP report, which classified and ranked the countries with the highest revenue and the greatest impact on their GDP from the Golden Visa program. According to that analysis, the following EU Member States have been the most successful in implementing the RBI or Golden Visa program: Spain, Malta, and Portugal (Surak & Tsuzuki, 2021). Then, after classifying the sample, short briefs of those sample countries can be explained for benchmarking purposes as follows.

a) Portugal in Brief:
Portugal's Golden Visa program has been successful since its launch in 2012. According to the Portuguese Immigration and Borders Service, the program has generated over €5 billion in investment and created over 7,000 jobs. It has been identified that most of the Golden Visa holders are Chinese (Gaspar & Ampudia de Haro, 2020).

b) Spain in Brief:
The total investment made through the Golden Visa program in Spain from its inception in 2013 until December 2021 was €5.36 billion (Spanish Ministry of Inclusion, 2022). The majority of these investments were made in the real estate sector, with other sectors including finance, industry, and energy also attract investments. It is important to note that the minimum investment required to obtain a Golden Visa in Spain is €500,000, and the program has been successful in attracting wealthy foreign investors to the country.

c) Malta in Brief:
According to the latest data published by the Maltese government, the total investment made through the Malta Individual Investor Program (MIIP), commonly known as the Golden Visa program, was over €1.6 billion as of December 2021 (NSO, 2022). The majority of these investments were made in the real estate sector, followed by government bonds and stocks. It is important to note that the MIIP was introduced in 2014 and has been one of the most successful Golden Visa programs in the world, attracting wealthy investors from all over the globe. The minimum investment required to obtain a Golden Visa in Malta is €250,000.

1.3. Benchmarking output

After discussing the legal framework, opportunities, and challenges faced by each country, this research will focus on drafting Golden Visa criteria and standards for Indonesian Golden Visa schemes based on the "*Welcoming talent: formal criteria*" framework. This, in turn, will be based on an agreement between the Governments of the Netherlands, France, and Spain, as summarized by Lange (2018) (Figure 2).

Entry Conditions	Formal Criteria	Actor (Guarantor)
Business Plan	Application Fees	Public
Minimum Investment	Length of Procedures	Regional/Local
Minimum Job Creation	Transparency	Public/Private sector
Minimum Skill Level	Legal Protection	Private
Specific Sector		
Innovative Level		

Figure 2. Welcoming Criteria for Golden Visas in the Netherlands, France, and Spain
(Source: de Lange, 2018)

The detailed standard for the entry requirements for a Golden Visa in this research will follow the standard in Figure 2 by examining the procedures in Portugal, Spain, and Malta in approving the Golden Visa criteria.

2. Country Sample Analysis

As previously mentioned, Golden Visa programs have become a popular way for countries to attract foreign investment and stimulate economic growth. Among the most successful and well-known programs are those offered by Spain, Portugal, and Malta (Surak & Tsuzuki, 2021). These countries have become major players in the global market for investment migration, offering various types of residency and citizenship through investment programs that have generated billions of euros in foreign direct investment.

Benchmarking the Golden Visa schemes of Spain, Portugal, and Malta can provide valuable insights into the design and effectiveness of these programs. It can also help investors and policy-makers assess the relative merits of each scheme and identify areas for improvement. Through a comparative analysis of the legal frameworks, investment requirements, benefits, and risks associated with each program, a better understanding of the factors that contribute to their success and how they can be replicated or adapted to suit the needs of other countries can be generated. Additionally, benchmarking can also help to identify any potential risks or challenges associated with Golden Visa programs, such as issues related to due diligence, transparency, and potential abuses. Ultimately, a comprehensive benchmarking analysis of the Golden Visa schemes of Spain, Portugal, and Malta can serve as a valuable tool for both investors and policy-makers looking to navigate the global market for investment migration.

2.1. Portugal's golden visa schemes

2.1.1. Legal framework and criteria for Golden Visa applications

The Golden Visa program in Portugal was established in 2012 and is one of the most popular and successful RBI programs in Europe (Schiappa Cabral & Associados, 2016). The program allows non-EU nationals to invest in Portugal and receive a residency permit in return. The legal framework for the Golden Visa program in Portugal is established in Law No. 29/2012 and Regulation No. 11820-A/2012 as Amended by Order No. 1661-A/2013 of the Ministries of Foreign Affairs and Internal Affairs. The Portugal Immigration authorities have specific terms regarding the Golden Visa, as referred to in Article III, paragraph (d) as "Investment Activity," which must fulfill the following requirements: (a) capital transfers equal to, or greater than, €1 million into Portugal; (b) creation of at least 30 new jobs; (c) investment in real estate equal to, or greater than, €500,000; and (d) all investment-related activities are carried out in Portugal (Act 23/2007 of July 4, Amended by Act 29/2012 of August 9, 2012). In addition, the investment must be supported by legal documents that have been certified by a financial institution that is formally established in the Portuguese territory, and all employees of the invested-in company must be registered in the Portuguese social security system as stated in Article 3 and Article 7 of Order No. 1661-A/2013.

Furthermore, the main criteria for obtaining a Golden Visa in Portugal are investment in real estate, investment in funds, investment in a business, or capital transfer (Act 23/2007 of July 4, Amended by Act 29/2012 of August 9, 2012). To be eligible for the program, an applicant must meet certain requirements related to investment and residency, have a clean criminal history, and pass the background checking process as stated in Article 23 of Regulation No. 11820-A/2012 as Amended by Order No. 1661-A/2013. After the application for the Golden Visa is granted, firstly, an applicant must invest in the country. The minimum investment requirement is €500,000 for a property purchase, €350,000 for properties older than 30 years or located in urban regeneration areas, €250,000 for artistic or cultural projects, or €500,000 for investment in funds (Visa Connect, 2021). The investment must be maintained for a minimum of 5 years, as previously mentioned. Secondly, an applicant must maintain residency in Portugal for at least 7 days during the first year and at least 14 days during the subsequent 2-year period, as stated in Article 5 of Order No. 1661-A/2013. This means that the applicant must have a valid residence permit and be physically present in Portugal for a certain period each year. Thirdly, an applicant must not have a criminal record and must provide proof of this through a criminal record certificate from their country of origin or during their stay in Portugal.

The legal framework for the Golden Visa program in Portugal also sets out the rights and obligations of the visa holder. A Golden Visa holder and their family members can live, work, and study in Portugal, as well as travel throughout the Schengen area without a visa as stated in Article 60 (Act 23/2007 of July 4, Amended by Act 29/2012 of August 9, 2012). However, the visa holder must comply with Portuguese law and regulations, and

failure to do so could result in the revocation of the visa. In conclusion, the legal framework for the Golden Visa program in Portugal is comprehensive and establishes clear criteria and requirements for obtaining a residency permit through investment. The program has been successful in attracting foreign investment to the country and contributing to its economic growth. However, it is important for applicants to fully understand the legal framework and their rights and obligations as Golden Visa holders before investing. In summary, the Portugal visa scheme can be outlined as follows (Figure 3).

Visa Approved

Entry Conditions	Formal Criteria	Actor (Guarantor)
Minimum property investment €500,000	€5,435 application fees	No guarantor needed
Minimum capital investment €1 million	Maximum 14 working days for application procedures	
Minimum job creation: 30 jobs inside Portuguese territory	Legalization of the proof of investment by a financial institution that is formally registered in Portugal, as evidenced by an official bank statement	
Workers have to register with the Portuguese national social security system	Have a clean criminal record verified by an official letter from the home country and legalized by the National Police of Portugal.	
No knowledge transfer required	Pass the background check conducted by the Portuguese immigration authorities	

Figure 3. Welcoming Criteria for a Golden Visa in Portugal
(Source: author's analysis based on certain legal documents)

Regardless of the official requirements, once the Golden Visa is granted, the perks of being a Golden Visa holder in Portugal are extensive, including the ability to work, travel, or even study in the regions of Portugal, as well as the benefits listed below (Portugal Golden Visa, n.d.).

a) Residency: Golden Visa holders are allowed to live and work in Portugal for up to 5 years, and they can renew their visa every 2 years. This residency permit also grants visa-free travel to the Schengen Area.

b) Investment opportunities: To obtain a Golden Visa, investors can choose from several investment options, including real estate, capital transfer, or the creation of a business in Portugal. This provides investors with access to new investment opportunities and a chance to diversify their portfolios.

c) Tax benefits: Portugal offers a tax-friendly environment for Golden Visa holders. Investors can benefit from Portugal's Non-Habitual Resident (NHR) tax regime, which provides favorable tax rates for foreign residents.

d) Family reunification: Golden Visa holders can include their family members in their residency application, including their spouses, children, and parents. This allows families to reunite in Portugal and benefit from the country's high-quality education and healthcare systems.

e) Citizenship: After 5 years of residency in Portugal, Golden Visa holders can apply for Portuguese citizenship, which grants them full access to the EU.

These benefits have made the Portuguese Golden Visa program popular among foreign investors. According to the Portuguese Immigration and Borders Service, as of January 2022, more than 10,000 Golden Visas have been issued since the program's inception in 2012 (Robb Report, 2020).

2.1.2. Legal challenges

Despite the success of Portugal's Golden Visa program, there have been some challenges and cases that have emerged over the years. One of the primary challenges has been the increasing concerns over money laundering and corruption. This issue was highlighted in 2014, when the head of Portugal's anti-corruption agency expressed concern that the Golden Visa program could be used as a way to launder money. For the regulation and oversight of such programs at the EU level, a common and comprehensive strategy is required as proposed by the EU. The Portuguese government responded by introducing additional measures to prevent money laundering, including stricter due diligence checks and enhanced reporting requirements (Pavlidis, 2021). The United Nations Office on Drugs and Crime (UNODC) estimates that 2%–5% of global GDP is laundered each year, amounting to up to €1.87 trillion. According to FATF case statistics, money laundering crimes accounted for nearly 15% of all cases recorded with the Agency between 2016 and 2021. Money laundering instances have been increasing since 2016, and the Golden Visa program has contributed to this growth (Figure 4).

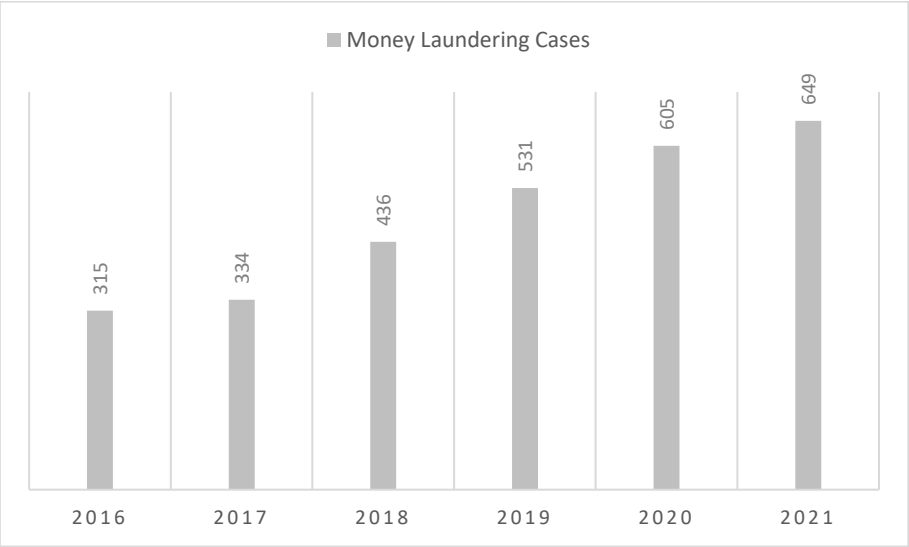


Figure 4. Money Laundering Cases in the EU including Portugal in 2016–2021
(Source: FATF, 2022, as cited by EUROJUST, 2022)

A parallel challenge has been the increasing scrutiny from the EU regarding Golden Visa programs, especially for the Portuguese Golden Visa program. In 2019, the EU launched an investigation into Portugal's Golden Visa program, citing concerns over transparency and potential security risks. As a result, Portugal was required to make some changes to the program, including imposing stricter requirements for applicants, such as mandatory criminal background checks and a higher minimum investment threshold (Running, 2023).

In addition to these challenges, there have also been some high-profile cases related to the Golden Visa program. One such case involved a Portuguese businessman who was arrested in 2019 on charges of corruption and money laundering. The authorities also assessed whether the Golden Visa program had been used by a rich Chinese migrant to leave their country because of political instability (Amante & Rodrigues, 2021). The individual in question had obtained a Golden Visa through the purchase of real estate in Portugal. The case sparked renewed calls for tighter controls on the Golden Visa program, particularly concerning real estate investments. Despite these challenges and cases, Portugal's Golden Visa program remains one of the most popular in the world.

In fact, the program has been so successful that it has led to a significant increase in foreign investment in the country, particularly in the real estate sector. This has had a positive impact on Portugal's economy, particularly in terms of job creation and increased tax revenues (Brillaud & Martini, 2018). In conclusion, while Portugal's Golden Visa program has faced some challenges in different cases over the years, the program remains a popular and successful way for foreign investors to gain residency in the country. With the introduction of additional measures to prevent money laundering and corruption and the imposition of stricter requirements for applicants, the Golden Visa program is likely to remain a key driver of foreign investment in Portugal.

2.2. Spain's Golden Visa schemes

2.2.1. Legal framework and criteria for Golden Visa applications

Spain's Golden Visa program was introduced in 2013 to attract foreign investment and talent to the country. Spain's economic interest is much larger than the aims of the Golden Visa program implemented in Portugal, as the Golden Visa application is available for people who are: (a) investors, (b) entrepreneurs, (c) highly qualified professionals, (d) investigators, or (e) foreign employees that are transferred to a Spanish branch or a branch of the same company group in Spain as legally stated in Law 14/2013 of September 27 (Williams, 2021). In addition, investors can also obtain residency by creating employment opportunities, promoting scientific or technological innovation, or contributing to the country's socio-economic and cultural development. It can thus be concluded that the Spanish Golden Visa program targets broader categories compared that of Portugal.

The legal framework for the Golden Visa program in Spain is governed by Law 14/2013 of September 27, which outlines the requirements for non-EU citizens to obtain a residency permit through investment. The law has since been updated with subsequent regulations, including Royal Decree 557/2011 and Law 7/2021, which introduced new criteria for residency permits. Legally, an applicant for the Golden Visa program cannot stay in Spain when applying for the Golden Visa, and their application must be submitted through the Spanish Embassy overseas as stated in Article 61 of Law 14/2013 of September 27. Foreign nationals who are not resident in Spain can obtain a stay visa or a residence visa for investors by making a significant capital investment, which must fulfill one of three criteria: a value equal to or greater than €2 million in Spanish government debt securities; a value equal to or greater than €1 million in stocks or shares of Spanish companies or bank deposits in Spanish financial institutions; or the acquisition of real estate in Spain with an investment value equal to or greater than €500,000 per applicant, as summarized from Article 62 of Law 14/2013 of September 27. As to the other requirements, the applicant can also submit a business project of general interest that satisfies one of three conditions, including job creation, relevant socio-economic impact in the geographical area, or a significant contribution to scientific and/or technological innovation (Spanish Ministry of Inclusion, 2022). In summary, the Golden Visa schemes employed in Spain can be seen below (Figure 5).

Entry Conditions	Formal Criteria	Actor (Guarantor)
Minimum property investment €500,000	€8,000 application fees for an individual application; €10,500 application fees for a family application	The applicant must be properly registered in a Spanish corporation and already working for a minimum of 5 years (for international workers), a local government (for entrepreneurs), or a local company or contractor (for investors)
Minimum capital investment €2 million in government debt, €1 million in Spanish company, or €1 million euro deposited in Spanish bank or financial institution	2–3 months (60–90 working days)	
The investor can start a company or organization which involves local workers (no minimum number of workers is mentioned)	Legalization of the proof of investment by a financial institution that is formally registered in Spain, as evidenced by an official bank statement	
Workers must originate from where that company is established (locals)	Have a clean criminal record verified by an official letter from	

	the home country and legalized by the National Police of Spain
The applicant has to contribute positively to Spain's scientific and technological innovation	Pass the background check conducted by the Spanish immigration authorities

Figure 5. Welcoming Criteria for a Golden Visa in Spain
(Source: author's analysis based on certain legal documents)

Furthermore, the applicant must also pass a background check and demonstrate that they have sufficient financial means to support themselves and their dependents while living in Spain. This program has been successful in attracting foreign investment, with over 4,000 visas issued since its launch (Paton & Mayr, 2019). Applicants must also obtain health insurance coverage and pay any applicable taxes and fees. Despite its benefits, the Spanish Golden Visa program has faced some challenges and criticism. Some critics argue that the program has led to an increase in property prices in certain areas, particularly in cities such as Madrid and Barcelona (Scherre & Thirion, 2018). The program has helped to boost the Spanish economy and promote the country's image as an attractive destination for international investors.

2.2.2. Legal challenges

Spain's Golden Visa program has been in operation since 2013 and has become one of the most popular investment migration programs in Europe. However, the program has faced several challenges and controversies, including criticism from the EU over potential abuses of the program for money laundering and organized crime. The program has been criticized for its lack of clear guidelines and monitoring, leading to potential abuse by applicants and intermediaries. The Spanish government has taken steps to address these concerns by introducing new regulations, including stricter due diligence requirements and increased oversight by regulatory bodies. However, the Spanish government has recently introduced new investment options, such as investment in Spanish startups, to attract a wider range of investors. In addition to these challenges, there have been several cases of abuse and controversy related to the Spanish Golden Visa program. In 2018, a Spanish court ordered the cancellation of several Golden Visas granted to Chinese citizens due to evidence of fraud and money laundering (Amante & Rodrigues, 2021). There have also been concerns over the program's potential use by organized crime groups, leading to criticism from the EU and calls for increased regulation and oversight. In detail, the challenges faced in the implementation of the Spanish Golden Visa program are as follows.

1. Lack of transparency: One of the main criticisms of the Spanish Golden Visa program is the lack of transparency in the application process and the criteria used for approving applications. As noted in a report by Transparency International, "There is no information available to the public on the number of applications received, the number of visas granted, or the reasons for refusal." This lack of transparency has raised concerns about the potential for corruption and the lack of accountability in the program (OECD Anti-Corruption & Integrity Forum, 2019).

2. Real estate speculation: Another challenge of the Spanish Golden Visa program is the potential for real estate speculation. The program requires a minimum investment of €500,000 in Spanish real estate, and some critics have argued that this has led to an increase in property prices in certain areas. This has raised concerns about the impact of the program on the local housing market. Moreover, some investors have used the program to launder money, leading to investigations and regulatory actions in some cases (Stucklin, 2023).

3. Dependency on the program: The Spanish Golden Visa program has become an important source of revenue for the Spanish economy, but this has also created a dependency on the program. As noted in a report by the Migration Policy Institute, "Spain has become heavily dependent on the Golden Visa program, with the program accounting for a significant share of foreign direct investment." The COVID-19 pandemic has also highlighted the vulnerability of the Spanish economy to external shocks, including a decline in foreign investment (Adenauer, 2021).

4. Lack of job creation: Another challenge for the Spanish Golden Visa program is the limited job creation that it has generated. The program was initially designed to attract entrepreneurs and highly skilled workers, but most of the investments have been made in real estate or government bonds. As noted in a report by the European Parliament, "the Spain Golden Visa program has not been very effective in creating jobs, as most of the investments are in passive assets that do not generate employment" (OECD, 2014).

5. Increasing competition from other countries: Spain's Golden Visa program faces increasing competition from other countries that offer similar programs, such as Portugal, Greece, and Cyprus. These countries have also attracted significant foreign investment through their programs, and some have introduced additional incentives such as tax breaks and lower minimum investment thresholds.

In conclusion, while the Spanish Golden Visa program has been successful in attracting foreign investment to the country, it has faced several challenges, including a lack of transparency, the potential for real estate speculation, dependency on the program, limited job creation, and increasing competition from other countries. These challenges highlight the need for continued monitoring and evaluation of the program to ensure that it remains an effective tool for promoting economic growth and development in Spain.

Despite these challenges, the Spanish Golden Visa program continues to attract significant investment and has been praised for its potential to drive economic growth and job creation. The Spanish government has taken steps to address concerns and improve the program's transparency and oversight, demonstrating a commitment to maintaining the program's reputation and appeal to investors. Overall, a thorough analysis of the legal framework, criteria, challenges, and cases related to the Spanish Golden Visa program is crucial for understanding the program's strengths and weaknesses and for informing future policy decisions, especially in creating the right schemes for Indonesian Golden Visas.

2.3. Malta's Golden Visa schemes

2.3.1. Legal framework and criteria for Golden Visa applications

Malta's Golden Visa program was introduced in 2015 under the Malta Residence Visa Programme (MRVP) Regulations (LN 288 of 2015). The program was designed to attract foreign investment and stimulate economic growth in Malta by offering a fast-track route to residency and citizenship for non-EU citizens who invest in the country (Fernández-Huertas Moraga & Rapoport, 2015). The regulations were later amended in 2017 to include additional investment options, such as government bonds and securities, in addition to real estate. The amendments were made to make the program more attractive to investors and to stimulate investment in the country. The Maltese Golden Visa program is governed by several legal frameworks, including the MRVP Regulations, the Maltese Citizenship Act, and the Immigration Act. The program is administered by the Malta Residency Visa Agency (MRVA), which is responsible for processing applications and ensuring that all applicants meet the eligibility criteria.

