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Saturs / Content

Priekšvārds 6

Introduction 10

Elza Timule, Artūrs Žukovs, Nataliia Filipenko, Hanna Spitsyna. Problems and Opportunities for Improvement of Legal Framework for Provision of Telemedicine Services: Experience of the Republic of Latvia and Ukraine 15

Viktoras Justickis. Diagnosis of Rare but Dangerous Diseases in Primary Telephone Consultation 28

Erik Hahn. Right to Copy of Medical Records Free of Charge According to Article 15 (3) Sentence 1 of the GDPR vs. Mandatory Reimbursement of Costs by Patient under National Law 39

Irēna Kucina. Challenges of Digitalisation in Judicial System 51

Uldis Ķinis, Ņikita Sinkevičs. Algoritms kā būtiska kaitējuma noteikšanas metode noziedzīgos nodarījumos, kas saistīti ar automatizētu datu apstrādes sistēmu (ADAS) 61

Algorithm as a Method for Determining Substantial Harm in Crimes which are Related with Automated Data Processing System (ADAS): Abstract 61

Nataliia Filipenko, Hanna Spitsyna. Development Strategy of International Cooperation of Forensic Science Institutions of Ukraine with Foreign Experts in Prevention of Terrorist Attacks on Critical Infrastructure 83

Liene Neimane. Money Laundering Issues and Recent Trends 96

Jānis Baumanis. Covid-19 pandēmijas aktualizētie pārvaldības kārtības noziedzīgie apdraudējumi Latvijā 111

Criminal Threats to Administrative Order in Latvia Updated by the COVID-19 Pandemic: Abstract 111

Gerda Klāviņa, Ansis Zanders. Victim's Right to Prove in Criminal Proceedings 122

Jānis Zelmenis. Definition of Tax Planning in the Case Law of the Court of Justice of the EU (ECJ) 132

Diāna Bukēviča. Sanctions as Means of Security in Registering Information on Beneficial Owners in the Register of Enterprises 145

Mārtiņš Birģelis. Towards Treaty on Business and Human Rights: Key Areas of Agreement 156

Kitija Bite. Augstskolas autonomija kā demokrātisks pārvaldības princips Latvijā 165

Autonomy of University as a Democratic Governance Principle in Latvia: Abstract 165

Jānis Musts. Defence of Rule-Deductivism 183

Autoru alfabētiskais rādītājs / Alphabetic List of Authors 194

Priekšvārds

Kārtējais Rīgas Stradiņa universitātes Juridiskās fakultātes elektroniskais izdevums *Socrates* dodas pie lasītāja trauksmainā laikā, kad notiek Krievijas imperiālistiskais karš Ukrainā, ir gaidāma un jau jūtama vispārēja enerģētiskā krīze. Tomēr šie un citi notikumi nespēj būtiski kavēt pētniecisko un akadēmisko darbību tiesību zinātnē. Tie nosaka jaunus pētnieciskās izziņas virzienus un tēmas, kuru atspoguļojumu gaidām nākamajos *Socrates* izdevumos.

Rīgas Stradiņa universitātes Juridiskā fakultāte 2022. gadā īstenoja starptautisku projektu "Attālināto veselības aprūpes pakalpojumu tiesiskie aspekti: Vācijas un Baltijas valstu pieredze" (projekta vadītāja *Ph.D.* Karina Palkova). Tā ietvaros 2022. gada 17. jūnijā RSU tika organizēta starptautiska konference ar juristu un ārstniecības personu piedalīšanos. Pētnieki ieradās no Vācijas, Igaunijas, Lietuvas un Ukrainas, bija pārstāvētas Latvijas universitātes un ārstniecības iestādes. Atsevišķi ziņojumi, kuri bija izstrādāti zinātnisku rakstu formātā, ir iekļauti šajā *Socrates* izdevumā. Tajos ir sniegts ieskats aktuālās veselības aprūpes problēmās (raksti izstrādāti Baltijas–Vācijas Augstskolu biroja projektā "Konference "Attālināto veselības aprūpes pakalpojumu tiesiskie aspekti: Vācijas un Baltijas valstu pieredze""; šo projektu finansiāli atbalsta Vācijas Akadēmiskās apmaiņas dienests (*DAAD*) no Vācijas Ārlietu ministrijas piešķirtajiem līdzekļiem).

Ukrainas Nacionālās Aviācijas un kosmosa universitātes tiesību zinātnieces, asociētā profesore ***Natālija Filipenko*** (*Nataliia Filipenko*) un profesore ***Hanna Spicina*** (*Hanna Spitsyn*a), un Rīgas Stradiņa universitātes (Latvija) jaunie tiesību zinātnieki – ***Elza Timule*** un ***Artūrs Žukovs*** – ir analizējuši telemedicīnas pakalpojumu tiesiskā regulējuma pieredzi un problēmas Latvijā un Ukrainā, apzinot to pilnveidošanas iespējas. Viņu rakstā analizētās tēmas aktualitāte ir saistīta gan ar jaunu tehnoloģiju visai intensīvu ienākšanu veselības aprūpē, gan ar specifiskajiem *Covid-19* pandēmijas apstākļiem. Pandēmijas laikā slimības plašās izplatības un augstā iedzīvotāju inficēšanās riska dēļ aktualizējās bezkontakta veselības aprūpes nepieciešamība. Aktīva attālinātās veselības aprūpes nodrošināšana tika veicināta gan *Covid-19* pacientiem, gan citām personām, kurām tā bija nepieciešama (tika sniegtas attālinātas konsultācijas). Publikācijas autori analizē telemedicīnas pakalpojumu sniegšanas starptautisko, kā arī Latvijas un Ukrainas normatīvo regulējumu, izceļ ar to saistītās problēmas un šo pakalpojumu sniegšanas tiesiskā regulējuma pilnveidošanas iespējas. Rakstā apskatītas dažādas telemedicīnas iespējas: slimības smaguma pakāpes noteikšana un tai atbilstīga pacientu šķirošana,

diagnostika, konsultēšana un monitorēšana. Publikācijas tematika ir ne tikai aktuāla, bet arī ar izteikti perspektīvu ievirzi, jo telemedicīna intensīvi attīstās un līdzi tai aug nepieciešamība pēc šo pakalpojumu tiesiskās regulācijas nodrošinājuma.

Mīkola Romera universitātes (Lietuva) profesora, habilitētā tiesību zinātnes doktora ***Viktora Justicka*** specializācija ietver arī medicīnas tiesības. Viņš savā rakstā sniedz ieskatu par to, kā notiek retu un bīstamu slimību diagnostika, izmantojot sākotnējās tālruņkonsultācijas. Rakstā pamatoti secināts, ka primārās attālinātās konsultācijas rada iespēju paātrināt laiku, līdz pacients saņem pirmo kvalificēto palīdzību. Tādējādi tiek palielināta turpmākās ārstēšanas efektivitāte. Tomēr turpmāko ārstniecības procedūru gaitā konsultēšana pa tālruni var radīt problēmas, no kurām būtiskākā ir saistīta ar to, ka šajā konsultācijā ārsta rīcībā ir tikai tie dati, ko komunikācijā sniedzis pacients. Raksta autors piedāvā jaunas pieejas tālruņkonsultāciju efektivitātes paaugstināšanā.

Drēzdenes Starptautiskās universitātes (Vācija) profesors, habilitētais tiesību un medicīnas zinātņu doktors ***Ēriks Hāns*** (*Erik Hahn*) ir analizējis visai specifisku medicīnas tiesību tēmu. Tā ir par pacientu tiesībām saņemt medicīnisko dokumentu kopijas bez maksas. Pētījums veikts, lietojot salīdzinošo analīzi. Galvenokārt vērtējot Vācijas nacionālā tiesību akta (Civilkodeksa) prasības par pacientu obligāto izmaksu atlīdzināšanu, autors pievērš uzmanību arī Austrijas Augstākās tiesas nolēmumam šajā jomā. Rakstā analizētā prakse ir interesanta arī salīdzinājumā ar Latvijas pieredzi pacientu tiesību aizsardzībā.

Atbilstoši mūsdienu intensīvajai jauno tehnoloģiju attīstībai tās objektīvi un likumsakarīgi ienāk arī tiesiskajā sistēmā. Tiesību zinātņu doktore, Latvijas Universitātes asociētā profesore ***Irēna Kucina*** ir pievērsusies inovatīvai tēmai – jauniem digitalizācijas izaicinājumiem un perspektīvām tiesu sistēmā. Saistoša ir mākslīgā intelekta un algoritmu izmantošana tiesu sistēmā. Autore ilustrācijai sniedz atsevišķus piemērus mākslīgā intelekta izmantošanai tiesvedībā. Apvienotajā Karalistē tiesu iestādes izstrādā automatizētu tiešsaistes rīku maza apmēra prasībām civillietās. Britu zinātnieki ir veikuši pētījumu par algoritmu izmantošanu, paredzot Eiropas Cilvēktiesību tiesas nolēmumus. Autore rosina uzsākt debates par mākslīgā intelekta lietošanu arī Latvijas tiesu sistēmā. Konstruktīvi ir rakstā minētie iespējamie tiesu sistēmā izstrādājamie divu veidu algoritmi: algoritmi, kas atbalsta lēmumu pieņemšanu, jeb "atbalsta algoritmi", un algoritmi, kas paši pieņem lēmumus, jeb "lēmumu algoritmi".

Socrates izdevumā ir ietverti saturiski nozīmīgi raksti par aktuālām krimināltiesiskām problēmām. Jāatzīst, ka minētajā kontekstā noziedzīgo nodarījumu apkarošanā viens no svarīgākajiem elementiem ir būtiska kaitējuma noteikšana. Sakarā ar interneta plašo pieejamību un datorsistēmu intensīvu izmantošanu būtiskā kaitējuma noteikšana ir aktuāla arī šajā jomā. Speciālisti atzīst, ka būtiska kaitējuma identificēšanas problēma bieži kļūst par iemeslu, kāpēc par kibernoziegumiem uzsāktos kriminālprocesus nākas izbeigt. Rīgas Stradiņa universitātes (Latvija) profesors ***Uldis Ķinis*** un zinātniskā doktora grāda pretendents tiesību zinātnē ***Ņikita Sinkevičs*** iesaka algoritmu būtiska kaitējuma noteikšanai noziedzīgos nodarījumos, kas saistīti ar automatizētu datu apstrādes

sistēmām (ADAS). Autori ir skatījuši jautājumus par būtiska kaitējuma legāldefinīciju un tās piemērošanu, par kiberapdraudējuma būtiska kaitējuma noteikšanas kritērijiem, kuri ir fiksēti Krimināllikumā. Analizējot dažādus avotus, autori secina, ka krimināltiesību praksē nav vienotas izpratnes par būtiska kaitējuma definējumu. Nozīmīgs ir rakstā izvirzītais jautājums par algoritma metodes ieviešanas teorētiskajiem un praktiskajiem aspektiem būtiska kaitējuma noteikšanā. Jāatzīst, ka autoru inovatīvā pieeja ADAS būtiska kaitējuma noteikšanā, izmantojot algoritmus, ir viens no segmentiem kiberdrošības nodrošināšanā.

Ukrainas Nacionālās aviācijas un kosmosa universitātes tiesību zinātnieces – asociētā profesore ***Natālija Filipenko*** un profesore ***Hanna Spicina*** – ir aprakstījušas Ukrainas tiesu ekspertīžu institūciju starptautiskās sadarbības attīstības stratēģiju ar ārzemju ekspertiem, novēršot iespējamos teroristu uzbrukumus kritiskās infrastruktūras objektiem. Autores plaši analizē dažādu valstu mūsdienu pieredzes izmantošanu preventīvajā darbā, skatot to Ukrainas tiesu ekspertīžu institūciju kriminālistiskā darba kontekstā. Perspektīvs ir priekšlikums par tiesiski nostiprinātu starptautisko standartu ieviešanas nepieciešamību tiesu ekspertīzes procesos. Rakstam ir ļoti būtiska nozīme saistībā ar Krievijas uzsākto visaptverošo iznīcinošo karu Ukrainā.

Neapšaubāmi, ka viena no aktuālākajām starptautiskajām un nacionālajām krimināltiesiska rakstura darbībām ir noziedzīgi iegūto līdzekļu legalizācijas novēršana. Jaunā tiesību zinātniece, zvērināta advokāte ***Liene Neimane*** (Latvija) ir izpētījusi tiesu praksi, atsedzot jaunākās tendences un problēmas, kas rodas, risinot naudas atmazgāšanas jautājumus. Pētījumā ir secināts, ka dažkārt manta vai citi īpašumi tiek konfiscēti nepamatoti. Tas varētu būt saistīts ar situācijas izpratnes, zināšanu trūkumu vai nepietiekamu praktisko pieredzi. Taču jāņem vērā, ka nepamatotas konfiskācijas gadījumā var noteikt nodarītā kaitējuma kompensāciju.

Tiesību zinātņu doktors un atzīts speciālists krimināltiesību jomā, Rīgas Stradiņa universitātes (Latvija) docētājs ***Jānis Baumanis*** detalizēti ir pētījis *Covid-19* izplatības Latvijā saistību ar pandēmijas apstākļos aktualizētiem jauniem dažādiem noziedzīgo apdraudējumu veidiem. Autors analizē Latvijā konstatētos pārvaldības noziedzīgos apdraudējumus, kā arī apdraudējumus, kas izpaužas kā pretdarbība personai, kura piedalās *Covid-19* dēļ noteikto ierobežojumu, speciālo noteikumu ievērošanas nodrošināšanā. Vērtēti tiek arī dokumentu virzības pārkāpumi. Īpaši ir jāatzīmē, ka autors radoši analizē ne tikai tiesu praksi, bet arī likumdevēja iecerētos un īstenotos Krimināllikuma grozījumus, pievēršot uzmanību grozījumu pozitīvajiem un negatīvajiem aspektiem.

Rīgas Stradiņa universitātes (Latvija) jaunie tiesību zinātnieki ***Gerda Klāviņa*** un ***Ansis Zanders*** ir analizējuši cietušā tiesību aizsardzības problēmu kriminālprocesā pirmstiesas izmeklēšanas posmā. Latvijas Republikas Satversmē noteikts, ka ikvienam ir tiesības zināt savas tiesības. Tas attiecas arī uz noziedzīgos nodarījumos cietušām personām, kā arī uz fiziskām vai juridiskām personām, kurām noziedzīga nodarījuma rezultātā ir nodarīts morāls vai mantisks kaitējums, fiziskas ciešanas. Autori uzsver, ka cietušajiem ir tiesības pierādīt savas tiesības pirmstiesas izmeklēšanas procesā. Tomēr

teorētiskā aspektā nav noteiktas cietušā tiesības iegūt pierādījumus. Rakstā tiek akcentēta uzmanība uz juridiskiem un praktiskiem jautājumiem par cietušā pierādīšanas tiesībām kriminālprocesā.

Pieredzes bagātais tiesību zinātnieks advokāts ***Jānis Zelmenis*** (Latvija) analizē aktuālo un līdzšinējo Eiropas Kopienu Tiesas (EKT) judikatūru nodokļu strīdu jomā, pamatojoties uz mūsdienu Eiropas Savienības valstu tiesisko regulējumu, lai noteiktu tiesību jēdzienu un kritērijus nodokļu plānošanas jomā. Pētījumā ir veikta padziļināta *Cadbury Schweppes* lietas izpēte saistībā ar EKT 2006. gada lēmumu, kas lika pamatu jaunai koncepcijai par nodokļu strīdu izskatīšanu un interpretāciju pēc būtības kopumā.

Tiesību zinātnes doktora grāda pretendente ***Diāna Bukēviča*** (Latvija) ir pētījusi sankciju kā drošības līdzekļa nozīmi, reģistrējot informāciju par patiesajiem labuma guvējiem Uzņēmumu reģistrā. Kā pamatproblēmu autore definē saistību starp sankcijām kā juridisku šķērsli un patieso labuma guvēju reģistrāciju Uzņēmumu reģistrā. Rakstā tiek sniegts likuma normu efektivitātes izvērtējums attiecībā uz sankcijām kā tiesisku šķērsli patieso labuma guvēju reģistrācijai un norādīta nepieciešamība veikt grozījumus Latvijas Republikas Uzņēmumu reģistra likumā.

Zinātniskā doktora grāda pretendents ***Mārtiņš Birģelis*** (Latvija) ir pievērsies transnacionālo korporāciju un citu biznesa uzņēmumu darbības saistībai ar cilvēktiesībām. Viņš atzīst, ka uzņēmumiem ir piemērojami cilvēktiesību standarti, novēršot šķēršļus piekļuvei tiesai starptautiskās tiesvedībās un veicinot korporatīvo atbildību par cilvēktiesību pārkāpumiem. ANO Cilvēktiesību padome 2014. gadā izveidoja beztermiņa starpvaldību darba grupu, lai uzņēmējdarbībā tiktu ietvertas cilvēktiesības. Autors akcentē, ka ir divas būtiskas vienošanās jomā, kas ir attiecināma uz regulējuma mērķiem un regulējuma modeli.

Augstākās izglītības sistēmas attīstības kontekstā aktuāls ir Rīgas Stradiņa universitātes (Latvija) docētājas, tiesību zinātnes doktores ***Kitijas Bites*** raksts par augstskolu autonomiju. 2021. gadā Latvijā pieņemtie grozījumi Augstskolu likumā maina augstskolas pārvaldības modeli. Tiek ieviestas padomes kā augstākā augstskolas lēmējinstitūcija. Autore secina, ka likumdevējs ir mainījis varas līdzsvaru, pieļaujot iespējas politiskai vai ekonomiskai varai ietekmēt augstskolas autonomiju.

Jaunais tiesību zinātnieks *Mg. iur.* ***Jānis Musts*** (Latvija) ir analizējis vienu no tiesiska rakstura dokumentu izziņas pieejām – juridisko siloģismu, balstoties uz Luisa Duartes d'Almeidas eseju "Par juridisko siloģismu". Rakstā tiek precizēta teorētiskā izpratne par juridiskā siloģisma lomu juridisko lēmumu pamatošanā.

Socrates izdevums ietver daudzveidīgus tiesību zinātnieku viedokļus par dažādām juridiska rakstura tēmām un problēmām, un tas ir pamats turpmākām diskusijām, jauniem pētījumiem, radošas zinātniskās domas refleksijām.

ANDREJS VILKS,
Rīgas Stradiņa universitātes
Juridiskās fakultātes profesors

Introduction

The latest regular electronic issue of the scientific journal *Socrates* reaches the reader at a troubled time – in the setting of Russia's imperialistic war against Ukraine and the upcoming and already perceptible energy crisis. However, the above and other factors cannot essentially influence research and academic activity in the science of law. These determine the new research lines and subjects of study, which we expect to be reflected in subsequent issues of the *Socrates.*

In 2022, the Faculty of Law of the Rīga Stradiņš University has been implementing the international project "Legal Comparison to the Regulations for Remote Treatment between Germany and the Baltic States" (project supervisor PhD Karina Palkova). Within the boundaries of the project, the RSU held an international conference on June 17, 2022, attended by lawyers, healthcare practitioners and researchers from universities and medical institutions of Germany, Estonia, Lithuania, Ukraine and Latvia. Separate reports developed in the scientific article format have been included in the respective issue of the *Socrates*, providing an insight into the current healthcare problems (articles developed within the boundaries of the Baltic-German University Liaison Office "Conference "Legal Aspects of Remote Healthcare Service Provision: German and Baltic Experience"". The Baltic-German University Liaison Office is financially supported by the German Academic Exchange Service (DAAD) from the funds provided by the German Ministry of Foreign Affairs).

Together with *Dr. iur.*, Associate Professor ***Nataliia Filipenko*** and Professor ***Hanna Spitsyna*** from the National Aerospace University (Ukraine), the young law scientists from the Rīga Stradiņš University (Latvia) ***Elza Timule*** and ***Artūrs Žukovs*** have analysed the legal regulatory experience and problems of telemedicine service provision in Latvia and Ukraine, identifying the opportunities for improvement thereof. The relevance of the subject covered by the article is associated with the rather intensive implementation of new technologies in the healthcare industry and the specific setting of the COVID-19 pandemic. The prevalence and high infectiousness of the disease emphasise the need for contact-free healthcare. In view of that, remote healthcare has been actively used both for the treatment of COVID-19 patients and for remote consulting of patients requiring medical advice. The authors analyse the international regulatory framework for telemedicine service provision, also in Latvia and Ukraine, the problems associated therewith and the opportunities for improvement of the regulatory framework for the provision of these services. Readers may find it interesting to discover the various telemedicine

service types addressed by the article: tele-triage, tele-diagnostics, tele-consulting and tele-monitoring. The subject matter of the article is not just relevant, but evidently prospective. This is due to the intensive development of telemedicine and the need to develop a proper regulatory framework for these services.

Dr. habil. iur., Professor ***Viktoras Justickis*** of the Mykolas Romeris University (Lithuania), who specialises, inter alia, in the domain of medical law, offers a perspective on the diagnostics of rare and dangerous diseases by means of initial consulting by phone. The article makes a substantiated inference that remote consulting allow earlier provision of qualified first aid to a patient, which improves the efficiency of further treatment. Initial consulting by phone allows immediate provision of the most necessary and qualified advice on the further course of treatment procedure. However, phone consulting can also create certain problems, the most essential one being that this restricts the data available to a physician to the information communicated by a patient. The author suggests new approaches to increasing the efficiency of telephone consulting.

Professor, *Dr. habil. iur.* and *Dr. rer. med.* ***Erik Hahn*** of the Dresden International University (Germany) has analysed a very specific subject of medical law that concerns patients' rights to free copies of medical documents. The article covers a comparative analysis with the requirements of the German national legal act (the Civil Code) regarding the reimbursement of mandatory patient fees. The author also draws attention to the judgements of the Supreme Court of Austria in this domain. The practical experience analysed in the article is also interesting to view in comparison with the Latvian practice in patients' rights protection.

The rapid development of new technology in the society of today objectively and naturally affects the legal system as well. Associate Professor of University of Latvia, *Dr. iur.* ***Irēna Kucina*** has presented an article on an innovative subject: the new challenges and prospects of digitalisation in the court system. The article offers a captivating summary of how court systems use of artificial intelligence and the algorithms developed by it. The author makes illustrative use of individual instances of the usage of artificial intelligence in judicial proceedings. Judicial institutions of the United Kingdom develop an automated judicial tool for use in proceedings on lesser civil claims. British scientists have studied the use of algorithms to predict the judgements of the European Court of Human Rights. The author urges to commence a debate on the implementation of artificial intelligence into court systems, including the Latvian court system. Two potential types of algorithms to be developed in court systems described in the article are particularly insightful: a "support algorithm" that supports decision making, and a "decision algorithm" that makes its own decisions.

The *Socrates* includes articles of essential content on the contemporary problems of criminal law. It is to be admitted that one of the most important elements of combating crime in this context is the identification of substantial harm. Identification of substantial harm is essential in the context of widely accessible Internet and intensive use of computer systems. Specialists acknowledge that identification of substantial harm often

becomes the reason why initiated criminal proceedings on cybercrime cases have to be dropped. *Dr. iur.*, Professor of Rīga Stradiņš University (Latvia) ***Uldis Ķinis*** and aspirant to the doctoral degree in legal science ***Ņikita Sinkevičs*** have performed a detailed analysis of algorithm as a means of determining substantial harm in criminal acts involving automated data processing systems (ADPS). The authors studied a series of issues related to legal definition and application of substantial harm and the criteria for determining substantial harm provided for by the Criminal Law in the setting of cyber threat. Having analysed a number of sources, the authors come to the inference that the criminal case law lacks a universal idea of definition of substantial harm. Especially notable are the reflections of theoretical and practical aspects of implementation of the algorithm method in the identification of substantial harm. It must be noted that the authors' innovative approach to the identification of substantial harm to ADPS through algorithms is one of the segments of ensuring cyber security.

Legal scientists Associate Professor ***Nataliia Filipenko*** and Professor ***Hanna Spitsyna*** of the National Aerospace University (Ukraine) have described a development strategy for the international cooperation of Ukrainian forensic investigation institutions with foreign experts in preventing terrorist attacks on critical infrastructure objects. The authors have carried out a broad analysis of the opportunities to use recent foreign experience in preventive actions within the context of criminalistics operations of Ukrainian forensic investigation institutions. A promising suggestion implies the need to implement legally established international standards in forensic investigation processes. The article is very essential in the setting of the all-out destructive war started by Russia in Ukraine.

It is beyond any doubt that one of the most relevant international and national criminal law phenomena at the time is the prevention and eradication of money laundering. Having studied the case law on the issue, the young legal scientist sworn advocate ***Liene Neimane*** (Latvia) has revealed the latest trends and problems in the area of money laundering. The study revealed that in some cases property is confiscated without proper grounds, which may be caused by misunderstanding of the situation, insufficient practical experience or lack of knowledge. Warrantless seizure can entail reimbursement for the losses thus inflicted.

Doctor of Law and a renowned expert in the domain of criminal law, docent of Rīga Stradiņš University (Latvia) ***Jānis Baumanis*** has conducted a detailed study of the relation between the prevalence of COVID-19 in Latvia with various criminal threats that had gained new relevance in the setting of the pandemic. The author analyses the current criminal threats existing in Latvia, including threats manifesting as countermeasures against persons resisting COVID-19 restrictions, or violations of special regulations and provisions of documents regarding COVID-19 restrictions. It is especially notable that the author analyses not just the case law, but also the amendments to the Criminal Law implemented and contemplated by the legislator, drawing attention to the positive and negative aspects of these amendments.

Introduction

Young law scientists of the Rīga Stradiņš University (Latvia) ***Gerda Klāviņa*** and ***Ansis Zanders*** have analysed the problem of safeguarding the victim's rights at the pre-trial investigation stage of criminal proceedings. The Constitution of the Republic of Latvia stipulates that everyone have the right to know one's rights, which also applies to crime victims. The aforementioned concerns individuals or legal entity who have incurred moral or financial damage or physical suffering as a result of a criminal act. The authors emphasise that victims have the right to assert their rights during the pre-trial investigation process. However, the aggrieved party's right to obtain evidence is not defined in the theoretical aspect. The article accentuates attention to legal and practical issues of the victim's right of proof in criminal proceedings.

Experienced legal scientist and attorney ***Jānis Zelmenis*** (Latvia) analyses the current and historical case law of the Court of Justice of the European Communities (CJEC) in the domain of tax disputes in reliance upon the current legal regulatory framework of the EU Member States, for the purpose of defining legal concepts and criteria in the area of tax planning. The article features a profound study of the decision of the CJEC in the Cadbury Schweppes case (2006). This has created a foundation for a new concept of adjudication of tax disputes and essential interpretation in general.

Aspirant to the doctoral degree in law ***Diāna Bukēviča*** (Latvia) has studied the position of sanctions as a security measure registering information on true beneficial owners with the Register of Enterprises. The underlying problem is defined by the author as the connection between sanctions as a legal obstacle and registration of the true beneficial owner with the Register of Enterprises. The article assesses the efficiency of legislative provisions in respect of sanctions as a legal obstacle for the registration of true beneficiaries, which determines the necessity of amendments to the Law on the Register of Enterprises of the Republic of Latvia.

Aspirant to the doctoral degree ***Mārtiņš Birģelis*** (Latvia) has addressed the cohesion between the operation of transnational corporations and other enterprises and human rights. The article infers that enterprises are subject to the application of human rights standards, eliminating impediments for access to courts in international judicial proceedings and promoting initiatives conducive to corporate responsibility for violations of human rights. In 2014, the UN Human Rights Council has assembled an ongoing intergovernmental workgroup on the inclusion of human rights in business domains. The author draws special attention to two essential agreements in the area applicable to the objectives and model of the regulatory framework.

The article on autonomy of higher education institutions by docent of Rīga Stradiņš University (Latvia), *Dr. iur.* ***Kitija Bite*** is relevant in the context of development of the higher education system. Amendments to the Law on Higher Education Institutions passed in Latvia in 2021 change the higher education institution management model. Councils are introduced as decision-making bodies of higher education institutions. The author comes to the inference that the legislator has shifted the power balance, allowing opportunities for political or economic power to affect the autonomy of higher education institutions.

The article by the young legal scientist *Mg. iur.* ***Jānis Musts*** (Latvia) analyses one of the approaches to legal document inquiry – legal syllogism. The author used Luís Duarte d'Almeida's essay "On Legal Syllogism". The article outlines an adjusted theoretical idea of the role of legal syllogism in substantiating legal decisions.

The *Socrates* encompasses diverse opinions of legal scientists on different subjects and problems of legal nature. Articles form a basis for further discussions and new studies, creative reflections on scientific thought.

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Problems and Opportunities for Improvement of Legal Framework for Provision of Telemedicine Services: Experience of the Republic of Latvia and Ukraine

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Abstract

In recent years technological progress has had a huge impact on healthcare sector. New products, services are becoming popular among patients and healthcare providers. Long waiting periods, to see healthcare specialists and COVID-19 pandemics have influenced the situation as well. As a result of the COVID-19 pandemic, there was a need for non-contact healthcare due to prevalence and infectivity of the disease, which has led to active provision of remote healthcare, both for COVID-19 patients and remote consultations. The aim of the article is to analyse the international regulatory framework of

telemedicine, problems, and opportunities for Improvement of the Legal Framework for the Provision of Telemedicine Services. The article will analyse both national regulatory framework of Latvia and Ukraine.