The details of the legal criteria of Malta's Golden Visa program are stated in Article 5 of the MRVP Regulations (LN 288 of 2015), which outlines the qualifying criteria for applicants. To be eligible for a certificate in terms of these regulations, an applicant must: be at least 18 years of age; satisfy a fit and proper test; have stable and regular resources which are sufficient to maintain themselves and their dependents without recourse to the social assistance system in Malta; have sickness insurance in respect of all risks across the whole of the EU normally covered for Maltese nationals; and satisfy one of the investment criteria.

Article 6 of the MRVP Regulations (LN 288 of 2015) outlines the investment criteria for eligibility. An applicant must satisfy one of the following investment criteria: a minimum investment of €250,000 in Malta Government Stocks or bonds, which shall be maintained for a minimum period of 5 years from the date of the certificate; a minimum investment of €250,000 in Malta Government-approved financial instruments, which shall be maintained for a minimum period of 5 years from the date of the certificate; or the purchase of immovable property situated in Malta for a minimum value of €320,000, or the lease of immovable property situated in Malta for a minimum annual rent of €12,000, which shall be maintained for a minimum period of 5 years from the date of the certificate.

Article 7 of the MRVP Regulations (LN 288 of 2015) outlines the validity and renewal of the certificate. A certificate issued under these regulations shall be valid for 1 year and may be renewed thereafter subject to the provisions of these regulations. Article 9 of the regulations outlines eligible dependents. Where an applicant satisfies the criteria established in these regulations, the following dependents shall also be eligible to apply for a certificate: the spouse of the applicant in a monogamous marriage or another relationship having the same or similar status to a monogamous marriage; a child of the applicant, or of their spouse, who is less than 18 years of age, or who is between 18 and 26 years of age and not married and is primarily dependent on the applicant or their spouse; and a parent or grandparent of the applicant or of their spouse, who is primarily dependent on the applicant or their spouse. In summary, the Golden Visa schemes implemented in Malta can be illustrated as follows (Figure 6).

Visa Approved

Entry Conditions	Formal Criteria	Actor (Guarantor)
Minimum property investment €320,000	€40,000 for the application fees	No guarantor needed
Minimum investment of €250,000, in the form of Malta Government bonds, with a minimum period of 5 years	7–15 days for the application review process	
No need to create jobs	Legalization of the proof of investment by a financial institution that is formally registered in Malta, as evidenced by an official bank statement	
No need to create workers	Have a clean criminal record verified by an official letter from the home country and legalized by the National Police of Malta	
€2000 contribution to Maltese society in the form of philanthropic, cultural, sport, scientific, animal welfare, or artistic NGO	Pass the background check conducted by the Maltese immigration authorities	

Figure 6. Welcoming Criteria for a Golden Visa in Malta
(Source: author's analysis based on certain legal documents)

Malta's Golden Visa program has proven to be a popular option for individuals and families looking to relocate to Malta, as it offers various benefits such as visa-free travel within the Schengen area, access to high-quality healthcare and education, and a high standard of living. The program has also been praised for its rigorous due diligence process, which ensures that only suitable and credible applicants are approved. Overall, the MRVP Regulations provide a clear outline of the criteria and requirements for eligibility for the program. The regulations ensure that applicants are financially stable and able to support themselves and their dependents and that they make a significant investment in Malta. The regulations also allow eligible dependents to apply for a certificate, providing an opportunity for families to relocate together.

2.3.2. Legal challenges

The MRVP has proven to be a popular option for individuals and families looking to relocate to Malta, but there are also some challenges associated with the program that applicants should be aware of. One of the main challenges is the application process, which can be time-consuming and complex. Applicants must submit a

significant amount of documentation and undergo a thorough due diligence process, which can take several months to complete. While this process is designed to ensure that only credible and trustworthy applicants are approved, it can be frustrating for some applicants who are eager to start their new lives in Malta.

Another challenge is the cost of the program. The main applicant is required to pay a non-refundable fee of €30,000, plus an annual contribution of €5,000 for each dependent. This can be a significant financial commitment, particularly for families with multiple dependents. In addition, the requirement to invest in property or pay a minimum annual rent of €10,000 has led to rising property prices in Malta, particularly in popular areas such as Sliema and St Julian's. Despite these challenges, the MRVP remains a popular option for many individuals and families. The program offers various benefits such as visa-free travel within the Schengen area and access to high-quality healthcare and education. Additionally, Malta is a safe and stable country with a high standard of living, making it an attractive destination for those seeking a better quality of life.

However, the program has faced criticism from some quarters due to the perception that it is primarily targeted toward wealthy individuals. There have also been concerns about the impact of the program on Malta's infrastructure, particularly in terms of the demand for property and services. In addition, there have been reports of delays in the processing of MRVP applications, which has caused frustration among some applicants. Delays can have a significant impact on applicants' business and personal plans, particularly if they are relocating to Malta for work or to start a new business.

Despite these challenges, the MRVP continues to attract a significant number of applicants. According to the latest statistics released by the Maltese government, a total of 2,642 main applicants have been approved for the MRVP, with an additional 5,268 dependents (Government of Malta, 2022). The majority of applicants are from Russia, China, and Turkey, but there are also applicants from a range of other countries. In conclusion, while the MRVP offers many benefits, including visa-free travel within the Schengen area and access to high-quality healthcare and education, there are also some challenges associated with the program, including its high cost and potential impact on Malta's infrastructure. However, for those who are willing to navigate the application process and financial commitments, the program can provide a valuable opportunity to relocate to one of Europe's most desirable destinations.

3. Discussions

3.1 Comparing the Golden Visa schemes

Portugal's Golden Visa program was established in 2012 and has been the most popular option among investors. The program has been successful in attracting foreign investment and has contributed significantly to the country's economic growth. According to the Portuguese Immigration and Borders Service (SEF), from its inception until 2021, the program received a total of 10,223 applications, with over €5.9 billion invested in the country (SEF, 2021). Spain's Golden Visa program was established in 2013 and offers a similar route to residency as Portugal. The program has been effective in attracting investors, especially in real estate, and has also contributed to the country's economic growth. According to the Spanish Ministry of Economy and Business, between 2013 and 2020 the program generated €3.8 billion in investment, with over 50% of it in real estate (Ministry of Economy and Business, 2021). Finally, Malta's Golden Visa program, the MRVP, was established in 2015 and offers a unique approach to residency. The program has been successful in attracting high-net-worth individuals and families looking for European residency that offers a good quality of life and business opportunities. According to the Malta Residency Visa Agency, from its inception until 2021, the program received over 2,600 applications, with over €850 million invested in the country (Malta Residency Visa Agency, 2021).

When it comes to comparing and analyzing the best Golden Visa schemes among Portugal, Spain, and Malta, there are several factors to consider. Each country has its own set of rules and regulations, and what may be considered the best option for one individual may not be the best option for another. Thus, a closer look at some of their factors will help to understand which country's Golden Visa program is the most attractive. First, the investment threshold is an essential factor when considering a Golden Visa program. Portugal has the lowest investment threshold among the three countries, with a minimum investment of €500,000 in property. In comparison, Spain requires a minimum investment of €500,000 in real estate or €1 million in public or business

investment. Malta has a lower investment threshold, with a minimum investment of €250,000 in property or a lease of €10,000 per year. While Portugal may be the most affordable, it is worth noting that property prices have been steadily increasing, which could impact investment in the long run.

Secondly, regarding residency and citizenship, all three countries offer a pathway to permanent residency. Portugal offers a 5-year residency permit, while Malta and Spain offer 1-year residency permits. However, the time frame for obtaining citizenship varies. Malta offers the fastest path to citizenship, with the possibility of obtaining citizenship after 1 year of residency. Portugal and Spain require a longer period of residency, with citizenship obtainable after 5 years and 10 years of residency, respectively. It is important to note that citizenship is not a requirement for a Golden Visa program, and permanent residency may be enough for some individuals.

Furthermore, as previously mentioned, the easy nature of Golden Visa residency programs appears to be highly contentious, particularly in the EU, which has a supranational legal framework. A recent case of this contentiousness was experienced by Malta. In 2022, the European Commission decided to submit Malta to the EU's Court of Justice over its investor citizenship scheme (European Commission, 2022). The Commission observed that granting EU citizenship in exchange for pre-determined payments or investments that have no genuine link to the Member State in question is incompatible with the principle of sincere cooperation enshrined in Article 4(3) of the Treaty on European Union, as well as the concept of Union citizenship enshrined in Article 20 of the Treaty on the Functioning of the European Union (Moretti, 2021).

Following Russia's invasion of Ukraine, Malta halted the new scheme for Russian and Belarussian nationals (Times of Malta, 2022). While this was a positive step, Malta continues to administer the scheme for all other nationalities and has stated that it has no plans to terminate it. As a result, the Commission decided to refer Malta to the European Union's Court of Justice under Article 258(2) of the Treaty on the Functioning of the European Union (Consolidated versions, 2012). Scholars also argued that this easy route to citizenship offered within the EU framework would potentially increase illegal activities and irregular migration (Gaspar & Ampudia de Haro, 2020).

Thirdly, all three countries offer favorable tax regimes for Golden Visa holders. Portugal offers a non-habitual residency scheme with reduced tax rates for foreign income. Malta has a global tax system with a high-net-worth individual tax regime, which allows for a flat tax rate of 15% on foreign income. Spain offers a tax regime for non-residents who meet certain criteria. It is worth considering the tax implications of each country's Golden Visa program, as this can impact the financial situation of residents in the long run. Related to financial matters, the Portuguese government was sued by 63 Golden Visa applicants because of the "purposively" slow process of visa approval, based on how much tax the applicant would have to pay to the government (Nesheim, 2022). This legal class action made the government of Portugal amend the Law on Foreign Nationals (Law 23/2007) and form a special task force responsible for ensuring that the application process conforms to national and EU citizenship law (Government of Portugal, 2022).

However, those countries are members of a supranational organization – the EU. The EU also contributes by providing the relevant legal framework surrounding Golden Visa programs in the EU to prevent money laundering and irregular migration for its Member States. The first of these frameworks is the Fifth Anti-Money Laundering Directive (AMLD5) – a comprehensive EU Directive aimed at combating money laundering and terrorist financing (Pavlidis, 2021). It requires Member States to implement stricter due diligence measures and enhance transparency in financial transactions. Financial institutions and designated professionals are required to conduct enhanced customer due diligence (EDD) on individuals involved in high-risk activities, including those seeking Golden Visas (Elo, 2021). This involves conducting thorough background checks, verifying the source of funds, and assessing potential money laundering risks associated with applicants. Furthermore, to ensure compliance with AMLD5, EU Member States are required to establish stringent Know Your Customer (KYC) and due diligence requirements for Golden Visa programs. These procedures involve verifying the identity and background of applicants, including the source of their wealth and funds. The goal is to ensure that individuals applying for residency or citizenship through these programs have legitimate reasons for their investment and that the funds used are not derived from illicit activities.

The EU also emphasizes the importance of information exchange and cooperation among relevant authorities, both domestically and internationally. Member States are encouraged to share information about applicants, their investments, and potential risks. Improved cooperation helps identify and prevent any misuse of Golden Visa programs, such as money laundering or irregular migration. The EU also collaborates with international bodies and organizations, including the FATF, to align its measures with global standards for combating money laundering and terrorist financing. This collaboration involves exchanging best practices, sharing information, and developing common guidelines to strengthen the legal framework surrounding Golden Visa programs.

It is important to note that the implementation of these measures and the specific legal frameworks may vary among EU Member States. Each country has the flexibility to establish its own rules and requirements for its Golden Visa programs, as long as they comply with the overarching EU directives and guidelines related to anti-money laundering and terrorist financing. In conclusion, choosing the best Golden Visa scheme among Portugal, Spain, and Malta depends on individual circumstances and preferences. Factors such as location, taxation, language, and culture can also be important considerations. Ultimately, it is essential to carefully understand the legal impact and the potential for transnational crime which can occur under Golden Visa schemes.

3.2. An analysis of the socio-economic gap in Indonesia

Indonesia has been struggling to attract foreign direct investment (FDI) in recent years, with FDI inflows declining by 6.9% to $23.6 billion in 2020 compared to the previous year (Azémar & Giroud, 2023). One of the main challenges for foreign investors in Indonesia is the complex regulatory environment, which can be a deterrent for those looking to invest in the country. According to the World Bank's Doing Business 2020 report, Indonesia ranks 73rd out of 190 economies in the ease of doing business index, with the country ranking particularly low in the areas of enforcing contracts (139th) and resolving insolvency (164th) (World Bank Group, 2020).

Furthermore, Indonesia's legal system can be slow and cumbersome, with disputes taking an average of 400 days to resolve, compared to the global average of 164 days (World Bank Group, 2020). This can result in additional costs and uncertainties for foreign investors, discouraging them from investing in the country. The COVID-19 pandemic has further exacerbated Indonesia's economic challenges. The country experienced a recession in 2020, with the economy contracting by 2.07% in the third quarter of the year (World Bank Group, 2021). The pandemic also resulted in a significant decline in foreign investment, with the country recording a 30% decrease in foreign direct investment in 2020 compared to the previous year (Azémar & Giroud, 2023). To address these challenges, Indonesia needs to adopt a more investor-friendly approach to attract foreign capital. The introduction of a Golden Visa scheme could provide a valuable incentive for foreign investors to invest in the country. Such a scheme would allow investors to obtain a visa in return for a significant investment in the country, thereby facilitating the transfer of capital and expertise to Indonesia.

Moreover, a Golden Visa scheme could help Indonesia attract high-net-worth individuals and entrepreneurs, who could potentially invest in a range of sectors, including technology, tourism, and infrastructure. This, in turn, could create jobs and boost economic growth. For instance, Portugal's Golden Visa scheme has generated more than €5 billion in investment since its inception, with the majority of investments being made in real estate, followed by capital transfers and business creation. A Golden Visa scheme could provide a valuable incentive for foreign investors to invest in the country and could help Indonesia to overcome its regulatory and economic challenges. However, it is important that the scheme is carefully designed and implemented to ensure that it attracts genuine investors and contributes to the sustainable development of the country's economy.

3.3. Legal challenges identified in Indonesia

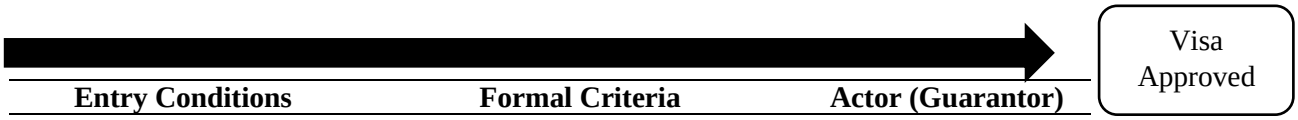
The legal challenges that Indonesia may face in implementing a Golden Visa program are numerous and complex. One of the key challenges is the current immigration law, Law No. 6/2011, which sets out strict rules for the issuance of visas and residency permits. This law requires foreigners to meet a number of requirements, including having a sponsor in Indonesia, obtaining a work permit, and passing a medical examination. These requirements can be time-consuming and bureaucratic, and may deter potential investors from applying for a Golden Visa in Indonesia. In addition to the immigration law, Indonesia also has a complex regulatory framework for foreign investment. This framework includes numerous laws and regulations that govern different aspects of foreign

investment, such as licensing, taxation, and labor relations. These laws and regulations can be difficult to navigate for foreign investors, and may add to the regulatory burden of implementing a Golden Visa program.

Comparatively, countries like Portugal, Malta, and Spain have more streamlined legal frameworks for Golden Visa programs. For example, Portugal's Golden Visa program requires only a minimum investment of €500,000 in real estate and has a simplified application process. Similarly, Malta's program requires a minimum investment of €250,000 in government bonds and has a clear and transparent application process. To address these legal challenges and create a more attractive Golden Visa program, Indonesia may need to revise its immigration and investment laws and regulations. This could include simplifying the application process, reducing the regulatory burden, and creating more flexible investment options. It is important for Indonesia to learn from the experiences of other countries and benchmark against them to create a Golden Visa program that is both attractive to foreign investors and meets the country's economic and social needs.

3.4. Proposed schemes

After comparing the best Golden Visa programs and analyzing the conditions and potential in Indonesia, Golden Visa schemes in Indonesia can be proposed. Based on the analysis, Golden Visa schemes in Indonesia could follow the example of Spain for eligible applicants who are: (a) investors, (b) entrepreneurs, or (c) highly qualified professionals. In this way, the Golden Visa scheme would maximize its potential to attract foreigners who have potential – not only in terms of investment but also in terms of the need for highly qualified professionals in certain areas. Furthermore, in terms of the entry conditions, formal criteria, and guarantors, the proposed schemes can be illustrated as follows (Figure 7).



Entry Conditions	Formal Criteria	Actor (Guarantor)
The minimum property rent is IDR 500 million	IDR 25 million application fees	The investor and entrepreneur would have to cooperate with a local company, while global talent would not need to have a guarantor
The applicant must deposit their money to the Indonesian Bank or registered financial organization of at least IDR 1 billion	Maximum 14 working days for application procedures	
The minimum job creation is 50 workers	Legalization of the proof of investment by a financial institution that is formally registered in Indonesia, as evidenced by an official bank statement	
Workers have to be registered with the Indonesia National Social Security System	Have a clean criminal record verified by an official letter from the home country and legalized by the National Police of Indonesia	
Knowledge transfer and environmental impact required	Pass the background check conducted by the Indonesian immigration authorities	

Figure 7. Potential Welcoming Criteria for a Golden Visa in Indonesia
(Source: author's analysis based on certain legal documents)

Furthermore, there are several potential Golden Visa segments that Indonesia could consider to attract foreign investment and stimulate economic growth. Proposed schemes could include the following.

1. Property Investment Scheme – Indonesia could introduce a Golden Visa scheme that is focused on property investment. This would allow foreign investors to obtain residency in Indonesia by investing a certain amount of

money in the country's real estate market. For example, the investment threshold could be set at IDR 10 billion (approximately $700,000), which would entitle investors to a renewable 5-year visa. This scheme could help boost Indonesia's property market and provide a steady stream of foreign investment.

2. Infrastructure Investment Scheme – Indonesia could introduce a Golden Visa scheme that is focused on infrastructure investment. This would allow foreign investors to obtain residency in Indonesia by investing in the country's infrastructure projects. For example, the investment threshold could be set at IDR 50 billion (approximately $3.5 million), which would entitle investors to a renewable 10-year visa. This scheme could help fund much-needed infrastructure development in Indonesia and create new job opportunities.

3. Business Investment Scheme – Indonesia could consider a Golden Visa scheme that is focused on business investment. This would allow foreign investors to obtain residency in Indonesia by investing in local businesses. For example, the investment threshold could be set at IDR 20 billion (approximately $1.4 million), which would entitle investors to a renewable 5-year visa. This scheme could help stimulate Indonesia's entrepreneurial ecosystem and provide much-needed capital for local businesses.

4. Start-up Investment Scheme – Indonesia could introduce a Golden Visa scheme that is focused on start-up investment. This would allow foreign investors to obtain residency in Indonesia by investing in the country's start-up companies. For example, the investment threshold could be set at IDR 5 billion (approximately $350,000), which would entitle investors to a renewable 3-year visa. This scheme could help create new job opportunities and stimulate Indonesia's start-up ecosystem.

5. Green Investment Scheme – Indonesia could consider a Golden Visa scheme that is focused on green investment. This would allow foreign investors to obtain residency in Indonesia by investing in the country's green projects, such as renewable energy and sustainable agriculture. For example, the investment threshold could be set at IDR 30 billion (approximately $2.1 million), which would entitle investors to a renewable 8-year visa. This scheme could help fund Indonesia's transition to a more sustainable economy and attract socially responsible investors.

6. Global Talent Scheme – Indonesia could introduce a Golden Visa scheme that is focused on attracting global talent. This would allow foreign professionals with specialized skills and expertise to obtain residency in Indonesia by contributing to the country's economic and social development. For example, the scheme could target professionals in fields such as technology, engineering, finance, and healthcare. The investment threshold could be set at IDR 15 billion (approximately $1 million), which would entitle investors to a renewable 5-year visa. This scheme could help address Indonesia's skills shortage and enhance the country's competitiveness in the global economy.

In conclusion, there are several potential Golden Visa schemes that Indonesia could consider to attract foreign investment and stimulate economic growth. The specific scheme(s) that Indonesia chooses to implement will depend on various factors, including the country's economic priorities, investment needs, and regulatory framework. However, by offering competitive and attractive Golden Visa schemes, Indonesia could potentially tap into a significant source of foreign investment and accelerate its economic development.

Conclusions

In recent years, Golden Visa programs have become increasingly popular among countries seeking to attract foreign investment and talent. Indonesia, with its vast potential for economic growth, natural resources, and strategic location, is well-positioned to benefit from such programs. However, designing an effective and inclusive Golden Visa scheme requires a thorough understanding of the benefits and challenges of such programs, as well as the local economic and social context. The comparative analysis of Golden Visa programs in Portugal, Spain, and Malta provides a useful benchmark for Indonesia to design its own scheme. Portugal's program, launched in 2012, has been one of the most successful in attracting foreign investment. As of December 2020, the program had raised over €5.9 billion in investment and created over 80,000 jobs. The majority of the investment has been in real estate, with Chinese and Brazilian investors accounting for the largest share of applicants.