Keywords: law, medical technologies, patients' rights, telemedicine.

Introduction

Legal definition of telemedicine is given in Article 1(29) of the Medical Treatment Law. It describes telemedicine as a set of processes and covers a wide range of concepts that belong to a specific category – provision of remote healthcare. Describing telemedicine, several types of telemedicine service provision can be distinguished that differ in specifics and general feasibility of their implementation, depending on the national concept, state of development, amount of funding, and experience.

The EU regulatory framework and the EU-funded Report on the EU State of Play on Telemedicine Services and Uptake Recommendations contain different definitions of telemedicine services, which would be important to clarify at the level of national regulation, e.g.:

1) Teletriage which involves determining the severity of a patient's condition (assessing urgency of treatment or care rather than diagnosing and identifying symptoms) and providing advice via mobile communication networks, mainly by doctors and medical support persons, as well as emergency medical dispatchers, etc. (Joint Action to Support the eHealth Network, 2022, Art. 15);
2) Telediagnosis which comprises the process of identifying a patient's symptoms and recognising the disease, based on information received in the form of images, video or remote communication using information communication technologies (Joint Action to Support the eHealth Network, 2022, Art. 15). It should be noted that the field of telemedicine in the Republic of Latvia has not been yet developed to the level where remote diagnosis of patients could be actively implemented. However, certain fields (e.g., psychiatry, dermatology, etc.) could, where feasible, perform identification of health conditions and diseases. While such consultations will not be applicable to all patients and telemedicine cannot fully replace face-to-face healthcare, it is important to define possibilities of remote diagnostic services and distinguish them from face-to-face healthcare services;
3) Teleconsultation which involves communication between a patient and a healthcare professional or between two or more healthcare professionals related to assessment of a patient's health condition using information communication technology (Joint Action to Support the eHealth Network, 2022, Art. 15);
4) Telemonitoring, a type of telemedicine service implemented to remotely monitor a patient's health condition (Communication from the Commission of

the European Communities, COM/2008/0689, 2008). In the Republic of Latvia, it could currently only be implemented with active involvement of the patient through regular submission of their health indicators (e.g., blood pressure, blood sugar, etc.) to attending physician within a set timeframe. This ensures that a patient's health status is continuously monitored, also in cases where the attending physician finds it necessary to see a specific healthcare professional based on a patient's general health indicators.

The above identifies problematics of international regulatory framework of telemedicine, as well as challenges for Improvement of the Legal Framework for the Provision of Telemedicine Services.

The article aims to analyse Latvian and Ukrainian national regulatory framework in the field of telemedicine. The legal interpretation methods will be used to identify the problems and solutions from the comparative perspective.

Limitations of Providing Telemedicine Services: Experience of Latvia

The Medical Treatment Law states that competence of medical practitioners as well as the amount of theoretical and practical knowledge required to practise in a given specialisation is determined by the Cabinet of Ministers of the Republic of Latvia. To provide telemedicine services, a medical practitioner must be able to use the necessary information and communication technologies, communicate with patients, including underaged patients, at a level to obtain all the necessary information and to implement other measures that would result in quality healthcare. This means that medical practitioners need a high level of communication skills with prior knowledge of psychology. Furthermore, it requires the Ministry of Health of the Republic of Latvia to develop provisions in the form of policy guidelines or Cabinet regulations that would reflect the scope of competences and knowledge of medical practitioners providing telemedicine services (Ashfaq, Memon, Zehra, et al., 2020).

The COVID-19 pandemic resulted in an increased demand for psychiatric health services. Statistics show that the risk of psychiatric illnesses was exacerbated during this period and the number of psychiatric illnesses grew (Veselības ministrija, 2021). Article 1(22) of the Medical Treatment Law defines psychiatric assistance as "individual prophylaxis, out-patient or in-patient diagnosis, medical treatment, rehabilitation and care for persons with mental health disorders" (Ārstniecības likums, 1997, *1*). The legal definition implies that psychiatric assistance can only be provided on an outpatient or inpatient basis, both of which require face-to-face contact. Article 66 of the Medical Treatment Law states that persons "have the right to receive medical assistance and care of a quality that conforms with accepted standards of general medicine" (Ārstniecības likums, 1997, *1*).

Article 67(1) of the Medical Treatment Law provides that psychiatric assistance may be provided at a patient's place of residence if the patient's health condition allows it (Ārstniecības likums, 1997, *1*). Thus, it should be possible to provide and receive psychiatric assistance remotely if the patient's state of health and other circumstances allow it. Telemedicine cannot fully substitute face-to-face healthcare, nor is it applicable to all patients, which should be objectively assessed by the clinician. However, under favourable conditions, it can be an effective alternative to face-to-face consultations, contributing to increased access to psychiatric assistance. It is especially valuable in a period when psychiatric illnesses are on the rise, both as a result of particular COVID-19 symptoms (which can lead to mental health complications) and the impact of changes experienced during the pandemic period (Veselības ministrija, 2021).

The legislation of the Republic of Latvia not only lacks professional requirements for medical practitioners but also a distinction of medical institutions that provide exclusively telemedicine services. Currently, only inpatient and outpatient institutions that primarily provide face-to-face services are recognised in the legal framework.

Mandatory Requirements for Telemedicine Institutions in Latvia

Article 54(2) of the Law on Medical Treatment provides that medical institutions may be outpatient and inpatient institutions (Ārstniecības likums, 1997, *54*). Pursuant to Article 55 of the Medical Treatment Law, medical treatment may only be provided in medical treatment institutions that meet the minimum requirements set by the Cabinet in accordance with Regulation No. 60 "Regulations Regarding Mandatory Requirements for Medical Treatment Institutions and Their Structural Units" of 20 January 2009 (hereinafter Regulation No. 60). Paragraphs 23 and 92 of Regulation No. 60 define outpatient and inpatient treatment institutions. Namely, an outpatient treatment institution "provides primary healthcare or outpatient secondary healthcare to patients, including inpatient care", and an inpatient treatment institution is an institution where the "patient is under the constant and continuous 24-hour care and control of medical practitioners". Simultaneously, the second subparagraph of paragraph 2 of Regulation No. 60 states that all medical institutions must "provide availability of an environment to persons with functional disorders" (MK Noteikumi Nr. 60, 2009). However, paragraph 4 of Regulation No. 60 sets out the provisions that a medical institution must ensure if it does not provide an environment that enables persons with functional disabilities to receive healthcare in accordance with the approved medical technologies, as well as information on medical institutions where it is possible to receive specific healthcare services, and the possibility of independent access to the medical institution (MK Noteikumi Nr. 60, 2009). Thus, within the scope of the regulatory framework, healthcare institutions are created for physical reception of patients and provision of

medical treatment. This is also confirmed by Cabinet Regulation No. 555 on Procedures for the Organisation of and Payment for Health Care Services of 28 August 2018, which states that for a healthcare institution to practice the provision of telemedicine services, it must comply with the requirements set out in Regulation No. 60. Thus, although there are exceptions in Regulation No. 60 that relate to the provision of access to the environment, this does not make it possible to provide healthcare services that primarily consist of telemedicine services.

In order to be able to provide telemedicine services, a healthcare institution must meet the following conditions:

1) It must be registered in the Register of Medical Institutions in accordance with the procedure set out in Cabinet Regulation No. 170 on the Register of Medical Institutions of 8 March 2005. It can only be achieved by meeting the requirements on the need to ensure accessibility of the environment for persons with functional disabilities set out in the third subparagraph of paragraph 2 of Regulation No. 60;
2) Medical practitioners and medical support staff employed in the institution shall be registered in the Register of Medical Practitioners and Medical Support Staff in accordance with the procedure established by Cabinet Regulation No. 317 on the Establishment, Update, and Maintenance of the Register of Medical Practitioners and Medical Support Staff of 24 May 2016;
3) The healthcare institution must be able to ensure secure processing of medical data and information necessary for medical treatment, as provided for in Article 1(29) of the Medical Treatment Law;
4) According to the principles set out in the first subparagraph of paragraph 17 of Regulation No. 60, to ensure high quality and safe treatment services for patients, unambiguous identification of patients must be implemented and ensured throughout the treatment process. Furthermore, not all patients are eligible to receive telemedicine services and there are several factors that a healthcare professional must take into account to assess a patient's eligibility for telemedicine services. This implies that the healthcare institution must provide secure remote communication channels for accurate patient identification;
5) In accordance with paragraphs 18 and 19 of Regulation No. 60, the medical institution must provide "information technologies connected to the internet and software that provides patient data storage and processing, observing the limitations of availability of information" and must develop "information protection provisions and provisions regarding procedures for medical information processing". Consequently, the medical institution must ensure the quality, content, and protection of records in medical and accounting documentation, and the procedures and time limits for their storage in accordance

with the requirements of Cabinet Regulation No. 265 on Procedures for Keeping Medical Documents of 20 January 2009;

6) Patients' rights under the Law on the Rights of Patients must be ensured (MK noteikumi Nr. 60, 2009).

The regulatory framework setting out the minimum requirements for healthcare institutions is broad and includes most important core principles that should be respected by both outpatient and inpatient healthcare institutions and health centres, as well as healthcare institutions that only provide telemedicine services. Nevertheless, institutions primarily providing face-to-face healthcare would be very different from telemedicine institutions, which, given the limited awareness and funding, are likely to continue to be established as call centres and telemedicine consultation centres. They would focus on teletriage and teleconsultation; thus, providing clinical support to patients (telemedicina.lv, 2022). Such services could not replace face-to-face healthcare but would contribute to the overall healthcare system.

The possibility of issuing electronic documents is fundamental for the implementation of comprehensive telemedicine services. In the Republic of Latvia, distribution of sickness absence certificates and prescriptions for state reimbursable medicines has been carried out through the e-health system, with doctor referrals added since 2019 (E-veselība, 2022).

The legislation of the Republic of Latvia does not restrict the issuance of referrals for telemedicine services. Similarly, there are no restrictions on the procedure for issuing electronic prescriptions. According to Article 60 of the Medical Treatment Law, the issuance and production of prescriptions is determined by the Cabinet, specifically, Cabinet Regulation No. 175 on the Manufacture and Storage of Prescription Forms, as well as Writing out and Storage of Prescriptions of 8 March 2005. Paragraph 29 states that prescriptions "shall be written out electronically in the health information system" and only the cases specified in paragraph 29 require prescription to "be written out on the form of a specific sample" (MK noteikumi Nr. 175, 2005). In addition, prescriptions for medicinal products issued in a Member State are recognised if they contain the information required by Commission Implementing Directive 2012/52/EU of 20 December 2012. This implies that prescriptions for medicinal products may also be issued in the case of telemedicine services, since the decision to issue a prescription is taken by the attending physician. In contrast, the procedure for issuing a sick note in telemedicine cases is limited.

Pursuant to Article 53 of the Medical Treatment Law, Cabinet issued Regulation No. 152 on the Procedures for the Issuance of Sick-Leave Certificates of 3 April 2001, paragraphs 10 and 10.1 which stipulate that a "sick-leave certificate shall be issued by a doctor or the assistant to a doctor of a medical treatment institution on the basis of a personal inspection and examination of a person", but personal inspection and examination may be omitted in cases:

1) where isolation is necessary during quarantine;
2) in connection with the care of a child;
3) in connection with the care of a child under 14 years of age if isolation is necessary during quarantine;
4) in the event of contracting a dangerous infectious disease;
5) after hospital treatment, for the period recommended by the hospital (MK noteikumi Nr. 152, 2001).

When receiving remote medical services, the issue of a sick-leave certificate is limited to the cases specified in the Cabinet Regulations. This restriction applies to telemedicine regardless whether the services are provided across the border or domestically. The provision of telemedicine services in cases of seriously infectious diseases is only part of the scope of remote healthcare. Telemedicine can be implemented through, for example, telemonitoring, which can improve the quality of life and access to healthcare for people suffering from chronic diseases, teleconsultation, and other forms of healthcare delivery (European Commission, 2012, art. 21). Problems arise when remote healthcare is provided for non-infectious diseases and the patient's health condition requires a sick note to be issued, but a physical consultation is not possible (due to cross-border healthcare or long distances between the patient and the attending doctor, or due to the patient's mobility problems, health condition, etc.). Thus, to facilitate access to treatment and sick leave, the regulatory framework should be improved and include a broader range of cases in which a healthcare professional would be entitled to issue sick leave, specific cases of remote treatment, and support for active cross-border telemedicine services.

In the judgment of the District Administrative Court *Rīgas tiesu nams* of 27 March 2013 in case No. A420449112, the Court found justifiable the conclusion of the Health Inspectorate that determination of inability to work without examining the applicant on that day serves as valid grounds to declare that the first sick-leave certificate issued was unjustified (Spriedums lietā Nr. A420449112). Based on this opinion, the author would like to point out that the provision of telemedicine services could, in some cases, are considered as examination of the patient even though it does not take the form of a face-to-face consultation. For this reason, it is necessary to differentiate the types of telemedicine services and to define competences of medical practitioners, because the legislature should define specifically what constitutes a "personal examination" or "examination", including provision of certain types of telemedicine services, which could be used to identify the validity of a sick-leave certificate.

The Telemedicine Experience in Ukraine

At this difficult time, while Ukraine battles the Russian army, the state's citizens face many challenges. One of the main challenges is the almost complete lack of access to proper medical services in the territories temporarily occupied by the Russian invaders.

According to published sources, nearly 900 health institutions have been damaged and 127 hospitals have been completely destroyed in Ukraine. According to Ukrainian Health Minister Viktor Lyashko, 90 ambulances were shot and rendered inoperable and will never go on duty again. In addition, 250 vehicles have been seized by the occupants (Head of the Ministry of Health, 2022). Unfortunately, these figures keep increasing every day.

Considering the circumstances, the most effective mechanism for individuals to access healthcare is complete digitalisation – accessible telemedicine, electronic health records for patients and doctors, electronic prescriptions, eSubmission and eCTD format for all drug registration procedures, and other necessary components.

According to the provisions of Order of the Ministry of Health of Ukraine No. 681 of 19.10.2015 that established the procedure for the organisation of medical care at the primary, secondary (specialised), tertiary (highly specialised) levels using telemedicine (hereinafter – the Procedure), this is a set of actions, technologies, and measures used in the provision of medical care, using remote communication by means of electronic messaging (The procedure for the organisation of medical care, 2015).

The main goal of telemedicine in Ukraine is to improve public health by providing equal access to quality medical services. The main objectives of telemedicine are:

1) to ensure delivery of medical aid to a patient when distance is a critical factor for its delivery;
2) to preserve medical confidentiality and privacy, integrity of medical information about a patient's health condition;
3) to create a unified medical space;
4) to help improve the quality of care and optimise organisation and management of healthcare;
5) to form systematic approaches to implementation and development of telemedicine in the healthcare system.

The telemedicine network, through which patients receive care, includes healthcare institutions regardless of ownership and legal form, and physical persons – entrepreneurs engaged in economic activity in medical practice. Participants join the system and use the internet platform for telemedicine (paragraph 1, section III of the Procedure). Healthcare institutions wishing to work with the telemedicine portal conclude a contract with the other participants. The number of telemedicine portals is unlimited. Healthcare professionals have the right to connect to different portals. The participants of the portal communicate by means of electronic messages. Each physician is required to have an electronic digital signature (Procedure for the organisation of medical care, 2015).

The telemedicine network enables one to:

1) streamline and systematise the process of medical aid delivery using telemedicine;

2) ensure compatibility of information and data in delivery of medical aid using telemedicine;
3) ensure use of medical information standards in the process of medical aid delivery using telemedicine;
4) monitor quality of medical aid delivery using telemedicine.

Medical care with the use of telemedicine is carried out in telemedicine offices operating within healthcare institutions and ensuring provision of high-quality, timely medical care to patients (Procedure for the organisation of medical care, 2015).

By analysing the situation, some major problems can be identified that are either existent or are expected to arise in the near future in the Ukrainian healthcare system and that can be solved with the use of telemedicine:

1) An extremely urgent issue is provision of necessary medical care to people who have been forced to leave their homes and are temporarily living in other areas (internally displaced persons);
2) People who have experienced acute stress will suffer from post-traumatic stress disorder in about a third of all cases in a short term. The expected number is likely to be around two million within the country alone. The problem is just as serious for the estimated more than one million refugees who have been granted temporary asylum in European countries. This is again a real problem, as effective professional psychological assistance can only be provided by native speakers of Ukrainian or Russian, who are hard to find abroad. Very few refugees speak European languages at a sufficient level to receive psychological assistance from professionals;
3) Spread of COVID-19 and other infectious diseases (e.g. monkeypox, recognised by the WHO as a new world epidemic) and the like is still relevant;
4) Inadequate provision of healthcare and hospitals in Ukraine with appropriate computer equipment and specialised software and hardware to perform the functions of the telemedicine portal, video and audio communication software and hardware, technical devices equipped with data storage and transmission facilities and electronic messages, specialised software for the transmission, storage, and interpretation of digitally recorded images, including radiology diagnostics.

The key challenges outlined above need to be urgently addressed. Statistics show that about 6.5 million Ukrainian citizens are considered internally displaced persons. The vast majority are residents of war-torn regions and occupied territories. Since the start of the war, 3.3 million people have left Ukraine. Consequently, the humanitarian crisis is likely to spread to other European countries if the situation does not change drastically in the near future.

For this reason, online services are becoming vital. For example, the Ministry of Health of Ukraine has launched an initiative regarding the possibility for citizens of

Ukraine, even those in the temporarily occupied territories, to call a single phone number where the call is forwarded to the appropriate doctor/specialist. While this is an extremely important and useful initiative for the Ministry, the question arises as to how effective it is for the nearly seven million internally displaced people. It seems that this can only be a first, urgent step that needs to be followed by systemic solutions.

Regarding the issue of providing emergency psychological assistance to the population and preventing occurrence of consequences, including post-traumatic stress disorder, it can be claimed that Ukrainian specialists are very quick to solve the problem. There are about a thousand different online platforms providing psychological services in the state. For example, specialists at the Faculty of Humanities and Law at the M. E. Zhukovsky National Aerospace University – Kharkiv Aviation Institute in Kharkiv, Ukraine, readily provide online consultations, webinars, and other scientific and practical activities (Faculty of Humanities and Law of the National Aerospace University, 2022).

Focusing on telemedicine, many proposals have been seen from colleagues abroad who offer their own telemedicine platforms. This allows many doctors to consult Ukrainians on voluntary basis. Nevertheless, almost none of the platforms currently have a user interface in the Ukrainian language. This concerns the user interface for both medical staff and patients. After all, psychological aid can be most effective only when a psychologist or psychiatrist speaks the patient's native tongue. Unfortunately, there are very few such specialists abroad, and those who could work remotely within Ukraine are suffering from the war themselves.

Leadership of the Ministry of Health and all citizens of Ukraine face another massive problem – the spread of COVID-19 and other infectious diseases. Doctors communicate with COVID-19 patients being treated at home as well as those who are unable to see a doctor in person for the duration of the self-isolation. Some health services offer free consultations with family physicians, general practitioners, and paediatricians. For example, as part of the 2022 campaign Save a Doctor – Choose Online, many Ukrainian and foreign companies provided the Telemed24 platform for teleconsultations free of charge during quarantine events.

Additionally, unsatisfactory equipment of Ukrainian healthcare institutions and hospitals with appropriate computers and specialised software and hardware to perform the functions of telemedicine is very distressing for the national healthcare system. However, Ukraine has received help from its foreign colleagues. For instance, a patient was admitted to a Lviv hospital with severe trauma after a shell had exploded next to him. As the nature of the patient's injuries was unfamiliar to civilian medicine, to provide him with the best possible care, the doctors decided to involve colleagues from other clinics and countries with extensive experience in treating similar injuries. They did it in a unique way due to an augmented reality device from the American company RealWear (The development of telemedicine, 2022).

Ukrainian doctors will also receive 10,000 state-of-the-art laptops with the help of the Ministry of Health and the Ministry of Digital Transformation. The equipment has been purchased by the French Ministry of Economy, Finance, Industry, and Digital Sovereignty at the request of Ukrainian authorities. The provision of medical institutions with high-quality internet and computers is an important part of the plan of digitalisation of the medical sector, emphasises the Ministry of Digital Transformation. Modern equipment combined with appropriate software will make doctors' everyday work more efficient and facilitate online interaction with patients. This is expected to significantly spare customers' time in receiving medical services and make healthcare more accessible to citizens (France will hand over 10, 000 modern laptops to Ukrainian doctors, 2022).

Telemedicine in Ukraine is developing at an accelerated pace. However, the country faces several complex issues that must be addressed comprehensively, involving foreign experience in every possible way.

Conclusions

Different healthcare professionals may currently be involved in provision of telemedicine services at different operational levels. For example, some specialists could provide remote consultations where no face-to-face examination of the patient is required, and possibly perform remote diagnostic measures, but to a limited extent (if the necessary communication and diagnostic technologies are available to the patient and the medical institution). However, there is currently lack of awareness, experience, and technology in the Republic of Latvia for safe performance of remote medical manipulations. For this reason, it is necessary to define types of telemedicine services to be provided and to set limits on their implementation in the national regulatory framework, while also including the scope of knowledge and, consequently, the permissible competence of specialists in the field.

The authors believe that the existing legal framework needs to be substantially improved in order to introduce appropriate requirements in the existing regulatory framework for medical institutions providing only telemedicine services. As a result, the Latvian legal system would not only recognise medical institutions providing only telemedicine services but also regulate the minimum requirements necessary for their proper provision.

Given the fact that telemedicine is not a traditional way of healthcare delivery, it is necessary to define and outline telemedicine fundamentals, which include definitions of the types of telemedicine delivery practised in Latvia, its general implementation requirements, and limitations. This requires introduction of guidelines for the provision of telemedicine services and the basic principles for its implementation, paying additional attention to requirements for communication security. There are several aspects of the Latvian regulatory framework that would need to be improved or updated to

ensure safe and effective telemedicine practice in Latvia, while the country is currently in the early stages of integrating telemedicine into the healthcare legal system, which requires development of a comprehensive regulatory framework and core principles for telemedicine.

To implement the issuance of sick-leave certificates based on telemedicine consultations, it is necessary to ensure that telemedicine services are monitored to avoid the issuance of fictitious certificates. After remote communication with a patient, if a healthcare professional has identified a medically justifiable reason for issuing a sick-leave certificate, they could make a note in the patient's medical records whether the certificate has been issued by means of a face-to-face or telemedicine check-up.

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Diagnosis of Rare but Dangerous Diseases in Primary Telephone Consultation

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Abstract

Primary telephone consultation provides the patient with the opportunity to make a phone call and receive medical information between the onset of the first symptoms of the disease and their first visit to the doctor. This creates an opportunity to speed up the moment when the patient receives the first qualified help and thereby increases the success of further treatment. This is especially important in the case of the so-called "must not miss" diseases. These are the most dangerous, albeit rare, diseases in which early detection and treatment is a decisive factor in the success of treatment. However, telephone consultations can also create new problems, the most important of which is related to the fact that in such process the doctor has only the data that can be obtained by interviewing the patient. This is fraught with an increased risk of medical error. This danger is especially great in the case of "must not miss" diseases, in which only at the very early stage there are serious chances to stop the progression of the disease.

The article discusses ways to solve this problem – the requirements that must be met by the organisation of a consultation in order to maximise the use of the possibilities of telephone consultation in these conditions for the timely detection of "must not miss" diseases. The problems of harmonising these requirements with the organisational and economic conditions in which telephone consultation is carried out are discussed.

Keywords: doctor's responsibility, primary telephone consultation, rare but dangerous diseases.

Introduction

Primary medical telephone consultation is a service that gives everyone the opportunity to call and get medical advice (Leite et al., 2020; Hjelm, 2005; McKinstry et al., 2010).

The primary consultant is the only doctor with whom the patient can consult at a very important moment: the very beginning of his disease. It is the time between the patient's first symptom and his first visit to the doctor. For the patient, this is the time when they are still painfully hesitating: to see a doctor immediately or hope everything will improve on its own. They are torn between the fear of raising the alarm in vain and the fear that they have a deadly disease. They consult with every friend, try to sort the conflicting information they find on the Internet out, and rush from one extreme to another.

At this time, the consultant is the only angel-saviour to show them the right path.

It is also important that a call to the primary consultation allows to speed up the moment when the patient receives their first qualified assistance.

The initial telephone consultation allows the patient to immediately receive the most necessary, and most importantly, qualified conferencing about their problem; while in order for a regular visit to the doctor to take place, the patient needs numerous time expenditures, often removing this visit for a long time: an appointment with a doctor, days and weeks until the moment when the doctor can see the patient, the distance to visit the doctor and back, waiting in line, and the like. Finally, telephone consultation is incomparably more cost-effective, both for the patient and the facility (Bergmo, 2014). All this opens up new opportunities for increasing the cost-effectiveness and success of treatment and new prospects for improving its quality.

However, primary telephone consultations also bring problems (Katz et al., 2008; Bunn et al., 2004; Hildebrandt, 2006). When interviewing the patient who called, the consultant must determine whether there are grounds to suspect that the patient has any disease and, if so, give the patient appropriate recommendations. These tasks are not easy even during a face-to-face visit when the doctor can not only interview but also examine the patient, as well as use data on their current and past diseases, research data, and treatment from their medical records. In contrast, in the case of telephone consultation, the consultant is limited to only the data that can be obtained during the interview. When consulting by phone, the consultant does not have access to the patient's medical records, and does not have data on their current and past illnesses. The consultant cannot also examine the patient. Therefore, they have to base their conclusions only on the data they can obtain from the patient's responses.

The risk of medical error is high in normal face-to-face interaction with a doctor. It increases significantly in the case of a telephone consultation, in conditions of very limited information about the patient. The problem is further exacerbated by the fact that the responsibility of the doctor in case of failure to detect such a disease, in the case

of telephone consultation, in principle, is no different from the responsibility in the case of a face-to-face visit.

Thus, telephone consultation, on the one hand, opens up opportunities to improve the effectiveness of patient care. On the other hand, the price for this opportunity is quite high – an increase in the risk of error and the associated harm to the patient.

All this is especially important in the case of the so-called "must not miss" ("red flag") diseases. These are the most dangerous diseases, in the treatment of which early detection and treatment of the disease is a decisive factor in successful treatment, while at the further stages of the disease the ability to help the patient is greatly reduced (Ramanayake et al., 2018; Sanges et al., 2020; Sujitha et al., 2022).

Such a disease, as its very name says, "should not be missed" – should be suspected already at the first visit of the patient to the doctor. The consultant must first make sure that the patient does not have signs of any of the "must not miss" diseases. If such a disease is detected only at the later stages of the disease, when the opportunity to effectively help the patient will already be missed, the question immediately arises whether all the possibilities for its timely detection have been used by the consultant and if not all, then, accordingly, about their responsibility for incomplete usage.

In Lithuania, in 2000–2018, court cases related to the fact that a dangerous and urgent disease was not detected on time and as a result, the patient died or suffered damage to their health account for the majority of cases for compensation for damage to the patient's health (Labanauskas et al., 2010).

The requirement to use all possibilities fully applies to the telephone consultation. During the interview, the consultant should take all measures to identify symptoms of a possible dangerous disease that requires urgent action.

The most important of these measures in the case of "must not miss" diseases is the timely detection of signs that make it possible to reasonably suspect such a disease. However, in "must not miss" diseases, detection is often associated with additional difficulties. Firstly, the vast majority of such diseases are less common (hence another name for these diseases – "rare but dangerous") and, accordingly, the doctor may not have sufficient experience in their detection. Secondly, at the initial stage, such diseases are most often manifested by nonspecific symptoms characteristic of the most common and non-dangerous diseases.

Therefore, a necessary condition for their timely detection is a "high level of vigilance", when the doctor makes every effort to check whether there are symptoms that would reasonably suspect "not to miss the disease" (Porter, 2008; Stern et al., 2020).

The issue of "not to be missed" is central to the problems associated with the introduction and expansion of telephone consultations in general. It is the "can't miss" diseases that pose a major threat to the reliability of such counseling. A review of studies on the reliability of telephone consultations (Huibers et al., 2011) showed that they are generally correct at 86.7–90.2 %. Yet, this figure drops to 46 % in the case of rare but dangerous diseases (10 high-quality studies).

All this makes addressing the "must not miss" problem central to telephone counselling, the "key" to the wider use of primary telephone consultations. This promising form of patient care will spread if the organisation and methodology of counselling ensure the identification of symptoms in its course that make it possible to reasonably suspect a "must not miss" disease.

Unfortunately, the problem of identifying "must not miss" diseases in the course of telephone consultations has not yet attracted due attention. Information search for publications on this topic has been carried out. PubMed's database of medical publications, covering 34 million medical publications, was searched using the keywords: "must not miss disease" OR "red flag disease" OR "rare but dangerous disease" OR "must not miss condition" OR "red flag condition" OR "rare but dangerous condition" AND "telephone consultation" OR "remote consultation". The search revealed 20,293 publications dealing with either these diseases or remote (including telephone) consultations, but none were found dealing with these diseases concerning just telephone consultations.