Spain's Golden Visa program, launched in 2013, has also been successful in attracting foreign investment, particularly in real estate. As of December 2020, the program had raised over €3.8 billion in investment and created over 20,000 jobs. Chinese and Russian investors have been the largest groups of applicants. Malta's program, launched in 2013, is relatively more exclusive, with a higher investment threshold and more rigorous due diligence processes. As of December 2020, the program had raised over €1.6 billion in investment and created over 1,700 jobs. The majority of the investment has been in real estate, followed by government bonds and stocks. The largest group of applicants has been from Russia.

However, the Golden Visa programs of these countries have also faced criticism for their potential to increase property prices, contribute to social inequality, and create opportunities for money laundering and corruption. In Portugal, for example, the program has been accused of fueling a real estate bubble and driving up prices in popular tourist destinations, such as Lisbon and Porto. Similarly, in Spain, the program has been criticized for contributing to the housing crisis and displacing local residents in popular tourist destinations, such as Barcelona and Madrid. Moreover, the COVID-19 pandemic has highlighted the potential risks of Golden Visa programs, particularly in terms of public health and safety. In Portugal, for example, the program has been linked to the spread of the virus in tourist hotspots, such as the Algarve and the Madeira Islands.

In light of these challenges, Indonesia should design its Golden Visa program with a focus on promoting social inclusion, addressing the country's socio-economic challenges, and mitigating potential risks. To achieve this, the program should be tailored to the country's specific needs and priorities, taking into account the local economic and social context.

One potential strategy for Indonesia's Golden Visa program could be to set a relatively low investment threshold to attract a broad range of foreign investors, including small and medium-sized enterprises (SMEs) and start-ups. This would help to diversify the sources of investment and promote entrepreneurship and innovation. For instance, Portugal's golden visa program has attracted a large number of investors from Brazil, South Africa, and the United States.

In addition, Indonesia's Golden Visa program should be designed to promote social inclusion and address the country's socio-economic challenges, such as poverty and inequality. This could include setting targets for investment in priority sectors, such as infrastructure, renewable energy, and technology, and providing incentives for investors to invest in these sectors. To mitigate potential risks, Indonesia's Golden Visa program should also focus on due diligence processes and anti-money laundering measures.

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PROBLEMS REGARDING COMPENSATION FOR THE BREACH OF THE RIGHT TO CRIMINAL PROCEEDINGS WITHIN A REASONABLE TIME

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Abstract. States have an obligation to ensure that criminal proceedings last for a reasonable time. If this obligation is not fulfilled, the damage suffered by the person must be effectively compensated. This article aims to determine whether effective compensation for violations of excessively long criminal proceedings is ensured in Lithuania. In order to achieve this goal, the legal regulation of Lithuania is analyzed through the prism of the criteria formed by the ECtHR, and is compared with that of other EU countries. The research shows that in other European countries, unlike in Lithuania, the right to compensation for damage caused by the excessively long duration of criminal proceedings is directly enshrined in legal acts, or compensation is provided in accordance with special legal instruments. The article reaches the conclusion that – although, in the ECtHR's assessment, the practice of Lithuanian courts can be considered an effective remedy for the protection of the right enshrined in Article 6 (1) of the ECHR – the legal regulation of Lithuania is insufficient. Considering the position of international institutions and the practice of other European countries, the conclusions of this article suggest that the clear and unambiguous right of a person to compensation for material and non-material damage caused by excessively long criminal proceedings should be enshrined.

Keywords: criminal procedure, tort liability, infringement of criminal procedure, compensation for damages, criminal proceedings within a reasonable time.

Introduction

One of the means of ensuring the human right to a fair trial is the principle of the speed of proceedings. This principle has a supranational character and is established in the main legal acts of the European Union (EU) regulating the protection of human rights. Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the ECHR) establishes the right of everyone to have their case properly examined within the shortest possible time, under the conditions of equality, in public, and by an independent and impartial tribunal constituted in accordance with the law. Article 47 (2) of the Charter of Fundamental Rights of the EU states that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

Ensuring that the state of uncertainty regarding the fate of a person who is subject to criminal proceedings is ended as soon as possible by resolving the issue of the criminal charges brought against them (and, accordingly, the issues of the related civil rights and obligations) implements both general legal certainty and that of the individual, as well as promoting the interests of process economy (*Stögmüller v. Austria*, 1969). Justice must be executed promptly, otherwise the effectiveness and reliability of the administration of justice, as well as respect for the principle of the rule of law, may be undermined. In its decision in *Sürmeli v. Germany*, the European Court of

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Human Rights (hereinafter – the ECtHR) stated that it is the duty of the Contracting States to organize their legal systems in such a way that their courts can fulfill Article 6 (1) of the ECHR requirements, as well as the obligation to examine cases in the shortest possible timeframe (*Sürmeli v. Germany*, 2006). Despite the above-mentioned imperative obligations and efforts made by states to ensure that criminal proceedings are as short in duration as possible, in the practice of the ECtHR the violation of Article 6 (1) of the ECHR is established most often (Council of Europe, n.d.).

In the jurisprudence of the ECtHR emphasizing the importance of the principle of the speed of criminal proceedings, it is stated that the effort to protect a person from a state of uncertainty that continues for too long is particularly important in criminal proceedings when deciding on the issue of a criminal charge brought against a person (*Stögmüller v. Austria*, 1969). EU legal obligations do not provide a justification for Member States' failure to comply with the reasonable time principle (European Union Agency for Fundamental Rights and Council of Europe, 2016, p. 141). Article 13 of the ECHR states that "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity". The turning point in the practice of the European control mechanism is the case of *Kudla v. Poland* (2000), as, for the first time, the ECtHR considered that it was necessary to examine an application under Article 13 when a violation of Article 6 (1) had been found. Therefore, the correct interpretation of Article 13 should be that it guarantees an effective remedy for an alleged breach of the right to have a court case determined within a reasonable time (Zoraska Kamilovska, 2021, p. 65).

Taking into account the aforementioned international requirements for States, and considering the fact that the excessively long duration of the criminal process is one of the most common violations of the ECHR in cases against Lithuania (Representation and Agent of the Government, 2021), the purpose of this article is to determine whether effective compensation for violations of excessively long criminal proceedings is ensured in Lithuania. Thus, this research does not aim to determine the definition of what is considered an excessively long criminal process, the reasons for it, nor what measures the state can use to ensure a speedy process. Instead, this article mainly focuses on the analysis of the effectiveness of compensatory measures when the requirement for the shortest possible process has already been violated. To achieve this goal, the legal regulation of Lithuania will be analyzed through the prism of criteria formed by the ECtHR, and will be compared with that of other EU countries. Systematic analysis, synthesis, critique and other scientific research methods will be used in this research.

1. Remedies of Redress for the Violation of the Principle of the Reasonable Time Limit of Criminal Proceedings

Various measures may be taken in the event of finding a breach of the principle of the reasonable time limit of proceedings and in the determination of the question of compensation. Article 13 of the ECHR allows a State to choose between a remedy which can expedite pending proceedings or a remedy *post factum* in damages for a delay that has already occurred (*McFarlane v. Ireland*, 2010). The Contracting States are afforded some discretion as to the manner in which they provide individuals with the relief required by Article 13, and conform to their Convention obligation under that provision (*Scordino v. Italy*, 2006). States' freedom of discretion in the choice of measures is also emphasized in the Recommendation of the Committee of Ministers of the Council of Europe to Member States on effective remedies for excessive length of proceedings, which calls on States to provide measures to speed up processes, compensate for damages caused by excessively long processes, and, if necessary, combine both of these methods (Recommendation CM/Rec(2010)3). Member States themselves choose which measures to provide in national law – as such, they can provide only one (for example, compensatory) or both measures (preventive and compensatory) (Averkienė, 2015, p. 163).

Preventive defense remedies play an important role in ensuring compliance with the shortest possible time requirement. The existence of an effective remedy for the protection of a right to a trial within a reasonable time primarily encompasses its effectiveness in the course of the proceedings where their length is brought into question. This means that the remedy is effective if it prevents the alleged violation or its continuation (a mechanism of preventing delays or accelerating proceedings) (Zoraska Kamilovska, 2021, p. 66). The ECtHR takes the stance that the best solution in absolute terms is indisputably prevention, as it is in many spheres (*Apicella v. Italy*, 2006). Such a remedy offers an undeniable advantage over a remedy affording only compensation since it also prevents a finding of successive violations in respect of the same set of proceedings and does not merely

repair the breach *a posteriori*, as a compensatory remedy does (*Gazso v. Hungary*, 2015). In practice, this would mean that in the countries of the preventive system there is a legal remedy in the form of a request for acceleration of the procedure submitted to the competent authority (Kurtović & Bećirović-Alić, 2020, p. 486). Preventive measures that guarantee the right to the shortest possible criminal trial can be implemented by a diverse set of legal instruments. Some countries provide specific preventive remedies which aim at speeding up investigative or pre-trial proceedings by allowing for complaints or requests for acceleration to be lodged with the superior prosecuting or judicial authority.[3]

Some States, such as Austria, Croatia, Spain, Poland and Slovakia, have understood this situation perfectly by choosing to combine two types of remedy – one designed to expedite the proceedings and the other to afford compensation (Kuijer, 2014, pp. 28–29). It should be noted that this form of redress has been introduced in countries such as Croatia, Slovakia, and Poland, where Constitutional or Appeals Courts have, rather successfully, been given the power to order the acceleration or conclusion of delayed proceedings (Final Resolutions DH(2005)60 and DH(2005)67, 2005). In the case of Croatia, the Constitutional Court must set a time limit and grant compensation to individuals for such delays (Sitaropoulos, 2011, pp. 22–23).

In cases where preventive defense measures have proved to be ineffective, and there is reason to believe that the requirement of the shortest possible criminal process has been violated, compensatory measures become relevant. Different types of remedy may redress this violation appropriately by: reducing the sentence in an express and measurable manner (in criminal cases) (Kuijer, 2013, p. 786), paying compensation of a reasonable or not manifestly inadequate amount, or discontinuing proceedings together with the payment of some legal costs (Reid, 2011, p. 205).

In most European countries (e.g., Germany, Norway, Denmark, Hungary, etc.), the excessively long duration of the criminal process is compensated for by imposing a sentence lower than that which the criminal law provides for the respective act. However, the legal doctrine states that the mitigation of a sentence on the ground of the excessive length of proceedings does not in principle deprive the individual concerned of their status as a victim within the meaning of Article 34 of the ECHR (Pantazatou, 2018, p. 5). However, this general rule is subject to an exception when the national authorities have acknowledged in a sufficiently clear way the failure to observe the reasonable time requirement and have afforded redress by reducing the sentence in an express and measurable manner (*Eckle v. Germany*, 1982; *Beck v. Norway*, 1995; *Cocchiarella v. Italy*, 2001; *Morby v. Luxembourg*, 2002 etc.). In other words, it is required that the sentencing must show that national courts recognize the violation and that it can be ascertained to what extent the violation has affected the sentencing (Nordhus, 2019, p. 60).

For example, in the case of *Tamás Kovács v. Hungary*, the applicant complained, *inter alia*, of the 8 years and 4 months that the criminal trial had lasted for. The court of first instance decided that the proceedings were too long and reduced the applicant's sentence from 2 years and 6 months to 2 years of imprisonment, suspending its execution for 4 years. The national court emphasized that the sentence was reduced only because of the unreasonably long duration of the process. Taking this into account, the ECtHR found that the applicant received sufficient compensation for the alleged violation of his right to a trial in the shortest possible time, established in Article 6 (1) of the ECHR (*Tamás Kovács v. Hungary*, 2004). It should be noted that the damage caused by an excessively lengthy process can be compensated for not only by directly mitigating the imposed punishment, but also by refusing to make it tougher (e.g., by refusing to satisfy an appeal from a prosecutor which asks for a harsher sentence than the one imposed by the court of first instance; *Bochev v. Bulgaria*, 2008). The analysis of the practice of the ECtHR shows that the damage caused by the violation of the requirement of the shortest possible time can be compensated for by mitigating not only the deprivation of liberty, but also other punishments, such as a fine (*Ohlen v. Denmark*, 2005).

Even in cases where the circumstances of the case show that the sentence was mitigated due to the violation of the right to the shortest possible criminal trial, in the practice of the ECtHR this is not always recognized as suitable compensation for the violation. As mentioned, the mitigation of the sentence must be in an express and

[3] For example: Belgium (where the request can be lodged not only by the defendant but also by the Attorney General), Bulgaria, Denmark and Portugal (where any party can request that the proceedings before the Prosecution Services or those taking place in a court or before a judge be expedited when the time-limits provided by law for any procedural step are exceeded) (Venice Commission, 2007, p. 18).

measurable manner. For example, in the case of *Taavitsainen v. Finland* (2009), the ECtHR noted that although the national court had taken into account the length of the proceedings in mitigating the applicant's sentence, it was not clear from the judgment what this mitigation was. If the decision of the national courts is not sufficiently clear and measurable, then compensation will often be the only alternative remedy to compensate for this breach (Nordhus, 2019, p. 60).

It is worth mention that in Germany, although as a general rule the length of the proceedings is a factor to be taken into account when imposing the sentence, judgments may even be annulled if the proceedings have persisted longer than necessary (Detter, 1992, p. 171). According to Beulke (2002, p. 16), German jurisprudence represents the view that there may be cases when, due to the particularly long delays in the procedure and the difficulties of the defendant in this regard, the recognized interest of the rule of law is to waive the enforcement of the criminal claim and discontinue the procedure.

In Hungary, according to Article 648 (c) of the Code of Criminal Procedure, there is room for legal review against the final decision of the court on the basis of the decision of a human rights body established by international treaty (thus, the ECtHR). At the same time, on the basis of Article 650 (4) of the Code of Criminal Procedure, there is no room for legal review based on the decision of the ECtHR if it only establishes a violation of the requirement to adjudicate the case within a reasonable time. The reason for this is that if a new procedure could be ordered for this reason, the principle of adjudication within a reasonable time would be further violated.

Principle 1 of the Recommendation of the Committee of Ministers of the Council of Europe "On Public Liability" indicates that compensation for damage caused by an act of a public authority must be ensured if the damage occurred because the public authority did not act towards the injured person in a way that is reasonably expected in its activities, considering legal requirements (Recommendation R 84 (15)). Despite the greater effectiveness of preventive measures, the legal doctrine states that the effectiveness of the remedy is not disputed even in cases when there are procedures providing redress for unreasonable delays in proceedings, whether ongoing or concluded (mechanism of compensation) (Zoroska Kamilovska, 2021, p. 66).

The approach of the Venice Commission to monetary compensation as a means of redressing the damage caused by excessively long criminal proceedings is far more critical. In December 2006, the Venice Commission published a report on the effectiveness of national remedies in respect of excessive length of proceedings. The Venice Commission went a step further than the ECtHR regarding preventive remedies (that is, the possibility to prevent exceeding the reasonable time requirement by expediting the judicial proceedings) (Kuijer, 2013, p. 788). The Venice Commission (2007) stated:

> While the payment of pecuniary compensation must be granted in cases where undue delays have occurred pending the possibly necessary reforms and improvements of the judicial systems and practices, it should not be regarded or accepted as a form of fulfillment of the obligations stemming from Articles 6 and 13 of the Convention.

In the jurisprudence of the ECtHR, it would be possible to distinguish the following requirements for monetary compensation as a form of remedy for damage caused by excessively long criminal proceedings: 1) if there has been a violation of the reasonable time requirement as set out in Article 6 (1), there should be a finding of such a violation by the domestic authority which is binding; 2) the remedy needs to be "effective, adequate and accessible", i.e., excessive delays in an action for compensation will affect whether the remedy can be considered "adequate" – likewise, the "accessibility" of the remedy could be affected by the rules regarding legal costs; 3) there should be "appropriate and sufficient" redress, which means, *inter alia*, that compensation should be paid without undue delay (i.e., 6 months from the date on which the decision awarding compensation became enforceable), and the amount of compensation paid by the domestic authority should not vary significantly from the standards concerning financial compensation developed by the ECtHR; and 4) the basic principles of "fairness" guaranteed by Article 6 (1) of the ECHR should be respected by the domestic authority in the compensatory proceedings (Kuijer, 2014, p. 14).

2. Compensation for a Violation of an Excessively Lengthy Process in Lithuania

As mentioned, States are afforded some discretion as to the manner in which they provide individuals with the relief required by Article 13 and conform to their ECHR obligations under that provision (*Scordino v. Italy*, 2006). The ECtHR has often emphasized that the national authorities have the competence to construe and apply domestic law (Gerards, 2019, p. 185). Despite that, the remedy required by Article 13 must be available in practice as well as in law, and must be adequate (Moya & Milios, 2021, p. 126).

As in most European countries, in Lithuania, the possibility of the mitigation of a sentence due to the violation of the right to the shortest possible criminal trial is established in the Criminal Code of the Republic of Lithuania and is applied in consistent national court practice. According to the judicial practice formed by the Supreme Court of Lithuania, the excessively long duration of criminal proceedings, depending on the circumstances significant to the imposition of the sentence established in the criminal case and the circumstances of the violation of the right to a trial in the shortest possible time, may be the basis for reducing the punishment, without leaving the limits of the sanction of the relevant article of the special part of the Criminal Code (Orders of the Supreme Court of Lithuania in cases No. 2K-296-788/2017; No. 2K-75-677/2016; No. 2K-7-358-303/2015, etc.).

Meanwhile, the situation regarding monetary compensation when a violation of Article 6 (1) of the ECHR is established is slightly different. Before starting to analyze Lithuanian legal regulation and court practice, it is necessary to emphasize that the ECtHR may deal with a matter only after all domestic remedies have been exhausted (Renucci, 2005, p. 109). The respondent State "must first have an opportunity to redress the situation complained of by its own means and within the framework of its own domestic legal system" (*Louvain Inhabitants v. Belgium*, 1994). Despite this, the respondent State must prove the existence of domestic remedies that have not been exercised (*Hauschildt v. Denmark*, 1989; *Whiteside v. the United Kingdom*, 1994; Sp*encer v. the United Kingdom*, 1998; etc.).

Compensation for damage caused by excessively long criminal proceedings is regulated quite differently in European countries. In some countries it is regulated by criminal procedure, in others by civil or administrative law (Kuijer, 2013, p. 791). In Lithuania, compensation is regulated both by the norms of criminal procedure and by civil law. Article 44 (5) of the Lithuanian Code of Criminal Procedure (hereinafter – the CPC) states that "Every person accused of committing a criminal offense has the right to have his/her case heard fairly by an independent and impartial court in the shortest possible time under conditions of equality and publicity". Thus, this article of the CPC establishes a concrete guarantee for the participants of the judicial process to a quick, public, fair, independent and impartial trial. The CPC also provides the duty of the prosecutor and the judge to explain the procedure for compensation of damages to a person due to their illegal detention, arrest or conviction. This obligation arises only in cases when the criminal proceedings are terminated due to the fact that no evidence of a crime or misdemeanor has been established, as well as when an acquittal is passed (CPC, 2002, Article 46 (1)). Article 6.272 (1) of the Lithuanian Civil Code (hereinafter – the CC) states that

> Damage resulting either from unlawful conviction, or unlawful arrest, as a measure of suppression, as well as from unlawful detention, or application of unlawful procedural measures of enforcement, or unlawful infliction of administrative penalty – arrest – shall be compensated fully by the state irrespective of the fault of the officials of preliminary investigation, prosecution or court.

Thus, Lithuanian legal regulation clearly and unequivocally guarantees the human right to timely criminal proceedings. However, when analyzing the legal measures intended to compensate for violations of the aforementioned right, several important aspects can be observed. Both the CPC and the CC guarantee a person's right to compensation only if they suffer as a result of very specific actions in the criminal process, such as: illegal conviction, illegal arrest procedure, illegal detention, and illegal application of procedural coercion measures. If a person suffers damage due to other procedural actions or decisions, as well as due to excessively long criminal proceedings, the Lithuanian legal acts do not provide for the right to compensation. In other words, according to the CC and CPC, the State's tortious liability is possible only with regard to certain actions committed in the course of criminal proceedings listed in the aforementioned "finite lists".

Thus, it could be stated that there are no effective remedies in Lithuanian legal acts to compensate for the violation of the right to a prompt trial, and such a situation contradicts the practice of the ECtHR. However, this problem is solved through case law, which took a significant amount of time to form and which was largely influenced by the jurisprudence of the ECtHR.

In Lithuania, the first court decision in a case dealing with the State's tortious liability for damage caused to a person in criminal proceedings was adopted on 8 January 1996 (Šalčius, 2021, pp. 21–22). Until 2007, the practice of this category of cases was very scarce. Although in recent cases the issue of compensation for damage caused by excessively long criminal proceedings was raised *inter alia*, the legal acts in force at the time, as well as those currently in force, did not provide for the tortious liability of the State for such violations. Damages were usually awarded only for acts falling within the "finite list" of criminal proceedings. However, the courts, realizing the flawed nature of the legal regulation, decided to establish the violation of Article 6 (1) of the ECHR. For example, when the duration of arrest or temporary restriction of property rights was determined to be too long, the entire duration of the criminal process was additionally determined to be too long (Orders of the Supreme Court of Lithuania in civil cases No. 3K-7-183/2006; No. 3K-3-895/2003; etc.). Thus, in the period from 8 January 1996 to 6 February 2007, violation of Article 6 (1) of the ECHR was not seen as an independent basis for compensation for damages suffered in criminal proceedings (Šalčius, 2021, pp. 126–127).

Only in the ruling of 6 February 2007 did the Supreme Court of Lithuania present a more detailed position regarding the infringement of Article 6 (1) of the ECHR as an independent ground for redress (Order of the Supreme Court of Lithuania in civil case No. 3K-7-7/2007). In this ruling, the Court stated that

> A person who is notified of suspicions that he has committed a criminal act may, at any stage of the criminal proceedings, request to defend his right to a trial as short as possible, if he believes that there are indications of unjustified delay, because the violation of this right may involve possible violations of other fundamental human rights (Order of the Supreme Court of Lithuania in civil case No. 3K-7-7/2007).

The Court, rejecting the arguments that Lithuanian legal acts do not provide for compensation for damage caused by excessively long criminal proceedings, stated that

> The legal system of the Republic of Lithuania consists not only of national legal acts, but also of international treaties, in which the Republic of Lithuania has undertaken to ensure the protection of certain rights and interests, and to consider actions that violate them as a violation. <…> In cases when a person refers to possible illegal actions of officials, which are not defined in special legal norms regulating the responsibility of officials, the courts evaluate the presented facts about possible violations in the context of general legal principles, the Constitution of the Republic of Lithuania and international agreements. Legal regulation, when the actions of certain institutions or officials are not identified as a possible basis for liability, cannot deny a person's right to claim compensation, if such damage was caused by the relevant actions (Order of the Supreme Court of Lithuania in civil case No. 3K-7-7/2007).

This ruling of the Supreme Court of Lithuania fundamentally changed the practice of Lithuanian courts. After this, the tort liability of the State began to be interpreted much more broadly. Today, damages are awarded not only for excessively long proceedings, but also for any other violation of the criminal process (e.g., for a pre-trial investigation that commenced illegally, unfounded suspicion, the untimely termination of pre-trial investigation, as well as for the inadequate quality of the entire criminal process in general) (Šalčius, 2021, p. 145).

It can be assumed that such a fundamental change in the practice of the Lithuanian courts was determined by several factors, first among which were the decisions made by the ECtHR against Lithuania in 2000–2003 and in subsequent years, by which the State was obliged to compensate for the damage suffered due to the violation of Article 6 (1) of the ECHR (e.g., *Grauslys v. Lithuania*, 2000; *Šleževičius v. Lithuania*, 2001; *Meilus v. Lithuania*, 2003; *Girdauskas v. Lithuania*, 2003). Another factor that led to such changes in the practice of ordinary courts was the ruling of 19 August 2006 of the Constitutional Court of Lithuania. In this ruling, the Constitutional Court of Lithuania stated that the definition of illegal actions – when a complete (final) list of illegal actions that can cause harm to a natural person relating to quotas, interrogation, prosecution and the court is provided – is legally

incorrect. Such a definition does not include all possible illegal actions that can cause harm (including moral) to a person (Ruling of the Constitutional Court of the Republic of Lithuania of 19 August 2006).

According to the ECtHR, the ruling of the Supreme Court of Lithuania of 6 February 2007 can be considered as the starting point from which judicial practice began to take shape in Lithuania, based on which a person has the ability to effectively defend their rights if they have suffered damage due to the excessively long duration of criminal proceedings (*Savickas and others v. Lithuania*, 2013). In the practice of the ECtHR, Article 6.272 of the CC was not considered an effective remedy of defense in the sense of Article 13 of the ECHR due to its lack of legal certainty (e.g., *Simonavičius v. Lithuania*, 2006; *Kuvikas v. Lithuania*, 2006; *Gečas v. Lithuania*, 2007; *Baškienė v. Lithuania*, 2007; *Naugžemys v. Lithuania*, 2009). Only in the ruling of 15 October 2013 did the ECtHR state that the judicial practice that began to take shape, and which has been formed since the above-mentioned ruling of the Supreme Court of Lithuania, had acquired sufficient legal clarity and therefore could be considered as an effective remedy of legal defense – i.e., demanding compensation from the state for damages suffered due to the excessively long duration of criminal proceedings (*Savickas and others v. Lithuania*, 2013). It is clear that, according to the ECtHR, Lithuania currently has effective remedies for a person to defend their rights by demanding compensation for damage caused by a violation of the criminal process. However, the ECtHR links these remedies to the developed practice of national courts, but not to the existing legal regulation. Such argumentation even allows us to state that, in the opinion of the ECtHR, Lithuanian legal regulation was and remains flawed and ineffective in the sense of Article 13 of the ECHR, and the situation is saved only by the practice of national courts.

The existence of the "finite list" in the Lithuanian legal regulation also raises doubts about its compliance with the requirements of EU law. In *Köbler*, *Francovich*, *Brasserie* and other cases, the Court of Justice of the EU (CJEU) established that the European Community Treaty itself prohibits Member States from establishing such legal regulation of state tort liability that would limit compensation for damage caused by a violation of EU law (Deards & Hargreaves, 2004, p. 92). Thus, when the legislator did not foresee a violation of Article 6 (1) of the ECHR in the "finite list", this allowed a situation to arise in which Lithuanian legal acts do not provide for the right to compensation for damage caused by a violation of EU law. Legal doctrine also states that any limitations of a national mechanism are questionable as regards the effectiveness and completeness of protection (Baginska, 2017, p. 25).

In the analyzed context, one of the latest Lithuanian cases where a violation of Article 6 (1) of the ECHR was established was *Gančo v. Lithuania*. In this case, the ECtHR recognized that the criminal case was complex because it involved allegations of financial crimes and involved multiple suspects. However, the ECtHR noted that while the complexity of a case may justify a longer than average length of proceedings, it cannot justify long periods of inaction by the authorities. In those cases, if the process takes too long – for example, in complex cases where it is necessary to appoint and then wait a long time for the conclusions of experts or specialists – the authorities should take responsibility for this (*Gančo v. Lithuania*, 2021). It is necessary to emphasize that in the report of the Agent of the Government of the Republic of Lithuania before the ECtHR on the implementation of the decision in the aforementioned case, which was approved, only consistent judicial practice was indicated as a sufficient compensatory remedy, but not legal regulation (Representation and Agent of the Government, 2022).

3. Comparison of the Legal Regulation of Redress in European Countries

Despite the fact that all European countries guarantee the individual's right to monetary compensation for damages suffered as a result of excessively long criminal proceedings, the locations of the legal remedies by which this right is realized in the legal system and their natures are quite different between countries.

Usually, norms protecting the right to the shortest possible duration of criminal trial are established in ordinary laws (e.g., CC or CPC). This is the case in: Austria, Bosnia and Herzegovina, Bulgaria, the Czech Republic, Finland, Estonia, France, Hungary, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Norway, Serbia and Montenegro, Slovakia, Slovenia, Sweden, Spain, Switzerland, Ukraine, etc. Moreover, in most European countries the general obligation of the State to compensate for damage caused by the violation of the criminal process is established at the Constitutional level (e.g., in Germany, Poland, Lithuania, Latvia, Estonia, Croatia, and Iceland). In this way, the significance of said compensation is emphasized. There are countries where

special laws have been enacted to protect the right provided for in Article 6 (1) of the ECHR (e.g., Croatia, the Czech Republic, Italy, Poland, Portugal, Slovakia, and Slovenia). In addition, in some countries, as in Lithuania, some legal instruments intended to compensate for the damage caused by excessively long criminal proceedings are developed in case law.

In comparing the legal regulation of Lithuania with other European countries, it can be noted that the mentioned "finite list" of actions of the criminal procedure for which damages are compensated is not only established in the legal acts of Lithuania. However, in other countries, unlike in Lithuania, the demand for compensation for the actions of the criminal process which are not included in the "finite list" can be based on other legal instruments provided by the laws. For example, in Germany this is based on the "victim theory"; in France on "the theory of risk" and "the principle of equality of social burden". In Poland, Estonia and Sweden, even when solving the issue of compensation for damages suffered in criminal proceedings regulated by special legal acts, there is an opportunity to refer to the general norms of tortious liability. It must be noted that the use of such legal instruments as the "victim theory", "risk theory" and "principle of equal social burden" is limited, and is only applicable in exceptional cases. A person can rely on these exceptional norms only if the damage that they suffer is disproportionately large and was caused by actions in which society as a whole is interested (Šalčius, 2021, p. 80).

Thus, with such differences in the legal regulation of States, the question of whether or not the remedy for the excessive length of proceedings should be contained in specific legislation arises.

The analysis of the legal regulation of different European countries and the practice of the ECtHR allows us to state that the detail of legal regulation when adopting special laws is often determined by the decisions made by the ECtHR against the State. Those States which have been faced with, or are expecting to face, a significant number of applications before the Strasbourg Court on account of the excessive length of proceedings have introduced remedies for this problem through specific laws which supplement or amend the relevant codes of procedure, or equivalent legislation (Venice Commission, 2006).

For example, in the *Lukenda* case the length of proceedings in Slovenia was identified as a systemic problem, and the ECtHR encouraged the respondent State to either amend the existing range of legal remedies or add new remedies so as to secure genuinely effective redress for violations of the right to a trial within a reasonable time (*Lukenda v. Slovenia*, 2005). Following the judgment in the *Lukenda* case, the Slovenian Government established the Lukenda Project to address this problem and passed legislation in 2006 to this end. In later cases (e.g., *Korcnjak v. Slovenia*, 2007), the ECtHR expressed its satisfaction that the 2006 legislation addressed the problem, and required future applicants complaining of failure to deliver judgment in a reasonable time to use the remedies provided under the new legislation (Rainey et al., 2020, p. 308).

A similar situation occurred in Greece. Under pressure from the ECtHR, specific remedies were introduced providing just satisfaction for injury sustained due to excessive length of judicial proceedings. In three pilot judgments (*Nikolaos Athanasiou and Others v. Greece*, 2014; *Michelioudakis v. Greece*, 2012; *Glykantzi v. Greece*, 2012), the ECtHR held that the excessive length of proceedings constituted a structural problem and requested that the Greek state institute an effective domestic remedy within 1 year. The Greek authorities complied with the above judgments by enacting laws and introducing a specific compensatory legal remedy for just satisfaction in case of the "non-reasonable" length of judicial proceedings in criminal matters (Stribis, 2016, p. 148).

The ECtHR also found the Czech Republic in violation of Article 6 (1) of the ECHR as the country's courts failed to comply with reasonable delays, and declared the lack of an effective national remedy (*Hartman v. Czech Republic*, 2003). This situation changed thanks to some amendments to legal regulation providing criteria on adequate satisfaction. The national court has to take into account the particular circumstances of the case, such as the entire length of the procedure, the complex nature of the procedure, the contribution of the victim to the delays, the conduct of public authorities, and the importance of an object of procedure for the victim. The criteria included in amendments of legal regulation mirrored the criteria applied by the ECtHR (Šturma & Bilkova, 2016, p. 39).

The large number of cases at the ECtHR and the systemic problems identified also influenced the adoption of special legislation aimed at compensation for damages caused by excessively long criminal proceedings in other European countries: e.g., Poland (Majewska, 2016); Italy (Mole & Harby, 2006, pp. 24–25), and Serbia (Kurtovic, 2020, p. 484). In subsequent cases, the ECtHR evaluated the adoption of such legal acts as effective remedies to protect the right to the shortest possible trial.

Lithuania faced a similar situation. As mentioned above, in the practice of the ECHR, Article 6.272 of the CC was not considered an effective remedy of defense in the sense of Article 13 of the ECHR due to its lack of legal certainty. Only in 2013 did the ECtHR state that the court practice which had been formed since 2007 had acquired sufficient legal clarity and therefore could be considered an effective remedy of legal defense in the sense of Article 13 of the ECHR. Thus, in Lithuania, unlike in the previously analyzed States, new legal acts which would be considered effective remedies of defense were not adopted. However, it cannot be said that such initiatives did not exist.

On 14 April 2011 the Ministry of Justice of the Republic of Lithuania registered a draft law which proposed supplementing Article 6.272 of the CC and supplementing the CC with a new Article: 6.2731. It was proposed to expand the existing legal regulation, providing that a person can claim compensation from the State not only due to an illegal conviction or the use of procedural coercive measures, but also due to the excessively long duration of the criminal process (CC Amendment Act, 2011). One of the reasons that led to the preparation of this draft law was the increasing number of decisions of the ECtHR against Lithuania which stated a violation of Article 6 (1) of the ECHR. Unfortunately, this draft law was never enacted.

Thus, the question remains as to whether in Lithuania, following the example of other European countries, it is necessary to return to the aforementioned initiative to change the law. Instead, should we be satisfied with the fact that the ECtHR considers established jurisprudence as an effective remedy for the protection of the right provided in Article 6 (1) of the ECHR?

In its report on the effectiveness of national remedies in respect of excessive length of proceedings, the Venice Commission stated that

> specific laws present the matter of reparation in a detailed manner, and therefore have the advantage of clarity and comprehensiveness. They (are deemed to) address the root cause of the length-of proceedings problem, regulate in detail all matters, and contain the necessary explicit references to the case-law of the Strasbourg Court (notably as concerns pecuniary reparation). They may be more easily accessible to the public (and, in some cases, even to the courts) as well as to the instances of the Council of Europe. <...> The criteria for awarding moral damage and the general criteria for calculating material damage should be set out clearly and in detail, preferably in the law itself (Venice Commission, 2006).

In summary, it can be stated that, although the practice of Lithuanian courts has achieved sufficient legal clarity according to the ECtHR, taking into account the position of the Venice Commission and the practice of other European countries it can be assumed that the legal regulation of Lithuania should be improved. Lithuanian laws should enshrine the clear and unambiguous right of a person to compensation for material and non-material damage caused by excessively long criminal proceedings. The easiest way to do this is to remove from legal acts the "finite list" of criminal proceedings for which damages can be compensated. Such an amendment to the legal acts would not only comply with the recommendations of international institutions (e.g., the Venice Commission) and prevent questions about the existence of effective remedies for the protection of human rights in the future, but would also increase the consistency and clarity of the Lithuanian legal system.

Conclusions

1. Usually, the violation of the right to criminal proceedings within a reasonable time is compensated for either by reducing the sentence or by paying monetary compensation. The reduction of the sentence as a compensation for excessively long criminal proceedings is provided for in most European countries (e.g., Germany, Norway, Denmark, Hungary). Research has shown that the legal regulation and the court practice of the mitigation of punishment as a measure to compensate for the violation of Article 6 (1) of the ECHR in Lithuania corresponds to international legal acts and the practice of the ECtHR.

2. Meanwhile, the situation regarding monetary compensation when a violation of Article 6 (1) of the ECHR is established is slightly different. The special norm (Article 6.272 (1) of the CC) regulating the State's tortious liability for the damages inflicted in criminal proceedings provides a finite list of actions in criminal proceedings for which damages may be compensated. This finite list does not provide for a person's right to compensation for damages caused by excessively long criminal proceedings. Such legal regulation is criticized not only in the legal doctrine, but also in the jurisprudence of the international courts (the CJEU and the ECtHR) and the Constitutional Court of the Republic of Lithuania.

3. The abovementioned problem is solved through case law. Only in the ruling of 15 October 2013 did the ECtHR state that the judicial practice that began to take shape after the ruling of the Supreme Court of Lithuania on 6 February 2007, and which has been formed since, had acquired sufficient legal clarity and therefore could be considered as an effective remedy of legal defense – i.e., demanding compensation from the State for damages suffered due to the excessively long duration of criminal proceedings. It is clear that, according to the ECtHR, Lithuania currently has effective remedies for a person to defend their rights by demanding compensation for damage caused by a violation of the criminal process. However, the ECtHR links these remedies to the developed practice of national courts, but not to the existing legal regulation.

4. In the States analyzed in this article, compensation for damages for excessively long criminal proceedings is either established in special legal acts or is based on special theories (e.g., in Germany it is based on the "victim theory"; in France on "the theory of risk and "the principle of equality of social burden"). Taking into account the practice of other European countries and the position of The Venice Commission – which states that compensation for such damage should be enshrined in a legal act – it can be assumed that the legal regulation of Lithuania should be improved. Lithuanian laws should enshrine the clear and unambiguous right of a person to compensation for material and non-material damage caused by excessively long criminal proceedings. The easiest way to do this is to remove the "finite list" of criminal proceedings for which damages can be compensated from legal acts. Such an amendment of the legal acts would not only comply with the recommendations of international institutions and prevent questions about the existence of effective remedies for the protection of human rights in the future, but would also increase the consistency and clarity of the Lithuanian legal system.

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BEYOND TRADITIONAL INTELLECTUAL PROPERTY: THE NECESSITY AND POSSIBILITIES OF STRENGTHENING THE PROTECTION OF TRADE SECRETS THROUGH ITS INTEGRATION INTO THE MODERN INTELLECTUAL PROPERTY SYSTEM[1]

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Abstract. The events of recent years, including the Russian Federation's aggression, China's intellectual property (IP) violations, and production localization fostered by the COVID-19 pandemic, have created a new global era in the field of IP enforcement and international trade relations. Russia has openly declared its intention to violate IP belonging to "unfriendly countries" (Western countries). This raises the issue of whether the existing patent system can handle these challenges. Namely, patenting involves the publication of an invention, which makes its misappropriation easy. The trends described above require specific adaptions for Western countries, as a result of which the author argues that the role of trade secret protection has become more prominent. However, assessing the suitability of trade secret protection in this changed environment is critical. Therefore, this article aims to first evaluate the current system of protecting trade secrets and then make suggestions to improve it.

Keywords: trade secrets, disclosure, reverse engineering, intellectual property.

Introduction

Digitalization and globalization have supported rapid economic development and the transformation of countries into knowledge-based economies. Despite minor inevitable tensions, the traditional intellectual property[3] (IP) system has functioned more or less satisfactorily so far. However, this trend was interrupted by certain events. Firstly, we had to face challenges caused by COVID-19. As a result of COVID-19, existing supply chains were interrupted, and governments had to start considering the localization of production.

The second challenge was even more significant. The Russian Federation's aggression against Ukraine began in February 2022 and has created a new global era in which international agreements are not upheld. This has also had an impact on the functioning of the IP system. In March 2022, the Russian Federation passed a decree allowing local companies and individuals to use the inventions, utility models and industrial designs of patent holders from "unfriendly countries" (Decree No. 430-p) without their consent or compensation (Decree No. 299). The effect of the Russian Federation's decree on intellectual property rights (IPRs) has manifested mainly in the fact that the protection of the rights of patent owners is no longer guaranteed. We should also not ignore the fact that China is not following a high level of IP protection. The reality is that relations between China and Western countries are rapidly deteriorating, and this could make the protection of IP originating from Western countries even more problematic. These are not the only examples, as Iran is involved in similar practices (see Lister, 2023).

[1] The author would like to thank Prof. Aleksei Kelli and Prof. Irene Kull from the University of Tartu for their valuable input to the quality of the paper.
[2] Lawyer at Confere Law Firm. This paper is partially based on research (the author's master thesis) which received a special award from the Ministry of Justice of Estonia.
[3] Article 2 (viii) of the Convention Establishing the World Intellectual Property Organization defines intellectual property as "rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields." Intellectual property is traditionally divided into three main categories: copyright, rights related to copyright and industrial property.

The trends described above raise the question of how adequate and efficient patent protection is under these circumstances. Patent protection is based on the principle of disclosure to meet the enablement requirement, where the inventor publishes their invention and, in return, is guaranteed exclusive rights for a specific time. The reality is that the patent system can function in civilized societies, but we have a situation where Russia openly encourages IP theft and China, while not being as open about it, is inclined to permit the same. Therefore, it is appropriate to ask whether the existing patent system (based on the disclosure requirement) corresponds to the current needs of Western countries.

Problems with patent protection are reinforced with the localization of production. In other words, when production is within a country and is focused on the domestic market, patent rights are not necessarily required since patenting reveals proprietary knowledge. The author is not suggesting that the localization of production is a major irreversible trend; on the contrary, we still live in a globalized world, but the interruption of supply chains because of COVID-19 will certainly have an impact. The author is not also suggesting that the patent system will become completely obsolete – this is not going to happen. However, at the same time, changed international and economic relations will impact the functioning of the IP system.

The author argues that these circumstances make trade secret protection more relevant. Even now, trade secret protection is essential in knowledge-transfer systems (see Kelli et al., 2018; Kelli et al., 2014; Kelli et al., 2013).

If production is localized then there is no good reason to apply for a patent, since its publication allows actors from countries like Russia to copy an invention. Thus, the very least that Western companies can do is combine patents and trade secret protection.

This article explores whether the current trade secret protection system established at the European Union (EU) and international levels can overcome the challenges described, as the role of trade secret protection is increasing. Trade secret protection has certain advantages compared to patent systems: its scope is broader; it protects technical as well as business information; information to be protected as a trade secret does not have to be new in the sense of patent law, but it has to be secret, which is particularly convenient when there have been information leakages; the period of trade secret protection is not limited (information is protected as long as it is secret); and protection is not dependent on registration (the trade secret holder still has to take measures to keep the information secret).

The author proposes prohibiting the use of reverse-engineered products for commercial purposes and limiting the disclosure requirement in patent applications. These two preliminary proposals should be considered together.

The author is aware of the controversial nature of these proposals. These preliminary academic proposals are not made because of a lack of understanding of how trade secret protection and patent systems function. The author knows that reverse engineering and disclosure requirements constitute the core elements of patent and trade secrets systems. The author also understands that the proposed solutions are by no means a universal panacea.

However, it is also evident that the international world order is changing. This also affects the functioning of the IP system, which is an integral part of the innovation system. Therefore, there is a need to discuss how we should move forward.