Traditionally, telephone consulation is most often seen as primarily intended for mild cases that do not require special attention. It is assumed that a patient with a potentially serious and dangerous illness does not use a telephone consultation, but goes directly to the doctor. This idea contradicts the fact that in reality, a significant part of such diseases debuts with non-specific and in many respects typical for the most frequent and non-dangerous disease symptoms. Simultaneously, symptoms specific to a dangerous disease may be mild, hardly noticeable, and their detection may require special attention of the doctor.

This means that it is at this primary stage that everything that is necessary to identify the symptoms of "must not miss" diseases should be provided. Therefore, the first priority of a telephone consultation is not to help in mild cases but to timely respond to dangerous ones.

Thus, the preparation of a consultant, the organisation and implementation of a telephone consultation should, first of all, ensure timely detection of any signs of "must not miss" diseases. The presence or absence of such signs is the first thing the consultant should do after listening to the patient and asking clarifying questions.

The purpose of this article is to clarify the requirements for the education of a consultant and the organisation of a consultation that allow them to cope with this task.

In the following sections of the article, three requirements for a telephone consultation that ensure the detection of "must not miss" diseases will be discussed.

1 First Requirement: Full Differential Diagnosis of Patient's Complaints

For any complaint of the patient, for any symptom they mention, the consultant must have the full list of "must not miss" diseases that may be hiding behind such symptom. Medical diagnostic textbooks and handbooks discussing the main symptoms

that patients most often present with symptoms can be caused by one or many "must not miss" diseases (Porter, 2008). Thus, headaches can be not only a manifestation of a wide variety of common diseases, but also a "must not miss" series (Porter, 2008; Stern et al., 2020).

Therefore, in listening to the patient and the symptoms they mention, the consultant should think not only of the most likely given symptoms but of all possible rare but dangerous diseases. Here it is necessary to emphasise the word "all". Indeed, if the doctor forgets about any of these diseases, the forgotten one may well be the exact one that the patient has.

The consulting physician should be provided with a complete list of "must not miss" diseases for each of the symptoms encountered during the consultation. Counselling protocols should require the clinician to review each symptom reported by the patient to check for the presence or absence of all "must not miss" diseases that may present with the symptom.

2 Second Requirement: "All Questions Must Be Asked"

Description of any "must not miss" disease in the textbook, as a rule, contains many symptoms. However, at the initial stage, such a disease is likely to show some of them. Those may be the only basis to suspect a dangerous disease. Therefore, the doctor must ask all questions that can reveal the symptoms of this disease. Only in this case there is a guarantee that those will be set that allows one to reasonably suspect "must not miss" disease in this case.

Hence, when checking whether there are any symptoms that may indicate a "must not miss" disease, it is necessary to ask all questions for each possible disease, aimed at identifying all possible symptoms. Each of these questions should be considered as "not to miss symptom".

Therefore, for each "must not miss" disease that may be hidden behind the patient's complaint, the consultant must also have a complete list of its symptoms that can be identified during the questioning.

3 Third Requirement: Reasonable Correlation between Duration of Consultation and Its Content

Telephone consultation should ensure that the consultant has sufficient time to complete the first and second requirements. As stated above, if a patient comes to a telephone consultation with a health complaint, the consultant should do two things:

1) According to the first requirement, he should consider every "must not miss" that may be hidden behind this complaint;
2) According to the second requirement, he must check for the presence or absence of every symptom of each of these possible "must not miss" diseases.

For instance, in a case where a symptom reported by the patient can be caused by five different "must not miss" diseases, and each of them can be manifested by 10 different symptoms, such patient must be asked at least 50 questions (5 diseases × 10 symptoms = 50 questions).

The process of telephone consultation involves the patient listening to the question, them thinking about it and then answering the question. The doctor may need to ask further clarifying questions and discuss the answer with the patient. Considering that all this may require at least one minute, the total patient interview should take 50 minutes. This further means that the consultant will interview no more than 8 patients per shift. However, from an economic and managerial point of view, the consultation cannot take as long. Modern health care is squeezed in the tight grip of economic restrictions. Studies of the duration of telephone consultations have shown that they are much shorter than is necessary to ask all required diagnostic questions. Moreover, they are much shorter than the usual face-to-face consultations. Studies have shown that a telephone consultation lasts on average about five minutes and does not exceed 10 minutes (Mohammed et al., 2012; McKinstry et al., 2010).

The world practice of telephone consultations is also based on the premise that such counselling should be short, and the counsellor's conclusion is based on several questions. The most popular sets of counseling protocols, such as Julie K. Briggs (2021), David A. Thompson, Barton D. Schmitt, Sheila Wheeler contain a strictly limited number of questions and focus on the most common illnesses.

Thus, the consultant has only a fraction of the time that they need to reliably detect "must not miss" diseases. Therefore, during the time allotted for a consultation, they do not have time to do everything that is necessary for the timely detection of such diseases, and at least some of them will be missed.

This is fraught with very serious consequences for both the patient and the doctor. It is obvious that the doctor-consultant is faced with the need to look for ways to solve this problem – to find ways not to miss the "must not miss" symptoms of the disease, despite the lack of time.

One of the ways to resolve this conflict is to focus on the most probable diseases. The consultant focuses their attention on the most likely, most common diseases in their daily practice and uses the limited consultation time available to check if there are signs of one of them. In this case, "must not miss" diseases, as rarer ones, are out of their attention, since there is not enough time to detect them. This approach is best expressed by the well-known medical wisdom that says: "If you hear a clatter of hooves, think of a horse, not a zebra" (Goldstein, 2012). This "horse, not zebra" approach is widespread in everyday medical practice and ensures its ability to adapt to equally widespread limitations of time resources.

The implications of such an approach need to be considered as well. A symptom that can be caused by a variety of diseases, among which one is dangerous, requires immediate response; fortunately, situations like this are rare, occurring in one out of

a thousand cases. If the doctor, due to lack of time or for other reasons, is guided by the "horse and zebra" rule and does not check whether there are signs of this disease, the probability is very high (999 out of a thousand) that the specialist will not be mistaken and that the rare disease symptom in reality does not exist. Moreover, they may encounter this symptom 998 more times and again will not be mistaken. However, in one out of 1000 cases, the "horse and zebra" rule will still naturally lead them to an error, which, due to the danger of this disease, will have serious consequences for the patient and for the doctor.

In every case, such an error is unlikely (only one chance in a thousand). However, throughout their career, the doctor examines many thousands of patients and may encounter such symptom many thousands of times. Therefore, with this approach, they are "programmed" to make a mistake and harm the patient and the right that follows from all this new responsibility. When a chance does bring the doctor to such a patient and the doctor misses the "must not miss" signs of the disease, they will be accused of being negligent and therefore not checking for signs of a dangerous disease.

In fact, the error will unlikely be caused due to negligence, but rather due to the fact that the doctor has followed the established and in most cases justified practice. This practice has evolved due to the limited duration of the consultation, which in turn reflects limited economic conditions. This practice is fraught with negative consequences for both the patient and the doctor. The most important consequence for the patient is late diagnosis, missed treatment opportunities, and, as a result, damage to health.

The second consequence is loss of confidence in the doctor and medicine. The patient expected the doctor to be able to diagnose any disease. No one warned them that by turning to a telephone consultation, they can only count on identifying the most common diseases. Therefore, the doctor's mistake is considered by the patient as inability or unwillingness of the doctor to fulfil their duties.

The consequence for the doctor is that he is found guilty of what they have no blame in, namely, that they follow the common practice. The mistake is not due to their negligence or lack of qualification, but to the fact that they have been unlucky and the case has brought them to a patient who has a rare "must not miss" disease.

The second way is diagnostic identification of rare diseases. During the interview of the patient, several symptoms are revealed, which together add up to a picture of a certain disease, which the doctor immediately recognises. This recognition is immediate and frees the physician from having to check all other suspicions. Therefore, it allows diagnosis or at least suspecting a "must not miss" disease in the shortest possible time.

The possibility of such "recognition" is supported by numerous studies showing the prevalence of such practice in everyday medical practice (Japp et al., 2018). In the case of time and data limitations typical of telephone counselling, such instant "identification" should play a particularly important role. Unfortunately, in rare diseases this diagnostic approach is ineffective. The doctor recognises diseases that are encountered quite often. This will not work in the case of a rare disease that the doctor will encounter only a few

times during their career. In addition, "identification" works best if they meet a typical, textbook-described picture of the disease and the entire set of characteristic symptoms is observed. Unfortunately, such a typical and complete picture appears only in the later stages of the disease, when it manifests itself "in full force". Meanwhile, in the case of dangerous but rare diseases, it is required to establish the disease at the earliest stage when the chances of stopping or slowing down its progression are highest.

The implications of this approach are identical to those of the first. The patient expects the doctor to diagnose any disease, not just ones that manifest themselves with typical symptoms and are well "recognised". Therefore, in this case, the doctor's mistake is considered by them as the inability or unwillingness of the doctor to fulfil their duties. In this case, the law places all the blame for the fact that a dangerous disease was not detected promptly on the doctor. The fact that rare, "must not miss" diseases that occur only a few times throughout a career are poorly recognised and not carefully considered.

The third way is to spare time by using the doctor's medical intuition and practical experience. In conditions of limited time, an experienced doctor often intuitively feels the right direction in the search for disease. This feeling helps them narrow their search considerably and immediately suspects the disease that has caused the observed symptom. Telephone consultation is precisely the case when, due to limited time and data, medical intuition should play a particularly large role. However, this approach does not solve the problem of early detection of "must not miss" diseases. Of course, in the course of a telephone consultation, medical intuition can suggest the correct diagnosis immediately. However, the law requires correct diagnosis not sometimes but in every single case. In some cases, intuition may not suggest the correct diagnosis. Moreover, whether intuition works or not depends on the will of the doctor; it is a spontaneous process. Therefore, the doctor's legal responsibility for the results of this spontaneous process, independent of their will, is very problematic. As a result, this approach generates the same consequences as the previous two. On the one hand, this is damaging and deceives legitimate expectations of the patient; on the other hand, it supposes laying responsibility on the doctor for something that does not depend on their will – inability to perform all the actions (ask all the questions) necessary to reliably identify symptoms of rare but dangerous diseases because of restricted consultation time.

The once wise Don Quixote, instructing Sancho Pancho on how to fulfil the role of governor, said: "*Most importantly, Sancho, never issue laws that your loyalist cannot comply with.*" The responsibility of the doctor in all the considered approaches violates this establishment. The doctor has duties that exceed their ability and responsibility for events that they are unable to prevent.

Totality of the consequences of excessive legal requirements is known as "defensive medicine". These are measures by which the doctor is protected from impracticable legal requirements and the unjustified liability arising from them (Sekhar & Vyas, 2022). Measures of "protective medicine" include avoiding any more or less responsible decisions,

prescribing unnecessary tests and drugs, avoiding (unjustified referral to other doctors) any embarrassing cases.

In the case of telephone consultation, a manifestation of "defensive medicine" is a direct or indirect refusal to consult a patient. This is, firstly, a direct recommendation to completely abandon the initial telephone consultation, and use it only in further treatment when the patient has already been examined, the diagnosis is clear and the patient just needs to clarify the details of the treatment (Katz et al., 2008; Bunn et al., 2004; Hildebrandt et al., 2006). This creates an opportunity for the doctor to avoid risks and responsibilities that they face during the initial telephone consultation. However, this is achieved at a high price – giving up all the opportunities that telephone consultation creates.

Secondly, it is an indirect avoidance. In this case, the initial consultation is still carried out; however, the same fear of the consultant doctor to miss a dangerous disease during a brief telephone conversation with the patient often prompts the doctor to turn the consultation into a non-specific, non-binding introduction to the subsequent referral to the doctor. This approach means giving the appearance of a telephone consultation without actually taking advantage of its benefits.

The main solution to these problems should be a clear definition of the boundaries of the real possibilities and responsibilities of the doctor in the course of telephone consultations. This requires that the consulting physician be held responsible only for those actions that he can actually perform. For this, in turn, it is required that the range of diseases be accurately established, including "must not miss", which can be identified in the conditions of a telephone consultation within the time allocated for such counselling. The patient who seeks consultation should be warned about the limits of the doctor's diagnostic possibilities. They should have access to information about the signs of which "must not miss" diseases are checked during the consultation and which ones can remain out of the doctor's attention. The patient should also have access to information about alternative ways of obtaining information that they cannot obtain during a telephone consultation.

Conclusions

1. Initial telephone consultation opens new prospects for improving the quality, accessibility and cost-effectiveness of medical services. However, it significantly increases the risk of medical errors, both diagnostic (the disease that is actually the source of the patient's complaints may not be suspected) and therapeutic (incorrect recommendations).
2. The main source of medical errors during consultations are rare, but dangerous ("must not miss" diseases) require immediate response.
3. To ensure the reliability of a telephone consultation, the counsellor must have a complete list of "must not miss" diseases, the symptoms of which occur during counselling.

4. For each of these "must not miss" diseases, there should be a complete list of symptoms that can manifest at an early stage.
5. Based on these lists, it is necessary to establish the time required to check for the presence of symptoms of each of the possible "must not miss" diseases.
6. Based on an assessment of available resources and the danger and rarity of each "must not miss" disease, it is necessary to determine whether the available resources allow for the time necessary to detect it and, accordingly, whether it can be included in the list of diseases that can be identified or suspected during a telephone consultation.
7. To clarify "must not miss" diseases is rather complicated due to their extreme rarity, less danger and limited opportunities for telephone consultations.
8. Lists of "must not miss" diseases, identification of which during telephone consultation cannot be ensured, should be available to everyone who applies for such consultation. These individuals should be informed where they can go for advice on non-listed conditions.
9. The consultant cannot be held liable for not detecting signs of a disease that are not among the "must not miss" diseases for which the consultation provides verification of the presence of their signs.

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Right to Copy of Medical Records Free of Charge According to Article 15 (3) Sentence 1 of the GDPR vs. Mandatory Reimbursement of Costs by Patient under National Law

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Abstract

The article covers the topic of compatibility of national regulations, which contain an obligation for the patient to reimburse costs for copies from the medical record, with the regulations of the GDPR. The discussion is based on the example of the German regulation in Section 630g (2) of the German Civil Code (BGB) since the German Federal Court of Justice (2022) recently submitted the question of the compatibility of this provision with the GDPR to the ECJ (European Court of Justice) for a preliminary ruling. The study also focuses on Austria, where the Supreme Court of Justice already in 2020 had assumed that the comparable provision in Art. 17a (2) lit. g of the Vienna Hospital Act 1987 could be a permissible restriction within the meaning of Art. 23 (1) lit. e of the GDPR. The article concludes that the request for a copy of the medical record is not "excessive" within the meaning of Art. 12 (5) sentence 2 of the GDPR, although the request did not serve data protection purposes but served to assert claims for damages against the physician. Furthermore, the article assumes that a national provision that requires the patient to bear the costs in any case is not a "necessary and proportionate measure" within the meaning of Art. 23 (1) of the GDPR. However, a restriction of the physician's obligation to provide copies free of charge based on the wording of Art. 15 (3) sentence 1 of the GDPR might be possible.

Keywords: right to copies free of charge, necessary and proportionate national measures, patient's personal data, medical record, European Court of Justice, German Federal Court of Justice, Austrian Supreme Court of Justice, health law.

Introduction

On May 25th 2018, the Regulation (EU) 2016/679 (known by the abbreviation GDPR), adopted in April 2016, superseded the former Data Protection Directive 95/46/EC and came into force. Article 15 (3) sentence 1 of the GDPR contains the obligation of the controller (i.e. the responsible person) to provide a copy of the personal data undergoing processing to the data subject. Just for any further copies requested by the data subject, the controller may charge a reasonable fee based on administrative costs in accordance with Art. 15 (3) sentence 2 of the GDPR. Possibly deviating from this, some provisions of the EU Member States (e.g. in Austria and Germany) include the patient's general obligation to pay for the cost of copies of their medical record. This leads to the question of the relationship between these national provisions and the EU law.

Both the ranking of the two levels of regulation and the possible deviations contained in the GDPR must be discussed here. At this point, the conceptual difference between the "duplicates of the medical records" according to Section 630g (2) sentence 1 of the BGB and the "copy of the personal data undergoing processing" according to Art. 15 (3) sentence 1 of the GDPR must also be considered. The fact that the German Federal Court of Justice (2022) recently submitted these questions to the ECJ for a preliminary decision offers a timely occasion to discuss these questions.

1 Right to Copies Under the German Patient Rights Act

With the German Patient Rights Act from 2013 (German Federal Law Gazette I, 2013), the legislature has expressly enshrined a patient's right to inspect their own medical record in the German Civil Code (BGB). Long before that, the German Federal Constitutional Court and the German Federal Court of Justice had already derived such a right to inspect medical records from the principle of human dignity and the general right to self-determination according to Art. 1 (1) in conjunction with Art. 2 (1) of the Basic Law for the Federal Republic of Germany.

Section 630g (1) & (2) of the BGB (Inspection of the medical records):

> "*(1) The patient is on request to be permitted to inspect the complete medical record concerning him/her without delay to the extent that there are no considerable therapeutic grounds or third-party rights at stake to warrant objections to inspection. Reasons must be provided for a refusal to permit inspection. Section 811 [BGB] is to be applied with the necessary modifications.*
>
> *(2) The patient can also request electronic duplicates of the medical records. He/she shall reimburse to the treating party the costs incurred.*"

According to Section 630g (1) sentence 1 of the BGB "the patient is […] to be permitted to inspect the complete medical records concerning him/her without delay to the extent that there are no considerable therapeutic grounds or third-party rights at stake to warrant objections to inspection". This basic statement is supplemented by

the right to "electronic duplicates of the medical records" according to Section 630g (2) sentence 1 of the BGB. The emphasis on the electronic form contained therein was only included in the text in the course of the legislative process (German Bundestag's documents, 17/10488) and *prima facie* gives the grammatical impression of a restriction. However, this was not intended by the legislature. The patient's right not only extends to the paper form but also to electronically stored records and data in the form of a file (German Bundestag's documents, 17/11710).

Based on the German civil law basic rule for the presentation of documents in Section 811 (1) sentence 2 of the BGB (German Bundestag's documents, 17/10488) the patient must pay the treating person according to Section 630g (2) sentence 2 of the BGB reimbursement for requested copies. The same principle applies to the professional law by the Chambers of Physicians according to Art. 10 (2) sentence 2 of the (Model) Professional Code for Physicians in Germany. According to this, "*the patient must be given copies of the documents in return for reimbursement of the costs*". The law does not set an absolute cost limit but corresponding to Section 7 (2) No. 1 of the German Judicial Remuneration and Compensation Act, 0.50 euros per page for the first 50 pages and 0.15 euros for each additional page are generally considered reasonable (Gruner, 2021; Munich I District Court, 2008).

On the one hand, this can result in considerable costs for the patient and thus in individual cases can influence their decision to request copies. On the other hand, the obligation to bear the costs protects the physician from a considerable and at the same time free use of their resources by the patient, which goes beyond the general civil law obligation to enable inspection of documents according to Section 810–811 of the BGB. Compared to the general German data protection law under the former Federal Data Protection Act (before the GDPR came into force), the Higher Regional Court Hamm, for example, gave priority to the special claim according to Section 630g of the BGB. Thus, the principle under the data protection law that information should be free of charge according to Section 34 (8) sentence 1 of the former German Federal Data Protection Act was superseded if the patient wanted to inspect their medical record.

2 Right to Information and Receipt of Copies According to Regulation (EU) 2016/679 (GDPR)

The GDPR also contains rules on the right to information about personal data. These regulations can contradict national regulations; nevertheless, they have a fundamental application priority (European Court of Justice, 1964). This results from the direct anchoring of the right to information in Art. 15 of the GDPR and the associated conversion of the previous regulations of national data protection law into directly binding (Article 288 (2) of the TFEU) EU secondary legislation.

In accordance with Art. 15 (1) of the GDPR, the data subject has the right to request a confirmation from the controller as to whether personal data relating to them

are being processed. If this is the case, such person also has the right to information about the data according to Art. 15 (1) of the GDPR. According to the relevant recital No. 63 sentence 2 of the GDPR, this right expressly "*includes the right for data subjects to have access to data concerning their health, for example, the data in their medical record containing information such as diagnoses, examination results, assessments by treating physicians and any treatment or interventions provided*." In addition to this right to information, Art. 15 (3) sentence 1 of the GDPR obliges the responsible person (i.e. the controller) to provide a copy of the personal data undergoing processing. Art. 4 No. 7 of the GDPR designates any natural or legal person, public authority, agency or other body as "controller" which, alone or jointly with others, determines the purposes and means of the processing of personal data. In the context of health data, this can be the physician in their own practice office, an association for practice of the profession or the legal entity of a hospital or medical care centre. Furthermore, according to Art. 26 of the GDPR, joint responsibility of several practitioners is also possible.

Compliant with Art. 4 No. 1 of the GDPR, "personal data" means any information relating to an identified or identifiable natural person ("data subject"); an identifiable natural person is one who can be identified, directly or indirectly, in particular, by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person. This is worded very broadly and is intended to provide comprehensive protection for the data subject.

The same also applies to the concept of processing data according to Art. 4 No. 2 of the GDPR. In this context processing "means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction".

In an information paper on the requirements for data protection in the practice of medicine, the German Medical Association pointed out that a fundamental distinction must be made between a right to information under the EU data protection law and the patient's right to inspect their medical record (German Federal Medical Association, 2018). On closer inspection, however, it becomes clear that the patient's wish to have access to their medical record may fulfil both criteria simultaneously. Therefore, both regulations (Sec. 630 (2) sentence 1 of the BGB and Art. 15 (3) sentence 1 of the GDPR) grant the patient's right to receive copies from their medical data. Deviating from Sec. 630g (2) sentence 2 of the BGB, the claim from the GDPR is not linked to the patient's obligation to bear the costs. This becomes particularly clear in Art. 15 (3) sentence 2 of the GDPR, according to which the "*controller may charge a reasonable fee based on administrative costs for any further[!] copies requested by the data subject*." This principle is also confirmed by Art. 12 (5) sentence 1 of the GDPR, according to which all

notifications and measures of Art. 15 to 22 and Art. 34 of the GDPR must be provided free of charge.

In accordance with Art. 12 (5) sentence 2 of the GDPR, the situation is different only for manifestly unfounded or excessive requests from the data subject, in particular because of their repetitive character. For this reason, the obligation to bear the costs already for the first copy under Sec. 630g (2) sentence 2 of the BGB seems to be superseded by the higher-ranked order (Walter/Strobl, 2018) according to Art. 15 (3) sentence 1 in conjunction with Art. 12 (5) sentence 1 of the GDPR. This priority has now also been confirmed by some German courts of lower instance (Dresden District Court, 2020).

3 Preliminary Ruling Request from the Federal Court of Justice to the ECJ

For a number of years, there has been a discussion in the legal literature (Bayer, 2018; Hahn, 2019; Hartwig & Schäker, 2020; Walter & Strobl, 2018) as to whether Sec. 630g (2) sentence 2 of the BGB anchored obligation to bear costs is a permissible national deviation within the meaning of Art. 23 (1) of the GDPR. In a decision from 2020, the Austrian Supreme Court of Justice assumed that a comparable Austrian regulation on the obligation to bear costs falls under the possibility of limitation according to Art. 23 (1) lit. e of the GDPR. In accordance with Art. 23 (1) lit. e of the GDPR, the Member State law, which the data controller or processor is subject to, may restrict by way of a legislative measure the scope of the obligations and rights provided for in Art. 12 to 22 and Art. 34 of the GDPR when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard a Member State's financial interests, including public health and social security. However, in this case a submission by the Austrian Supreme Court of Justice to the ECJ was not made (2020).

Sec. 17a (1) & (2) lit. g of the Vienna Hospital Act 1987 (unofficial translation):

> "*(1) The legal entity of the hospital has to ensure that the rights of the patients in the hospital are observed and that the patients are able to exercise their rights in the hospital, taking into account the purpose of the hospital and the range of services.*
>
> *(2 lit. g) This applies in particular to the following patient rights: the right to access the medical history or to have a copy of the medical history made against reimbursement of costs.*"

In Germany, on the other hand, there has not yet been a decision by a Federal Court about the relationship between Sec. 630g (2) sentence 2 of the BGB and Art. 15 (3) sentence 1 in conjunction with Art. 12 (5) of the GDPR. Nevertheless, now such a legal dispute has reached the German Federal Court of Justice. This lawsuit concerns a patient's claim against their dentist for a free copy of all of their medical record held

by the defendant. In this way, the plaintiff wants to receive the necessary documents to examine possible claims for damages due to an alleged incorrect treatment. The defendant believes that they only have to provide a (full) copy of the patient's record in return for reimbursement of costs.

In 2022, the German Federal Court of Justice has suspended the proceedings and submitted them to the ECJ for a preliminary ruling on the scope and possible exceptions to the right to information in accordance with Art. 15 of the GDPR. First, the German Federal Court would like to know whether Art. 15 (3) sentence 1 in conjunction with Art. 12 (5) sentence 2 of the GDPR should be interpreted so that a request for a copy of the medical record is "excessive" if the copy is not requested for data protection purposes mentioned in recital 63 of the GDPR but serves to assert claims for damages against the physician. Secondly, the Court asks the ECJ to decide whether the obligations and rights resulting from Art. 15 (3) sentence 1 in conjunction with Art. 12 (5) of the GDPR can be restricted in accordance with Art. 23 (1) lit. i of the GDPR by a national regulation that (1) was enacted before the GDPR came into force and (2) that always and independently of the specific circumstances of the individual case provides a reimbursement claim by the physician against the patient if a copy of the patient's personal data from the patient's record is handed over by the physician. In addition, the German Federal Court of Justice would like to know whether Art. 23 (1) lit. i of the GDPR is to be interpreted in such a way that the "rights and freedoms of other persons" mentioned there also include their interest in the reimbursement of the costs for issuing a copy of the data in accordance with Art. 15 (3) sentence 1 of the GDPR and other costs for the provision of the copy.

In contrast to the argumentation of the Austrian Supreme Court of Justice from 2020, the alternative reason for a restriction, "financial interests, including public health and social security", according to Art. 23 (1) lit. e of the GDPR was not addressed at all in the German referral decision. On the one hand, this could be due to the respective national financing structure of the health care system. On the other hand, an obligation to bear the costs for copies of medical records based solely on "*important economic and financial interests in the area of public health and social security*" is likely to be significantly less promising than the path chosen by the German Federal Court of Justice via Art. 23 (1) lit. i of the GDPR. Finally, the German Federal Court of Justice would like to know from the ECJ whether Art. 15 (3) sentence 1 of the GDPR justifies a right to the transfer of copies of all parts of the patient record containing the patient's personal data in the physician-patient relationship, or whether the patient only has a right to obtain a copy of the personal data as such, allowing the physician to compile such data according to their own views.

4 Sec. 630g (2) Sentence 2 of the BGB as Permissible Limitation of Art. 15 (3) Sentence 1 of the GDPR

4.1 Interests in Receiving Personal Data that Deviate from Recital 63 of the GDPR as "Excessive Requested" within the Meaning of Art. 12 (5) Sentence 2 of the GDPR

It would be conceivable to restrict the claim from Art. 15 (3) sentence 1 of the GDPR according to Art. 12 (5) sentence 2 of the GDPR with the argument that the patient does not want to receive the copy for any data protection purposes, but to prepare for a claim for damages against the physician This consideration could be based on the fact that, in the case of excessive requests, the persons obliged to provide information may demand a reasonable fee, considering the administrative costs for providing the information or notification or taking the requested measure, in accordance with Art. 12 (5) sentence 2 lit. a of the GDPR.

Two approaches are conceivable for this route. Primarily, it is conceivable that recital 63 sentence 1 of the GDPR should be viewed as a restriction of the right to information under Art. 15 (3) sentence 1 of the GDPR. Recital 63 sentence 1 of the GDPR states that a data subject should have the right of access to personal data which have been collected concerning them, and to exercise that right easily and at reasonable intervals, in order to be aware of, and verify, the lawfulness of the processing. One could deduce from this that a request for copies in order to prepare a claim for damages is not covered by the protective purpose of Art. 15 (3) sentence 1 of the GDPR. A similar argument was recently used by the Regional Social Court of North Rhine-Westphalia (2021) for the relationship between Art. 15 (3) of the GDPR and the granting of procedural file inspection in the form of a right to free delivery of a CD-ROM with all administrative processes requested by the plaintiff. However, what speaks against this view is that the wording of Art. 15 (3) sentence 1 of the GDPR itself does not contain any such restriction of the motivation for the request (German Federal Court of Justice, 2022).

Purpose of the right to information (recital 63 sentence 1 of the GDPR: creating awareness of data processing and the possibility of checking legality) can also be achieved if the request is motivated by another intention (German Federal Court of Justice, 2022). Therefore, it does not matter for what purpose the right to information is asserted against the treating physician (Balke, 2022).