The author relies on traditional legal methods such as the analytical method, analyzing European Union legal doctrine and legislation alongside examples of Estonian, Latvian and Lithuanian law. The author draws data from books, legislation, journals, reports, and other publications related to the topic of research. The results of this study form a preliminary starting point for discussion.

This study focuses on the key issue of whether the changed global circumstances have redefined the objectives of the IP system. Should the objective of the IP system be limited to rewarding innovation, or should it also aim to protect and enhance the technological knowledge base of Western countries? The author tends to support the latter position. This means that countries not supporting the international framework for IP protection should not take advantage of its benefits (e.g., they should not be able to copy inventions from disclosed patent documents). Limiting the scope of reverse engineering (not allowing the commercial use of acquired information) would

encourage European entrepreneurs to rely more on trade secret protection and to not reveal the essential parts of their technology.

To sum up, this article aims to look beyond pre-established dogmas and search for solutions which are not necessarily confined to the logic of existing systems. This does not mean that the proposed solutions should be implemented. One of the outcomes of this work could be to widen the scope of discussion and ensure that it is not trapped in the established framework. The author acknowledges that the answers to the problems described above could involve adopting completely new IP instruments to protect technology being copied by authoritarian regimes.

1. The Importance of Trade Secrets in the Intellectual Property System Due to the Challenges of Patent Protection

The IP system aims to promote and protect the sustainability of innovation by granting exclusive rights to the inventor. Trade secrets have mainly been compared to patents, and the objects of protection of these two systems have numerous similarities. Both patents and trade secrets protect ideas as knowledge; at the same time, it can be argued that every patent is preceded by a trade secret. A patent protects the inventor if its owner can enforce their rights in case of infringement (Drahos & Mayne, 2002, p. 15). This requires the enforceability of IP rights in national legal systems and reliable cooperative relations between national governments at the international level. The traditional IPRs system operates under a hierarchy of bilateral or multilateral agreements (Anderson & Razavi, 2010, p. 269). Unfortunately, due to a change in the global balance of security and a lack of respect for international institutions by authoritarian regimes, the current functioning of the patent system has come into question. It is impossible to have functioning legal relations with countries that engage in systematic human rights violations (including genocide), withdraw from international agreements, isolate themselves from the legal space and exclude any cooperation for the functioning of the patent system. Consequently, patent protection is no longer attractive, as enforcement is becoming impossible in certain large economic areas.

The fear of losing one's invention slows the innovation process and inhibits knowledge sharing, as there is no legal certainty when disclosing. The IP system is only helpful for promoting investment in innovation and economic growth if it is efficient, well thought out, and takes into account changes and events occurring in a specific time and space. The efficient protection and enforcement of IPRs is crucial for the EU's economic growth and the ability of various sectors to stimulate innovation and remain globally competitive.

According to a study conducted in 2019 by the European Union Intellectual Property Office and the European Patent Office, industries related to IP accounted for approximately 45% of the EU's gross domestic product, and were worth approximately €6.6 trillion per year (European Commission, 2021, p. 4). In addition, a large part of the EU's imports and exports is based on companies' activities which rely on IP rights (p. 4). Therefore, a comprehensive IP protection system must cover all of the different aspects of IP, such as appeals, enforcement rights, defense rights and transactional aspects.

In addition to security risks and intense conflicts between countries, the digital environment enables the wider and faster spread of products infringing IPRs. It is often difficult for consumers to distinguish genuine infringing products, which is compounded by the fact that infringers may use fake identities and are often located outside the EU, in jurisdictions with weak IPRs enforcement regimes (European Communication, 2017, p. 1).

The fields of information technology, robotics and manufacturing create more situations where trade secrets must at least partially protect information related to an invention. At the same time, political conflicts can facilitate the unauthorized use of valuable information for personal gain, especially to create a competitive advantage (Dreyfuss & Silberman, 2017, p. 266). More and more fields of activity where trade secrets protect companies' knowledge bases because other traditional forms of IP cannot provide effective legal protection have emerged, and they will continue to emerge in the future. Since inventions must be kept secret before a patent application (otherwise, novelty is lost), it could be said that patent protection begins with trade secret protection (Kelli et al., 2019, p. 18). However, it would be wrong to suggest that this is the only connection that trade secrets has with the protection of an invention.

Weaknesses in the patent system at the global level, the leaking of trade secrets, transnational economic espionage and the cold war of IP have raised a specific need to promote and strengthen the protection of trade secrets. This would ensure inventors' interest, opportunities for the consistent development of new solutions and products, and the protection of modern IP.

2. The Dynamics of Trade Secret Protection

2.1. The development of trade secret protection in the European Union

The right to trade secret protection is one of the general principles of EU law (Ginter et al., 2013, p. 659). The legal protection of trade secrets began in the middle of the 19th century in connection with the start of industrialization (Bone, 1998, p. 251), but the legal regulation of trade secrets in EU legislation took place significantly later, during the 21st century. The legal protection of trade secrets is based on the idea that know-how or information should be protected from unfair practices and theft. Theft of trade secrets consists of copying an invention containing its information or parts thereof, copying data, or otherwise maliciously exploiting data for general profit. Trade secrets are essential in protecting the exchange of knowledge between businesses. Trade secrets allow creators and innovators to derive profit from their creations or innovations and, therefore, are particularly important for business competitiveness, research and development, and innovation-related performance.

Article 1 (2) of the Paris Convention for the Protection of Industrial Property (hereinafter the Paris Convention) names the repression of unfair competition as an object of the protection of industrial property. The Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter the TRIPS Agreement) was the first piece of international legislation to explicitly regulate the legal protection of undisclosed information together with traditional IP (Ike, 2021, p. 285).

The TRIPS Agreement and the Paris Convention were adopted to protect IP, including industrial property. At the same time, the violation of a trade secret has traditionally been considered one of the clearest examples of unfair competition, which is why reliance on the principles of unfair competition is stipulated in the domestic legislation of many EU member states (Torresmans, 2015, p. 29).

Article 39 of the TRIPS Agreement stipulates the obligation to protect undisclosed information against unfair competition in accordance with Article 39(2). According to the latter, the following undisclosed information must be protected: that which is secret, and therefore has commercial value, and where the person with legal control over the information has taken the necessary measures to keep it a secret. Consequently, trade secrets that have commercial value must be protected from breaches of confidentiality and practices contrary to fair trade practices. However, this does not automatically exclude trade secrets from the domain of IP. For example, using a trademark without the owner's consent to market and sell products misleads consumers and leads to unfair competition, but IP provisions protect trademarks. The same ideology should be considered with trade secrets.

The TRIPS Agreement provides protection for undisclosed information, which is similar to the definition of a trade secret, and Article 1(2) seems to allow us to conclude that trade secrets belong to the field of IP. However, there is still a lack of clarity regarding the legal nature of trade secrets. In some academic circles, there has been a long-standing struggle to treat undisclosed information as equivalent to traditional forms of IP, which is why undisclosed information has been considered to be one of the cases where the norms of the field of unfair competition may apply (Correa, 2020, pp. 351–352). The author mildly disagrees with this assessment, and believes that undisclosed information, such as trade secrets in the context of the global digital economy, are an equivalent form of protection in the modern IP system, as are traditional forms of industrial property protection.

The TRIPS Agreement obliges the EU member states to establish minimum legal remedies in their national legislation to protect patents, copyrights, trademarks, and undisclosed information. At the same time, member states retain the freedom to decide on the content and measures of such legal remedies (Ike, 2021, p. 286). In the case of the discussed provisions of the TRIPS Agreement and the Paris Convention, the protection of trade secrets entailed a rather flexible but vague obligation which only concerned protection against unfair competition, leaving aside any civil protection in legal disputes related to trade secrets (Schröder, 2017, p. 58).

It has been found that trade secrets have increasingly significant importance in the development of the economy, especially for small- and medium-sized enterprises (Patel et al., 2016, p. 474). This particularly holds true in Estonia, because most Estonian entrepreneurs are involved in small-sized enterprises.[4]

In the case of *Varec SA v. Belgian State* (2008, para. 54), the European Court of Justice established that a competitor's illegal access to certain information can cause considerable damage to the company. In the case of *AKZO Chemie BV and AKZO Chemie UK Ltd v. Commission of the European Communities* (1986, para. 28), the European Court of Justice highlighted that third parties should under no circumstances have access to documents containing trade secrets, and the latter must be protected in any judicial or administrative proceedings. Otherwise, competitors could file complaints and thereby gain access to companies' trade secrets and/or business management (para. 28).

There was also an increasing fear among entrepreneurs that the differing legal protection of trade secrets between EU member states did not guarantee the effective implementation of legal remedies applicable to violations of trade secrets and endangered the disclosure of trade secrets (Patel et al., 2016, p. 474). As a result, in 2016, Directive 2016/943 of the European Parliament and of the Council was adopted on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (hereinafter – the Trade Secrets Directive).

In most EU member states, the legal protection of trade secrets is dispersed between several legal branches, often in both criminal and civil law (Schröder, 2017, p. 58). In Portugal and Italy, the legal protection of trade secrets is governed by IP laws (Torresmans, 2019, p. 28). In Estonia, Poland, Austria and several other EU member states, trade secrets are protected with laws related to unfair competition, and some EU member states rely on general tort or contract law (p. 28). In the German Model Law on Intellectual Property, trade secrets are classified as IP, where they are referred to as a legal position protected by the provisions of IP (Värv, 2020, p. 419).

The Trade Secrets Directive was adopted into Estonian law on the 17 December 2018 when the Restriction of Unfair Competition and Protection of Business Secrets Act entered into force (for further discussion on the implementation of the Trade Secret Directive in the Baltic States, see Birstonas et al., 2020). Before the adoption of the Trade Secrets Directive, the protection of trade secrets in Estonian law clearly belonged to the field of competition law.[5] Afterwards, the legislator separated trade secrets from classical competition law and regulated the protection of trade secrets with a separate law act. Before the implementation of the Trade Secrets Directive in Lithuania, the protection of trade secrets was based on two different, although related, fields. This meant that the legal bases for the protection of trade secrets were regulated in the Civil Code and in the Law on Competition (Birštonas, 2019, p. 14). During the implementation of the Trade Secrets Directive in Lithuania, the new law on the Legal Protection of Trade Secrets was adopted, entering into force in 2018 (p. 17). The legal protection of trade secrets in Latvian law was previously scattered among different legal acts, such as the Commercial Act and the Freedom of Information Law, containing legal norms on the protection of trade secrets which fell either within public or private law depending on the legal relationship which was regulated (Birstonas et al., 2020, p. 352). After implementing the Trade Secrets Directive in Latvia, the new Trade Secret Protection Act was enacted in 2019.

Insofar as the Estonian Restriction of Unfair Competition and Protection of Business Secrets Act provides the scope of the law, it also regulates the prohibition of unfair competition. Therefore, the legal protection of trade secrets in Estonian law still belongs to the field of competition law. In Lithuania, as was the case before the implementation of the Trade Secrets Directive, trade secret protection remains based on the tort rule (Birštonas, 2019, p. 18). Thus, violating a trade secret is primarily considered inappropriate behavior in the economic environment and not a violation of IPRs. One possible explanation for conceptualizing the protection of trade secrets within the framework of unfair competition comes from the fact that, in practice, trade secrets have only consciously been used as an IP strategy in the last decade. That is why there was previously reason to consider

[4] See Statistics Estonia, http://andmebaas.stat.ee/Index.aspx?lang=et&DataSetCode=ER32 (retrieved 25 March 2023).
[5] Chapter 7 of the Estonian Competition Act (2001) stipulated the prohibition of confidential information, exploitation of an employee or representative of another company.

trade secret theft strictly as dishonest behavior regarding unfair competition. This position needs critical attention considering the effects of recent global events on the traditional IP system, as a result of which a clear stance that trade secrets should belong to the IP system in a knowledge-based economy should be taken.

2.2. The enforcement of trade secret protection rights

When placing trade secrets into the IP framework, it is essential, among other things, to identify the relationship between trade secrets and the Directive on the enforcement of intellectual property rights (hereinafter – the Enforcement Directive). Although it is clear that the Enforcement Directive extends to the enforcement of patent-related rights, there is some ambiguity in its application to protecting trade secrets. The Enforcement Directive is directly related to the TRIPS Agreement because it complements the latter with special measures regarding the enforcement of legal remedies. Just as in the case of patents, the provisions of the TRIPS Agreement are also relevant in protecting trade secrets insofar as they set the minimum legal requirements for the protection of undisclosed information.

From the drafting of the legislation mentioned above until today, there has been no consensus at the international level as to whether the legal protection of trade secrets is covered, among other things, by the legal protection of IP provisions. In addition, trade secrets are still not legally treated as an exclusive right, regardless of their numerous similarities with other types of IP and the goals of the IP system. Both industrial property and trade secrets are the result of intellectual work and consist of benefits with financial value, for the development of which investments have been made. Furthermore, similarities exist in the consequences of violating such benefits and in applying appropriate legal remedies. The main problem arises from the fact that neither the Enforcement Directive nor the Trade Secrets Directive exclude trade secrets from belonging to the field of IP.

The TRIPS Agreement is designed to protect IPRs. Still, it conceptualizes trade secrets from the perspective of unfair competition, which causes a conflict in the scope of application of the objectives of the Trade Secrets Directive and the Enforcement Directive. More specifically, the Enforcement Directive states that its scope must be defined as broadly as possible so that it covers all IPRs covered by the domestic laws of the EU member states. It does not exclude the notion that the EU member states may expand the provisions of the Enforcement Directive for domestic reasons by adding points on unfair competition (Directive 2004/48/EC, Recital 13). However, it is noteworthy that the legal protection of trade secrets under the Trade Secrets Directive should not affect the application of relevant law in any other field, including IP law and contract law. If the scope of the Enforcement Directive and the Trade Secrets Directive overlap, the Trade Secrets Directive should prevail (Directive EU 2016/943, Recital 39). Thus, upon initial interpretation, it could be concluded that the Enforcement Directive does not apply to the legal protection of trade secrets. The TRIPS Agreement allows for the conclusion that IP provisions indirectly cover the protection of trade secrets. According to the Trade Secrets Directive, it is not possible to apply the Enforcement Directive to the protection of trade secrets.

Furthermore, the TRIPS Agreement aims to ensure high-level IP protection. According to Article 1, the term "intellectual property" means all categories of IP which are discussed in parts 1–7 of section II, where part 7 constitutes the protection of undisclosed information (i.e., trade secrets). Compared to the TRIPS agreement, the Enforcement Directive does not clarify the scope of its objects. This is a significant shortcoming, which makes it possible to exclude trade secrets from the scope of the Enforcement Directive. The Trade Secrets Directive has stipulated that IP protection is one method of protecting innovation. Another way is to limit access to valuable knowledge in order for the entrepreneur to ensure their ownership of innovation results (Directive EU 2016/943, Recital 1).

In both cases there is either a kind of property right that is disclosed or access is restricted. In both cases, the starting point is the protection of innovation, which is the foundation of the IP system. It could be concluded that a trade secret belongs to the category of intellectual property but is not protected by an independent exclusive right.

For clarity, the wording of the Trade Secrets Directive should ensure a uniform understanding of the legal nature of trade secrets. It should be evident whether legal protection strictly belongs to the field of IP norms or whether it should be based on the norms of unfair competition.

Article 6(1) of the Trade Secrets Directive stipulates that "Member States shall provide for the measures, procedures and remedies necessary to ensure the availability of civil redress against the unlawful acquisition, use and disclosure of trade secrets." When the measures, procedures and remedies set out in Chapter 3 of the Trade Secrets Directive are compared with those stated in the Enforcement Directive, it appears they are largely similar, except for some differences. It has been observed that during the preparation of the Trade Secrets Directive, enforcement measures for legal protection were primarily based on the Enforcement Directive. This would mean a duplication of legal provisions, as some provisions were adopted unchanged, some were modified, and some were omitted from the Trade Secrets Directive (Riis & Schovsbo, 2019, p. 2).

Firstly, there are no obligations in the Trade Secrets Directive regarding measures to preserve evidence or to obtain orders regarding the origin and distribution networks of goods and services infringing IP (Aplin, 2021, p. 177). Secondly, the Trade Secrets Directive excludes a legal remedy, which involves the possibility of issuing temporary or final injunctions against intermediaries whose services are used to violate trade secrets (p. 177). Additionally, regarding the decision-making competence of legal authorities in terms of the granting of provisional or final remedies, unlike the Enforcement Directive, the Trade Secrets Directive clearly states the factors that should be taken into account when assessing the proportionality of the legal remedies (p. 177).

However, despite these differences, there are numerous similarities in terms of provisional and injunctive relief, final injunctions, remedial measures and damages awards, which seem to point to IP regulation (Aplin, 2021, p. 177). At the same time, according to the European Commission, it is impossible to apply the measures provided in the Enforcement Directive regarding the legal protection of trade secrets, as trade secrets are not considered an independent exclusive right or part of traditional IP (Abell & Wayne, 2015, p. 39). For this reason, it was decided to separate the enforcement measures related to the legal protection of trade secrets from the Enforcement Directive, which does not resolve the conflict with the TRIPS Agreement. In addition, dividing enforcement provisions between several directives may make litigation somewhat tricky, if not impossible.

More specifically, it may lead to the application of different enforcement measures in the case of a lawsuit, as the violation of a trade secret may include, among other things, other claims arising from the violation of IP. As a possible solution, the provisions of the Enforcement Directive could have been extended to a breach of trade secrets. Still, in this area, the European Commission noted that legal disputes related to trade secrets are primarily regulated through ordinary civil legal proceedings, and did not consider it necessary to further expand the provisions of the Enforcement Directive (European Commission, 2013, p. 268). Several arguments about the existing case law and legislation of the EU member states and the reliance on the principle of exclusivity were the main reasons that, according to the European Commission, made it impossible to apply the Enforcement Directive with regard to trade secrets.

It must be recognized that the Trade Secrets Directive does not clearly regulate its relationship with the Enforcement Directive. What is problematic is the fact that the justifications of the Trade Secrets Directive allow for the conclusion that, in principle, it is possible to apply the Enforcement Directive to the protection of trade secrets as well. Only when the areas of application of the two directives overlap is the Trade Secrets Directive to be considered *lex specialis*. A similar conclusion can be drawn from the preceding discussion. However, it has been observed that such an interpretation is difficult to reconcile with the purpose of the Trade Secrets Directive, which is primarily to regulate fair trade activities and to ensure the smooth functioning of the internal market (Knaak et al., 2014, p. 5). The position that the Enforcement Directive cannot be extended in terms of trade secret protection has been widely accepted. It would be necessary to stipulate a similar position in the Trade Secrets Directive to exclude contradictions between certain legal acts. Implementing this proposal would also ensure a degree of legal clarity regarding the legal nature of trade secrets, and would promote the consistent interpretation of legal regulations.

3. The Ideology of Trade Secrets

The legal clarity concerning trade secrets allows us to conceptualize its position in the modern IP system. The integration of trade secrets and patent protection could lead to considerable synergy.

Trade secrets have not been treated as traditional IP. Their legal protection has emerged only in the last 10 years, and the main discussion has surrounded the question of whether the bases for the legal protection of trade secrets derive from property rights or tort law in the framework of unfair competition (Menell et al., 2020, p. 43). At the same time, it is appropriate to assess whether the foundations of the ideology of trade secret protection can be derived similarly to the ideology of intellectual property, i.e., patent law.

The lack of exclusivity is seen as the main obstacle to conceptualizing trade secrets as a type of IP. The issue of trade secrets ownership is not within the scope of this paper. However, the author points out that defining trade secrets through ownership rights is problematic. This is not because of abstract objects of protection, but from the perspective of confidentiality. It has been questioned whether the object of IP protection must necessarily correspond to the concept of ownership in its content (Rognstad, 2018, p. 48). In contrast to traditional property rights, IP works require exclusive control for their effective use (Gosseries et al., 2008, p. 33), which can also be observed in the context of trade secrets.

According to the wording of Article 39 of the TRIPS Agreement, it is possible to conclude that the protection of trade secrets is not simply a matter of avoiding the disclosure of secret information, but that a specific person must have legal control over such information. The element of legal control allows for the inference that this classified information must be in a person's possession, which does not directly preclude the existence of ownership. Although the right to ownership of trade secrets is not guaranteed at the level of legislation, it is realistically possible to conceptualize trade secrets as a question of ownership to some extent. Nevertheless, it has never been argued that to offer protection against unfair competition it is necessary to guarantee a particular person the exclusive right of ownership of a trade secret (Aplin, 2021, p. 179). Consequently, the absence of an exclusive right cannot be an obstacle that excludes the inclusion of trade secrets in the IP system.

Exclusivity is a generally accepted concept within the IP system, and IP rights are referred to as exclusive rights (*ius excluendi*). Exclusivity does not need to be absolute to reward and stimulate innovation; instead, it should provide advantages for developing a new idea (Lemley, 2008, p. 330). This can be expressed in the limitation of certain competitive activities or mechanisms that allow legal control over the information related to the invention after its disclosure to be ensured. To understand this, it is necessary to look at the products of creative processes that need isolation or protection from excessive interference in the main stages of their development. Their forced disclosure can be so disruptive that it prevents the full effective use of these ideas (Gosseries et al., 2008, p. 33).