Another approach to excluding the right to a free copy of the medical record from Art. 15 (3) sentence 1 of the GDPR could be based on the fact that the patient's request could be assessed as an "abusive practice". "It is settled case-law that there is, in the EU law, a general legal principle that the EU law cannot be relied on for abusive or fraudulent ends" (ECJ, 2019, 2018, 2017).

However, the above statements on the scope of the claim from Art. 15 (3) sentence 1 of the GDPR would also argue against such an argument. It should also be considered that the patient has a right to information about any treatment errors acc. to German

treatment contract law in accordance with Sec. 630c (2) sentence 2 of the BGB: "If circumstances are recognisable for the treating party which give rise to the presumption of malpractice, they [the physician] shall inform the patient thereof on request or in order to avert health risks." It, therefore, seems doubtful to consider the motivation of a patient who requests copies in order to assert a right to information to which he is entitled under national law to be an abuse of Union law only because, contrary to national law, access to copies is granted free of charge.

An obligation for the patient to bear the costs of the copy also cannot be justified by Art. 15 (4) of the GDPR. Thereafter, the right to obtain a copy referred to Art. 15 (3) of the GDPR "shall not adversely affect the rights and freedoms of others". However, the restriction does not relate to the question of the cost burden, but to the content of the data and the unreasonableness of the copy transmission itself (Hahn, 2019). This understanding is supported by the fact that recital 63 sentence 5 of the GDPR mentions "trade secrets or intellectual property and in particular the copyright protecting the software", as an example (Walter & Strobl, 2018).

4.2 Admissibility of National Restrictions within the Meaning of Article 23 of the GDPR Already Having Existed before the EU law came into force

It is arguable whether Art. 23 of the GDPR also covers such regulations from the national law of the member states that already existed when the GDPR came into force. If this is not the case, neither Sec. 630g (2) sentence 2 of the BGB from 2013 nor Sec. 17a (1) & (2) lit. g of the Vienna Hospital Act 1987 would be a suitable basis for a restriction of the obligations and rights provided for in Articles 12 to 22 and Article 34 of the GDPR. Especially the fact that Art. 23 of the GDPR requires an examination of proportionality by the national legislature could speak against an application of the deviation option to older regulations originating from the time before the GDPR came into force.

With a view to a need for a proportionality test, the Austrian Supreme Court of Justice (2020) also overturned the decision of the lower court and referred it back for retrial. However, the Supreme Court of Justice related the proportionality test solely to the statutory provision itself and not to whether the national legislature carried out such a proportionality test when this provision was issued. The question of whether Art. 23 of the GDPR also covers older regulations as stated was not discussed the by the Austrian Supreme Court of Justice at all. Rather, this result was simply subordinated by their substantive discussion with Sec. 17a (1) and (2) lit. g of the Vienna Hospital Act 1987 in the decision. The German Federal Court of Justice (2022), on the other hand, did not take this point for granted and therefore submitted it to the ECJ as a question.

The wording of Art. 23 of the GDPR does not exclude its applicability for Sec. 630g (2) sentence 2 of the BGB from 2013 or Sec. 17a (1) and (2) lit. g of the Vienna Hospital Act 1987 and comparable older national regulations. However, a sufficient proportionality test by the legislature within the meaning of Art. 23 of the GDPR could prevent the fact

that at the time of enactment of Sec. 630g (2) sentence 2 of the BGB in 2013 the Directive 95/46/EC "on the protection of individuals with regard to the processing of personal data and on the free movement of such data" (the precursor to GDPR) was still in force.

Article 12 lit. a of this Directive included the principle that when a right to information was asserted, only an obligation to bear "excessive expense" was excluded, but there was no provision for complete freedom from costs. Due to the "new" complete freedom from charge according to the GDPRs since 2018, the physician who is obliged to provide information is now more heavily burdened. These circumstances could not be fully taken into account in 2013. However, it must be considered that the right to information from Sec. 630g (2) of the BGB is the codification of a principle that case law developed directly from fundamental rights.

The German legislator also explicitly emphasised the constitutional connection of the provision in the explanatory memorandum to the law (German Bundestag's documents 17/10488). Since it has linked the right to copies of the medical record in the German codification to an obligation to reimburse costs, it can be assumed that sufficient balancing of the fundamental rights and freedoms of the patient with the interests of the person obliged to provide information has been carried out (German Federal Court of Justice, 2022). On the other hand, a balancing decision by the national legislature can also be seen in the fact that the obligation for the patient to bear the costs was not changed in the national (German) GDPR Amendment Act (Gruner, 2021). Ultimately, this is a case of regulation by non-regulation. Under these conditions, Art. 23 of the GDPR should also allow restrictions through older national laws in principle.

4.3 Sec. 630g (2) Sentence 2 of the BGB as Permissible Limitation within the Meaning of Art. 23 (1) lit. i of the GDPR

Section 630g (2) sentence 2 of the BGB could be a restriction permitted under the EU law within the meaning of Art. 23 (1) lit. i of the GDPR. For this purpose, the national regulations must serve to protect the data subject or the rights and freedoms of others. On the one hand, it is already debatable whether the term "other person" also includes the controller itself within the meaning of Art. 4 No. 7 of the GDPR (Johannes & Richter, 2017). Ultimately, this would considerably expand the possibility for national legislators to limit the obligations under the GDPR (Johannes & Richter, 2017).

On the other hand, it is doubtful whether the rule stated in Sec. 630g (2) sentence 2 of the BGB that the patient has to bear the costs is a "necessary and proportionate" restriction of the Union law principle of freedom from costs to protect the "data subject or the rights and freedoms of others". Firstly, there is the fact that Section 630g (2) sentence 2 of the BGB does not contain any differentiation according to the circumstances of the individual case. Considering the German regulation, the patient would ultimately have to bear the costs even if the burden associated with being free of charge was actually reasonable for the treating side. It is not apparent why exactly the opposite

of Art. 15 (3) sentence 1 of the GDPR, regulated in Sec. 630g (2) sentence 2 of the BGB, would be more appropriate and better suited to protect the rights and freedoms concerned (Gruner, 2021).

Secondly, it can be assumed that the European legislature had in mind the economic burdens associated with the patient's right to a free copy when enacting Art. 15 (3) of the GDPR (German Federal Court of Justice, 2022). The European legislature obviously did not classify this as fundamentally inappropriate. This understanding is also supported by the fact that recital 63 sentence 2 of the GDPR explicitly mentions "data in the [...] medical records" (Walter & Strobl, 2018; German Federal Court of Justice, 2022) in this context.

Thus, it can be assumed that Art. 23 (1) lit. i of the GDPR does allow national deviations with regard to a patient's obligation to bear the costs for the first copy in principle (Walter & Strobl, 2018). However, a blanket transfer to the patient side, as is currently provided for in German law, is not suitable to fulfil these requirements (Walter & Strobl, 2018).

4.4 Scope of Terms "Copy of the Personal Data" in Art. 15 (3) Sentence 1 of the GDPR and "Duplicates of the Medical Records" in Sec. 630g (2) Sentence 1 of the BGB

The final and, according to the view represented here, the most promising possibility of restricting the right to a free "copy of the (full) medical record" under the GDPR can be derived from the wording of Art. 15 (3) sentence 1 of the GDPR. Sec. 630g (2) sentence 1 of the BGB which expressly grants a patient's right to "duplicates of the medical records". In contrast, the controller shall provide a "copy of the personal data undergoing processing" according to Art. 15 (3) sentence 1 of the GDPR. From this difference in wording, it can be deduced that the right to a data copy under the EU law only extends to the entire medical record if this is necessary for the fulfilment of the obligations under Art. 15 (3) sentence 1 of the GDPR (Gruner, 2021; Piltz & Zwerschke, 2021; Bayer, 2018). Otherwise, the physician (controller) already fulfils their duty by simply copying the data. However, due to the broad understanding of the term "personal data" according to Art. 4 No. 7 of the GDPR, this should also be very extensive in practice.

Conclusions

The forthcoming decision of the ECJ on the relationship between Art. 15 (3) of the GDPR and the patient's obligation to bear the costs for a copy of the medical record under national law is eagerly awaited. The submission by the German Federal Court of Justice gives the ECJ the opportunity to clarify a large number of legal issues in the context of Articles 12, 15 and 23 of the GDPR. Although the decision will be based on German law as an example, its justification will also be important for the legal systems of other EU member states.

However, since the questions referred by the Federal Court of Justice are interdependent, it is possible that the ECJ cannot answer some questions because they are excluded by the answer to a preliminary question. This concerns in particular the suitability of Sec. 630g (2) sentence 2 of the BGB as a restriction within the meaning of Art. 23 (1) lit. i of the GDPR. Should the ECJ affirm this differently than represented here, the scope of the term "copy of the personal data" according to Art. 15 (3) sentence 1 of the GDPR is no longer relevant in the context of German medical records. In any case, it is to be hoped that the ECJ will create far-reaching clarity for legal practice with its decision on the obligation to bear costs, so that physicians and hospitals can deal with the corresponding claims of patients more securely in the future.

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Challenges of Digitalisation in Judicial System

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Abstract

Digitalisation opens the debate on the fundamental principle of a democratic society: legitimacy of decisions. There is a relationship of trust between a society living in a law-governed legal area and a judge based on the expectation that the relationship between the individual and the state is governed by a public contract that defines the rights and obligations of all parties involved to represent the common interest.

The aim of the study is to detect challenges of digitalisation in judicial system and define whether it is possible to include a decision algorithm in such a public contract and what innovations that guarantee efficiency, legal certainty and access to justice could be.

Keywords: artificial intelligence, judicial system, litigation, fundamental rights, fair trial.

Introduction

British scientists have published a study looking at an algorithm that can predict the outcome of rulings by the European Court of Human Rights (Aletras et al., 2016). The forecast made by the automated system coincided with almost 600 judgements of the European Court of Human Rights in 80% of cases.

Around the world, artificial intelligence has evolved in many industries. Attempts have been made to develop algorithms tailored to judicial system. There are also many examples of implementation of algorithms in judicial system in Europe. In the United Kingdom, the judiciary is developing an automated online tool for small claims in civil matters. This is called Online Dispute Resolution.

The United States has developed the prediction algorithm COMPAS, which is primarily used in the criminal justice industry used by the US State Court and Probation Service. The system helps to determine whether a person is liable to a suspended sentence

or whether a custodial measure is still required. The United States is developing a predictive method of judicial decisions based on weight of evidence to determine whether there is prejudice (Classification module). This is the basis for launching a debate on the introduction of artificial intelligence in judicial system, including in Latvia.

Initially, there is a need to determine how to qualify artificial intelligence in judicial system. Two types of algorithms can be developed in judicial system: algorithms that support decision making, or "supporting algorithms", and algorithms that make their own decisions, or "decision algorithms".

Algorithms that support decision-making should aim to provide support to the decision-making process by facilitating and improving efficiency of the judicial process. In contrast, algorithms that make their own decisions would aim at providing an automated court system. It is this system introduced by algorithms that would be criticised, questioning the ability of artificial intelligence to respect fundamental human rights.

1 Artificial Intelligence as Auxiliary Tool for the Judicial Process

The European Convention of human rights (ECHR) is providing the right of a fair trial in its article 6.1:

> "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*".

The Charter of fundamental rights of European Union is providing the right of an effective remedy and a fair trial in its article 47:

> "*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented*".

These requirements can be supported by the use of algorithms, granting to the Court more tools to resolve litigation. Artificial intelligence could be used as an auxiliary tool for the judicial process by pre-procedural assistance, supporting judges for examinations of the admissibility of the action or even by assisting judge during the judicial process.

Pre-procedural assistance allows the litigant to evaluate the opportunity of their action by indicating in algorithms some information regarding their situation. Based on a large amount of judicial information (law, case law), the algorithm can indicate the probability to win a case. This information provided by statistics and graphs guarantees greater judicial security: the litigant can assess if it were interesting to go before a judge or if an alternative dispute resolution process would be more suitable. First, it

is a guarantee in terms of reasonable time because considering the opportunity of its action by an anticipation of a potential decision, it can limit the congestion of the Courts.

By supporting judges for examination of the admissibility of the action, in fact, algorithms help judges in assessing time prescription, or also considering possibility to benefit from a legal aid during the trial. European Court of Human Rights has already considered this option and concluded that an examination procedure assessing chance of a potential appeal is acceptable regarding the ECHR (ECHR, 28 January 2003, 34763/02, Burg et a v. France). Moreover, a State can also reject a legal aid funding its decision on lack of legal basis in a demand (ECHR, 26 February 2002, 46800/99, Del Sol v. France). Finally, observing these possibilities offered to the States to limit access to Court algorithms can promote judicial security and good administration of justice (ECHR, Gd. Ch, 3 December 2009, 8917/05, Kart v. Turquie). Algorithms can also assist judges in their researches of jurisprudence giving them an easier way to find similar cases. Thus, regarding reasonable time requirement and facility to respond efficiently to a demand, they seem to benefit both for parties and judges.

2 Artificial Intelligence as Significant Risk for the Judicial Process

When analysing the nature of decision-making algorithms in terms of their potential functionality and impact on the judiciary, it is possible to speak of a number of potential risks. The existence of these risks is a major concern for the introduction of decision-making algorithms into judicial system. Whether there are definite solutions to these risks, there is no certainty at the moment. Therefore, it is important, in the author's opinion, to outline them and allow further discussion with legal scientists, judges and experts.

It appears possible to doubt the objectivity of algorithms and positive consequences on judicial security by using objectives and reliable criteria (ECHR, 30 July 2015, 30123/10, Ferreira Santos Pardal v. Portugal). Nevertheless, algorithms remain a mathematical translation of human language. This translation, realised by a human intervention can be criticised regarding its objectivity and neutrality. Moreover, in collecting information on the jurisprudence, the robot is not considering the motivations of judges but only facts and the final decision. Moreover, the data are treated the same when jurisprudence comes from different Courts, and has an impact. Lack of precision and subjectivity of algorithms can be discussed regarding the requirement of neutrality to guarantee a fair trial.

The existence of the risk is a concern for the independence of judges (6.1 ECHR, 47 ECFR, ECHR, 6 October 2011, 23465/03, Agrokompleks v. Ukraine). Judges can be influenced by algorithms in their decisions. In fact, a risk of "performativité" (Garapon, 2017) exists. The distance between presenting jurisprudence and deciding on a case is insignificant; thus, by proposing a solution based on case law and influencing the judge in

their decision, the independence of choice of the Courts would be questionable, creating uniformisation of jurisprudence and avoiding any evolution of case law.

The risk for impartiality of judges is worth mentioning as well. Parties cannot be submitted to an arbitrary decision (ECHR, 27 May 2010, 18811/02, Hohenzoblernc v. Roumanie). However, by considering the algorithm, there is a risk for judges to have an opinion about the case before the hearings that would be a risk in terms of partiality. Establishing control and comparative logic have become concerns of creating a serious pressure on the judges' decisions. The motivation requirement would limit this risk by obliging judges to base their decision on particular facts and the arguments of the involved parties of the case (ECHR, 28 June 2007, 76240/01, Wagner et J.M.W.L. v. Luxembourg).

Automated decision-making process is questionable regarding the right to effective remedy. Algorithms helping to determine admissibility of the case can lead to rejection of access to Court on an unclear basis (Article 13 ECHR, Article 47 ECFR). A risk of biased algorithm that systematically discriminates one group in society has to be considered. Based on the police data, for example, decisions granted by an algorithm can create some discrimination (Article 14 ECHR, Article 21 ECFR).

Algorithms cannot respect exigence of motivation of justice decisions. This lack of motivation is revealed by three elements:

1. Decision proposed by algorithms is merely giving the answer of the question asked (guilty or not, for example) and not the reasoning way leading to this decision. There is lack of motivation in the decision itself.
2. Lack of motivation is observed in the process followed by algorithms providing a decision. Algorithms only consider the facts of the case, the law, and the case law in its final decision (position) (without considering motivation of past decisions). Thus, motivation is not considered as a based data to build a decision, because it is not analysed by the algorithm in the decision making process. In fact, algorithm is limited to recognise key words in past cases and to reapply past decisions corresponding current situation. That is to say, the process previously described does not allow an algorithm to give a subjective consideration of the facts and produce a personal reasoning. In brief, this lack of personal motivation by algorithms does not stimulate evolution of case law. For instance, evolution could exist with a human and so, subjective perspective, by taking in consideration social context. However, algorithms in Courts are limited to mechanical application of law, and mechanical use of case law, a system that does not let any marge of subjective consideration compared to human judges.
3. The objective of algorithms is only to reproduce behavior but not to reproduce reasoning. The aim is to create a decision on a statistic basis without any justification and motivation way. This point is linked to the previous one, because of the process not considering the motivation in the case law, the answer given cannot develop any motivation or justification. The process itself is biased

because of global lack of motivation creating a mechanical process, leading to a mechanical decision. Motivation does not exit either in the process or in the decision itself.

It should be borne in mind that artificial intelligence is not responsible. Therefore, it can be interrogated whether the relationship of trust between a man and a judge can be transferred to artificial intelligence without the above guarantees. Lack of accountability in the case of artificial intelligence can be a reason to question legitimacy of such decisions. In addition, such a system can lead to creation of an anarchic society, disrupting foundations of social contract between the state and an individual.

Additionally, the question whether a robot-judge can be defined as a Tribunal arises. A definition of Tribunal has been defined by the ECHR, in its judgement from 22 June 2000, 32492/96, Coëme v. Belgique, point 99:

> *"A tribunal "is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner" It must also satisfy a series of other conditions, including the independence of its members and the length of their terms of office, impartiality and the existence of procedural safeguards".*

This definition becomes even more interesting regarding the ambition to create a robot-judge replacing human judges. Regarding the definition of tribunal previously mentioned, this robot-judge would not respect the criteria provided by the ECHR, especially the motivation requirement.

Therefore, judicial decisions, replacing a judge with artificial intelligence should be made only in standardised judicial proceedings where the judge may review the AI's decision. It correlates with guaranteeing independence of the judge. Artificial intelligence works with data and makes decisions based on algorithms and probability theory. Those powering artificial intelligence are programmed by information technology specialists. The debate remains who should take the responsibility for the AI's decisions. Particularly if the algorithm is not transparent and accessible, it would be rather difficult to ensure that users are able to control choices made or control a decision solely issued by artificial intelligence.

Meanwhile, very little attention is paid to possible use of artificial intelligence in private international law where artificial intelligence software should be able to orient itself in different legal systems, avoiding situations where systematically preference is given to the law of one state over the law of other states. Even in cases where an artificial intelligence tool is used in a supportive capacity, objectivity on reliance of the data produced by artificial intelligence remains questionable if there is no possibility to verify the algorithm of the programme providing its decision.

3 Artificial Intelligence and Ethical Aspects

Along the introduction of artificial intelligence tools in judicial system, the question of ethics is very important and requires deeper research. Ethical aspects of artificial intelligence are fully linked with the right to a fair trial and have become topical not only in judicial system, but also across the entire spectrum of industries and social activities. As the result of rapid development of industries where artificial intelligence is used, not only the aspects of the right of fair trail have become important but also the aspects of the right to privacy and equal treatment.

Advantages of artificial intelligence tools to be used in improvement of efficiency of judicial systems have been widely discussed, but it is also important to be aware that high technologies require specific knowledge and that the chosen algorithms for the processing of information still create significant risks for respecting fundamental rights in courts' decision-making processes.

Paragraph 1 of Article 17 of the Law on Judicial Power of Latvia states the obligation of the court, when examining any case, to establish the objective truth. All procedural laws governing courts' decision-making in different law sectors similarly include the principle that the court shall assess evidence according to its own convictions which are based on evidence that has been thoroughly, completely, and objectively examined, and according to judicial consciousness based on the principles of logic, scientific findings, and principles of justice (Article 154 of Administrative Procedure Law, Article 97 of Civil Procedure Law, Article 94 of Law on Administrative Liability).

Judicial consciousness and principle of justice are tightly linked to moral and ethical aspects. These are the reasoning categories which artificial intelligence does not have in such a form. The society is not homogeneous and each individual guides their actions not only based on the prescriptions included in written legal norms but also adjusts their actions to particular legal situations. The behaviour of an individual is influenced by generally accepted moral norms and other values which are characteristic to particular society. However, each personality has a different level of judicial consciousness, which can be influenced by perception of written legal norms and also by denial of commonly accepted norms in society.

Therefore, even in standard cases, aspects of individual approach emerge between the judge and the parties of the case, which helps the judge to establish the objective truth. The ability to understand the merits of the case as well as to hear and assess the considerations of the parties in depth is one of the key professional competencies of the judge. Artificial intelligence lacks mentioned competencies, but they are very important to ensure justice in the courts' decision-making process. It is essential that the party that has lost the case can accept the outcome of the case, because it forms trust to the judicial power. This level of trust is mostly formed by how the court has motivated its judgement and indicated considerations the preference was given to, and also by how communication with society was carried out in order to explain the essence of the judgement.

Consequently, the question arises whether the judgement made by artificial intelligence will be perceived as fair in all cases. Fairness as philosophical category should be separated from the judicial category of access to the fair trial. However, strict and technical application of laws cannot always bring to the establishment of the objective truth.

Scientists, in developing automatised data processing systems, so far have relied on assumption that analysis of court judgements can be sufficient basis to elaborate algorithms for reliable predictions of outcome of the case (Aletras et al., 2016). Namely, artificial intelligence software presumes that reliable prediction of the activity of judges would depend on a scientific understanding of the ways that the law and the facts impact the relevant decision-making. However, the question whether it will be possible to integrate basic principles of natural law school into conclusions of artificial intelligence remains open. In most cases, current algorithms are based on basic principles of legal positivism. Therefore, it can be challenging for artificial intelligence software to derive from written legal norms enacted by state and base the outcome of the case on general principles of law. Such situations can arise also in apparently standard cases, for example, in cases of parental responsibility (the best interests of the child as a primary consideration), in cases concerning social rights (the concept of *human dignity), and others.* In the significant number of cases in order to achieve the result which is fair and corresponds to judicial consciousness, the court during the court procedure has to also evaluate irrational and emotional aspects.

In 2018, the European Commission for the Efficiency of Justice (CEPEJ) adopted European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment (Council of Europe, 2018).

Acknowledging the increasing importance of artificial intelligence in modern societies and the expected benefits when it is fully used at the service of the efficiency and quality of justice, the CEPEJ adopted five fundamental principles:

1) Principle of respect for fundamental rights: ensure that the design and implementation of artificial intelligence tools and services are compatible with fundamental rights;
2) Principle of non-discrimination: specifically prevent the development or intensification of any discrimination between individuals or groups of individuals;
3) Principle of quality and security: with regard to the processing of judicial decisions and data, use certified sources and intangible data with models elaborated in a multi-disciplinary manner, in a secure technological environment;
4) Principle of transparency, impartiality and fairness: make data processing methods accessible and understandable, authorise external audits;
5) Principle "under user control": preclude a prescriptive approach and ensure that users are informed actors and in control of the choices made.

Regarding respect for fundamental rights, it is admissible to use artificial intelligence tools for resolving disputes or for assistance in judicial decision-making only when it does not undermine the individual's right to a fair trial, especially, the principle

of the equality of arms and the right to be heard. The methods used to develop artificial intelligence tools also should not reproduce or aggravate discrimination. Therefore, particular care must be taken in both the development and deployment phases of software if the processing is based on sensitive data. Simultaneously, designers of machine learning models should draw widely on the expertise and knowledge of relevant justice system professionals and researchers in the fields of law and social sciences, including fields of sociology and philosophy.

Currently, there are cases in practice which evidence that it is too early to completely rely on conclusions drawn by artificial intelligence tools (Contini & Lanzara, 2017). For example, in the United Kingdom, the financial capacity of spouses in maintenance proceedings was determined by artificial intelligence software to enable the courts to decide on the amount of maintenance. The spouses were required to fill in the form regarding their income and as the result of the mistake in the calculation system, remaining unnoticed, in several thousands of cases the incorrect income calculations were made. Debts which spouses were indicated, instead of being deducted, were added to the assets and the incorrect court decisions on the maintenance amount were taken as the result.

Therefore, artificial intelligence tools can be viewed as providing support to the courts in the decision making and they are the most efficient when large amount of information should be structured. Nevertheless, drawing of conclusions and provision of assessment is still very questionable.

Another negative example follows from the analysis of the system of artificial intelligence which uses ethnicity data to profile and "predict" future criminality. In the Netherlands, the top 600 list includes persons with the highest risk of committing the high-impact crime. One in three included in the top 600 list is of Moroccan descent and is being followed and harassed by police (Fair Trials, n.d.).

Discrimination has a long history and the threat of breach of fundamental rights can exist on digital platforms. Without careful analysis of the data provided to machine learning systems, inequality can become part of the logic of everyday algorithmic systems. Therefore, ability for AI to produce useful outputs depends on the quality of the data.

Another case was pointed out by journalists in 2016, when it was revealed that Amazon's same-day delivery service was unavailable for postal codes in predominantly black neighborhoods. Amazon promised to redress the gaps, but it reminds us how systemic inequality can be caused by machine intelligence (Craford, 2016).

The notion, that existing artificial intelligence systems are producing their results by engaging in a synthetic computer cognition that matches or surpasses human-level thinking, is incorrect. In reality, modern artificial intelligence systems are not reasoning tools with intellectual abilities (Surden et al., 2014). Therefore, artificial intelligence, considering its current stage of development, cannot fully protect fundamental rights. Artificial intelligence tools are able to analyse structured information which is based on facts. However, when the judge is applying legal norms which require to take into the consideration the principle of equality, the principle of proportionality or the principle

of reasonable application of legal provisions, the judge grounds on their personal convictions and and life experience. Artificial intelligence lacks such aspects of reasoning and information processing.

Artificial intelligence, in the light of the progress in science, should become support of a country's legal system and it should not come in contradiction with fundamental rights, principles of democratic state and rule of law. Therefore, the science faces many challenges to ensure that artificial intelligence is responsible, fair, traceable, trustworthy and controllable.

On April 21, 2021, European Commission unveiled a Proposal for a Regulation of the European Parliament and of the Council Laying down harmonised rules on Artificial Intelligence and amending certain Union Legislative Acts (Artificial Intelligence Act). This Proposal for the Regulation is a result of political commitment of the European Commission to put forward legislation for coordinated European approach on the human and ethical implications of artificial intelligence (COM (2021) 206 final 2021/0106 (COD). European Commission, after announcing its political commitments, already in February 19, 2020 published the White Paper On Artificial Intelligence – A European approach to excellence and trust (COM (2020) 65 final). The White Paper sets out policy options on how to achieve the twin objective of promoting the uptake of artificial intelligence and addressing the risks associated with certain uses of such technology. Following the publication of the White Paper, the Commission launched a broad stakeholder consultation, which was met with a great interest by a large number of stakeholders who were largely supportive of regulatory intervention to address challenges and concerns raised by the increasing use of artificial intelligence.

Therefore, taking all this into account, the Proposal for a Regulation aims to implement the White Paper's second objective, i.e., to develop an ecosystem of trust by proposing legal framework for trustworthy artificial intelligence. The Proposal for a Regulation is based on EU values and fundamental rights and aims to give people and other users confidence to embrace artificial intelligence-based solutions, while encouraging businesses to develop them.

Conclusions

Artificial intelligence in judicial system could be considered as an advantage. However, functioning of artificial intelligence would be permissible within a clear legal framework in order to prevent any possible infringement of fundamental rights, in particular the right to a fair trial.

Artificial intelligence, considering its current stage of development, cannot fully protect fundamental rights. It lacks such aspects of reasoning and information processing as consideration the principle of equality, the principle of proportionality or the principle of reasonable application of legal provisions.

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Algoritms kā būtiska kaitējuma noteikšanas metode noziedzīgos nodarījumos, kas saistīti ar automatizētu datu apstrādes sistēmu (ADAS)

Algorithm as a Method for Determining Substantial Harm in Crimes which are Related with Automated Data Processing System (ADAS)

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Abstract

The aim of the article is to analyse the problem of applying substantial harm in offenses against the security of information systems, in particular Paragraph one of Article 241 and the paragraph one and two of Article 243 of the Criminal Law. Although substantial harm is defined in Article 23 of the Law on the Procedures for the Coming into Force and Application of the Criminal Law, the wording of the current law and its application in the court practice of Latvia is still problematic. The authors have studied the European Union and regulations in Latvia on the network and information system, which provides security of services essential to society. The authors concluded that systems which provide essential service and significant impact of service must be recognised as the direct object of the offense of Article 241, Paragraph three and Article 243, Paragraph five of the Criminal Law. Furthermore, it is not necessary to prove existence of harmful effects in order to prosecute these offenses. The authors propose

to introduce a classification of information systems that would functionally cover all existing systems in the country. Therefore, the authors propose to simplify this process of determining significant damage and replace the current procedure with an algorithm. General methods of scientific research and methods of legal interpretation have been used in the research.

Keywords: algorithm, automated data processing system, substantial harm, security incident, non-material loss, criminal delinquency.

Ievads

1999. gada 1. aprīlī stājās spēkā Krimināllikums, un vienlaikus stājās spēkā arī likums "Par Krimināllikuma spēkā stāšanās un piemērošanas kārtību" (turpmāk – Speciālais likums). Speciālā likuma 23. pantā tiek definēti trīs nosacījumi, kurus procesa virzītājam ir pienākums konstatēt, lai Krimināllikuma Sevišķajā daļā paredzētajam noziedzīgajam nodarījumam būtu iespējams konstatēt būtisku kaitējumu, un tie ir šādi:

1) mantiskam kaitējumam jāpārsniedz ne mazāk kā piecu minimālo mēnešalgu kopumu un ar nodarījumu tiek apdraudētas citas ar likumu aizsargātas intereses;
2) nodarīts mantiskais kaitējums, kas nav bijis mazāks par desmit minimālo mēnešalgu kopumu;
3) ievērojami ir apdraudētas citas ar likumu aizsargātās intereses.

2001. gada 21. novembrī Eiropas Padome pieņēma Kibernoziegumu konvenciju (turpmāk – konvencija), kurā paredzēta krimināltbildība par nodarījumiem, kas vērsti pret informācijas sistēmu drošību (turpmāk – ISD) – to pieejamību, integritāti un konfidencialitāti. Lai Latvija varētu pievienoties šai konvencijai, 2005. gada 28. aprīlī tika veikti attiecīgi grozījumi Krimināllikumā, iekļaujot tajā noziedzīgos nodarījumus, kas vērsti pret ISD, tostarp, Krimināllikuma 241. panta pirmo daļu, 243. panta pirmo un otro daļu, kas paredz kvalificējošo pazīmi – būtisku kaitējumu. Savukārt 2020. gadā Krimināllikums tika papildināts ar 145. pantu – šā panta pirmajā daļā par obligātu noziedzīga nodarījuma sastāva pazīmi ir noteikts būtisks kaitējums.

2019. gadā Eirobarometra ziņojumā Nr. 499 (Eiropas Komisija, 2022) teikts, ka 38 % Latvijas respondentu atzinuši, ka bažījas par personīgo datu ļaunprātīgu izmantošanu, 29 % – par tiešsaistes maksājumu drošību, 13 % respondentu bija kļuvuši par cietušajiem saistībā ar identitātes zādzību un sociālo tīklu vai e-pasta uzlaušanu, bērnu pornogrāfijas, naida informācijas izplatīšanu u. tml.

Saskaņā ar *Kantar* aptaujas *Latvia Digital* (*Kantar*, 2021) datiem 2020. gada pavasarī Latvijā vecumā no 16 līdz 74 gadiem internetu lietoja 1 miljons 444 tūkstoši iedzīvotāju, un lietotāju skaits pastāvīgi pieaug.

2018. gadā aprīlī Rīgas Stradiņa universitātes Juridiskās fakultātes zinātniskajā konferencē vairāki referenti uzsvēra, ka tieši būtiska kaitējuma identificēšana bieži kļūst par iemeslu, kāpēc arī uzsāktos kriminālprocesus par kibernoziegumiem nākas izbeigt, jo

nav iespējams pierādīt, ka ar attiecīgām darbībām cietušajiem nodarīts būtisks kaitējums. Savukārt Latvijas Kiberdrošības stratēģijā 2019.–2022. gadam (Aizsardzības ministrija, 2019) ir uzsvērts, ka kibernoziegumu skaits un intensitāte tikai pieaugs, un šā dokumenta 4.5.5. punktā akcentēts, ka jāveic Valsts policijas darbinieku, prokuroru, tiesnešu apmācības, lai efektīvi apkarotu kibernoziegumus.

Stratēģijā tiek izdalīti divu veidu kibernoziegumi:

1) noziegumi, kuriem ADAS ir noziegumu izdarīšanas līdzeklis un mērķis;
2) noziegumi, "kuru nodarījumu var palielināt", izmantojot ADAS.

Pārvēršot šeit teikto par kibernoziegumiem krimināltiesību terminoloģijā, varētu apgalvot, ka tie aptver visus noziedzīgos nodarījumus, kuros ADAS tiek izmantota kā nozieguma rīks, nozieguma priekšmets vai medijs nelikumīgas informācijas aprites nodrošināšanai. Tādējādi, lai efektivizētu kibernoziegumu apkarošanu, būtu vērts apsvērt jautājumu, vai esošais Speciālā likuma būtiska kaitējuma regulējums nebūtu jāpārskata un šī kritērija identificēšana tieši ar nodarījumiem, kas saistīti ar ADAS izmantošanu, vienkāršojama.

Tieši šādu virzienu savā politikā vēlas panākt Eiropas Savienība (turpmāk – ES), gan pieņemot Eiropas Parlamenta un Padomes 2016. gada 6. jūlija Direktīvu (ES) 2016/1148 par pasākumiem nolūkā panākt vienādi augsta līmeņa tīklu un ISD visā ES (turpmāk – NIS1 Direktīva), gan izstrādājot NIS2 Direktīvas priekšlikumu (*The NIS2 Directive COM(2020)82*, 2021), kura mērķis ir stiprināt kiberdrošību ES. Direktīvas šim mērķim paredz radīt vienkāršu un pārskatāmu ADAS sistēmu klasifikāciju un to apdraudējuma pakāpes būtiskas ietekmes kritēriju noteikšanu. Savukārt šī apdraudējuma pakāpe noziedzīgos nodarījumos ir cieši saistīta ar kaitīgām sekām, ko šādi nodarījumi var radīt sabiedrībai. Līdz ar to minētais ir cieši saistīts ar noziedzīgo nodarījumu, kas saistīti ar ADAS, kaitīgo seku izvērtēšanu un identificēšanas vienkāršošanu.

Par būtiskā kaitējuma noteikšanas problēmām ir rakstījis profesors Uldis Krastiņš (2015), profesore Valentija Liholaja (2012) un docente Diāna Hamkova (2012), kā arī profesors Uldis Ķinis (2015), Džena Andersone (2018) u. c. Taču to, ka situācija būtiska kaitējuma noteikšanas jomā īpaši nav mainījusies, apliecina Valsts kontroles 2020. gada revīzijas ziņojumā "Noziedzīgu nodarījumu ekonomikas un finanšu jomā izmeklēšanu un iztiesāšanu kavējošo faktoru izvērtējums" (Valsts kontrole, 2020, 38) konstatētie fakti. Valsts kontrole ir secinājusi, ka kriminālprocesā pastāv problēmas ar "būtiska kaitējuma" izpratni un apstākļiem, kas nepieciešami tā pierādīšanā. Tas nozīmē, ka joprojām krimināltiesību praksē nav vienotas izpratnes par šiem jautājumiem. Būtiska kaitējuma problemātika ir ļoti plašs jautājums, tāpēc šeit tā tiks apskatīta vien tiktāl, cik tā saistīta ar noziedzīgiem nodarījumiem, kas vērsti pret ADAS. Raksta mērķis ir izvērtēt būtiska kaitējuma institūtu noziedzīgos nodarījumos, kas ir vērsti pret ISD, kā arī izstrādāt algoritmu būtiska kaitējuma noteikšanai šāda veida noziedzīgos nodarījumos.

Rakstā ir trīs nodaļas un nobeigums. Pirmajā nodaļā apskatīta būtiska kaitējuma legāldefinīcija un tās piemērošanas aktuālās problēmas, otrajā nodaļā – kiberapdraudējuma būtiskas ietekmes institūts ES un Latvijā, kā arī tiek veikts salīdzinājums ar būtiska kaitējuma noteikšanas kritērijiem Krimināllikumā. Trešajā nodaļā aplūkoti algoritma ieviešanas teorētiskie un praktiskie aspekti būtiska kaitējuma noteikšanā. Nobeigumā ir apkopoti secinājumi, kā arī sniegti priekšlikumi algoritma ieviešanai būtiska kaitējuma noteikšanai.

Raksta sagatavošanā izmantotas vispāratzītas zinātniskās pētniecības metodes un speciālās tiesību interpretācijas metodes.

1. Būtiskā kaitējuma regulējums Krimināllikumā un tā piemērošanas aktuālās problēmas

Terminu "būtisks" tiesību teorijā uzskata par atklāto juridisko terminu. Šis termins nevar pastāvēt pats par sevi, jo tam ir jābūt saistītam ar konkrētu saturu, piemēram, notikumu. Tiesību jomā tā saturu atklāj divi faktori:

1) tiesību joma, kurā termins ir piemērojams;
2) konkrētā tiesiskā attiecība, kas rada, groza vai izbeidz juridiskus faktus.

Krimināltiesībās būtiskā kaitējuma institūts ir plaši izplatīts daudzviet pasaulē. Arī pirms Krimināllikuma pieņemšanas – toreizējā Latvijas PSR Krimināl kodeksā – vairākos pantos noziedzīgā nodarījuma obligāta pazīme bija būtisks kaitējums. Tāpēc ir pašsaprotami, ka Krimināllikuma eksperti, izstrādājot Krimināllikuma Sevišķo daļu, turpināja šo institūtu attīstīt un vairākos noziedzīgos nodarījumos iekļāva to kā objektīvās puses obligāto pazīmi, kas nošķir noziedzīgu nodarījumu, par kuru izdarīšanu paredzēta krimināl atbildība, no citiem pārkāpumu veidiem. Krimināllikumā iekļautie nodarījumi, kas saistīti ar ADAS nelikumīgu vai patvaļīgu izmantošanu, visi ir konstruēti tā, ka tieši būtisks kaitējums ir galvenais apstāklis, kas noteic, vai par konkrētām darbībām vainojamai personai ir nosakāms krimināl sods vai arī var piemērot citus ietekmēšanas līdzekļus.

Konvencija, definējot desmit ar ADAS saistītus noziedzīgus nodarījumus, speciāli neparedzēja kaitīgo seku apmēru kā pamatu darbību kriminalizēšanai. Taču konvencija elastīgi atstāja dalībvalstīm brīvas rokas lemt, vai atbildībai par patvaļīgu piekļuvi ADAS un tajā esošo datu traucēšanu ir nosakāmi papildu kritēriji. Piemēram, konvencijas 1. pants par tādu paredzēja "sistēmas drošības līdzekļu pārvarēšanu vai citu negodīgu nodomu". Savukārt saistībā ar datu un sistēmu traucēšanu konvencijas paskaidrojošā ziņojumā (*Council of Europe*, 2001, *8–12*) norādīts, ka krimināl atbildībai par šiem nodarījumiem kā kritēriju dalībvalstis var noteikt arī nopietnu (angļu val. *serious*) kaitējumu.

Latvijas Republikas Krimināllikuma 241. panta pirmajā daļā paredzēti alternatīvi papildu kritēriji: 1) sistēmas aizsardzības līdzekļu pārvarēšana un 2) situācija, kurā darbības izdarītas bez attiecīgas atļaujas vai izmantojot citai personai piešķirtas tiesības,

kā arī jābūt trešajam kritērijam – 3) būtiskam kaitējumam, kuru procesa virzītājam obligāti ir jāpierāda, ja sekas iestājušās pirmajā vai otrajā kritērijā paredzēto darbību rezultātā. Līdzīgu konstrukciju likumdevējs ir izmantojis arī Krimināllikuma 243. panta pirmajā daļā, kurā paredzēta atbildība par nelikumīgu rīcību ar ADAS datiem, un otrajā daļā, kurā paredzēta atbildība par ADAS darbības nelikumīgu traucēšanu, kas iestājas tikai tad, ja ar šīm darbībām radīts būtisks kaitējums. Pēc būtības likumdevēja pieeja ir pragmatiska – ievērojot to, ka kiberapdraudējumu apjoms pasaulē dramatiski pieaug, nebūtu prātīgi uzlikt par pienākumu uzsākt kriminālvajāšanu par ikvienu patvaļīgas piekļuves, datu vai ADAS traucēšanas gadījumu, bet tā jāsāk tikai par tiem nodarījumiem, kuru rezultātā cietušajiem radies būtisks kaitējums.

Būtiskā kaitējuma kritēriji ir noteikti Speciālā likuma 23. pantā (Par Krimināllikuma spēkā stāšanās un piemērošanas kārtību, 1998). Taču šeit sākas problēma, jo izrādās, ka cietušajiem (ADAS īpašniekiem vai arī tiesiskajiem valdītājiem) ar objektīviem pierādījumiem ir gandrīz neiespējami pierādīt, ka nodarīts būtisks kaitējums, jo, godīgi atzīsim, ne katrs cietušais spēj pierādīt, ka nodarījuma pret ISD rezultātā ir radies zaudējums, kas ir lielāks par piecām minimālajām mēnešalgām, un aizskartas ir arī citas ar likumu aizsargātās intereses. Teorētiski ikvienam procesa virzītājam būtu jāsaprot un jāspēj izskaidrot cietušajiem, kā būtu jāaprēķina būtiskais kaitējums. Diemžēl lielākā daļa procesa virzītāju nespēj to izdarīt, un iemesls – viņiem vienkārši trūkst nepieciešamo juridisko zināšanu, kā atklātos juridiskus jēdzienus vai vērtējamo jēdzienu piepildīt ar konkrētu saturu.

Šobrīd ir radusies absurda situācija, ka teorijā minētās atziņas, kā arī Augstākās tiesas secinājumi ne vienmēr ir piemērojami praksē. Piemēram, Augstākās tiesas apkopojumā "Tiesu prakse lietās, kurās noziedzīga nodarījuma sastāva pazīme ir būtisks kaitējums" (Hamkova, 2018, *62*) Secinājumu daļas 9. punktā Senāta Krimināllietu departaments ir atzinis: "Lai atzītu, ka ar nodarījumu ir radīts mantisks zaudējums, jāņem vērā, ka tam jābūt reālam, nevis varbūtējam." Tas nozīmē, ka, nosakot mantisko zaudējumu apmēru ADAS, netiek ņemta vērā neiegūtā peļņa, kuru dīkstāves dēļ nespēs saņemt cietušais. Savukārt tas daļēji ir pretrunā ar praksi, ko realizē absolūti lielākā daļa konvencijas dalībvalstu. Piemēram, Apvienotās Karalistes Prokuroru kodeksā ir uzsvērts, ka kaitējuma apmēra noteikšanā tiesas tulko šo terminu liberāli, iekļaujot šajā jēdziena arī tādu kaitējumu, kas var izrietēt no notikuma (*Crown Prosecution Service*, 2021).

1.1. Drošības incidenta rezultātā radīto ADAS zaudējumu tipoloģizācija

Drošības incidents krimināltiesību izpratnē ir tīšs nodarījums, kas vērsts pret ADAS integritāti, pieejamību vai konfidencialitāti (Informācijas tehnoloģiju drošības likums, 2010). Pasaulē ISD pētījumos tiek izmantotas dažādas sistēmu klasifikācijas metodes drošības incidenta rezultātā radīto risku izvērtēšanai, piemēram, pēc darbinieku skaita: 1–5, 5–25, 25–50, 50–100 utt.

Informācijas tehnoloģiju drošības likumā (turpmāk – ITDL) ir lietoti šādi termini: "*sistēmas, kas sniedz būtiskus pakalpojumus, pamatpakalpojumus, digitālos pakalpojumus, kuru sniegšana ir atkarīga no informācijas tehnoloģijām*". Taču ārpus šīs klasifikācijas paliek mazie e-komersanti, kas savas darbības nodrošināšanai izmanto ADAS; dažādas nevalstiskās organizācijas, kas digitālajā vidē sniedz informācijas pakalpojumus; kā arī personas, kas ADAS izmanto savām personiskajām vajadzībām vai arī sniedz sīkus pakalpojumus.

Saskaņā ar ES klasifikāciju mikrouzņēmumu kategorijā ietilpst uzņēmumi, kuros ir nodarbināti mazāk nekā 10 darbinieki un kuru gada apgrozījums un / vai gada bilances kopsumma nepārsniedz 2 miljonus eiro. Mazo uzņēmumu kategorijā ietilpst uzņēmumi, kuros ir nodarbināti mazāk nekā 50 darbinieki un gada apgrozījums un / vai gada bilances kopsumma nepārsniedz 10 miljonus eiro. Savukārt vidējo uzņēmumu kategorijā ietilpst uzņēmumi, kuros ir mazāk nekā 250 darbinieku un gada apgrozījums nepārsniedz 50 miljonus eiro un / vai gada bilances kopsumma nepārsniedz 43 miljonus eiro (Regula (ES) 651/2014, 2014).

Tādējādi var secināt, ka katrai valsts teritorijā esošajai ADAS ir sava sociālā funkcija. Tieši sociālā funkcija ir tā, kas nosaka ar likumu aizsargāto interešu būtiskumu. Tāpēc ir svarīgi saprast, kā veidojas kaitējums ADAS, jo neatkarīgi no sistēmu klasifikācijas metodes jebkuru nodarījumu pret ISD raksturo turpmāk minētā tipoloģija.

Marks Horonijs (*Horony,* 1999) uzskata, ka drošības incidenta rezultātā ADAS radušies zaudējumi ir iedalāmi taustāmos (angļu val. *tangible*) un netaustāmos (angļu val. *nontangible*) zaudējumos. Taustāmie zaudējumi ir tieši saistāmi ar incidenta rezultātā radītajām tiešajām izmaksām, ieskaitot pavadītās darba stundas sistēmas darbības atjaunošanai, darbinieku dīkstāves izmaksas, kas radušās sistēmas darbības pārtraukuma dēļ, jaunās programmatūras un tās instalēšanas izmaksas. Savukārt pie netaustāmiem zaudējumiem, pēc Horonija domām, pieder organizācijas vai komersanta reputācija, risks zaudēt klientus un saņemt juridiska rakstura pretenzijas, piemēram, apdrošināšanas kompānijas var celt apdrošināšanas likmes, zaudētās informācijas vērtība, peļņas zaudēšana, datu pārraides konfidencialitātes riski u. tml.

Nīderlandes pētnieki (*Michel, Bauer, & Tabatabaie*, 2009) zaudējumus iedala šādās kategorijās: tiešos un netiešos zaudējumos, un netiešie izdevumi vēl var būt iedalāmi nepārprotamos, piemēram, kā drošības sistēmas uzlabošanas izmaksas, un citos netiešajos izdevumos, uz kuriem varētu attiecināt reputācijas zaudēšanu, peļņas samazināšanos u. tml. Turklāt viņi uzsver, ka ir svarīgi, lai kaitējuma aprēķins būtu vispusīgs, taču vienlaikus tam ir jāizslēdz zaudējumu uzskaitījuma dublēšanās. Protams, kaitējuma apmēra noteikšanu nedrīkstētu saistīt tikai ar "tīru" cietušā ADAS īpašnieka vai tiesiskā valdītāja subjektīvo uztveri, kura saistīta ar kaitējuma noteikšanu, bet nav pamatota ar objektīviem pierādījumiem. Vienlaikus šo procesu nedrīkst padarīt par birokrātisku šķērsli, kura dēļ faktiski netiek sasniegts krimināltiesību galvenais uzdevums, t. i., aizsargāt savu iedzīvotāju pamattiesības un no tām izrietošās likumiskās intereses.

1.2. Būtiskais kaitējums – īss ieskats tik nesenajā vēsturē

Viens no šīs publikācijas autoriem – Uldis Ķinis – no 1981. līdz 2006. gadam strādāja par tiesnesi Kuldīgas rajona tiesā. Gatavojot šo rakstu, pārrunājot ar kolēģiem, pārlasot tā laika krimināltiesību komentārus, jāatzīst, ka nenāk atmiņā gadījumi, kad būtiska kaitējuma konstatēšana kriminālprocesā būtu radījusi kādas nopietnas diskusijas.

Var minēt divus piemērus. Pirmais saistīts ar huligānismu, un ļaunprātīga huligānisma pazīme bija būtiska sabiedrības interešu traucēšana. Praksē par ļaunprātīgu tas tika atzīts tad, ja ar huligāniskām darbībām bija traucēts uzņēmuma vai iestādes darbs vairāk par 30 minūtēm. Otrais gadījums – kādai sirmgalvei tika nozagti pieci rubļi, bet tiesa, ievērojot to, ka tie bija vienīgie viņas iztikas līdzekļi un līdz pensijai viņa bija atstāta vispār bez līdzekļiem, atzina, ka ar šo zādzību apsūdzētais nodarījis cietušajai būtisku kaitējumu. Tā bija visiem saprotama pieeja: tiesai bija kompetence izvērtēt, kas ir vai nav būtisks kaitējums. Turklāt šo būtisko kaitējumu varēja identificēt gandrīz ikviens tiesībaizsardzības iestāžu atbildīgais darbinieks.

1998. gadā tika pieņemts Krimināllikums un Speciālais likums, kurā definēts būtiskais kaitējums un noteikti tā piemērošanas kritēriji, kas ietver mantiskos un nemantiskos kritērijus. Tomēr šo kritēriju piemērošana rada problēmas. To atzīst arī Diāna Hamkova (Hamkova, 2018, *17*), rakstot, ka būtiskā kaitējuma konstatēšanā un pamatošanā ir daudz nekonkrētību. Šim viedoklim var piekrist, jo īpaši par gadījumiem, kuros noziedzīgs nodarījums ir vērsts pret ISD.

1.3. Speciālā likuma 23. pantā noteikto kritēriju būtiskā kaitējuma noteikšanai piemērošanas iespējas saistībā ar nodarījumiem, kas vērsti pret ISD

Iepriekš jau tika minēts, ka Speciālā likuma 23. panta pirmajā daļā paredzēti trīs kritēriji būtiskā kaitējuma noteikšanai. Pirmajā punktā noteiktais kritērijs satur divus kumulatīvus apakškritērijus, proti, materiālo zaudējumu minimālo slieksni un vērtējamo kritēriju – citas ar likumu aizsargātas intereses. Otrais punkts satur mantisko kritēriju – desmit minimālo mēnešalgu kopumu, un trešais kritērijs ietver to, pie kādiem apstākļiem var tikt konstatēts būtisks kaitējums, kas saistāms ar "ievērojamu citu ar likumu apdraudētu interešu aizskārumu. Var piekrist Jurijam Lomonovskim, ka vārdu kopa "citas intereses" norāda uz nemantiskajām interesēm, kas cietušajam radušās saistībā ar konkrēto nodarījumu.

Krimināllikumā grupas objektu "Informācijas sistēmu drošība" veido elementu triāde: **pieejamība, konfidencialitāte un integritāte**. Tāpēc procesa virzītājam ir precīzi jāidentificē tiešais nodarījuma objekts, proti, vai tas ir vērsts tikai pret vienu ISD pazīmi – pieejamību (Krimināllikums, 241. panta pirmā daļa) –, vai pret konfidencialitāti (Krimināllikums, 243. panta pirmā daļa), vai arī pret visām trim ISD pazīmēm (Krimināllikums, 243. panta otrā daļa). Savukārt, ja pārējās ISD triādes pazīmes

neietilpst konkrētā nodarījuma priekšmetā vai tiešajā apdraudējuma objektā, tad tās var izmantot par pamatu, lai no šiem elementiem atvasinātu un pamatotu aizskarto interesi.

Termins "interese" juridiskajā literatūrā ir skaidrots vairākkārt (Liholaja & Hamkova, 2012; Krastiņš, 2012), tomēr tiesību piemērotājiem tas joprojām sagādā nopietnas problēmas. Tiesību zinātnē termins "interese" ir vērtējamais kritērijs. Interese ir dzinulis, kas liek personai kaut ko darīt, tomēr dzinuļi var būt vērsti gan uz nelikumīgu, gan uz likumīgu darbību. To, vai interese ir aizsargājama vai gluži pretēji – nepieļaujama, nosaka tiesības. Herberts Laube (*Herbert David Laube*) norāda, ka "jebkurā kultūrā tikai leģitīmi aizsargātas intereses nosaka valstī pastāvošo tiesību jomu" (*Laube*, 1949). Taču nevajadzētu vārdus "interesei ir jābūt garantētai ar likumu" saprast tā, ka likumiska interese personai rodas tikai tad, ja joma ir speciāli regulēta. Tāpēc likumīgās intereses saturu nav iespējams definēt likumā, bet tas skaidrojams tiesību piemērošanas procesā. Cilvēkam jau dabiski piemīt vēlmes un intereses, kas nemitīgi dzen uz priekšu, ļauj radīt jaunus izgudrojumus un veikt atklājumus. Tieši dabiskā interese ir pamatā tam, kādu sabiedrība vēlas veidot tiesību sistēmu. Tā arī rodas aizsargājamās tiesības un no tām izrietošās intereses.

Tāpēc neizpratni rada Augstākās tiesas apkopojuma (Hamkova, 2018, *62*) Secinājumu daļas 11.1. punkts, kurā izvirzīto prasību norādīt "*konkrētu personu, kuras interesēm būtisks kaitējums radīts, tiesību aktu, kurā šīs intereses aizsardzība nostiprināta, kā arī aprakstīt, kā tieši kaitējums norādītajai interesei ir izpaudies*," citādāk kā par "birokrātiju" nosaukt diezin vai var, jo neizdevās atrast nevienu valsti, kur būtiskā kaitējuma pamatošanai tiktu izvirzītas tik striktas prasības. Būtiska kaitējuma jēdziens krimināltiesībās tiek piemērots daudzu Eiropas valstu krimināltiesībās, taču tur nodarījumiem, kas vērsti pret ISD, ir izveidojusies jau stabila prakse.

Latvijā ar stabilu tiesu praksi nodarījumos pret ISD lepoties nevar. Piemēram, baltkrievu krimināltiesību pētnieki (*Stuk, Turko* u. c., 2017) norāda, ka tiesu praksē lietās par ISD tiek lietoti šādi būtiskā kaitējuma pamatojumi: piekļuve ar mērķi izdarīt citu noziegumu, ierobežotas lietotāju līgumtiesiskās attiecības, nelikumīga likumisko īpašnieku identitātes piesavināšanās, lai piekļūtu citiem interneta resursiem u. tml. Līdzīgu argumentāciju izmanto arī Vācijas un Krievijas tiesas, kas būtisko kaitējumu ADAS pamato ar zaudējumu tipoloģijā uzskaitītajiem nemantisko zaudējumu kritērijiem. Katrs no šiem apstākļiem var būt par pamatu būtiska kaitējuma noteikšanai. Taču šie elementi ne vienmēr ir tieši likumā regulēti. Te nu ir skaidrs, ka pie esošās prakses nemantiskie zaudējumi vispār nevar tikt ņemti vērā, jo diezin vai katram reputācijas riskam, informācijas vērtības zudumam būtu iespējams piemeklēt konkrētu tiesību normu. Tāpēc jāpiekrīt Horonijam (*Horony,* 1999), ka visi iepriekš uzskaitītie faktori (mantiskie un nemantiskie) būtu vērtējami kā kaitējums, kas radies cietušajam kiberuzbrukuma gadījumā. Arī Krievijas Krimināl kodeksa komentārā par 274. pantu "ADAS ekspluatācijas vai tīkla noteikumu pārkāpšana" (*Verhovnyj Sud Rossijskoj Federacii*, 2008) ir uzsvērts, ka būtiskais kaitējums ir vērtējamais jēdziens,

kas ietver gan tiešos materiālos zaudējumus, gan arī citu kaitējumu, piemēram, morālo, kas nodarīts ADAS īpašniekam vai tiesiskajam valdītājam. Līdzīgi ir risināms jautājums par ievērojamu interešu apdraudējumu. Tā būtu pietiekami saprātīga pieeja. Taču, ja eksperti un likumdevējs šādu pieeju neatbalsta, tad ir nepieciešams būtiskā kaitējuma noteikšanai noziedzīgos nodarījumos, kas vērsti pret ISD, veidot speciālu pielikumu, kurā tiktu iekļauti skaidri un viegli identificējami kritēriji visām ADAS, grupējot tās pēc sociālā nozīmīguma un apdraudējuma pakāpes – sekām, kas var iestāties noziedzīga nodarījuma rezultātā.

2. Informācijas tehnoloģiju (ADAS) klasifikācija un drošības incidenta būtiskas ietekmes jēdziens

2021. gada janvārī Latvijā bija reģistrēti 1,67 miljoni interneta lietotāju, interneta izplatība valstī – 88,9 % (*Kemp*, 2021). Ja valstī ir vairāk nekā 1,6 miljoni interneta lietotāju, tad ir skaidrs, ka ADAS, kas tiek izmantotas šādas komunikācijas nodrošināšanai, gādā ne tikai par valstij būtisku informācijas pakalpojumu saņemšanu, bet tiek izmantotas arī dažādu citu sabiedrisko funkciju un privātpersonu likumisko interešu realizēšanai.

Kopš 2020. gada drošības incidentu novēršanas institūcija CERT.LV uzskaita apdraudējumus pēc šādiem kritērijiem:

1) cik būtiskas sekas šis apdraudējums ir radījis vai radīs;
2) cik nozīmīgu iestādi, uzņēmumu vai cik plašu sabiedrības daļu apdraudējums ietekmē.