To define the concept of trade secret protection in the modern IP system, the author suggests the following statements as a starting point of discussion:

- A person with legal control over a trade secret has, in a sense, ownership of their economically valuable trade secret information.
- The legal protection of trade secrets in the field of IP allows, in addition to patents, innovation to be stimulated. Otherwise, inventors would give up investments in innovations or would make unnecessary efforts to hide their innovations.
- The legal protection of trade secrets promotes sharing knowledge with third parties, enabling the application of legal remedies provided by law in case of misconduct.
- Trade secrets promote patent disclosure insofar as a trade secret can protect information related to an invention, which helps protect the invention from abuses or economic espionage.

Trade secret protection exists for the same reason as patent rights: to encourage investment in research and development that results in information of commercial value (Lemley, 2008, p. 326). To the extent that a patent grants an exclusive right to an invention, the information related to the invention is not protected by an exclusive right as a trade secret. It provides protection as an intangible object in someone's possession that can be acquired through unfair competitive practices.

It is possible to justify the conceptualization of trade secrets as a type of IP. Trade secret protection is made of a set of trade secret rights which provide protection against possible unlawful disclosure and use. Thus, the only difference between traditional patent law and modern trade secret protection is the content and scope of their

rights (Risch, 2007, p. 19). However, it is difficult to imagine that it is possible to exclude the use of trade secrets by third parties due to confidentiality. Namely, trade secret protection is not based on its informational property. Still, the property protection of trade secrets is related to its classified nature (p. 22).

The doctrines of patents and trade secrets are constantly interacting because it is possible to protect an invention with different forms of protection (patents, trade secrets or even design rights if it is possible to represent the invention in a specific form). There are empirical studies and research articles on combining the two forms of protection (see, e.g., Kelli et al., 2010). The legal literature has so far mainly focused on comparing the contrasts between the abovementioned two forms of protection. Still, for example, considering the possible impact of the Russian Federation's aggression on the legal protection of IP, integrating the forms of patent and trade secrets should immediately be considered to prevent research and development from stalling and to ensure that their benefits are promoted to society.

From an innovation policy perspective, understanding the relationship between trade secrets and patents is crucial to predicting the impact of changes in the rights of different fields and countries on IP protection strategy. Suppose these two forms of protection are treated as alternatives. In that case, changes in different legal acts may favor one form of protection due to the weakening of the other. It can be assumed that strengthening trade secrets laws will make trade secret protection more favorable and the application of patents more complex – for example, in the case of biotechnology or information technology inventions (Linton, 2016, p. 12). Conversely, when patents and trade secret protection complement each other, they can be expected to respond similarly to legislative and policy changes (p. 12) and not create exclusionary competition.

4. Preliminary Recommendations to Strengthen the Protection of Trade Secrets

4.1. Limitation of the right to use the information acquired through reverse engineering for commercial purposes

Reverse engineering involves taking apart a legally owned product to understand how it is made or how it works (Menell et al., 2020, p. 61). The main driving force behind reverse engineering originates from the need to obtain information that is not publicly available.

According to the TRIPS Agreement, which constitutes one of the pillars of the international IP framework, the IP system must strike a fair balance between different interests. This principle is manifested in Article 7 of the TRIPS Agreement as follows: "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations." This principle encourages innovation and the exchange of information, and could be interpreted in support of reverse engineering.

The right to reverse engineering does not explicitly exist in patent law (Evans, 2013, p. 89). Since patenting requires disclosing information related to an invention and its technical specifications (the enablement requirement), there is no need to reverse engineer a patented invention to understand how it works (p. 90). The patent publication reveals sufficient information about the object of the patent claims, such that a person skilled in the art can use a specific invention. Patent law does not prohibit such activity if someone wants to reverse engineer a patented invention (Ohly, 2009, p. 543). The right to reverse engineer can also be considered a part of the experimental use exception. For instance, according to the Estonian Patent Act, the use of a patented invention in testing related to the invention itself does not constitute an infringement of the patent rights (§ 16(3)). On the contrary, Lithuanian and Latvian Patent law does not explicitly regulate reverse engineering with legal provisions.

Trade secrets law *expressis verbis* regulates reverse engineering. According to Article 3(1)(b) of the Trade Secrets Directive, "The acquisition of a trade secret shall be considered lawful when the trade secret is obtained by observation, study, disassembly or testing of a product or object that has been made available to the public or that is lawfully in the possession of the acquirer of the information who is free from any legally valid duty to limit the acquisition of the trade secret." Recital 16 of the Trade Secrets Directive further explains that "Reverse engineering of a lawfully acquired product should be considered as a lawful means of acquiring information, except when otherwise contractually agreed."

The Trade Secrets Directive, however, does not stipulate what can be done with a trade secret obtained through reverse engineering (Arcidiacono, 2016, p. 1080). According to the Trade Secrets Directive, reverse engineering represents the legal acquisition of a trade secret. Therefore, it can be assumed that a person who acquires a trade secret during reverse engineering can legally use it for their own benefit, including by reproducing an invention or a part of it that is protected by a specific trade secret. This, in turn, causes prejudice to the inventor's interests, especially the legitimate expectation of receiving legal protection for the disclosure of their creation (public sale of the product could also mean the disclosure of an invention protected by a trade secret). Consequently, if an invention or part of it is discovered through reverse engineering, it is possible to reproduce the product and thereby earn a commercial benefit. In a way, this aligns with Recital 16 of the Trade Secrets Directive, which emphasizes that "In the interest of innovation and to foster competition, the provisions of this Directive should not create any exclusive right to know-how or information protected as trade secrets."

Reverse engineering means acquiring trade secrets and integrating them into one's own invention without additional developmental costs. Reverse engineering allows one to use another inventor's product while trying to create an image of it as if it were an independent discovery (Ike, 2021, p. 292). According to this, the reverse engineering of a product alternatively resembles the reproduction of a product that is not in line with fair competition conditions.

One of the justifications for the permissibility of reverse engineering is its beneficial effect on the development of competition. Still, it is debatable whether disassembling a product to reproduce it later and use it for commercial purposes ensures fair competition.

Restrictions on reverse engineering in the case of trade secrets have been linked to the risk that the balance of patent protection would be weakened. If trade secrets were protected from reverse engineering, the initiative and number of patent applications would decrease (LaRoque, 2017, p. 451). Still, in a world where some countries do not recognize foreign patents and allow the use of inventions without the owners' consent, it is not conceivable to disclose one's invention despite the patent protection.

One option to strengthen the inventor's position is to limit reverse engineering. This would be an additional motivator to choose trade secret protection instead of patent protection. The limitation of reverse engineering is supposed to function within the Western IP system. However, the impact of this on enemy states would be that inventors would not patent some inventions (relying on trade secret protection) and, therefore, would not disclose the nature of the invention. Nothing stops authoritarian regimes from illegal reverse engineering. However, this would require more effort (e.g., they would need to get hold of a product, run tests, etc.) than accessing and copying patent documents. Communication technology makes the latter especially easy.

The author is aware that the concept of reverse engineering cannot be changed within the current regulatory framework. However, now might be the right time to start discussing the limitation of its scope. Namely, the author raises the issue of whether using reverse-engineered products for commercial purposes should be forbidden. This would fundamentally impact the trade secrets framework, raising many relevant objections. It could be argued that restricting the commercial use of information acquired through reverse engineering would create legal uncertainty. Competitors could easily be accused of trade secrets infringement (i.e., in the commercial use of reverse-engineered information), even if acquired by independent discovery.

Regarding the legal uncertainty argument, the solution to prohibit the commercial use of information acquired through reverse engineering (essentially copying) is not unprecedented. For instance, copyright law also allows for the independent creation of the work (similarly to trade secret protection), but considers (even subconsciously) copying to represent copyright infringement. Article 1(2)(a) of the Community Design regulation (CDR) (No. 6/2002) establishes the protection of unregistered Community design. An unregistered Community design is protected for three years (Article 11) and confers on its holder the right to prevent the copying of the design (Article 19). The renewed trade secrets framework would follow the same logic.

All possible uncertainties can be solved through case law and the amendment of regulations. For instance, if the defendant argues that they independently discovered a trade secret, then it is up to the claimant to prove that the defendant reverse engineered the product.

Like an unregistered design, a trade secret could be protected against copying (i.e., the commercial use of a product based on reverse engineering) for a limited duration (e.g., 3 years from the first use of a product containing a trade secret). Reverse engineering should remain legally permitted if it is related to research and fulfils the latter's goals. The right of independent creation would not be affected by the discussed proposal.

It is possible to treat reverse engineering as a violation of a trade secret if the reverse engineering of an invention is similar to its theft or, figuratively speaking, breaking into the territory of the inventor. Such an approach does not inhibit the spread of innovation and does not prohibit the reverse engineering of an invention for scientific purposes. In addition, the question may arise as to whether the restriction of the right to reverse engineering requires the application of the exclusivity principle to a certain extent in the case of trade secrets. In response, the author considers that this is not a matter of completely excluding the right to reverse engineering, but instead limiting it to a certain extent based on the promotion of fair competition conditions and the further development of innovation. The legal holder of a trade secret is not guaranteed a monopoly of knowledge, but their interests in disclosing the invention are protected.

4.2. Limiting the disclosure of the content of patent applications

The documents submitted with the patent application are of critical importance in the context of their disclosure. These documents contain detailed information about the invention's structure, which may weaken the legal protection related to it. In the description of the invention submitted in the patent application, the nature of the invention must be disclosed so precisely and clearly that a person skilled in the art can carry out the creation of the invention. This requirement has been considered by the European Court to be a common feature of modern patent systems (*Kingdom of the Netherlands v. European Parliament and Council of the European Union*, 2001, para. 24). The clear and precise disclosure of the nature of the invention does not require the patent applicant to disclose all relevant details of the invention. As a rule, it is necessary to provide sufficient technical information in the patent application so that a person skilled in the art can reproduce the invention without significant obstacles or numerous experiments (Asay, 2016, p. 268).

On the one hand, it is an inherent feature of the patent system to make information on patented inventions publicly available. On the other hand, the changed political situation wherein some countries openly challenge the existing economic institutions (including the IP system) forces democratic societies to look for new (even unconventional) solutions. One very preliminary route would be to explore whether it would be possible to limit the extent of disclosure of patent applications.

Firstly, it should be borne in mind that patent applications are often filed because it is impossible to keep an invention secret (it is possible to obtain information by reverse engineering). Secondly, members of society (including competitors) have to know the scope of patent protection. If the information on patented inventions is not public, then there is no legal certainty as to the extent of patent protection. The patent gives its owner the exclusive right to prohibit other persons from exploiting the patented invention, so these other persons must know exactly what inventions are patented. So far, various modifications to the patent system have attempted to ensure more extensive and detailed patent disclosure (Burk, 2016, p. 1607).

However, we should bear in mind that the non-disclosure of patent information is already known to patent law. For instance, the Estonian Patents Act regulates patent applications containing a classified invention. Most inventions are disclosed in official patent registers. However, some inventions can be classified as inventions that are of importance for national defense (Ostrat, 2012, p. 565). According to Article 35(8) of the Estonian Patent Act, upon registration of an invention, the Patent Office publishes a patent grant notice and the patent specifications in its official gazette, unless the patent application is classified. In Lithuanian law, Article 27(3) of the Patent Law Act states that access to an invention which has been made secret shall be provided in the manner prescribed by legal acts. Section 11(2) of the Latvian Patent Law Act stipulates that if an invention is recognized as secret, then making the patent application and the granted patent public shall not be applicable to the procedure for granting the patent. Overall, classified inventions are inventions that have a dual-use option: they can be used both in and outside of national defense. These inventions contain solutions that, in the opinion of the competent

bodies, must be kept secret, either completely or to a limited extent, and whose entry into civilian circulation must be excluded (Ostrat, 2012, p. 565).

In Estonian law, only patent applications submitted for national defense inventions classified by the Ministry of Defence or the corresponding authority of a foreign country are subject to classification. The same applies in Latvian law, which states that if an invention affects the interests of the State defense bodies, the Ministry of Defence may allocate secret invention status thereto. Article 7 of the Estonian State Secrets and Classified of Foreign Information Act treats state defense inventions as state secrets, the scope of which is established separately by the minister responsible for the field for each invention. According to Article 1 of the NATO Agreement for the Mutual Safeguarding of Secrecy of Inventions Relating to Defence and for which Applications for Patents Have Been Made, parties to this agreement shall safeguard and cause to be safeguarded the secrecy of inventions for which applications for patents have been received under agreed procedures whenever secrecy has been imposed on such inventions in the interests of national defense by the Government.

Patent application secrecy arose during WWI and WWII, when it became apparent that the inventions most beneficial to the government in wartime would also convey useful information about the nation's military capabilities to the enemy when disclosed (Saltz, 2022, p. 215). A similar analogy can be applied to modern invention protection. Due to the public availability of patent applications, authoritarian regimes can obtain information about the technical capabilities of a particular country and use this information to strengthen their competitive advantage, completely ignoring the compensation regime of the existing patent system. Similarly to ordinary patents, the registration of a classified patent in the patent register takes place in the general procedure. Still, differences lie in the availability of the content of this classified patent application to the public (Ostrat, 2012, p. 570). Thus, it is possible to raise parallels with the concept of secrecy underlying the protection of trade secrets and to analyze the possible impact of the secrecy of patent applications on innovation and knowledge transfer.

Suppose the existing patent system continues to focus on the principle that the disclosure of technical information is an unavoidable circumstance for the system's functioning. In that case, inventors may start looking for other ways to partially hide information related to their inventions. Inventors may deliberately omit critical technical information from a patent application or may obscure such information with complex legal terms unfamiliar to those skilled in the art related to the invention (Zaby et al., 2022; Rassenfosse & Higham, 2021, p. 15). Complexly worded or unclear patent applications no longer fulfil the function of patent disclosure, as the information related to the invention is not presented clearly and needs additional codification (Rassenfosse & Higham, 2021, p. 15). Consequently, if it is necessary to protect some critical parts of the invention from disclosure, it would be appropriate to integrate the ideology of trade secret protection into the patent system. This would allow a part of the patent application to remain undisclosed – for example, documents related to technical detail, for which additional requests can be submitted to the patent office.

If we consider the history of the patent system, it is argued that in countries with patent laws, the majority of innovations have taken place outside the patent system (Moser, 2013, p. 40). In addition, it is now quite challenging to navigate publicly available information because new information is produced in an insane amount, and receiving it and assessing its adequacy is rather time-consuming. Consequently, if a significant proportion of innovation takes place outside the patent system, strict patent disclosure requirements do not justify patent disclosure from the point of view of fostering innovation (p. 40). It can be agreed that, in a certain sense, patents represent a primary source for promoting innovation. However, limiting the disclosure of patent applications should not directly affect innovation, resulting in a significant reduction in the creation of new inventions.

Additionally, it has been argued that some companies do not depend on technical information in patent applications to advance their research and development efforts (Eckert & Langinier, 2014, p. 5). There are suggestions that engineers in many fields rarely read patents to learn about technology (Lemley & Feldman, 2016, p. 4). The reason for this can be attributed to the fact that reading the information published in patent applications may not be useful on its own, but rather requires the existence of certain know-how that can be shared through various forms of cooperation. Therefore, it can be argued that the non-disclosure of technical information in public databases does not prevent the continuation of future innovation. In the modern world of science, cooperation

between research institutions, scientists, engineers or other specialists plays a central role (e.g., through the publication of research results).

Disclosure of the technical details of the invention in patent documents does not always facilitate the spread of knowledge. The publicity of the patent system is not attractive for inventors in the context of the current market economy, nor does it encourage the publication of information related to the invention. The patent owner cannot enforce their rights in the context of certain global trade relations. More specifically, to incentivize inventors to disclose their inventions in the future, the possibility of partial non-disclosure of technical information related to the invention in the official databases of patent applications should be ensured, applying the concept of trade secret protection to this part. Integrating the ideology of patent and trade secret legal protection allows the disclosure of general information related to the invention. Still, trade secret protection should cover specific and technical information (Price, 2017, p. 1618).

A possible solution is to integrate both patent and trade secret protection elements into the information related to the invention, thereby limiting the patent system's publicity to a certain extent. Restricting the publication of the information of a patent application would be based on its connection with trade secrets. Therefore, a situation where the inventor decides on their own what information related to the invention they want to publish, which would thereby exclude any possibility of disseminating new knowledge in society, would not emerge. In practice, the described solution would manifest itself so that all of the information required by law is indicated in the patent application so that the patent office can assess the invention's compliance with the criteria. Still, when the patent application is made public, this information, which falls under the scope of trade secret protection, is not disclosed. This is consistent with both forms of protection, where patents encourage the disclosure of information while trade secrets protect the secrecy of information. Again, this is a preliminary quest for solutions to challenges created by international developments and should not be interpreted as a final proposal.

Conclusions

The author assessed the adjustment of the trade secrets and patent protection systems to meet new requirements considering the changed circumstances. The suggested solutions are preliminary; they serve as a starting point for a discussion on the possible reform of the IP system to correspond to new international settings.

Regarding the right to reverse engineering, patent law does not prohibit such activity if someone wants to reverse engineer a patented invention. Patent laws usually provide a specific exception for testing related to the invention itself. Usually, this is unnecessary since an invention is disclosed in the patent application anyway (the enablement requirement).

When it comes to trade secret protection, reverse engineering is explicitly regulated. A person who discovers a trade secret during reverse engineering can legally use it for their benefit. It can be argued that this harms the inventor's interest. One way to strengthen trade secret protection is to limit the scope of use of the inventions obtained through reverse engineering. It is debatable whether disassembling a product to reproduce it later and use it for commercial purposes ensures fair competition. It is possible to treat reverse engineering as a violation of a trade secret. Such an approach does not inhibit the spread of innovation nor prohibit the reverse engineering of an invention for scientific or educational purposes. The burden of proof as to whether a competitor's product is based on information acquired through reverse engineering lies with the trade secret holder.

The author is aware that there are several counterarguments against this approach. Firstly, it could be argued that if the reverse engineering right were to be limited to the experimental use exception, then it would be hard to distinguish trade secret protection from patent protection. On the one hand, the patent system generates income for society through patent fees. This is part of the social contract, which obliges a patent applicant to disclose the invention and pay patent fees and the society to offer the protection of patent rights. Trade secret protection is offered for free (this is not entirely true, but there are no state fees at least). On the other hand, the social contract cannot be wholly upheld since, in countries like the Russian Federation and China, one cannot effectively protect their rights and technology could be misappropriated through patent disclosures. Therefore, offering an equivalent alternative to patent protection requiring disclosure could be fair. The restriction of reverse engineering should not be absolute. Firstly, a specific time limit should exist (e.g., 3 years after making the product publicly available).

Secondly, reverse engineering should be limited only to commercial purposes (creating a competing product) but should be allowed for other purposes, such as scientific research.

Another preliminary proposal to ensure a functional IP system at the international level is to consider limiting the disclosure of the content of patent applications. It should be clear that an inherent feature of the patent system is to make the information on patented inventions publicly available. However, the changed political situation where some countries openly challenge existing economic relations forces democratic societies to search for new, even unconventional, solutions.

Prior patent system modifications have attempted to ensure more extensive and detailed patent disclosure. Still, we should bear in mind that the non-disclosure of patent information is already known to patent law. Although most inventions are disclosed in official patent registers, some inventions can be classified as inventions of importance to national defense. Compared to regular patents, a classified patent is registered in the general procedure, but differences lie in the availability of the content of this classified patent application to the public. This allows parallels with the concept of secrecy underlying the protection of trade secrets to be drawn. The disclosure of technical details of the invention in patent documents does not always facilitate the spread of knowledge. Consequently, a possible solution is to integrate both patent and trade secret protection elements into the information related to the invention, thereby limiting the patent system's publicity to a certain extent and restricting the publication of the information of a patent application.

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IMPLICATIONS FOR THE INVENTIVE STEP UNDER THE EUROPEAN PATENT CONVENTION RELATED TO THE INCREASING APPLICATION OF ARTIFICIAL INTELLIGENCE AND CERTIFICATION AS A SUI GENERIS PROTECTION MECHANISM FOR CREATIONS INVOLVING ARTIFICIAL INTELLIGENCE[1]

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Abstract. The purpose of this article is to observe whether the European Patent Convention avails protection for creations involving Machine Learning regarding its current and future development. The article analyzes in more detail the notion of compliance with the requirement of an inventive step under the European Patent Convention when using Machine Learning becomes routine. The article concludes that, due to the specifics of Machine Learning, comprehensive protection for creations involving it would require conceptual amendments to the European Patent Convention. The author argues that instead of fundamentally amending the European Patent Convention, certification as a sui generis protection mechanism for creations involving Machine Learning could be a potential solution. The article further builds on and develops current academic proposals, providing an overview of the wider framework. The paper relies on the descriptive, analytical, historical and comparative legal methods to substantiate the main argument.

Keywords: artificial intelligence, patent, obviousness, certification.

Introduction

Artificial Intelligence (hereinafter – AI) and Machine Learning (hereinafter – ML), a subfield thereof, have considerable potential to augment the prosperity of humans. Due to this, their application is becoming more widespread. As a result, this might trigger challenges related to the examination of the obviousness of the patent under the Convention on the Grant of European Patents (hereinafter – the EPC; The European Patent Office [EPO], 1973; European Commission Directorate-General, 2020, pp. 109–111).

Furthermore, there is a stance that compliance with the concept of an inventor is more challenging for ML regarding the system developed under the EPC (Iglesias et al., 2021, p. 22). The author has already addressed numerous other hurdles that ML poses related to the EPC, including: 1) sufficiency of disclosure (Rudzite, 2022a); 2) inventorship (Rudzite, 2022b); and 3) patent eligibility (Rudzite, 2023). Some of these issues are in the distant future; however, considering the rapid development of ML, current issues have to be addressed in the present.