Atbilstoši šiem kritērijiem CERT.LV izmanto sešpakāpju (no C1 līdz C6) incidentu novērtēšanas sistēmu, kurā C6 ir ikdienas apdraudējumi, kas ietekmē atsevišķus IT pakalpojumu saņēmējus un kam nav nozīmīgas ietekmes uz uzņēmumiem vai valsts un pašvaldību iestādēm – tie ir 322 536 incidenti (98,7 % no visiem incidentiem); C5 – mēreni apdraudējumi, kam ir neliela ietekme uz komerciālo sektoru, valsts un pašvaldību iestādēm – 2770 incidenti (tas ir, 0,85 % no visiem incidentiem). Savukārt C4 un C3 incidenti jau ir vērtējami kā apdraudējumi ar būtisku ietekmi. Tā, piemēram, 2021. gadā CERT.LV reģistrēti 1252 (0,38 %) drošības incidenti ar būtisku ietekmi (C4 kategorija) un 118 (0,04 %) drošības incidenti, kas atbilst C3 kategorijai, kas klasificēti kā nozīmīgs apdraudējums ar plašu ietekmi uz komerciālo sektoru vai valsts un pašvaldību iestādēm (sk. 1. tab.). C3 apdraudējuma rezultātā skarta 471 persona, C4 apdraudējuma rezultātā – 1203 personas (sk. 2. tab.) (CERT.LV, 2022).

Tāpēc būtiskā kaitējuma noteikšanas algoritma veidošanā ir svarīgi veikt visu valstī esošo ADAS klasifikāciju. Vispirms visas ADAS var sadalīt sistēmās, kas sniedz sabiedrībai būtisku informācijas pakalpojumu, un sistēmās, kas sniedz pakalpojumus, bet nekvalificējas būtiska sabiedrības pakalpojuma statusam, un šai grupai pieder absolūtais ADAS vairākums.

1. tabula. Kopējais apdraudēto unikālo IP adrešu skaits sadalījumā pa apdraudējuma kategorijām (2021. gads)

C6	C5	C4	C3	C2	C1
322 536	2770	1252	118	—	—

Avots: CERT.LV, 2021.

2. tabula. Skarto iedzīvotāju, institūciju vai uzņēmumu kopējais skaits sadalījumā pa apdraudējuma kategorijām (2021. gads)

C6	C5	C4	C3	C2	C1
306 503	17 389	1203	471	582	528

Avots: CERT.LV, 2021.

2.1. Būtiskā informācijas pakalpojuma jēdziens

Atkarībā no tā, uz kuru tiesību nozari pakalpojums ir attiecināms, mainās arī pakalpojuma tiesiskās reglamentācijas pakāpe. Piemēram, ja informācijas pakalpojums saistīts ar komercdarbību, tad komersantu aizsargā Satversmes 105. pants, jo ierobežot komercdarbību valsts var tikai tad, ja pastāv Satversmes 116. pantā noteiktie leģitīmie mērķi. Jāpiebilst, ka par leģitīmo mērķi ir atzīta arī sabiedrības drošība un demokrātiskas valsts iekārtas aizsardzība. Valsts drošība ir viena no svarīgākajām valsts varas funkcijām, un kiberdrošība ir valsts drošības sastāvdaļa. Savukārt kiberdrošības mērķis ir "droša, atvērta, brīva un uzticama kibertelpa, kurā ir garantēta, valstij un sabiedrībai būtisku pakalpojumu droša, uzticama un nepārtraukta saņemšana un sniegšana, un indivīda cilvēktiesības tiek ievērotas kā fiziskajā, tā virtuālajā vidē" (Aizsardzības ministrija, 2019, *3*). Tādējādi var secināt, ka būtisks informācijas pakalpojums ir saistāms ar valsts varas funkciju un tas ir publisko tiesību regulēšanas objekts. Mūsdienās daudzas valsts funkcijas pilda arī privātais sektors un nevalstiskās organizācijas, piemēram, finanšu jomā – kredītiestādes u. tml. Tāpēc arī šādu ADAS sniegto pakalpojumu pārtraukšana vai ierobežošana var ietekmēt sabiedrisko kārtību, sabiedrības labklājību, nemaz nerunājot par sabiedrisko drošību un demokrātiskas valsts iekārtas apdraudējumu. Tas ir nostiprināts ITDL 2. pantā, kurā par subjektiem, kas var sniegt būtisku informācijas pakalpojumu, ir atzītas gan publiskās personas (valsts, pašvaldības), gan arī privāto tiesību juridiskās personas.

2.2. Informācijas pakalpojuma būtiskuma noteikšanas kritēriji

Iepriekšējā apakšnodaļā tika noskaidrots, ka sabiedrībai būtisks informācijas pakalpojums ir atkarīgs no diviem apstākļiem:

1) no tā, kam attiecīgā informācijas tehnoloģija pieder;
2) no jomas, kurā pakalpojums tiek sniegts, vai tā radītās sekas var tikt atzītas par tādām, kas apdraud demokrātiskas valsts būtisku funkciju izpildi.

Šīs informācijas tehnoloģijas nosacīti var iedalīt šādi:

1) kritiskā informācijas tehnoloģiju infrastruktūra, kas sniedz sabiedrībai būtisku informācijas pakalpojumu;
2) pamatpakalpojumi;
3) digitālo pakalpojumu sniedzēji;
4) valsts varas un pašvaldības institūcijas;
5) pakalpojumi, kuru iespējamo kaitīgo seku ietekmi uz sabiedrības drošību var atzīt pēc publiskās personas lūguma, ievērojot konkrētus faktiskos apstākļus.

Kritiskā informācijas tehnoloģiju infrastruktūra. Tā ir kritiskās infrastruktūras sastāvdaļa, jo ir nepieciešama, lai ADAS, kas veic datu apstrādi, nodrošinātu kritiskās infrastruktūras sniegto informācijas pakalpojumu nepārtrauktību gan reālā vidē, gan arī tiešsaistē. ITDL 3. pantā noteikts, ka kritisko informācijas tehnoloģiju infrastruktūru aizsargā, lai nodrošinātu valstij un sabiedrībai būtisku pamatfunkciju veikšanu. To atbilstoši Nacionālās drošības likumam reglamentē Ministru kabinets (turpmāk – MK) saskaņā ar 2011. gada 1. februāra MK noteikumiem Nr. 100 "Informācijas tehnoloģiju kritiskās infrastruktūras drošības pasākumu plānošanas un īstenošanas kārtība". Latvijā informācija par automatizētām datu apstrādes sistēmām, kas iekļautas kritiskajā informācijas tehnoloģiju infrastruktūrā, ir valsts noslēpums. Taču, izanalizējot dokumentu "Nacionālās drošības koncepcija", var secināt, ka šādā infrastruktūrā tiek iekļauti valsts reģistri, sistēmiskas banku informācijas tehnoloģijas, veselības aprūpes sistēma un citi sabiedrības drošībai svarīgi objekti.

Svarīgi ir uzsvērt, ka šo sistēmu klasifikācija balstās uz diviem kritērijiem:

1) sistēmu piederību (valstij, pašvaldībai vai komersantam, kas darbojas attiecīgā nozarē);
2) riska faktoru (būtisks un apgrūtinošs).

2018. gada 14. maijā visās ES dalībvalstīs stājās spēkā NIS1 Direktīva, kuras 14. panta ceturtajā daļā noteikts, ka, vērtējot apdraudējuma ietekmes būtiskumu, ir jāņem vērā vismaz trīs kritēriji: skarto **lietotāju skaits**, **ilgums** un **ģeogrāfiskā izplatība**. Turklāt NIS1 Direktīvas apsvērumu 53. pantā norādīts, ka prasībām ir jābūt samērīgām ar risku, ko rada attiecīgā tīklu vai informācijas sistēma. Tādējādi NIS1 Direktīva uzliek par pienākumu dalībvalstīm pamatpakalpojumu sniedzējus klasificēt daudz detalizētāk un precīzāk.

Jebkurš drošības incidents, kas vērsts pret kritiskajā informācijas tehnoloģiju infrastruktūrā iekļautu ADAS, satur Krimināllikuma 241. panta trešās daļas un 243. panta piektās daļas noziedzīga nodarījuma pazīmes, un atbilstoši jurisdikcijai šādu nodarījumu novērtēšana ir Valsts drošības dienesta kompetencē. Taču kritiskā informācijas tehnoloģiju infrastruktūra ir tikai neliela daļa no sistēmām, kas sniedz sabiedrībai būtiskus pakalpojumus.

Pamatpakalpojums. NIS1 Direktīvas 4. panta 4. punktā noteikts, ka pamatpakalpojumu sniedzējs ir tāda veida publiska vai privāta vienība, kā minēts 2. pielikumā, kas atbilst 5. panta 2. punktā noteiktajiem kritērijiem. NIS1 Direktīvas 5. panta pirmajā daļā noteikts, ka dalībvalstīm līdz 2018. gada 9. novembrim bija pienākums identificēt vienības, kas tiks uzskatītas par pamatpakalpojumu sniedzējiem.

NIS1 Direktīvas 5. panta otrajā daļā noteikti vienoti kritēriji, pēc kuriem identificējami pamatpakalpojumi. Tie ir šādi:

1) vienība sniedz pakalpojumu, kas ir būtisks īpaši svarīgu sabiedrisku un / vai ekonomisku darbību nodrošināšanai;
2) minētā pakalpojuma sniegšana ir atkarīga no tīklu un informācijas sistēmām;
3) incidentam būtu būtiska traucējoša ietekme uz minētā pakalpojuma sniegšanu.

NIS1 Direktīvas 6. pantā sniegts kritēriju minimums, kas dalībvalstīm jāņem vērā, vērtējot būtisko traucējošo ietekmi uz pakalpojuma sniegšanu, tostarp lietotāju skaitu, pakalpojuma sniedzēja tirgus daļu, ietekmi, kādu drošības incidents varētu nodarīt ekonomikai un sabiedriskām darbībām vai sabiedrības drošībai.

Savukārt 2. pielikumā ir definētas jomas, kuru ietvaros pakalpojumu sniedzēji būtu atzīstami par pamatpakalpojuma sniedzējiem. Tā ir enerģētika, transports, banku nozare, finanšu tirgus infrastruktūras, veselības nozare, dzeramā ūdens piegāde un izplatīšana un digitālā infrastruktūra (interneta plūsmu apmaiņas punkts, domēnu nosaukumu sistēma, augstākā līmeņa domēnu nosaukuma reģistrs).

Atbilstoši NIS1 Direktīvai tika veikti grozījumi arī ITDL, papildinot to ar 3.[1] pantu "Pamatpakalpojuma sniedzējs, digitālā pakalpojuma sniedzējs un digitālā pakalpojuma pārstāvis".

Šā panta pirmajā daļā noteikts, ka pamatpakalpojuma sniedzējs ir valsts vai pašvaldības institūcija vai privātpersona, kas veic saimniecisko darbību Latvijā un sniedz:

1) finanšu pakalpojumus;
2) pakalpojumus, kas atkarīgi no informācijas tehnoloģijām;
3) pakalpojumus, kuru pārtraukšana informācijas tehnoloģiju incidenta rezultātā var radīt sabiedrībai būtisku traucējošu ietekmi.

Jāuzsver, ka "pamatpakalpojums" nav identisks termins "informācijas tehnoloģiju kritiskajai infrastruktūrai", jo pamatpakalpojumu statusu saskaņā ar MK noteikumu Nr. 43 9. punktu piešķir atbildīgā ministrija. Savukārt šo noteikumu 10. punktā norādīts, ka atbildīgā ministrija reizi divos gados izvērtē, vai šāds statuss ir saglabājams vai arī pakalpojums neatbilst ITDL 3.[1] pantā noteiktajiem kritērijiem. Turklāt lēmums par to, vai ir saglabājams vai maināms pamatpakalpojuma saturs, ir jāpieņem Administratīvā procesa likuma kārtībā un jāpaziņo arī pamatpakalpojuma sniedzējam. Līdz ar to šādu lēmumu pakalpojumu sniedzējs var apstrīdēt administratīvajā tiesā. No tā var secināt, ka jurisdikcija par nodarījumiem, kas saistīti ar patvaļīgu piekļuvi vai datu vai sistēmu darbības traucēšanu šajā ADAS kategorijā, ir Valsts policijas kompetence.

Digitālo pakalpojumu sniedzējs. ITDL 3.[1] panta otrajā daļā noteikts, ka digitālo pakalpojumu sniedzējs ir privāto tiesību juridiskā persona, kas:

1) veic saimniecisko darbību Latvijas Republikā un sniedz tiešsaistes tirdzniecības vietas, tiešsaistes meklētājprogrammas vai mākoņdatošanas pakalpojumu kādā no Eiropas Savienības valstīm;
2) veic saimniecisko darbību ārpus Eiropas Savienības un digitālo pakalpojumu Latvijas Republikā sniedz ar pilnvarota pārstāvja palīdzību.

Savukārt šā panta trešajā daļā ir noteikts, ka par digitālā pakalpojuma sniedzēja pārstāvi var būt jebkura fiziska vai privāto tiesību juridiskā persona, kas veic saimniecisko darbību Latvijas Republikā.

Valsts pārvalde. Šajā sektorā iekļautas visas informācijas tehnoloģijas, kas tiek izmantotas, lai valsts un pašvaldību institūcijas, izpildot konkrētu valsts funkciju, spētu realizēt e-pārvaldes pakalpojumus sabiedrībai. Saskaņā ar NIS2 Direktīvas priekšlikuma 1. pielikumu šī infrastruktūra atzīstama par būtisku objektu. Turklāt šai kategorijai piederošās ADAS nav uzskatāmas par kritisko informācijas tehnoloģiju infrastruktūru.

Pakalpojumi, ko par būtiskiem var atzīt, ievērojot konkrētos faktiskos apstākļus un iespējamo kaitīgo seku ietekmi uz sabiedrības drošību. Pakalpojumu sniedzēja iekļaušana kritiskajā infrastruktūrā vai pamatpakalpojumā ir diezgan laikietilpīgs process. Taču var būt gadījumi, ka par šādu sabiedrībai būtisku informācijas pakalpojumu sabiedrības drošības un veselības interesēs ir nepieciešams atzīt infrastruktūru, kuras nepārtrauktu darbību ir nepieciešams nodrošināt nekavējoši. Gadījumos, kad ir noticis informācijas tehnoloģiju drošības incidents, izvērtējot konkrētos apstākļus, CERT vienojas ar drošības incidenta pieteicēju par atbalsta sniegšanu drošības incidenta novēršanā, un puses vadās no ITDL 6. panta trešajā un ceturtajā daļā paredzētās rīcības incidentu novēršanas gadījumā.

2.3. Drošības incidenta būtiskas traucējošas ietekmes jēdziens

NIS1 Direktīvā, kā jau iepriekš minēts, ir izvirzītas vairākas prasības dalībvalstīm informācijas tehnoloģiju drošības jomā – gan ADAS klasifikācijā, gan arī risku novērtēšanas sistēmas izveidošanā, ieviešot jaunu terminu "būtiska traucējoša ietekme". Direktīvas 6. pants satur kritēriju minimumu, kas dalībvalstīm jāņem vērā, vērtējot būtisku traucējošo ietekmi uz pakalpojuma sniegšanu, tostarp lietotāju skaitu, pakalpojuma sniedzēja tirgus daļu, ietekmi, ko drošības incidents varētu nodarīt ekonomikām un sabiedriskām darbībām vai sabiedrības drošībai.

Lai izpildītu NIS1 Direktīvas prasības, Latvijā 2019. gada 15. janvārī tika pieņemti MK noteikumi Nr. 43 "Par nosacījumiem drošības incidenta būtiski traucējošās ietekmes noteikšanai un kārtību kādā piešķir, pārskata un izbeidz pamatpakalpojuma sniedzēja un

pamatpakalpojuma statusu". Šo noteikumu 1. punktā ir norādīti nosacījumi informācijas tehnoloģiju drošības incidenta būtiski traucējošās ietekmes noteikšanai dažādās nozarēs, tostarp dzeramā ūdens piegādes un izplatīšanas, interneta plūsmas, domēnu nosaukumu, kā arī enerģētikas nozarē, transporta nozarē un veselības nozarē sniegtajiem pakalpojumiem. Turklāt noteikumi paredz arī kārtību, kā tiek pārskatīts šo pamatpakalpojumu sniedzēju statuss.

Savukārt MK 2019. gada 15. janvāra noteikumu Nr. 15 "Noteikumi par drošības incidenta būtiskuma kritērijiem, informēšanas kārtību un ziņojuma saturu" 2. punktā par būtisku ietekmi uz pakalpojuma nepārtrauktību tiek atzīti gadījumi, kas atbilst vismaz vienai no šīm pazīmēm:

1) ilgst vairāk nekā 24 stundas neatkarīgi no skarto lietotāju skaita;
2) skar no 1 līdz 10 % (ieskaitot) pamatpakalpojuma lietotāju un ilgst vismaz četras stundas;
3) skar no 10 līdz 15 % (ieskaitot) pamatpakalpojuma lietotāju un ilgst vismaz divas stundas;
4) skar vairāk nekā 15 % pamatpakalpojuma lietotāju un ilgst vismaz vienu stundu;
5) skar vismaz vienu pamatpakalpojuma lietotāju, kurš saskaņā ar Energoefektivitātes likuma 10. panta otro daļu ir iekļauts lielo uzņēmumu sarakstā;
6) skar pamatpakalpojuma lietotājus vismaz vēl vienā citā Eiropas Savienības dalībvalstī un ilgst vismaz divas stundas.

Savukārt šo noteikumu 3. punktā noteikts, ka drošības incidentam ir būtiska ietekme uz digitālā pakalpojuma sniegšanu, ja tas ilgst vairāk nekā divas stundas.

Šeit jau faktiski ir gatavs algoritms, kā būtu vērtējams būtiskais kaitējums nodarījumos pret ISD. To, ka šajā klasifikācijas shēmā iekļauto sistēmu loks nākotnē tikai paplašināsies, liecina arī Eiropas Komisijas 2020. gada 16. decembrī publicētais priekšlikums NIS2 Direktīvai "Eiropas Parlamenta un Padomes Direktīva, ar ko paredz pasākumus nolūkā panākt vienādi augsta līmeņa kiberdrošību visā Savienībā un ar ko atceļ Direktīvu (ES) 2016/1148" (Eiropas Komisija, 2020).

NIS2 Direktīvas projekta 11. apsvērumā norādīts, ka pakalpojumi būtu jāiedala divās kategorijās atkarībā no nozares, kurā darbojas to sniedzēji, vai sniegto pakalpojumu veida. Šīs kategorijas apzīmētas kā būtiskas un svarīgas vienības. Turklāt, veicot to iedalīšanu kategorijās, būtu jāņem vērā nozares vai sniegto pakalpojumu veida svarīgums, kā arī atkarība no citām nozarēm vai pakalpojumu veidiem.

Šīs grupas ir uzskaitītas NIS2 Direktīvas priekšlikuma pielikumos. Pirmajā pielikumā uzskaitītas būtiskās vienības. Par būtisku pakalpojumu sektoru atzīta enerģētika, transports, banku pakalpojumi un finanšu tirgus infrastruktūra, veselības aprūpe, dzeramais ūdens, notekūdeņi, digitālā infrastruktūra, valsts pārvalde un kosmoss. Savukārt otrajā pielikumā ir reglamentētas svarīgo jomu vienības: pasts un kurjeru pakalpojumi, atkritumu pārvaldība, ķīmisko vielu izgatavošana, ražošana un izplatīšana, pārtikas ražošana, pārstrāde un izplatīšana, ražošana (medicīnisko ierīču un diagnostikas ierīču ražošana, datoru, elektronisko un optisko iekārtu ražošana, elektrisko iekārtu ražošana,

citur neklasificētu mehānismu un darba mašīnu ražošana, automobiļu, piekabju un puspiekabju ražošana, citu transportlīdzekļu ražošana), digitālos pakalpojumu sniegšana. Svarīgi uzsvērt, ka par šādām vienībām – objektiem – būtu jāatzīst visi vidēja lieluma un lielie uzņēmumi, kas darbojas "konkrētā kritiskā sektorā", kas ietverti 1. vai 2. pielikumā.

Teorētiski par visiem C4 un C3 kategorijas incidentiem, ja tiktu konstatēts nodarījums, būtu jāuzsāk kriminālprocesi. Anonimizētu tiesu nolēmumu datubāzē šīs publikācijas autori neatrada nevienu publiski pieejamu tiesas nolēmumu pēc Krimināllikuma 241., 243., 244., 244.[1] vai 245. panta. Visticamāk, šādus spriedumus tiesas nav pieņēmušas.

Jautājums – kāpēc tika izdarīti grozījumi Krimināllikuma 241. panta trešajā un 243. panta piektajā daļā?

Atbile – lai nepieļautu situācijas, ka personām, kuras nelikumīgi piekļūst šādām sistēmām, izdotos izvairīties no kriminālatbildības, jo nav iespējams pierādīt būtisko kaitējumu. Tādēļ likumdevējs noteica, ka atbildība par abiem nodarījumiem iestājas jau par pašu drošības incidentu – darbībām, kas vērstas pret ADAS, kas iekļautas iepriekš minētajās būtisko pakalpojumu sniedzēju kategorijās. Tāpēc uz šīm sistēmām attiecas Krimināllikuma 241. panta trešā daļa, proti, to apdraudējuma gadījumā būtu automātiski uzsākams kriminālprocess, jo minēto nodarījumu sastāvs ir pabeigts ar brīdi, kad persona ir izdarījusi Krimināllikuma 241. panta pirmajā daļā paredzētās darbības.

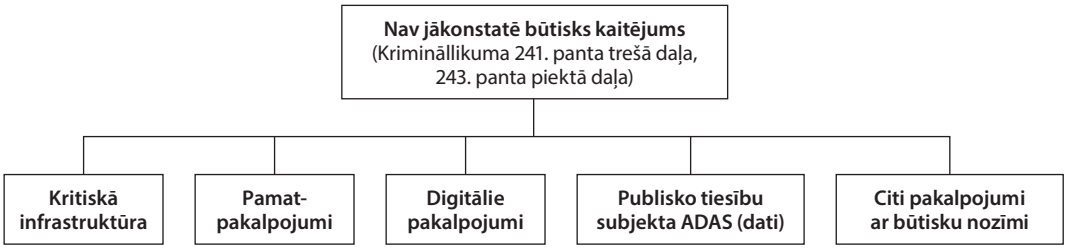
Līdzīgi būtu jārīkojas, ja iepriekš minēto grupu sistēmās tiktu veikta nelikumīga rīcība ar sistēmā esošo informāciju (Krimināllikuma 243. panta pirmā daļa) vai arī ADAS apzināta darbības traucēšana, ja ar to tiek bojāta vai iznīcināta aizsardzības sistēma (Krimināllikuma 243. panta otrā daļa). Respektīvi, šādos gadījumos būtu jāuzsāk kriminālprocess pēc Krimināllikuma 243. panta piektās daļas. Turklāt, ja ADAS vai ar tās palīdzību apstrādājamie dati tiek saistīti ar valsts deleģētas funkcijas pildīšanu vai arī ADAS darbība tiek finansēta no valsts budžeta, neatkarīgi no jau iepriekš minētās CERT.LV klasifikācijas, par jebkuru apdraudējumu šādām ADAS vai datiem ir uzsākams kriminālprocess.

3. Būtiska kaitējuma noteikšanas algoritmiskā metode pret ISD vērstos noziedzīgos nodarījumos

No iepriekš minētā var secināt, ka ADAS, kas ir saistītas ar kritisko infrastruktūru, kā arī ar pamatpakalpojumu, digitālpakalpojumu un citu būtiskas nozīmes pakalpojumu sniegšanu, nevar būt par apdraudējuma priekšmetu noziedzīgos nodarījumos, par kuriem kriminālatbildība ir paredzēta Krimināllikuma 241. panta pirmajā daļā, 243. panta pirmajā un otrajā daļā. Šāda veida ADAS krimināltiesiskā aizsardzība ir paredzēta speciālajās normās, tas ir, Krimināllikuma 241. panta trešajā daļā un 243. panta piektajā daļā. Tas nozīmē, ka būtisko kaitējumu nav nepieciešams konstatēt, ja noziedzīgs nodarījums ir vērsts pret šāda veida ADAS.

3.1. Krimināllikuma 241. panta trešās daļas un 243. panta piektās daļas piemērošanas problēmas

Krimināllikuma 241. panta trešajā daļā un 243. panta piektajā daļā paredzētie noziedzīgie nodarījumi ir vērsti pret ADAS, kas apstrādā ar valsts politisko, ekonomisko, militāro, sociālo vai citu drošību saistītu informāciju. Taču svarīgi ir precīzi noteikt ADAS un tajā apstrādājamo datu funkcionālo nozīmi (sk. 1. att.).



1. attēls. ADAS un tajā apstrādājamo datu funkcionālās nozīmes noteikšana

Praksē ir bijuši gadījumi, ka šo normu piemērotajiem radušās grūtības pierādīt, ka konkrēta ADAS patiešām apstrādā šāda veida informāciju. Kā jau minēts iepriekš, gan nacionālajos, gan starptautiskajos normatīvajos aktos ir noteikts, ka ADAS ar būtisku nozīmi jau pati par sevi ir krimināltiesiski aizsargājams objekts, tādējādi jebkura ADAS ar šādu nozīmi ir saistīta ar minētājos Krimināllikuma pantos norādītajām drošības jomām. Līdz ar to kriminālatbildība iestājas jau ar kaitīgo darbību izdarīšanu (formāls sastāvs), proti, par patvaļīgu piekļūšanu šāda veida ADAS, pārvarot attiecīgus drošības līdzekļus vai izmantojot citai personai piešķirtas tiesības, vai arī par šāda veida ADAS esošās informācijas (datu) neatļautu grozīšanu, bojāšanu, iznīcināšanu, pasliktināšanu vai aizklāšanu, vai apzināti nepatiesas informācijas ievadīšanu.

3.2. Krimināllikuma 241. panta pirmajā daļā, 243. panta pirmajā un otrajā daļā ietvertais "būtiskais kaitējums"

Krimināllikuma 241. panta pirmajā daļā, 243. panta pirmajā un otrajā daļā paredzētie noziedzīgie nodarījumi, kuros ir jānoteic būtisks kaitējums, ir vērsti tieši pret ADAS (un datiem), kas ir piederīgas galvenokārt privāto tiesību jomai un nepilda publisko tiesību funkcijas.

Līdzīgi Horonija (*Horony,* 1999) paustajam, arī Liholaja norāda, ka šāda veida noziedzīgajos nodarījumos būtisks kaitējums ir saistīts ar vairākiem faktoriem: ADAS darbības traucēšanas ilgumu, zaudējumiem, kas saistīti ar ADAS dīkstāvi, izdevumiem par bojātās informācijas atjaunošanu vai tās aizstāšanu, jaunu programmisku resursu instalēšanu, sistēmas lietotāju piekļuves tiesību korekciju, neiegūtu peļņu, kā arī citiem izdevumiem (Liholaja, 2019).

Papildinot šos kritērijus, ir jānorāda, ka būtisks kaitējums pats par sevi iestājas tad, ja ADAS apstrādājamā informācija ir ar likumu aizsargājama, piemēram, sensitīvie dati, komercnoslēpums u. tml. Tāpat tas ir tad, ja ADAS ir noteikta sabiedriska funkcija, piemēram, ADAS ir piederīga kādai biedrībai, partijai, fondam u. tml.

Savukārt, ja ADAS neapstrādā ar likumu aizsargājamos datus vai arī tai nav noteikta sabiedriska funkcija, tad **būtiskā kaitējuma izvērtēšanā jāpiemēro turpmāk minētie kritēriji**.

Laika kritērijs. Kā jau iepriekš tika minēts, MK 2019. gada 15. janvāra noteikumos Nr. 15 "Noteikumi par drošības incidenta būtiskuma kritērijiem, informēšanas kārtību un ziņojuma saturu" noteikti nosacījumi, kuru iestāšanās gadījumā drošības incidents ir atzīstams par būtisku. Šie kritēriji ir saistīti, pirmkārt, ar pakalpojuma nepārtrauktību noteiktā laika griezumā; otrkārt, ar skarto lietotāju skaitu. Tādējādi šajos noteikumos norādītie nosacījumi būtu piemērojami kaitējuma izvērtēšanā.

Mantisko zaudējumu kritērijs. ADAS apdraudējuma gadījumā var rasties kā faktiski zaudējumi, kurus var izteikt naudas izteiksmē, jeb mantiskie zaudējumi, tā arī zaudējumi, kas nav novērtējami naudas izteiksmē, jeb nemantiskie zaudējumi.

Speciālā likuma 23. panta pirmās daļas 1. punktā noteikts, ka būtisko kaitējumu veido mantiskie zaudējumi vismaz piecu minimālo mēnešalgu apmērā un vēl citu ar likumu aizsargāto interešu apdraudējums, savukārt no šīs daļas 2. punkta izriet, ka būtisko kaitējumu veido arī zaudējumi, kas paši par sevi jau ir vismaz 10 minimālo mēnešalgu apmērā. Uz mantiskiem zaudējumiem attiecināmi arī izdevumi, ko veido tehnisku manipulāciju izmaksas, kas vērstas uz radīto seku novēršanu, piemēram, programmēšanas, datu atjaunošanas / aizstāšanas izmaksas u. c. Turklāt mantisko zaudējumu var veidot arī neiegūta peļņa un dīkstāves izmaksas darbiniekiem ADAS traucējumu dēļ.