A complex solution to the rapid development of ML might be preferred because ML encounters various issues regarding compliance with the EPC. Nonetheless, some aspects might require fundamental amendments, such as the concept of inventorship (*Designation of inventor/DABUS*, 2021, 4.6.6). Alternatives include opting for trade secret protection that, on the contrary, would slow technological progress,[3] or choosing an open-source approach, neither of which might be preferred.

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[3] Trade secret protection would deprive the enrichment of common general knowledge, since those who need a particular technology would have to create it from scratch. Additionally, it would indefinitely impair the transparency and explainability of the decision-making process (Pendleton, 2022, p. 127; Foss-Solbrek, 2021, pp. 257–258).

As its main argument, this article proposes that instead of diluting the EPC or forcing creators to choose between the non-desirable scenarios mentioned above, implementing and recognizing a *sui generis* patent-like mechanism for ML creations might be favored. The article builds upon existing academic proposals (Norvig, 2020; Samuelson et al., 1994, pp. 2423, 2426–2429) and develops them further, suggesting certification and providing a preliminary framework of the concept.

Certification is offered as a voluntary patent-like protection mechanism similar to utility models. The primary aim is to provide optimal protection for creations involving ML in those aspects where existing intellectual property (hereinafter – IP) regimes stop. Ideally, certification could be recognized as industrial property rights availing the benefits of existing regimes, such as regarding enforcement. In this regard, certification is provided as an addition to the current frameworks of industrial property specifically for creations related to ML; thus, it would not substitute or duplicate them. Depending on the aim of certification, it could result in: granting economic rights (for a human or a legal entity) or the possession of property as human rights; the recognition of moral rights (for a human); the recognition of the role of ML in creation; or as a non-binding, impartial expert opinion. Certification is framed dynamically, allowing its adjustment towards future technological development.

This article relies on the descriptive, analytical, historical and comparative legal methods. Primary legal acts, such as the EPC and the EU, and secondary legal sources, including academic publications and case law, are considered to evaluate the principal argument of the paper. The article is divided into four sections and sub-sections, within which the specifics of ML, issues related to evaluating the inventive step under the EPC when the application of ML becomes routine, and the proposed certification mechanism are analyzed.

Under its territorial scope, the article addresses issues related to the patentability of creations involving ML under the EPC. Except for touching upon aspects of the recognition of the role of ML in the inventive process, the article does not elaborate on further hurdles related to compliance with the EPC requirements for inventions generated by AI, which falls outside the scope of this analysis.

1. Machine Learning

AI and ML, its subfield, are areas of computer science that differ from traditional programming because their programs are formed when an ML algorithm processes inputs and underlying patterns between input and output data. In other words, output and data form a program (Esteva et al., 2019, p. 24). The function of ML algorithms is to capacitate learning and produce an end model for the right task. ML algorithms have various types, ranging from simple linear regression (that perform straightforward tasks) to sophisticated deep neural networks (that iterate more profound interrelations between the input data) and others (Sevahula et al., 2020, p. 1). Model preparation requires numerous steps (Kim, 2020, p. 449).

The accuracy of ML depends on the complexity of the model and the quality of testing, training and input data. More data allows more learning, and enables new outcomes to be presented. Additionally, the ability to process large datasets with heterogeneous natures and increasing generalizability makes ML applications preferable in many areas, including drug discovery (Zemouri et al., 2019, p. 8).

The specifics of ML that differentiate it from other areas encounter hardships when complying with legal frameworks developed before their era. In addition, ML will also pose challenges in the future when its application becomes routine. One issue involves examining the inventive step requirement under the EPC.

2. The Inventive Step

2.1. The Current Framework

Article 56 of the EPC defines the requirement of the inventive step as follows: “An invention shall be considered as involving an inventive step if, having regard to state of the art, it is not obvious to a person skilled in the art”. “Obviousness” does not exceed the normal technical process, and relates to the natural or logical observation of the prior art. Furthermore, “prior art” relates to all publicly available materials (solo or in combination) at the relevant date. The “person skilled in the art” is a fiction, and stands for a skilled practitioner (or group thereof) in

the fields of the claimed invention that has access to all available materials and existing means for routine experimentation.

The problem-solution approach has been developed in the case law to alleviate the evaluation of the inventive step (which does not comprise *ex post facto* analysis) as follows: 1) the determination of the closest prior art; 2) the formulation of the solvable, objective technical problem (achievable aim); and 3) the evaluation of obviousness. "Obviousness" might be present when there is a "long-felt need," "surprising effect," "remarkable technological progress" (which requires some creative activity) or other such indicator (Haedicke & Timmann, 2014, pp. 177–199).

Due to its use of open-ended terms, the framework poses challenges regarding compliance and clarity. The rapid development of ML might reach a point when it becomes a routine practice and application. In this regard, novel implications might appear.

2.2. The Implications of ML

If the application of ML becomes a routine practice, it might pose challenges related to the evaluation of obviousness for a person skilled in the art. Namely, due to the ability of ML to search large amounts of information, the bar for inventiveness will be significantly raised (Blok, 2017, p. 71). Additionally, this raises an issue regarding the definition of a person skilled in the art (with or without ML as an ordinary tool for routine tasks, what kind of ML, and other issues).

It must be outlined that the technical capabilities of various tools at the relevant date are also known to a person skilled in the art since they have to be cognizant in the state-of-the-art technologies in the field (*Efomycine als Leistungsförderer/BAYER*, 1992, para. 4.4.; *Combustion engine*, 1990, paras. 6.1.–6.2.). Nonetheless, except in straightforward cases, the novelty of a combination of even previously known features, if considered in isolation, is decisive (Muir et al., 1999, p. 164). Hence, the fact that ML applications might become widespread and set a new "normal" cannot be deemed as a paradigm exclusively related to ML. It is established case law in the Board of Appeals of the EPO (hereinafter – EPO BA) that inventive is not technologically normal development (EPO BA T 0232/01, 2002, para. 2). Therefore, an analogous aspect could be related to numerous items – for instance, a calculator, a computer, and others.

Currently, non-obviousness is perceived to represent a surprising effect, remarkable progress, an accelerative impact on further technological development, a switch to another approach, social perception towards the effect that a creation causes (for instance, that it increases road safety), and other impacts compared to the prior art (Haedicke & Timmann, 2014, pp. 195–196). In this regard, this approach can also be applied analogously to future situations to distinguish non-obvious creation.

Therefore, it is at the essence of the patent system to maintain a level of inventiveness and facilitate technological progress (Leith, 2007, p. 187). Nevertheless, the practical meaning of this paradigm has to be observed more closely. That is the focal point of the following sub-sections.

2.2.1. The Perception of a Person Skilled in the Art

The fiction of a person skilled in the art outlined under Article 56 of the EPC in conjunction with the Guidelines for Examination (EPO, n.d.-i) presumes that said person is an expert in the field. In this regard, a person skilled in the art is deemed as being consistently involved in the technology development process (*Efomycine als Leistungsförderer/BAYER*, 1992, para. 4.4.), and is knowledgeable on the state of the art (*Combustion engine*, 1990, paras. 6.1.–6.2.). Hence, said person forms their knowledge not only from the specific field of the problem addressed in the patent claim, but also from the wider generic area and even neighboring sectors. This person is expected to be aware of the normal technological progress of those fields at a level that does not exceed it (EPO, n.d.-h).

AI and ML have been evolving for some time, as have applications in numerous fields (Feldman & Bajorath, 2020, pp. 1–3). Furthermore, the EPO has even developed separate guidelines for the examination of inventions

involving AI and ML (EPO, n.d.-a). Thus, a person skilled in the art might be deemed to be aware of those general applications of AI and ML.

2.2.2. Other Aspects to be Taken into Consideration

2.2.2.1 Related to ML

It must be stressed that ML differs from traditional programming. Namely, the crucial part of building an ML program is a correlation between an algorithm and input and training data (Esteva et al., 2019, p. 24). In this regard, any random ML would not be able to achieve the same outcome. In other words, although ML tends to be generalizable (to be applicable for more than one purpose or field), this is not a trivial task if the ML program has not been built with particular abilities (Eche et al., 2021, p. 1). Thus, any outcome would be inaccurate without the appropriate training and input data (Barzamini et al., 2022, p. 181). Additionally, the EPO BA in case T 161/18 (*Äquivalenter Aortendruck/ARC SEIBERSDORF*, 2020, para. 2.2) confirmed that without the disclosure of the specific training, input and testing data, a skilled person is not able to repeat an invention.

Moreover, for ML to access the appropriate closest prior art and remote technical fields, an examiner must initially determine the respective datasets. Moreover, those datasets might not be deemed to be made available for ML, but may instead be protected trade secrets (European Commission Directorate-General, 2020, p. 110). Consequently, ML is as accurate as the underlying algorithm and testing and training data.

Therefore, the crucial part before presuming that a person skilled in the art can use ML is to conclude on the public availability of the respective datasets to reveal the prior art and the extent of such availability. In other words, it might be presumed that, in the future, the application of ML might become a routine process. However, for complete reliance on ML to determine prior art, it would first be necessary to have access to all the publicly available materials, datasets, and information.

Another aspect that would have to be decided beforehand is how to perceive the outcome of ML. ML can be trained on ready-made end-products (for instance, monographs) and raw data that has yet to be converted into information. Furthermore, various ML algorithms exist for different purposes. For instance, simpler algorithms aim to conduct pure classification, while more complex forms learn a generalizable representation of underlying correlations (Russel & Norvig, 1995, pp. 578–580). Thus, an agreement would have to be reached as to whether it might be presumed that ML would apply only to documents that represent ready-made end-products, or also to raw data. If it was decided that ML should be applicable to raw data, it would have to be decided whether ML has to perform only the recognition and classification of raw data or process them, converting into information.

A consensus would have to be reached as to what functions applicable ML would have to conduct – would it only find sources, or further process them to determine their interrelationships? The former approach would treat ML as a purely automated search tool. In this regard, an end user would decide on using the received information. However, the latter triggers a decision as to whether the outcome is already a part of the invention (if claimed afterwards) and thus has to be disclosed in the patent application.

2.2.2.2. Related to the Evaluation of Inventiveness

Irrespective of whether the prior state of the art was learned by applying ML, an end-user (a human) will determine the use of the received result. In this regard, a human will decide on the added value of the respective information or its potential application in creating an invention (*Designation of inventor/DABUS*, 2021). The widespread application of ML will inevitably raise the bar for inventiveness because it diminishes non-obviousness. However, it will not deny the ability to find inventive applications, consequently maintaining a high standard for patent protection and facilitating sustainable technological progress (Shemtov & Gabison, 2022, pp. 436–441).

Except for in cases where the solution is straightforward (*Moulding composition*, 1984, para. 16), the decisive factor is not whether separate components are novel but whether the combination of the claimed features is inventive. In other words, whether a skilled person would have achieved the claimed aggregate of features for the solution (Muir et al., 1999, p. 164).

Moreover, Article 52(3) of the EPC excludes algorithms (also comprises ML) "as such" from patentability. Therefore, only those creations involving ML which have "technical character" or present a contribution by technical teaching to the prior art might be patentable (EPO, n.d.-g). Additionally, it is not the unusualness of each feature separately that is decisive, but the composition of separate parts. Moreover, the total synergetic impact (sum) outweighs the effect of each feature individually (Haedicke & Timmann, 2014, pp. 195–196).

Therefore, the increasing application of ML as a concept does not differ from normal progress related to all kinds of technological items (computers, cell phones and others). Since ML algorithms cannot be patented as such, the inventiveness of creations involving ML is evaluated in its own "weight class," or by comparing inventiveness with the prior art related to the respective ML.

Additionally, Article 83 of the EPC requires sufficient description to also reflect the steps to obtain the product (in product patent claims; England & Cohen, 2021, p. 102). Article 100(b) of the EPC also foresees grounds for revocation of a patent, amongst which are opposition to non-compliance with Article 83. Hence, either the EPO may reject the application based on non-sufficient disclosure if it is obvious that ML has been applied, or it might be revoked under Article 100(b) of the EPC.

Nevertheless, exceptions that might remedy non-disclosure could include a surprising technical effect (EPO BA T 1164/11, 2015, para. VIII) or the ability to retrieve information missing from the common general knowledge. In the former, all constituting components are disclosed, but the process cannot be explained. However, in the latter, the disclosure does not contribute value to the science; therefore, it would not have an impact (*Paper-making method/AVEBE*, 2005, para. 2.3.1).

Suppose the non-disclosure of the even indirect involvement of ML in creating an invention was not obvious. In that case, it might be presumed that the person skilled in the art would consider all approaches, especially the most resource-effective, as potential starting points (*Paper-making method/AVEBE*, 2005, para. 2.3.1). For the determination of the closest prior art, it has to be appropriate for the claimed invention. In other words, if the claim does not address, for example, high-performance computing, it cannot be presumed as a valid starting point (*On demand instantiation/RAYTHEON*, 2016, para. 6.5–7).

Overall, there is a stance that even if only one case solving this problem in the general field has been revealed, it is presumed that the same could be attributed to related specific areas (Haedicke & Timmann, 2014, pp. 190–191). The exception to this is pioneering technical research fields, where only one publication or patent specification might indicate inventiveness (*Starting compounds*, 1988, para. 9). If no prior art exists, novelty instead of inventiveness is rewarded (Leith, 2007, p. 187). Nevertheless, due to the specifics of ML and its particularly high reliance on concrete datasets, an ML algorithm applied as a solution for an individual problem in the general sector seemingly might not be generalizable, and may be unable to be automatically applied to address the issue in the selected sub-field. This might appear especially with genetic programming algorithms that include an element of randomness (Koza et al., 1999). Consequently, conducting actual testing would exceed seemingly routine experimentation for a person skilled in the art. In this regard, the usage of ML may not be deemed as a viable starting point. To consider building a new ML algorithm, sufficient general knowledge must be present according to the current stance of the EPO.

Hence, currently, the only occasion in which a person skilled in the art would be expected to apply ML to verify compliance with Article 56 of the EPC is if the description of the claim mentions the involvement of ML. Otherwise, the legal rationale substantiated by the EPC is missing the requirement for the skilled person to: 1) figure out what kind of ML algorithm to build; 2) establish the type of datasets to train and test the model on and what input data to insert to achieve the outcome; 3) gain access to the desired datasets; and 4) decide on the features that should be added to provide the accuracy of the results outside the testing environment, hence the realizability and repeatability of an invention (EPO, 2020, p. 384).

Conversely, if the usage of ML becomes routine, it might be presumed that a skilled person will apply ML regardless of what the patent application discloses (Lee et al., 2021, p. 149). In this regard, it would be necessary to initially determine the capabilities of ML algorithms that are deemed to be state-of-the-art at the time (Abbott,

2020, p. 104). Since, except for in open-access cases, all algorithms might not be fully disclosed but may still be available, this would require a definition of how to compare their abilities. Furthermore, unless all documents, materials, and data in the world become publicly available, the capabilities of ML depend on the underlying algorithm as well as testing, training and input data. Thus, in this approach, there might appear a necessity to either: 1) impose an obligation to disclose the usage of ML and its credentials (Abbott, 2020, p. 102), although there is a criticism that such a requirement would not incentivize invention (Shemtov & Gabison, 2022, p. 431); 2) consider also incorporating a publicly available database where all ML algorithms along with sources of prior art they cover would be outlined; or 3) set a common standard of capabilities that applicable ML tools for searching the prior art have to comply with and examine all patent claims against it to determine obviousness.

It has to be outlined that just because more complex, advanced and resource-efficient (when built) solutions exist for the same technical problem does not mean that other solutions become obsolete. Namely, less complicated approaches claimed as such are evaluated towards the prior art of those particular techniques, not compared with more automated methods. Besides, building an ML algorithm could require more resources than finding a solution otherwise – for example, making a selection from many candidates using sheer luck (*Paper-making method/AVEBE*, 2005, para. 2.3).

2.2.3. Proposed Approaches

It has been suggested that the term "technologies used by active workers, including inventive AI," could be used to define a person skilled in the art. "Inventive AI" would mean generating inventive outcomes while corresponding to conventional criteria of inventorship. Replacing the skilled person with inventive AI is suggested as a second step. Furthermore, the evaluation of inventiveness in the second case is suggested, as done primarily by AI: 1) defining the respective extent of the use of inventive technologies; 2) if inventive AI becomes a standard, describing inventive AI that would most precisely reflect the ordinary worker; and 3) determining if an invention would be found obvious by AI (most likely with assistance by experts) (Abbott, 2020, pp. 100, 102, 104–106).

It would require fundamental amendments to implement this proposal in the EPC framework. Firstly, the EPC does not recognize the concept of "inventive AI" because only humans can invent and recognize the inventive value of outcomes provided by applying AI (*Designation of inventor/DABUS*, 2021). Secondly, entirely abolishing the involvement of a human examiner would require revising the formulation of the criteria of the inventive step. Thirdly, the proposition implies that subjectivism (involving experts) is nonetheless necessary to achieve objectivism. Fourthly, criticism has been made towards the non-existence of any exceptions of fields where the method would not be deemed practical (Lee et al., 2021, p. 149).

Furthermore, an inventive step is also present when a creation goes in an opposite direction than technological progress (*Etching process*, 1986, para. 7). Besides, since the EPC excludes patentability for ML as such, for a creation involving ML, the "technical contribution" has to appear through the implementation or application of the claimed invention (EPO, n.d.-c, n.d.-d). Decisive in the framework of the EPC is not ML which is purely a tool for the automation of tasks or a mathematical method, but the resulting tangible or intangible invention. Additionally, a creation does not have to improve the prior art because alternatives to known devices or processes with identical or similar effects or that are more resource-effective are allowable (EPO, n.d.-f). Considering this, the striking factor is not whether the person skilled in the art *could* have, but whether they *would* have made an invention (EPO, n.d.-e).

Another approach that has been suggested is to examine inventions against the "obvious to try" approach based on the substantiality of their distinction from the prior art and the likelihood of success (Shemtov & Gabison, 2022, pp. 432–435). Additionally, the necessity of determining the version that the person skilled in the art would be deemed to use has to be determined. Simultaneously, there is also ambiguity towards the underlying incentives of inventors. Nevertheless, the proposal also outlines that in examining inventiveness the following aspects, amongst others, should also be evaluated: the need and substance of value judgements by the person skilled in the art, the level of research in the area, the expectancy of success, and the motivation to invent (whether obtaining a patent is the only inducement).

This proposition is more grounded. Nevertheless, the EPC has already incorporated the "would-could" standard under Article 56 that, together with the "problem-solution approach", essentially corresponds to the "obvious to try" threshold (EPO BA T 1734/07, 2009, para. 3.3). At the same time, the proposal outlines its drawbacks. Additionally, there is criticism that the "obvious to try" standard renders the evaluation of obviousness even more ambiguous (Pendleton, 2022, p. 126).

It can be concluded that unless the respective amendments are made in the EPC or related acts,[4] altering the perception of the notion of a person skilled in the art, the current legal stance addresses the present and the future application of ML as any other development of technology (*Äquivalenter Aortendruck/ARC SEIBERSDORF*, 2020, para. 3.6). Any legal adjustments to the framework of the EPC would need to be carefully evaluated since, as the analysis demonstrates, the consideration of ML as an ordinary tool for a person skilled in the art is interrelated with other criteria stipulated in Articles 52, 56, 83 and 84. Hence, the perception of a person skilled in the art of ML in all cases (Lee et al., 2021, pp. 136–151) might require fundamental changes in the EPC.

Issues with a person skilled in the art of applying ML in evaluating compliance with Article 56 of the EPC could be: 1) the concerns that it would impose significant barriers for obtaining a patent for those who would not opt for applying ML; 2) on the basis of the problem-solution approach developed under Article 54 of the EPC (its suitability for evaluation the future situation).

A part of the observed potential solutions to tackle the issue would require conceptual amendments to the framework of the EPC that the EPO might not support. One proposal aims to find a solution in the existing system but encounters difficulties. Nevertheless, it can be derived that the application of ML for searching a prior art would not make a subjective factor redundant. However, applying ML might require deciding on the perception of the yielded outcome in the context of the invention claimed later. Additionally, other alternations adjusting the standard of inventiveness to technological progress might require a decision as to whether to impose additional disclosure requirements in the application, determine a standard for applicable ML, or even develop a separate public database listing all applicable ML programs and their capabilities. Alternatively, all materials and data must be rendered publicly available, which may require some fundamental changes.

It should also be considered whether there would be an inducement for creators of ML to tolerate such widespread use if the patent reward was not an option. Namely, the EPC BA has decided that ML cannot be deemed and named as an inventor unless legal amendments are made (*Designation of inventor/DABUS*, 2021, 4.6.6). Nevertheless, there is an incentive to continue facilitating technological progress in creating ML if its role in the inventive process is recognized as demonstrated by both legal (Rudzite, 2022b) and economic (Kahn, 2022, pp. 385–398) aspects.

Some experts have suggested that due to the specifics of modern technology, including AI, and the shortcomings of existing IP regimes (including patents), a separate legal framework for them has to be implemented (Pendleton, 2022, pp. 131–132; Harison, 2008, p. 74). Thus, the concept of certification is proposed as a preliminary starting point for discussion.