Nemantisko zaudējumu un sociālā nozīmīguma kritērijs. Nemantisko zaudējumu izvērtēšana ir saistāma ar ADAS sociālā nozīmīguma kritēriju. Šis kritērijs vienmēr būs vērtējams kopā ar bīstamību – risku, ko nodarījums var radīt sabiedrībai. Lai šis kritērijs izpildītos, ir jākonstatē acīmredzams, nepārprotams sabiedrisks kaitējums, kas kādai sabiedrības grupai radījis leģitīmo interešu aizskārumu. Ja ar noziedzīgo nodarījumu ir apdraudēts uzņēmums, tad šī kritērija izvērtēšanā ņemams vērā arī uzņēmuma lielums, proti, vai uzņēmums ir mikrouzņēmums vai vidēja lieluma uzņēmums. Ja uzņēmums ir atzīstams par lielu, tad būtisks kaitējums iestājas pats par sevi.

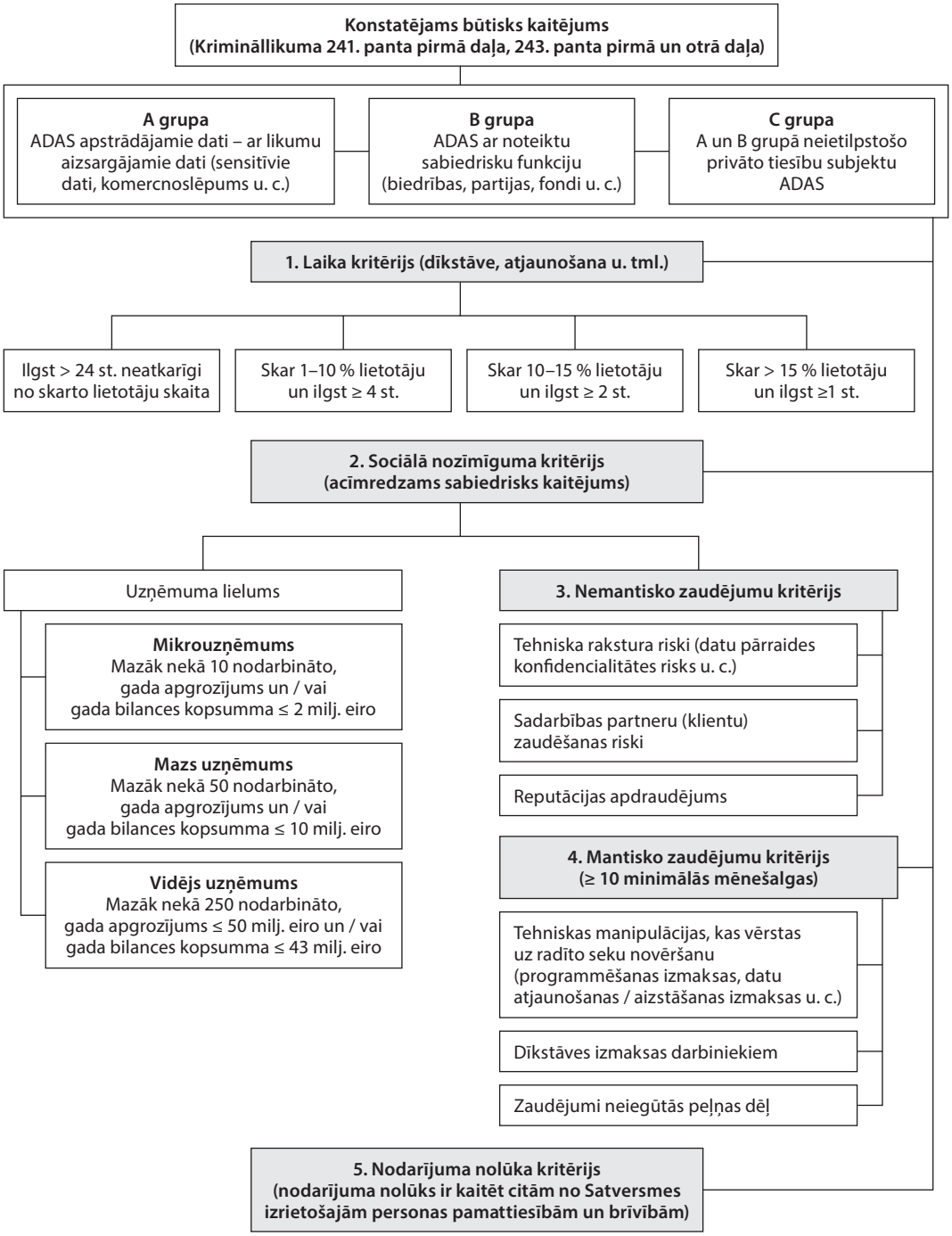
Savukārt nemantiskie zaudējumi veido arī tehniska rakstura riskus, sadarbības partneru (klientu) zaudēšanas riskus, reputācijas apdraudējuma, kā arī citus nemantiskus riskus. Ņemot vērā to, ka noziedzīgos nodarījumos, kas vērsti pret ADAS, būtisks kaitējums jau iestājas ar jebkuru citu leģitīmo interešu aizskārumu, kuram var būt arī nemantisks raksturs, nav nepieciešams nemantisko zaudējumu tiešā veidā saistīt ar mantisko kaitējumu, jo aizskarto interesi pēc būtības var veidot jebkurš no uzskaitītajiem nemantisko zaudējumu veidiem. Turklāt to saraksts noteikti nedrīkst būt

izsmeļošs, jo, vērtējot sociālā nozīmīguma kritēriju, jāņem vērā arī cietušās personas subjektīvais viedoklis. Tādējādi šā panta pirmās daļas 1. punkta jēga zūd attiecībā uz būtiskā kaitējuma noteikšanu noziedzīgos nodarījumus, kas vērsti pret ADAS. Līdz ar to būtiska kaitējuma noteikšanā būtu piemērojams Speciālā likuma 23. panta pirmās daļas 2. un 3. punkts.

Nodarījuma nolūka kritērijs. Ar šā kritērija palīdzību tiek izvērtēts, vai nodarījuma mērķis ir bijis kaitēt citām leģitīmām interesēm. Tas nozīmē, ka īpaši ir jāvērtē, vai nodarījuma mērķis nav saistāms ar citu Satversmē noteikto pamattiesību, kas nav saistītas ar noziedzīgā nodarījuma objektu (priekšmetu), ierobežošanu. Piemēram, nesankcionēti piekļūstot ADAS, vainīgais bija plānojis šajā sistēmā apstrādājamos datus iegūt savā prettiesiskajā rīcībā un pēc tam tos nelikumīgi izplatīt nolūkā apdraudēt personas reputāciju, kas nepieciešama konkrētas komercdarbības veikšanai.

Jāuzsver, ka minētie kritēriji nav izsmeļoši, taču tie veido minimumu, kas būtu obligāti jāizvērtē, lai konstatētu būtiska kaitējuma esamību konkrētajā noziedzīgajā nodarījumā, kas ir vērsts pret ISD. Turklāt nebūtu pareizi, ja šos kritērijus uzskatītu par kumulatīviem. Šo kritēriju izvērtēšanā jābūt kopsakarībai, kas tieši izriet no konkrētā noziedzīgā nodarījuma faktiskajiem apstākļiem. Piemēram, ļaunprātīgu darbību rezultātā kāda tīmekļvietnes darbība tikusi traucēta vairāk nekā 24 stundas. Pēc laika kritērija, kas izriet no jau iepriekš minētājiem MK noteikumiem Nr. 15, šāds traucējums jau pats par sevi ir uzskatāms par būtisku drošības incidentu. Taču var būt arī tā, ka šādu tīmekļvietni apmeklē vien pāris lietotāju dienā un tajā nav publicēta kāda patiešām nozīmīga informācija, kura kādai personai varēja būt vitāli nepieciešama tieši traucējumu brīdī. Šajā gadījumā, izvērtējot apstākļus kopsakarībā atbilstoši minētajiem kritērijiem, nebūtu konstatējams, ka ļaunprātīgu darbību rezultātā kādai personai būtu radīts tieši būtisks kaitējums.

Turklāt nedrīkst aizmirst, ka būtiska kaitējuma jēdziens ir jāpiepilda ar saturu, līdz ar to tieši likuma piemērotājam ir nepieciešams vispusīgi, izmantojot minētos kritērijus, izvērtēt būtiska kaitējuma esamību. Ņemot vērā visu iepriekš minēto, ar mērķi sistematizēt būtiska kaitējuma noteikšanas kritērijus noziedzīgajos nodarījumos, kas vērsti pret ISD, autori ir izstrādājuši būtiskā kaitējuma noteikšanas algoritmu šāda veida noziedzīgajos nodarījumos (sk. 2. att.). Jāuzsver, ka šis algoritms, tāpat kā paši izvērtēšanas kritēriji, nekādā gadījumā neaprobežo attiecīgo likuma piemērotāju būtiska kaitējuma tvērumu izskatīt vēl plašāk.



2. attēls. Algoritms būtiska kaitējuma noteikšanai noziedzīgos nodarījumos, kas vērsti pret ISD

Nobeigums

Ar pašreizējo Speciālā likuma 23. panta pirmo daļu, kurā noteikti būtiska kaitējuma kritēriji, netiek sasniegts Krimināllikuma 241. panta pirmās daļas un 243. panta pirmās un otrās daļas mērķis – nodrošināt krimināltiesisko aizsardzību ADAS un tās datiem, ja nodarījuma rezultātā ir nodarīts būtisks kaitējumus. Tas ir saistīts ar to, ka, galvenokārt, izmeklēšanas iestādēm vai arī pašiem cietušajiem rodas grūtības pierādīt būtiska kaitējuma iestāšanos, jo īpaši tad, ja radītais kaitējums ir saistīts ar nemantiskiem zaudējumiem.

ITDL 3. un 3.[1] pantā ir norādīti kritēriji, pēc kuriem ADAS atzīstamas par sistēmām, kas sniedz būtisku pakalpojumu. Minētās sistēmas kopumā veido Krimināllikuma 241. panta trešās daļas un 243. panta piektās daļas apdraudējuma objektu, jo jebkura būtiska pakalpojumu sniegšana ir saistīta ar Krimināllikuma attiecīgajos pantos definētajām drošības jomām. Ja ADAS vai ar tās palīdzību apstrādājamie dati pilda valsts deleģētu funkciju vai arī ADAS darbība tiek finansēta no valsts budžeta, tad par jebkuru apdraudējumu ir jāuzsāk kriminālprocess pēc Krimināllikuma 241. panta trešās daļas vai 243. panta piektās daļas. Turklāt tikai ITDL 3. pantā definētā informācijas tehnoloģiju kritiskā infrastruktūra ir Valsts drošības dienesta jurisdikcijā, savukārt pārējie pakalpojumu veidi, kas noteikti 3.[1] pantā, ir vispārējās jurisdikcijas pārraudzībā. Krimināllikuma 241. panta pirmās daļas un 243. panta pirmās un otrās daļas apdraudējuma objekts ir ADAS, kas nesniedz būtisku pakalpojumu, piemēram, darbojas privāto tiesību jomā un apstrādā ar likumu aizsargājamu informāciju. Šajos noziedzīgajos nodarījumos būtisks kaitējums ir izvērtējams sistematizēti, pēc noteiktiem vispārpieņemtiem kritērijiem.

Pētījuma ietvaros izstrādāta būtiska algoritmiskā metode kaitējuma noteikšanai noziedzīgos nodarījumos, kas vērsti pret ISD, un tā būtu izmantojama būtiska kaitējuma pierādīšanā.

Priekšlikumi

Speciālo likumu nepieciešams papildināt ar speciālu pielikumu par būtiska kaitējuma noteikšanu noziedzīgos nodarījumos, kas vērsti pret ISD, ietverot tajā šā pētījuma autoru izstrādāto būtiska kaitējuma noteikšanas algoritmu, kas pamatojas uz vispārpieņemtajiem būtiska kaitējuma izvērtēšanas kritērijiem.

Nepieciešams veidot visu valstī esošo ADAS vienotu klasifikāciju, kas aptvertu sistēmas, kuras nav minētas ITDL 3.[1] pantā, ieskaitot tās, kurām netiek atzīta būtiski traucējošā ietekme, tostarp maziem un vidējiem e-komersantiem, nevalstiskām organizācijām, kā arī citām privātpersonām piederošām ADAS. Tas radītu vienotu pieeju ADAS (un datu) funkcionālās nozīmes noteikšanā, tādējādi arī mazinātu pret ISD vērsto nodarījumu kvalifikācijas noteikšanas un būtiska kaitējuma pierādīšanas problemātiku.

Nepieciešams Krimināllikuma 241. panta trešo daļu un 243. panta piekto daļu grozīt, precizējot, ka šajos pantos norādīto nodarījumu apdraudējuma objekts ir tieši ADAS, kas apstrādā informāciju, kura ir saistīta ar būtiska informācijas pakalpojuma sniegšanu, atsevišķi neminot konkrētas drošības jomas, ar kurām šīs ADAS ir saistītas.

Tas ir nepieciešams, lai šo normu dispozīcijās ietvertais teksts neradītu šaubas likuma piemērotājiem attiecībā uz ADAS (un datu) saistību ar šajās normās norādītajām drošības jomām, lai šo normu mērķis būtu nepārprotams.

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Development Strategy of International Cooperation of Forensic Science Institutions of Ukraine with Foreign Experts in Prevention of Terrorist Attacks on Critical Infrastructure

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Abstract

The issue of using modern foreign experience of preventive activity in criminological work of forensic science institutions of Ukraine has been considered in this study. Peculiarities of the main organisational forms of forensic science activity have been analysed through specialised (forensic science) institutions and through specific specialists, namely: forensic experts (for example, practice of the institute of sworn experts: specialists who took the oath or received a license for forensic examination). Analysis of international standards used in forensic science activity has been carried out. Necessity position of legislative introduction of international standards in process of forensic examination has been revealed and substantiated. The main emphasis is on highlighting problems of cooperation of forensic institutions of Ukraine with foreign experts in preventing terrorist attacks on critical infrastructure.

The research aim is to study the use of modern foreign experience in preventive activities in criminological work of forensic expert institutions of Ukraine.

The result of the study provides evaluation of the problems of cooperation of forensic institutions of Ukraine with foreign experts in preventing terrorist attacks on critical infrastructure.

Based on this evaluation, a proposal is put forward for the improvement of normative regulations.

Keywords: forensic science, forensic expert, international standards, prevention, critical infrastructure facilities.

Introduction

One of the main work directions of all public authorities in Ukraine on integration into the European and world community is preparation of proposals on international legal relations and Ukraine joining international treaties and conventions, signing agreements on legal cooperation with relevant foreign bodies and international organisations, interaction with them within their powers, etc. Therefore, the current trend is to expand participation of forensic science institutions in such international cooperation, increasing their role in development of theory and practice of criminalistics and forensic science (Filipenko, et al., 2021).

This issue has received due attention in other international documents in particular in the Global Counter-Terrorism Strategy (A/RES/60/288) adopted by the General Assembly in 2006. United Nations Member States recognised that capacity-building in all States is a core element of the global counter-terrorism effort (UNODC, 2014).

This is especially true in responding to the complications of criminological situation, as well as in emergencies, including prevention of terrorist attacks on critical infrastructure. This is reflected in the official position of the state, expressed in a number of recently issued legal acts. In particular, they emphasise that priority in achieving the goals of crime counteraction and eliminating external and internal threats to Ukrainian national security belongs to all state bodies that should have appropriate forces and means capable of performing specific tasks (On the Strategy of Military Security of Ukraine, 2021).

Thus, it can be argued that today there is a lack of research on criminological activities of forensic science institutions of Ukraine to prevent terrorist attacks on critical infrastructure, cooperation of forensic science institutions of Ukraine with foreign experts in these issues increasing the relevance of the chosen direction and prospects determining effective practices for improving such activity.

Scientists indicate that forensic experts should note circumstances identified via the facilitated examination by the commission of offenses and develop recommendations to prevent certain crimes including terrorist attacks on critical infrastructure (Nechyporuk et al., 2021).

Main Content Presentation

Important part of Ukrainian modern criminal law policy is countering various terrorist threats. The most dangerous and devastating consequences are terrorist acts related to encroachment on critical infrastructure, as they pose a real threat to stable

operation of such facilities that threatens human life and health, violates work of enterprises, institutions and organisations, industrial and economic facilities, etc. (Spitsyna & Filipenko, 2019).

According to the provisions of the Law of Ukraine "On the Fight against Terrorism", terrorism is a socially dangerous activity that utilises deliberate use of violence by taking hostages, arson, murder, torture, intimidation of the population and authorities or other encroachments on life or health, or threats of committing criminal acts in order to achieve criminal goals (On the Fight against Terrorism, 2003).

As a criminal phenomenon, terrorism is an illegal, criminally punishable act expressed in the use of weapons, explosion, arson or other acts that endanger human life or health or cause significant property damage or other serious consequences, if any actions were committed for the purpose of violating public safety, intimidating population, provoking a military conflict, international complication, or in order to influence decisions or acts or omissions of public authorities or local governments, officials of these bodies, associations of citizens, legal entities persons, international organisations, or drawing public attention to certain political, religious or other views of perpetrator (terrorist), as well as the threat of committing these acts for the same purpose (Criminal Code of Ukraine, 2001).

Terrorism includes ideology of violence and terrorist activities in various forms. Terrorist activities include planning and (or) creating terrorist structures, involvement in terrorist activities, financing or any other assistance to these activities, propaganda of violent methods to achieve social and political goals, as well as the actual commission of terrorist acts.

Terrorism is a multi-object crime, the main purpose of which is public safety, as well as encroachment on citizen lives and health, critical infrastructure facilities, air transport facilities, natural environment, information environment, public administration bodies, statesmen and public figures, etc.

Experts in crime counteraction identify about 200 types of modern terrorist activities. The main ones are: political terrorism, nationalist terrorism, religious terrorism, technological terrorism, etc. The most dangerous is technological terrorism that is the use or threat of use of weapons of mass destruction, including nuclear, chemical and bacteriological, radioactive and highly toxic chemicals, biological substances, as well as threat of seizure of critical infrastructure, increased danger to human life and health. An act of international terrorism was observed during the seizure of the Chernobyl nuclear power plant by the troops of the Russian Federation, shelling of the territory of the Zaporozhye nuclear power plant. World leaders have accused Russia of endangering safety of an entire continent, and the president of Ukraine Volodymyr Zelensky accused Russia of "nuclear terror". US President Joe Biden urged Moscow to stop its military activities around the site, while the Prime Minister of Canada Justin Trudeau insisted the "horrific attacks" from Russia "must cease immediately". UK Prime Minister Boris Johnson said the "reckless" attack could "directly threaten the safety of all of Europe". All three leaders spoke to the President Volodymyr Zelensky by phone. Mr Zelensky, meanwhile, said the attack

could have caused destruction equal to six Chernobyls, the site of the world's worst nuclear disaster in 1986 (Ukraine nuclear plant: Russia in control after shelling, 2022).

Analysis of domestic and foreign sources makes it possible to attribute the following to the main current trends in the evolution of terrorism:

1) consolidation of local terrorist groups and their rapid internationalisation;
2) strengthening mutual influence of various internal and external social, political, economic and other factors that contribute to emergence and spread of terrorism;
3) increase of the level of organised terrorist activities, creation of large terrorist groups with developed infrastructure;
4) strengthening the link between terrorism and organised crime;
5) growth of financial and logistical support of terrorist structures;
6) desire of terrorism subjects to master the means of mass destruction of people;
7) attempts to use terrorism as a tool for interfering in internal affairs of states;
8) development and improvement of new forms and methods of terrorism aimed at expanding the consequences of terrorist acts and increasing the number of victims, etc. (UNODC, 2019).

The degree of danger of threats of terrorist acts is determined by the improvement level of forms, methods, forces and means of terrorist activity, tactics of its implementation, as well as efficacy of anti-terrorist measures of national and international systems of terrorism counteraction.

The purpose of countering terrorism in Ukraine is to protect individuals, society and the state from terrorist threats and prevent such manifestations.

The main tasks in achieving these goals are:

1) identification and elimination of factors that contribute to emergence and spread of terrorism;
2) detection, prevention and cessation of actions of persons and organisations aimed at preparation and commission of terrorist crimes and (or) assistance in such activities;
3) bringing to justice the subjects of terrorist activity in accordance with the current legislation of the state and international community;
4) cessation of attempts to transfer activities of international terrorist organizations to the territory of Ukraine, involvement in this process of the potential of the international anti-terrorist coalition;
5) constant improvement of the national system of terrorism counteraction, maintenance in a state of readiness for the use of forces and means designed to detect, prevent and stop terrorist acts and minimise their consequences;
6) ensuring effective anti-terrorist protection of critical infrastructure, livelihoods and places of mass stay of people;
7) counteraction to the spread of terrorism ideology, implementation of active information and propaganda measures of anti-terrorist orientation (Nechyporuk et al., 2021).

National system of terrorism counteraction is a set of organisational structures (subjects of terrorism counteraction), which, within the powers established by laws and regulations issued on their basis, carry out activities to combat terrorist threats, develop and implement a set of measures to prevent terrorist threats, including detection and cessation of terrorist activities, minimisation and elimination of possible consequences of terrorist acts.

Subjects of terrorism counteraction are authorised bodies of state power and local self-government responsible for conducting anti-terrorist measures, non-governmental organisations and associations, as well as individual citizens who aid in implementation of measures in this area. One of the central authorities that protect not only life, health, safety but justice in general is the state forensic science institutions of Ukraine.

Therefore, consideration of the strategy of international cooperation development of forensic science institutions of Ukraine with foreign experts in prevention of terrorist attacks on critical infrastructure is of great practical and scientific importance. The strategy is based on the principles of international law, the main international documents that determine the conditions and procedure for cooperation between states in the field of international forensic science cooperation. The basis of strategic planning should be science, since only relying on scientific knowledge it is possible to assess the real state of affairs and existing opportunities in determining strategic and tactical goals and trajectory of their achievement.

The main purpose of state forensic science institutions is to protect interests of the state, rights and freedoms of citizens and rights of legal entities by conducting objective, scientifically sound forensic examinations and forensic research. International cooperation of forensic science institutions is important for implementation of the rule of law, improving forensic activities and quality of forensic science as one of the main forms of using specific expertise in modern justice, as well as formation of preventive recommendations for law enforcement agencies. Proactive activity in the field of international integration of Ukraine into the world legal space puts a wide range of tasks for state forensic institutions to establish international cooperation and expand cooperation with foreign specialised forensic science institutions.

One of the main directions of work of all public authorities in Ukraine on its integration into the European and world community is preparation of proposals on international legal relations and Ukrainian accession to international treaties and conventions, signing agreements on legal cooperation with relevant foreign bodies and international organisations, interaction with them within their powers, etc. Consequently, the current trend is to expand the participation of forensic institutions in such international cooperation, increasing their role in the development of theory and practice of forensic science and criminalistics (Dmitrieva, 2020). International cooperation of expert institutions is necessary for exchange of experience, advanced training of specialists of forensic institutions, considering modern achievements of science and technology, creation of standardised forensic methods, profile forensic directions (Zakovyrko, 2018).

It difficult to perform its law enforcement functions without integration with the international community. Therefore, international cooperation of expert institutions is necessary in order to exchange experience considering modern achievements of science and technology, prevention of terrorist attacks on aerospace and critical infrastructure, elimination of duplicating scientific and methodological support of regional distribution of tasks between forensic science institutions and creation of specialised forensic directions (Nechyporuk et al., 2021).

However, the area related to strengthening preventive activities of forensic institutions is not mentioned or highlighted as a priority that is an incomplete reflection of criminological potential of these entities (Filipenko et al., 2021).

It should be noted that in recent years creation of international forensic networks has intensified. Currently there are five such networks that unite scientific reserves of forensic science institutions of different countries:

1) European Network of Forensic Science Institutes, existing since 1995, is the most developed and strong network;
2) South African Regional Network of Forensic Science, since 2008, covers the entire African region;
3) Asian Network of Forensic Science, existing since 2008;
4) International Forensic and Environmental Expert Network, existing since 2008, to assist forensic experts in the field of ecology and environmental offenses;
5) Traced evidence forensic environmental network, existing since 2006, is a non-governmental organisation to assist in conducting forensic examinations in cases of crimes against wildlife and to preserve biological diversity of flora and fauna (de Kinder, 2011).

For example, within the European Network of Forensic Science Institutes (ENFSI), one of the most important conditions for effective operation of forensic institutions is validation (assessment of suitability) of forensic methods. Validation of methods is an important system element of ensuring quality control of forensic research results, and its practice is widespread in forensic science institutions around the world.

As innovative mechanisms for improving the quality of forensic activities in recent years, validation and certification of methodological materials for forensic examination should be included in cooperation plans of forensic science institutions. In addition, standardisation (unification) of forensic methods, common terminological standards, unified requirements for forensic experts and professional forensic expert education programmes will solve another problem – conducting forensic examinations on the basis of a single scientific and methodological approach.

European Network of Forensic Science Institutes has existed since 1995 (official site ENFSI). It consists of 54 forensic science institutions, 41 of which are located in EU Member States. The purpose of ENFSI is enshrined in its Constitution: to be at the forefront of the world to ensure the quality of development and conduct forensics throughout Europe.

The main activity of ENFSI is to strive to achieve a high reputation of the organisation in the field of forensic science in Europe and the world by developing the quality of forensic services at all stages of the proceedings from the scene to the court, provided by the following principles:

1) ENFSI membership combines production, scientific and methodological capabilities of forensic science institutions;
2) ENFSI membership expansion strengthens trust of this organisation by law enforcement agencies and judges;
3) Business relations with other organisations related to forensic science and criminalistics are established and maintained in an organised manner;
4) Activities of all ENFSI member institutions are actively encouraged to implement modern research methods and international standards in forensic practice and ensure high competence of experts in specific types of forensic science.

Within international cooperation, this is important for combating crime, in particular for combating illegal migration, human trafficking, arms and drug trafficking, smuggling, spread of transnational and cross-border crime, search for criminals wanted internationally, search for missing persons, etc. It should be noted that the European Union recognises the leading role in provision of judicial assistance by ENFSI; in particular, in December 2011 at a meeting of the Council of Europe on Justice and Home Affairs a Decision on the Strategy for European Forensic Science until 2020 providing for a European Forensic Science Area and development of forensic infrastructure in Europe was adopted (ENFSI held the 10th conference of the working group of experts on documents, 2018).

What is the vision of the European Forensic Science Development Strategy? Thus, in order to improve police cooperation with forensic institutions throughout the European Union and create a European forensic space by 2020, member states and the National Forensic Commission (NCFS), seeking to ensure the effective administration of justice and security of citizens, agreed to achieve success in relevant areas, among which, given the focus of this study, the following should be highlighted:

1) accreditation of forensic institutes and laboratories;
2) approval and use of best practices and their use in the work of forensic science institutions;
3) determination of optimal ways to create, update and use forensic databases;
4) use of forensic science achievements terrorism counteraction, organised crime and other types of crimes (Nechyporuk et.al, 2020);
5) research and implementation of projects for further development of forensic infrastructure, etc.

The above allows to claim that this document only indirectly traces the tendency to strengthen the preventive capabilities of forensic science institutions of the European Union.

Simultanously, another international document emphasises strengthening of international cooperation between forensic science institutions of foreign countries for

administration of criminal justice. Thus, in 2010, at the 19th session of the Commission on Crime Prevention and Criminal Justice of the UN Economic and Social Council, Resolution 19/5 *International cooperation in the field of forensic science* was discussed and adopted. This document notes that the role of forensic science in the administration of criminal justice and the need to further develop international relations of forensic science institutions within the existing regional networks of forensic institutions to ensure a global exchange of forensic knowledge, information and data (International cooperation in the field of forensic science. Report of the Executive Director of the Commission on Crime Prevention and Criminal Justice, 2012).

Thus, it should be noted that the international community is constantly interested in the field of forensic science and use of its capabilities in combating crime and ensuring administration of justice. In order to exchange information, improve forensic expert methods, form common standards of forensic science, solve practical problems of law enforcement, train and improve staff skills and solve other important tasks, currently more than thirty international organisations are successfully operating.

The next thing to pay attention to is the fact that both in Ukraine and in foreign countries it is important to introduce the latest information technologies in the preventive activities of forensic institutions (due to digitalisation processes). In forensic activities, use of latest information technologies (hereinafter referred to as IT) and computer technology, achievements of various sciences — mathematics, semiotics, modeling theory, algorithm theory, use in expert research of integrated automated database (hereinafter referred to as AD), intelligent interactive (dialogue) information systems and the formation of automated information systems (hereinafter referred to as AIS) of the new generation allow timely receipt and processing of relevant information, record illegal activities of individuals and organised criminal groups, prevent illegal activities of "authorities" and "leaders" of criminality, to organise work on active search of criminals and other persons, to identify and eliminate causes and conditions that contribute to commission of crimes, thereby effectively implementing requirements of current legislation to protect the rights and interests of individuals, society and the state as a whole from criminal encroachment (Filipenko, 2019).