3. Certification

3.1. The Rationale of Implementation

ML imposes numerous challenges for the EPC: 1) sufficiency of disclosure (Rudzite, 2022a); 2) inventorship (Rudzite, 2022b); 3) patent eligibility (Rudzite, 2023); and, as the analysis mentioned above demonstrates, also regarding the inventive step (European Commission Directorate-General, 2020, pp. 109–111). It is also suggested that there is an economic rationale to recognize the role of AI in the inventive process (Kahn, 2022, pp. 385–398). Additionally, there is a stance that recognition of the role of ML in the inventive process is more challenging for ML than for other fields regarding the patent framework (Iglesias et al., 2021, p. 22). Another reason for addressing the issues that ML encounters regarding compliance with the EPC is the alternative of opting for trade secret protection. This scenario presumably would cause a significant impact on technological development, non-

[4] For instance, examination guidelines (European Commission Directorate-General, 2020, p. 111).

enrichment of common general knowledge and, consequently, economics if everyone would have to spend resources developing the desired item from scratch. A patent is said to be the key incentive in disseminating and developing new ML programs and providing their interoperability (European Parliament, [EP], 2020, para. 11).

Some of the outlined challenges might be addressed within the existing framework, such as via sufficiency of disclosure with minor (Rudzite, 2022a) or more considerable alterations (Rathi, 2020, p. 23). Simultaneously, others related to inventorship (Rudzite, 2022b; *Designation of inventor/DABUS*, 2021, 4.6.6) and patent eligibility (Rudzite, 2023) would require fundamental amendments to the framework of the EPC. Considering the abovementioned, a *sui generis* mechanism could be deemed to be preferred to overcome obstacles that ML comes across related to the framework of the EPC (Pendleton, 2022, pp. 131–132; Harison, 2008, p. 74; Rudzite, 2022a, 2022b). Moreover, there are proposals for the potential framework of such an alternative mechanism.

Evaluating various possible approaches and following existing regulations for semi-conductor chips suggests that the optimal solution could involve introducing a registration system of know-how that embodies software. This would facilitate keeping track of technological progress, enriching common general knowledge and rewarding disclosure. Others, by law, could obtain an automatic, compensated license to use the software once it has been registered. This approach would incentivize developers to favor the reuse of their product for reward. Various already drafted licenses could be incorporated, with the discretion to choose terms, limited public access or commercial use, and others that, to some extent, would parallel licensing mechanisms in the music industry. The protection is suggested for three years or less to provide time to root a niche in the respective market (Samuelson et al., 1994, pp. 2423, 2426–2429).

Considering their difference from traditional programming, a *sui generis* mechanism to address the specifics of ML could be preferred instead of adjusting the existing regimes. In this regard, for instance, certification similar to in the electricity market[5] could be the chosen approach (Norvig, 2020).

Despite criticism towards seemingly unsuccessful *sui generis* semi-conductor and database regimes, the conclusion is that there is a crucial need for an autonomous protection mechanism for creations involving software (which also pertains to ML) due to its dual nature. Registration with the disclosure of source code is outlined. The mechanism could exist at the national and EU level in parallel with existing regimes (Picht & Thouvenin, 2022, pp. 15–17). This article builds on the mentioned proposals and develops them further. The introduction of a voluntary certification system is suggested (Rudzite, 2022b). The analysis of the suggested system is preliminary, and is not intended to be an all-embracing conceptualization of the proposed system. It instead serves as a starting point for a discussion to address problems within the context of the interaction between ML and patent law under the EPC.

3.2. A Preliminary Proposed Framework

3.2.1. The Concept of Certification

In essence, the certification process is not novel since numerous areas foresee the necessity of undergoing such a mechanism (Rudzite, 2022a, 2022b). The concept of a protection certificate is acknowledged in the IP framework, for instance, as with supplementary protection certificates for pharmaceutical and plant protection products (EP, 1996, 2009) or a certificate of patent grant (EPO, n.d.-b). The proposed framework considers them to avoid repetition, contradiction or posing unnecessary administrative burdens. The suggested certification is deemed to exist in parallel with already established mechanisms and includes autonomous terms and framework. The term *certification* has been chosen as most precisely describing the framework outlined further, and means the process that includes evaluation of correspondence with certain steps to obtain a protection certificate. Vice versa, the "certificate" attests to said conformity (achievement). "Certification" indicates an understanding that it is a separate process that has to be completed and complied with to obtain certain benefits. The concept also reflects that certification is parallel but lower in scope than the patent framework (*patent* from Latin means "to disclose";

[5] Certification in the electricity market is issued as an approval that a certain amount of electricity has been generated, is owned, and can be further sold or otherwise traded (Karakosta & Petropoulou, 2022, p. 2).

certification – "to make certain"). Nonetheless, the chosen terminology is provisional and could be altered accordingly if another term was deemed more appropriate.

3.2.2. The Role of Certification in the Framework of Intellectual Property – its Legislative Implementation and Enforcement

Certification, similar to utility models (which are not implemented by all countries; World Intellectual Property Organization, [WIPO], n.d.), is deemed to comprise "patent-like" protection (Rudzite, 2022a, 2022b; Picht & Thouvenin, 2022, pp. 10–11). *Sui generis* certification as an optimal protection mechanism for creations involving ML is chosen because, firstly, the EPC was developed to reward humans. On the contrary, due to the specifics of ML, it does not require equal efforts to conduct the respective processes (Kahn, 2022, p. 384).

Secondly, computer science, of which ML is a sub-field, develops rapidly, heavily relies on other respective works to save resources and facilitate the developmental process, and outperforms the period taken for patent examination (Samuelson, 1994, p. 2376). In this regard, the patent protection term of twenty years for creations involving ML, as foreseen by the EPC and society in general, is cumbersome because the technology might already become outdated before the patent examination has concluded. Besides, until the patent is granted, the creation avails only provisional protection. Hence, competitors can use incorporated ideas without risking patent infringement if the creation is used until the patent is obtained (Articles 64 and 67 of the EPC).

Additionally, after the patent is granted, technology might have already gone further, which may require developers to make necessary adjustments. Besides, consumers might have already opted for using more up-to-date technology. In this regard, the knowledge that granting a patent would reveal might not be seen as an enrichment. Thus, a granted patent may not truly reward both the creator and society. Therefore, shorter examination and protection terms for ML creations are required. Exceptions where a longer protection term is needed could include areas where the involved resources are considerable – for example, drug development and discovery, which might even exceed twenty years of development (Lalli et al., 2021). Although the involvement of ML as an additional step facilitates this process, it does not exclude additional necessities as a requirement for clinical trials, *ex post* funding (Feldmann & Bajorath, 2020, pp. 1–2), and others. Hence, protection under the EPC might be suitable and preferable for those applications.

Thirdly, certain aspects cannot be protected under the current scope of the EPC or any other existing IP regime (Rudzite, 2022b). Fourthly, IP regimes already encompass creations involving ML; thus, there is no legal substantiation to step outside the realm of IP and IP-like protection. Fifthly, it is crucial to avoid redundancy with the EPC framework.

Considering the abovementioned, it would not be practical to delegate the conducting of certification for the EPO due to legal and administrative aspects, but instead to trust the function of an autonomous body (Rudzite, 2023). Depending on the approach chosen for the legal implementation of certification (observed further), the autonomous body could be established centrally in the EU, for example, by the European Parliament and the Council. Alternatively, it could be selected by each EU Member State separately. The independent body would examine ML creations, issue a certificate and review appeals if submitted.

There are multiple approaches (solo or combined) for the legislative implementation of the certification system. Amongst others, firstly, the European Commission could initiate a proposal implementing the suggested certification considering that the so-called "AI-Act" (a sort of *sui generis* system), that also foresees an obligation to obtain certification for ML with a certain level of risk, is already under discussion (European Commission, [EC], 2021). The initiative forms part of the *ordre public* for ML (Rudzite & Kelli, 2021, pp. 404–405). Namely, if certification would have to be conducted for ML and the same ML application intended to be placed in the market in the EU. This would most likely also initially apply for the patent under the EPC since all Member States of the EU are parties of the EPC (EPO, 2022). In this regard, there might be a possibility that if certification due to high-risk ML was required and not completed or not passed, the exception to this situation under Article 53(a) might be triggered.

Additionally, the EU has already proposed enacting a harmonized EU-wide regime of utility models that was suspended due to a preference for EU patents (EC, n.d.). Regardless of the prior outcome of the mentioned suggestion, the proposal of the AI Act and the stance of the European Parliament (2020) demonstrates the initiative to address aspects related to ML, including IP protection. Furthermore, the EU already has Directive 2004/48/EC addressing enforcement aspects of IP, including utility models. The regime could be attributable to the proposed certification if it were recognized as industrial property rights. Thus, it would be resource-effective for institutions and creators if the certification mechanism under the AI Act and the certification proposed in this article could be combined (Rudzite, 2022a, 2022b).

Secondly, the World Intellectual Property Organization could initiate a discussion on recognizing the certification as industrial property rights. Thirdly, similar decentralized national implementation currently exists regarding utility models (WIPO, n.d.). A mechanism, even a decentralized one, could be considered necessary to combine in whole or in part with the certification included in the AI Act. Additionally, recognizing certification as industrial property could allow already transposed enforcement mechanisms to be applied.

Fourthly, there is a possibility of creating a completely autonomous centralized mechanism. This approach could trigger a discussion on substantiation, considering that utility models are decentralized. Nonetheless, the starting point for discussion regarding the enforcement mechanism in this scenario could be the approach already transposed nationally.

Fifthly, it is possible to widen the scope of utility models by incorporating certification for ML matters. On the one hand, this approach could require minor adjustments because certification is proposed as, *mutatis mutandis*, the framework of utility models. In this regard, the enforcement mechanism could also be applied without additional adjustments. However, since the suggested certification includes several aspects that the current utility models do not foresee, a combination of both might render the system of utility models more complex.

The initiative taken by the Council of Europe based on the necessity of protecting property rights, including IP, as stipulated in Article 1 of Protocol 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe, 1950), might not be a viable option. Namely, the further proposed mechanism suggests the recognition of the role of ML in the inventive process through the lens of the rights of society that corresponds to the mentioned convention. Nonetheless, the offered certification includes various procedural aspects that might not be preferred to be initiated by the Council of Europe since it ordinarily deals with substantial aspects.

The initiative by the EPO or even considering using the upcoming mechanism of the Agreement on a Unified Patent Court (2013) might not be an option. In other words, said approaches deal with patent matters, not with patent-like matters – at least not yet. Thus, imposing another duty on them might disrupt both the patent and patent-like systems; hence, not be preferred.

Regardless of the approach preferable, the implementation of certification will be the outcome of the political debate. Nevertheless, an alternative would be to opt for trade secret protection, conceptually altering the EPC, or choosing an open-source model. None of the mentioned routes could be favored over certification.

3.2.3. Rights Comprised

Since certification is deemed as being built on the approach of utility models, it would not be justifiable to grant fewer rights than the utility model applicant receives. Namely, certification would result in granting exclusive rights to the owner of the certified creation (a human or a legal entity as a holder of rights depending on the respective contractual relationship). This would allow for a limited period in the designated region to prevent, without authorization, the exploitation of the protected creation commercially if an applicant chooses protection fully or partially under certification. In other words, granting economic rights under certification to prevent overlap will be prohibited if the same protection already applies through other IP mechanisms (copyright and related rights, patent and others) (WIPO, n.d.). Authorization for users to use the protected creation would involve issuing a license (for free or a gratuity), the terms of which could be stated by the holder of the economic rights (Rudzite, 2022a, 2022b).

Certification would also recognize moral rights for a creator to be named individually or collectively as a co-contributor, unless protection was not already covered by other IP mechanisms (copyright and related rights, patents and others). The economic right would be transferable and alienable, similar to other respective patent-like rights. Furthermore, certification for the mentioned moral right holders would also allow them to choose whether it was necessary to recognize the role of ML in achieving the work (mentioned for transparency). This would relate to cases where the involvement of ML in said process would not be deemed to have been solely as a tool. Such recognition of the role of ML would not grant any right to ML per se but derive from the right of the respective humans to choose who should be named as one depending on the level of their involvement in the outcome (Rudzite, 2022b).

The respective rights will depend on the desired aim of certification. Firstly, one could choose certification as the only protection mechanism instead of, for instance, a patent. Protection by two mechanisms simultaneously would not be possible, to avoid overlap if the creation had already been covered by other IP mechanisms (copyright and related rights and others). In this case, as a result of certification, economic and moral rights (for a human) might be obtained (Lee, 2020, p. 15), and a role (for ML) recognized.

Secondly, the aim of certification could be not to obtain exclusive rights and recognition, but to seek a non-binding, impartial expert opinion for patent purposes. The substantiation of this is that persons heavily involved in creating or drafting a patent application for a particular invention might perceive some aspects as obvious and not disclose them in detail (Rudzite, 2022a). Thus, if necessary, certification would allow for verifying (in a confidential manner) and rapidly improving the written description deemed to be submitted for the EPO to ensure compliance with the requirements of Articles 83 and 84 of the EPC. This mechanism would be especially beneficial for sophisticated ML algorithms that are said to encounter the so-called “black box” aspect.

This approach will not require depositing the algorithm, training, testing and input data, and will allow for choosing the optimal limit of information to be disclosed to meet said criteria and not lose competitive advantage. Certification would serve as an expert opinion if needed, via a group of experts that the EPC accepts as capable of providing additional approval of the feasible reproducibility of the invention (Rudzite, 2022a). Additionally, the same mechanism could also serve the purposes of Article 56 of the EPC since a person skilled in the art of evaluating inventiveness has an equal level of ability for evaluating the sufficiency of disclosure (EPO, n.d.-i). In this case, neither economic rights would be granted nor moral rights recognized. Furthermore, this mechanism could also be used to evaluate the “technicality” (Article 52) of the invention in advance. This approach could also be used for future matters (verifying obviousness) if the usage of ML were to become widespread, as analyzed previously.

Thirdly, certification could offer protection in cases where other mechanisms would not guarantee the desired protection for certain features. For instance, it could be suitable for creations in areas that are not recognized as “technical” under the EPC. Certification would also suit creations that would be too technical for copyright protection but not technical enough for a patent under the EPC (such as program behavior or design, algorithms as embedded tools, and others). For the certified part, economic rights could be granted, and moral rights (for a human) and role (for ML) recognized if overlap with other granted IP rights did not exist (Rudzite, 2023).

Fourthly, registration might be sought only to recognize the role of ML in producing a creation without seeking to grant the protection of the economic rights of said solution. This approach would not overlap with nor impact other IP regimes since it would not alter any rights granted under them, but would exist in parallel in its framework. In this regard, this route would allow transparently informing others about the respective role of ML, hence, allowing ML to compete in its own “weight class” (Rudzite, 2022b).

Fifthly, certification could be chosen to evaluate the possibility of obtaining protection under the existing IP regimes (for instance, a patent under the EPC), as well as to determine what steps might need to be taken to achieve the desired result. Thus, if desired, certification would serve as an impartial, non-binding opinion of an expert for the purposes mentioned earlier for a patent under the EPC (Rudzite, 2022a). Said approach would not yield economic rights, nor the recognition of moral rights (for a human) or role (for ML).

An intrinsic part of certification would be disclosure to the public: 1) to deprive others of seeking protection (for instance, patent, Article 54 of the EPC) for the same creation (defensive publishing); 2) to inform others about the creation, thus enriching the public knowledge base; 3) to inform others about the role of ML in the respective process, hence providing economic stability towards the capacities of humans and ML; and 4) to allow for tracking technological progress, which could serve not only for a present purpose but also for the future. Namely, suppose the usage of ML becomes widespread. In that case, the certification record could serve as a basis for determining the state of the art of ML or act as a sort of register for evaluating obviousness, as mentioned previously (for further discussion, see Rudzite, 2022a, 2023).

The described disclosure would be implemented by registration in a public database like an information system where a record of issued certificates would be kept. The database would include a catalogue system similar to the EPC, with all the respective documentation. Additionally, said system would not have a repository or other deposit mechanism that, on the contrary, might have a negative impact (Rudzite, 2023). Depending on the aim of certification, the certificate would: 1) certify the granted economic rights due to the created work and their holder; 2) recognize moral rights (to whom, what); 3) outline the term of protection and area where protected; and 4) identify the protected object that could be viewed in detail in said database.

Based on the chosen purpose, the respective record would be made in the database following disclosure. Moreover: 1) to obtain economic rights (for a human or a legal entity) and the recognition of moral rights (for a human) and role (for ML), the entry would be made public; 2) for the purposes that certification serves as an impartial, non-binding opinion of an expert, the respective event would not be disclosed publicly to ensure a) the possibility to examine the application confidentially and b) the avoidance of the risk of losing novelty (Article 54); and 3) to achieve both aims the entry would initially not be made public, but if, as a result, the protection of certification was chosen, the record would be made public.

The term for protection would be differentiated depending on the aim of certification. For the recognition of moral rights (for a human; Lee, 2020, p. 15) or role (ML), certification would be indefinite since there is no rationale to limit the term. Furthermore, the incrementality of the creation and the role of ML in the respective process would determine the term of protection for economic rights. A multi-term approach would provide an optimal reward for the involved efforts and for the benefit of society (for further discussion, see Rudzite, 2023).

3.2.4. Evaluation Process

The examination could be based on the same aspects as for the patent under the EPC and utility models. Namely, the application for certification would be necessary, upon which novelty, achievement level regarding the distance from the prior art, disclosure and others would be verified before granting the certificate. The approach would avoid complications and allow the aim of issuing an opinion of an expert without systemic adjustments to be fulfilled. The level of compliance evaluation would be equally stringent with the EPC (for instance, for novelty, non-obviousness and industrial applicability (not incentivizing triviality)). In other aspects, it would be lifted (for the sufficiency of disclosure, it would be possible to fulfil the missing information during the examination). The stringency of the evaluation of achievement level would be differentiated depending on the incrementality of the creation and rewarded accordingly. The focal point of the evaluation would be the fulfilment of the material (technical) aspects. However, if opted for, compliance of *ordre public* and morality might be reviewed, especially for high-risk ML applications seeking patents and deemed to be placed in the market in the EU (Rudzite, 2022a; Rudzite & Kelli, 2021).

Examination would be expedient, similarly to utility models, to facilitate technological progress. It would be provided by creating an inspective "sandbox" with multiple experts from various fields, and would take less time than granting a patent under the EPC. Applicants or third persons could appeal the results of the examination with the respective body, after which it would then become final.

Conclusions

ML triggers challenges, not only regarding inventorship under the EPC, but also in other areas, such as sufficiency of disclosure, obviousness, patent eligibility, and economic stability towards the capacity of humans compared to ML. Due to technological developments, the future might bring more challenges once the usage of ML becomes routine, especially relating to obviousness.

Because of the specifics of ML, for this paradigm to become a reality as a new normal, all of its information, materials and data would have to be rendered publicly available, and ML algorithms would have to be equally capable. Alternatively, ML might become widely used, but underlying training, testing and input data might be kept secret. Thus, a technological divide would be present since ML algorithms processing more data would be more powerful than others.

In the first scenario, no hardships would exist in examining the obviousness of a claimed invention. However, in the second situation, for the purposes of examining obviousness, there would initially be a necessity to either: 1) enact a duty to disclose the application of ML and its capabilities; 2) consider creating a database available to the public where all ML algorithms and their underlying sources of prior art would be reflected; or 3) determine a standard that a person skilled in the art would be used regarding the capabilities that an ML algorithm has to comply with for searching the prior art and reviewing all patent claims towards it to conclude on obviousness.

Additionally, an agreement under the EPC is needed on how to treat the result that the ML algorithm would display when searching the prior art. Namely, a consensus would have to be made on ML algorithms that would be presumed as being used for the purposes of searching the prior art – simpler examples that perform routine tasks such as classification without additional input, or more sophisticated ones that perform connections at a profound level, such as deep neural networks. In other words, more complex ML algorithms might process raw data and convert them into information. A consensus would then be required on how to perceive the result displayed by ML (should it be seen as raw data, a discovery, or as part of the invention if it is obtained afterwards by applying the output). If the outcome reflected by ML is agreed to serve as a part of the invention, it would have to be disclosed according to EPC Articles 83 and 84, and vice versa. Common understanding by the EPO could help to overcome difficulties in examining obviousness.

Alternatively, approaches have been proposed to tackle future difficulties related to evaluating obviousness. However, these solutions encounter problems. Therefore, they are not supported. Considering the present and presumed future challenges that ML will come across in complying with the requirements of existing IP regimes, the *sui generis* approach might be preferred.

This article builds upon existing suggestions and develops them further, offering implementation and recognition of certification as additional areas of industrial property that, as a patent-like regime, would exist in parallel with the EPC and utility models. The article provides a detailed preliminary overview of the framework of the suggested mechanism.

Certification is offered as a voluntary patent-like protection mechanism similar to utility models. Certification primarily aims to provide optimal protection for creations involving ML in those aspects where the existing IP regimes stop. Ideally, certification could be recognized as industrial property rights, availing the respective benefits of the existing regimes regarding enforcement. Certification is provided as an addition to the current frameworks; thus, it would not substitute or repeat them. The suggested method of certification is framed dynamically, allowing adjustments for future technological development.

The suggested model would not require significant legal amendments but, favorably, would allow existing regimes to be built on. The *sui generis* system would allow the needs of technological progress to be addressed dynamically, facilitating the enrichment of knowledge, industrial development, and optimally rewarding creators. One alternative could involve fundamentally amending the EPC; another opting for trade secret protection, slowing technological progress or even rendering said creations open-source – neither of which might be preferred.

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