Creation of international and regional reference and information databases of international forensic institutions, foreign forensic science institutions is an urgent area of international cooperation of forensic science institutions of Ukraine with foreign professionals in preventing terrorist attacks on aerospace facilities and critical infrastructure (Filipenko et al., 2021). These problems could be tackled and the full potential of point-of-care and mobile forensic analyses could be realised if measurement devices could be operated in an integral forensic network. Through the network, the necessary calibration and quality control measures could be taken that would enable deployable forensic instrumentation to yield robust findings that can directly be used as evidence. The network would allow forensic experts to assess data generated outside the forensic laboratory and to provide direct assistance to the operators on location. From these activities, it also becomes apparent for which samples a more detailed follow-up investigation is required

at the forensic laboratory. The forensic expert capacity is thus used more effectively and findings can be fed into the platform creating a continuous cycle of platform and data development. This approach would combine central data gathering allowing forensic intelligence and knowledge management with rapid and efficient decentralised forensic analysis. This novel concept, although technologically challenging, could lead to a step change in efficiency and efficacy of the forensic information gathering process. It could also cause a paradigm shift in the role of forensic institutes and forensic experts in the criminal justice system: a shift towards a new role for forensic institutes and laboratories as custodians of the forensic platforms and point-of-care and portable equipment and methods. It would also allow forensic institutes to develop powerful forensic intelligence tools to reveal potential case and evidence connections, to better understand criminal activities, to monitor and optimise policing, to improve the efficiency of forensic investigations and to assist in crime prevention and disruption (Kloosterman et al., 2020).

Use of the latest devices and equipment, such as unmanned aerial vehicles (UAVs), has a powerful potential in countering terrorist attacks. With their help, in particular, it is possible to ensure various preventive measures: round-the-clock monitoring of the territory adjacent to the objects of critical infrastructure and aerospace; monitoring activities of ground safety equipment and protecting the data they integrate and transmit. According to researchers, there is far more technology developed and ready for the war on terror. Unmanned aerial vehicles, ranging from the small quad copters to the large military UAVs, have surveillance potential that should be exploited to its fullest. Aerospace and defense systems integrators should be always thinking about how they could be using current off-the-shelf technologies in cutting-edge new ways to detect, track, and deter potential terrorists (The growing role of technology in the global war on terrorism, 2015).

The United States has sent 600 more AeroVironment Switchblade drones to help the Ukrainian military counter Russia's invasion. That is a major increase from the 100 drones the US sent at the onset of war. Drones are "loitering munitions" that can circle above a battlefield before in effect becoming missiles that attack specific targets. Those are included in the Pentagon's new $800 million in military aid to Ukraine, a package that brings the country's total contributions to $2.6 billion in security assistance. The US also has sent an undisclosed number of AeroVironment Puma drones, which can circle for hours above a battlefield and help soldiers direct Switchblades toward their targets. Drones in Ukraine are changing the nature of war, providing a relatively cheap way for soldiers to follow the ongoings and launch attacks against expensive armored vehicles. Ukrainian troops are using everything from small commercial drones to the large military Turkish-built Bayraktar TB2 (US Military Sends Another 600 Switchblade Drones to Ukraine, 2022).

Current stage of forensic science development is characterised by high dynamism, active influence on its development of scientific and technological progress, purposeful and active search for effective ways to improve forensic expert practice on a fundamental theoretical basis. The main features of forensic research at the present stage include its high science intensity, use of cybernetics integrating into forensic science and

criminalistics that serve as a catalyst for further development of its traditional tools and methods based on achievements of natural, technical and human sciences.

Conclusions

For development and effectiveness of international cooperation of forensic science institutions of Ukraine with foreign experts in preventing terrorist attacks on critical infrastructure, it is necessary to do the following:

1. Develop the Strategy for the development of forensic institutions of Ukraine until 2030 that provide:
   1) Improving efficiency of forensic activities and quality of forensic examinations in Ukraine, creating favourable conditions for international exchange of scientific achievements and practical experience in this field;
   2) Creation of an effective model of interaction of state forensic science institutions of Ukraine and domestic forensic experts with international associations of forensic experts and foreign forensic institutions and professionals;
   3) Promoting development of integration processes in the field of forensic science activities in the European Union and other international and regional organisations with participation of Ukrainian forensic experts;
   4) Creation of scientific, methodical and organisational bases of forensic expert support of prevention and investigation of terrorism with use of domestic and international experience. The main types of examinations required in the investigation of acts of terrorism are forensic explosives, ballistics, forensic aeronautical, DNA testing, computer forensics, forensic examinations of radioactive materials, forensic speech and audio analysis;
   5) Use of international cooperation results in creating scientific, methodological and organisational bases of forensic support for crime investigation in the field of information technology including the illegal use of outsider personal data. In addition to computer forensics in investigation of such crimes, it is important to conduct other engineering and technical examinations, as well as forensic economics, forensic linguistic, forensic intellectual property examination;
   6) Use of international cooperation results in creating scientific, methodological and organisational bases of forensic support for investigation of transnational and international financial crimes. Investigation of such crimes should make full use of results of forensic economics, computer forensics;
   7) Management of practical implementation of long-term strategic projects for development of international forensic cooperation, as well as monitoring their implementation;
   8) Training of highly qualified forensic experts who are fluent in foreign languages and have received additional training in the field of international forensic cooperation and necessary basic knowledge in the field of international law and other international legal subject matters.

2. It is also important to harmonise the Strategy with the documents of the UN, the European Union, Interpol and Europol, which define the goals and objectives of international cooperation in the field of forensic science.

3. Creation of a new forensic association (such as the International Forensic Association for Combating Aerospace Terrorism), which will deal exclusively with cooperation in the crime investigation in the aerospace sector, is equally important. Members of the Association can be domestic and foreign forensic organisations; forensic science institutions, higher education institutions that provide training and retraining of forensic experts; specialised higher education institutions that train professionals in aerospace industry; editors of professional periodicals, etc.

Co-founders of the Association can be two powerful intellectual centers: National Aerospace University – "Kharkiv Aviation Institute" (NAU "KhAI") of the Ministry of Education of Ukraine and National Scientific Center "Hon. Prof. M. S. Bokarius Forensic Science Institute" of the Ministry of Justice of Ukraine.

The main theoretical and applied tasks, which will be dealt with at a high professional level by representatives of this association can be presented as follows:

1) Development of scientific and methodological recommendations to eliminate causes and conditions that contribute to emergence and spread of terrorist attacks on objects of aerospace industry and critical infrastructure;
2) Drawing up short-term and long-term forecasts on occurrence and spread of terrorist threats, informing domestic and foreign specialised bodies about them in order to take measures to their neutralisation;
3) Development and improvement of regulatory framework of activity of anti-terrorist bodies;
4) Development and introduction into activity of forensic science institutions of latest achievements of science and technology, equipment including those produced by domestic industry;
5) Development of a list of anti-terrorist measures at aerospace facilities and critical infrastructure;
6) Development and implementation of scientific and methodological recommendations on anti-terrorist protection of potential aerospace industry and critical infrastructure;
7) Conducting cultural, educational and informational and advocacy activities for formation of socially significant values in Ukrainian society;
8) Improving measures of interaction and coordination of forensic science institutions of Ukraine with foreign professionals in prevention of terrorist attacks on aerospace and critical facilities in order to develop a common strategy for international cooperation in the field of terrorism counteraction.

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Money Laundering Issues and Recent Trends

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Abstract

The legitimate aim of confiscation of property obtained by crime can be defined as the removal of property obtained by crime from the lawful civil circulation to prevent its further circulation and the commission of further criminal offences and to reduce the financial incentive to commit criminal offences. The author's research into the case law and new trends has led to the conclusion that the qualification of property as criminally acquired requires time and understanding of the application of the relevant rules in practice.

The study examines current issues in money laundering cases and recent trends. In many cases, the evidence presented to prove the legal origin of assets is often considered insufficient by the prosecution. In order to develop an understanding of what the proceeds of crime really are, an appropriate institution should be established with relevant economic expertise and understanding of business structure, to name the few.

It has been often found that property or other assets are confiscated simply due to the lack of understanding or lacking education, knowledge and practical experience, which leads to unjustified decisions. Thus, assets are considered to be criminally acquired and confiscated for the benefit of the State. In this way, the State itself is put at risk, because sooner or later, a claim for compensation will be brought, as human rights violations are also detected.

Keywords: anti-money laundering, money laundering.

Introduction

Increasingly, the opinions of various experts on the seizure of property because it has been declared by some official body to be criminally acquired, rightly or wrongly, are being heard, which leads to controversy. Not only has the law changed between

its adoption and the beginning of 2022, but a number of legislative changes have been in the pipeline, and current issues and trends have been identified. On 22 July, 2017, the Criminal Law was substantially amended, which entered into force on 1 August, 2017, adding Article 70 (*Saeima*, 2022) to the Criminal Law, which regulates the confiscation of criminally acquired property and provides:

> *"(1) Proceeds of crime shall mean any economic benefit which has come into the possession or ownership of a person as a direct or indirect result of the commission of a criminal offence.*
>
> *(11) Indirectly acquired criminal property is any economic benefit which has come into the possession or ownership of a person as a direct result of the further use, including reinvestment or transformation, of property acquired directly through crime, or the proceeds and profits derived from the disposal of such property.*
>
> *(2) Where the value of the property is not proportionate to the lawful income of the person and the person does not prove that the property was lawfully acquired, property belongs to a person who:*
>
> *1) has committed a crime which, by its nature, is aimed at obtaining a material or other benefit, regardless of whether the crime has resulted in a material or other benefit;*
>
> *2) is a member of an organised group;*
>
> *3) has committed a crime related to terrorism.*
>
> *(3) Property in possession of another person who maintains a regular family, economic or other property relationship with a person referred to in paragraph (2) of this Article may also be recognised as criminally acquired property if the value of the property in the possession of that person is not proportionate to his lawful income and if the person does not prove that the property was acquired by lawful means.*
>
> *(4) The property obtained by crime shall be confiscated if it does not have to be returned to the owner or lawful possessor."*

After the addition of this article, in practice, it is observed that in some cases this article and other articles of the law are used for the purpose of formally depriving a person of his property.

Relevance: 1) the issue of the examination period is becoming more and more relevant. There have been cases where a person is asked to provide documents relating to transactions that took place as long as 20 years ago; 2) a difference of opinion in cases where a person has to prove the origin of certain property in accordance with the principle of procedural economy, in which there is lacking uniform and clear understanding of what constitutes clear and reliable evidence and what is the extent of the steps that would have to be taken to prove it.

Methods and methodology: several research methods were used to investigate the question: comparative method, synthesis and analysis method, deductive and inductive method, analytical method. The research also used the methods of interpretation of legal norms, historical, grammatical and teleological, systemic methods, which were used to evaluate and study the content of legal norms and the text. In addition, the study of scientific articles, national and international normative acts was carried out.

1 Amendment, Implementation and Enforcement of Laws

On 1 June, 1998, the Law on the Prevention of Money Laundering entered into force; this law expired with the new regulation of 7 July, 2008 – the Law on the Prevention of Money Laundering and Terrorist Financing, on 29 June, 2019, a number of significant amendments to the law entered into force, the most important of which are: the name of the law was changed to the Law on Prevention of Money Laundering and Terrorist and Proliferation Financing, and the Control Service changed its name to the Financial Intelligence Service. Simultaneously, the law was amended to change the procedure for reporting to the Control Service from the notion of unusual transactions to reporting only suspicious transactions. The amendments also prevented false information about the real beneficiaries of companies. The subjects of the law, such as attorneys-at-law, outsourced accountants, credit institutions and others, were required to report to the Registrar of Companies (RoC) cases in which investigations concluded that the information on the client's beneficial owner did not correspond to that registered with the RoC. The main rationale for the changes to the law is to transpose Directive (EU) 2018/843 of the European Parliament and of the Council, or the so-called AML (anti-money laundering) V Directive, and to implement the recommendations of the Moneyval assessment.

Likewise, amendments to the Criminal Procedure Law were promoted. Following the adoption of the draft law, amendments to the Administrative Offences Code were necessary, providing for liability for failure to provide information to the State Revenue Service (Criminal Procedure Law, 2005). It was also necessary to amend the Law on the State Revenue Service, adding to the tasks of the State Revenue Service and the rights of its officials to enable the State Revenue Service to ensure supervision and control of the non-financial sector, and to re-issue or amend the regulations of the Cabinet of Ministers and the Financial and Capital Market Commission (*Saeima*, 2022). Subsequently, the Criminal Law was also amended several times.

In Latvia, there is no uniform approach and practice to money laundering; the issue can be characterised by adaptation to circumstances and learning from every case. As K. Dreimanis has pointed out, the old European countries have found the fulfilment of the norms through many years of practice, while Latvia adopts good norms, translating them and writing them into law, but there is no practice and experience in adequate application of these norms, which is why strange situations arise. Attention should be drawn to the fact that the Netherlands has gained a great deal of practical experience in combating the laundering of money obtained from selling illegal drugs. Latvia has so far had five Moneyval assessments; the first four were technical (compliance of the law with the Directive), which produced good results, but as soon as the fifth assessment touched on the efficacy of the operation of these norms, the assessment became unsatisfactory (Ķirsons, 2020).

2 Impact of "Overhauls"

The Council of Europe (CoE) Convention on Laundering, also known as the Warsaw Convention, binding from 1 June, 2010, Articles 9(5) and (6), which provide that Member States shall ensure that prior or concurrent convictions, are not a prerequisite for a conviction for laundering and that a person may be convicted of laundering if it is proved that the funds were obtained through the predicate offence without it being necessary to prove precisely which crime the acquisition of the property is linked to. This is how "stand alone" laundering entered the Latvian legal system. Thus, on 1 September, 2018, amendments to Article 124 of the Criminal Procedure Law came into force, which was supplemented by Part 7, which provides that in order to prove money laundering, it is necessary to prove that the funds were criminally obtained, but it is not necessary to prove which offence the funds were obtained from.

The amendments to the Criminal Procedure Law (which entered into force on 1 August, 2017) supplement Article 124 of the Criminal Procedure Law by lowering the standard of proof from the classic "beyond reasonable doubt" to "preponderance of the evidence". The same amendments also shifted the burden of proof from the State to the private party, uncharacteristic of criminal proceedings, by adding a new paragraph 3.1 to Article 126, which now provides that if a person involved in criminal proceedings claims that property should not be considered as criminally acquired, the burden of proving the lawfulness of the origin of the property in question lies with that person.

The annotation to the draft law states that the linguistic construction "in order to prove money laundering, it must be proved that the funds were criminally obtained" is ambiguous, which complicates its application, and such amendments are intended to improve the application of the norm in "stand alone" cases of money laundering.

On 13 February, 2018, the US Treasury Department's FinCEN published a notice on Latvia's AS ABLV Bank (Financial Crimes Enforcement Network, 2018). On 18 February, 2018, the Financial and Capital Market Commission (FCMC), at an extraordinary meeting of its Supervisory Board, acting on the instruction of the European Central Bank (ECB) No ECB-SSM-2018-FCMC-1, decided to temporarily impose payment restrictions on ABLV Bank, prohibiting debit operations on customer accounts in any currency. In fact, this decision meant that the bank was forced to start a self-liquidation process, which resulted in freezing of funds of some non-residents (AS ABLV Bank was the largest bank in Latvia servicing non-residents). Numerous investigations were launched, which were reduced to criminal proceedings.

On 23 February, 2018, the Bank adopted a decision on non-availability of deposits in AS ABLV Bank (hereinafter – the Company). In order to maximally protect the interests of customers and creditors, on 26 February 2018, the shareholders of AS ABLV Bank at an extraordinary meeting adopted a resolution on the bank's self-liquidation, which was formally approved by the FCMC by its decision of 12 June, 2018. The Company's self-liquidation initiated a self-liquidation process unprecedented not only in Latvia, but also in

Europe. The aim of the self-liquidation was to satisfy the claims of the Company's creditors in full, unless there were legal obstacles to doing so. The Company's assets exceeded its liabilities, which was the most important precondition for the regulators (the European Central Bank and the FCMC) to approve the self-liquidation process.

In practice, there are cases where a series of transactions, even nine years old, are analysed in the context of a proposed case, in isolation from all other material in the case. Such a fragmented approach prevents the possibility to fully provide the defence and the attorney – representation. In this regard, several applications have been submitted to the Constitutional Court with a request to assess the right to get acquainted with the case materials, since according to Section 627(4) of the Criminal Procedure Law, the materials contained in the case on criminally acquired property are investigative secrets and may be consulted by the proceeding director, the prosecutor and the court hearing the case. The persons referred to in Section 628 of the Criminal Procedure Law may have access to the materials in the case with the permission of the proceeding director and to the extent determined by them. Section 627(5) of the Criminal Procedure Law provides that the decision of the proceeding director to reject a request for access to the case file may be appealed against to the district (city) court hearing the proceedings on proceeds of crime. The court shall decide whether or not to uphold or reject the appeal in whole or in part. The decision is not subject to appeal. In order for the court to decide whether the access to the case file endangers the fundamental rights of other persons, the interests of society or hinders the achievement of the aim of the criminal proceedings, the court may request and inspect the criminal case file.

There are cases where the person has no status, no perpetrator has been identified, and there is only a probability that the funds (property) were obtained through criminal means. This raises doubts as to whether this is indeed sufficient grounds for declaring the funds (property) to have been obtained by crime. In the author's opinion, the problem is caused by the role of the "universal policeman", which is currently operating within the pilot project (LSM.lv News, 2021). The idea itself may be good, but aiming for quality cases, it is unlikely that an operative officer will be a good investigator of economic cases.

This is not the only reason why court decisions are not always sufficient. A quality case is based on time. Section 629(2) of the Criminal Procedure Law sets the time limit for the court's appointment – within 10 days of the decision of the proceeding director being received by the court. In practice, it has been found that if a case is large and the transactions in it (at least 100) have to be analysed, a rhetorical question remains whether the decision will be of high quality and whether every argument will be really considered; the practice shows the opposite.

After loud announcements, only on 21 November, 2019, the *Saeima* adopted amendments to the law, where the fifth paragraph of Section 356 of the Criminal Procedure Law was amended to read as follows: "*If it is alleged that property has been criminally acquired or is connected with a criminal offence, the proceeding director shall notify that*

person that within 45 days from the date of notification he/she may submit information on the legality of the origin of the property concerned, and shall inform the person of the consequences of failure to submit such information."

With such amendments, Article 125 of the Criminal Procedure Law "Legal Presumption of Fact" was amended (the amendments entered into force on 24 December, 2019, those proved effective at the beginning of 2020) by adding a third paragraph, which states: "*If a person involved in criminal proceedings is unable to explain reliably of the origin of the property with which the laundering activities have been carried out, and the totality of the evidence gives the proceeding director grounds for presuming that the property was most likely criminally acquired, this shall be presumed to be proven*."

The author of the study can agree with the above-mentioned that there is still no uniform case law on the fair settlement of property issues. In order to create a common understanding of criminal offences among investigators, prosecutors and the courts, the Financial Intelligence Service (FIU) developed a methodological material "Typologies and characteristics of money laundering", which states *"According to Article 124(7) of the Criminal Procedure Law, the investigation of money laundering (ML) can be carried out independently, i.e. to prove ML, it is not necessary to prove specifically from which criminal offence the funds were obtained. This means that the offence under Article 195 of the Criminal Law may be investigated as a stand-alone or independent money laundering offence based on circumstantial evidence indicating the criminal origin of the property, typologies and characteristics of money laundering offences, as well as the failure of persons to prove the lawful origin of the property*" (Financial Intelligence Service Methodological Material on Typologies and Characteristics of Money Laundering, 2020).

Both globally and in Latvia, at the end of 2021, a new trend of "stand-alone" or the so-called autonomous or independent fight against money laundering emerged with the changes to the Criminal Procedure and Criminal Law already mentioned above. This crime was the subject of an international symposium (Ministry of the Interior of the Republic of Latvia) for law enforcement authorities on "Current trends and future challenges in combating money laundering". The proposals and insights presented at the conference can be used to improve stand-alone money laundering investigations, which would create a common understanding between law enforcement authorities in the investigation and prosecution of such crimes (Iekšlietu ministrija, 06.10.2021).

Corruption is recognised as one of the main crimes generating "dirty money" worldwide. It is unrealistic to prove every case of corruption, but it is very realistic to get the dirty money out. Corruption is also predominantly what constitutes the autonomous offence, or this so-called "stand-alone".

Section 126(3)[1] of the Criminal Procedure Law provides that if a person involved in criminal proceedings claims that property should not be considered as criminally acquired, the burden of proving the lawfulness of the origin of the property in question lies with that person. If a person fails to provide reliable information on the lawfulness of the origin of the property within the prescribed time limit, that person shall be deprived

of the possibility to obtain compensation for the damage caused to him/her in connection with the restrictions imposed in the criminal proceedings on the disposal of that property. Article 125 of the Criminal Law (legal presumption of fact) provides that it shall be presumed that the property laundered has been criminally acquired if the person involved in the criminal proceedings is unable to provide a reliable explanation of the lawful origin of the property and if the totality of the evidence gives the proceeding director reason to believe that the property is likely to have criminal origin.

3 Understanding and Weighing Evidence

In practice, the question of what constitutes sufficient evidence of the lawful origin of the property in question on the part of the investigator, the prosecutor and the court is a matter of debate.

For example, a person is gainfully employed and receives a salary. Criminal proceedings are initiated against that person without the person even knowing it. This fact came to light when, during a vacation, the person went outside the borders of the Republic of Latvia to visit their relatives in another country. At the border, the person was stopped and told that the car had been declared stolen and that they should leave the car at the border of the other country and continue on their own. At the border, the person tried to prove that they were both the owner and the keeper of the car and that it was impossible for them to steal the car themselves. The arguments did not help, as the fact that the car was internationally wanted as stolen was substantially enough. The person was left without a car at the border and without a means of subsistence at the same time, because when the person contacted the investigator the next day, their bank accounts were blocked, which prevented them from paying with a payment card. It was only after their return to Latvia that the reason for the blocking of the bank accounts became clear, which the person was only able to resolve on their arrival in Latvia.

Looking at the situation in conjunction with many other circumstances, one wonders whether officials who are endowed with a certain level of power can really do implausible things to a person and their right to a basic existence. On their return to Latvia, they were asked, in accordance with Article 365 of the Criminal Procedure Law, to provide information on the legality of the origin of the property in question (the purchase of the car) within 45 days of the notification. The person did so, but the evidence provided was insufficient in the opinion of the investigator.

Upon analysing this case, the author of the study returns to the question of what the investigator considers to be sufficient evidence, whether bank statements of income and the amount of a previous sale of a car received by a non-cash transfer are insufficient evidence. It is often found that a threshold is crossed in the examination of sufficient evidence, which escalates into an invasion of a person's privacy. The author is confronted with many different cases in practice, each one is different and the analogy is not applicable, but investigators and prosecutors are of different opinion.

Recently, this trend has become more and more frequent in practice: persons submit all the documents on the lawful origin of the property in question, but the proceeding director considers that the evidence submitted is insufficient. The impression is given that the prosecutor does not have sufficient knowledge and understanding of the economic substance of the transactions, so a decision is taken to declare the property as the proceeds of crime and the cases are referred to court for adjudication. The observation shows that the process promoters have insufficient knowledge of economic issues, as well as fear of taking responsibility for declaring the property as legitimate. As a result of such behaviour, it can be concluded that Article 195 of the Criminal Code is an effective means of depriving a person of their property, whether the decision is justified and weighty will certainly be assessed by the European Court of Human Rights in the future.

Article 105 of the *Satversme* of the Republic of Latvia guarantees the right to own property. The Constitutional Court of the Republic of Latvia, in describing Article 105, has indicated that this Article, on the one hand, provides for the State's obligation to promote and support property rights, i.e., to adopt such laws as would ensure the protection of these rights; on the other hand, the State also has the right to interfere in the exercise of property rights within a certain scope and procedure (Constitutional Court's judgment, 2005).

On 31 March, 2021, the specialised Economic Court started its work. The main objective of the establishment of the specialised court was to ensure high quality and rapid handling of complex commercial disputes, economic and financial crimes, as well as corruption cases, ensuring efficient and rational use of state budget funds. The Economic Court has jurisdiction over specific commercial disputes and criminal cases of particularly serious and serious crimes that cause significant damage to the business environment and development of economy (Latvian Courts, 2021).

The Economic Court has jurisdiction over the offence of money laundering (Criminal Code, 2017, Art. 195). It also hears cases which are distinguished and heard under Chapter 59 of the Criminal Procedure Law – proceedings for proceeds of crime (Criminal Procedure Law, 2005).

The proceedings for criminal property provided for in Chapter 59 of the Criminal Procedure Law correspond to the doctrine-recognised term for such special proceedings – "proceedings in rem" or "proceedings against the thing" (Ķirsons, 2020).

Following the amendments to the mentioned laws and the establishment of the Economic Court, a wave of criminal proceedings and numerous decisions on the seizure of assets (including cash accounts) was initiated, which were later referred to court under Chapter 59 of the Criminal Procedure Law.

Despite the long history, persons (non-residents) have to prove the origin of funds for events going back 10 or even 20 years. Importantly, the different legal frameworks in different jurisdictions often lead to confusion as to why certain proof is required when a different legal framework had been in force at the time in the country where the transaction took place. In practice, the author of the study has found that, when

assessing events in court dating 10 or 20 years back, both the court and investigation assess transactions and documents supporting them, not according to the law in force at the time of the investigation, which has no retroactive effect, but already according to the law in force at the time the case is being examined.

It is also a coincidence that a large number of criminal proceedings were initiated between one and five months after the entry into force of Article 365 of the Criminal Procedure Law and the amendments to Article 125 of the Criminal Law. Moreover, almost all persons against, whom criminal proceedings have been initiated, are customers of LAS ABLV and other banks. Whether this is coincidence or contingency remains an open question.

Prosecutor General J. Stukāns expressed the opinion that "[...] *with current understanding one cannot judge 5 or even 10 and 20 year-old events of the past* [...], *although confiscation of property will not be applied for events that took place in the distant past* [...]."

He also believes that the competence of officials – investigators, prosecutors and judges – is the most important factor in this situation. Currently, the easiest way is for the authorities to initiate criminal proceedings and seize the account with the money, so that the money can be "held" for two years, but the investigation should actively work on the grounds. This is a misunderstanding, because before the state seizes and charges something, it has to collect evidence that shows the money is linked to a criminal offence or criminal origin (Ķirsons, 2020).

4 Impact of Legislative Changes on National Law

The European Court of Human Rights has recognised that there are common European and international legal standards that encourage the confiscation of property related to serious criminal offences such as corruption, money laundering and drug trafficking offences (Telbis and Viziteu vs. Romania, 2018).

Article 3(1) of the Warsaw Convention obliges Council of Europe Member States to adopt such laws, regulations and other measures as may be necessary to enable them to confiscate the instrumentalities and proceeds of crime or property the value of which corresponds to the value of the proceeds of crime and the laundered property. Similarly, Article 12((1)a) of the Palermo Convention obliges its Contracting Parties to take the necessary measures, to the greatest extent possible under their domestic legal systems, to enable them to confiscate the proceeds of crime, i.e. the proceeds of the offences covered by this Convention, or property the value of which corresponds to the value of those proceeds.

Article 5(1) of the Vienna Convention obliges States to take the necessary measures to confiscate the proceeds of the offences referred to in Article 3(1) of the Convention. Recommendation 4 of the Financial Action Task Force, which develops and promotes policy frameworks, including frameworks to protect the global financial system against money laundering on confiscation and provisional measures, also states that States

should consider establishing measures whereby the proceeds or instrumentalities of crime can be confiscated without criminal conviction (Confiscation of Cash and Property in Bribery, 2018).

In the Republic of Latvia, there is a right to appeal against a decision on confiscation of property taken by a regional court in accordance with Chapter 59 of the Criminal Procedure Law, if the district (city) court has taken a decision to terminate the proceedings for proceeds of crime as provided in Section 630(2) of the Criminal Procedure Law, in conjunction with the provisions of Directive 2014/42/EU.

There are different views on the implementation of Directive 2014/42/EU of the European Parliament and of the Council of 3 April, 2014 (on the freezing and confiscation of instrumentalities and proceeds from crime in the European Union) in the application of the Criminal Procedure Law.

Chapter 59 of the Criminal Procedure Law "Proceedings on Criminally Acquired Property", currently provides for a two-stage trial. The first instance is the Court of Economic Affairs, the second instance is the Riga Regional Court, whose decision is final and cannot be appealed. The current procedure does not comply with paragraphs 6 and 8 of Directive 2014/42/EU of the European Parliament and of the Council of 3 April, 2014, which states that the current system is incomplete due to differences in laws of the Member States (Directive 2014/42/EU).

On 4 December, 2020, the Ombudsman's Office announced the initiation of a review case on the alleged violation of Article 92 and Article 105 of the *Satversme* of the Republic of Latvia in relation to the right to appeal in court against a court decision, which was the first and only decision on confiscation of property in a case.

On 8 December, 2020, a submission was made to the Subcommittee on Criminal Justice Policy of the Legal Affairs Committee of the *Saeima* of the Republic of Latvia, outlining the circumstances of the opening of an investigation case against the Latvian Ombudsman. On 26 January, 2021, a meeting of the Subcommittee on Criminal Law Policy of the Law Commission of the *Saeima* was held, the agenda of which was "Chapter 59 of the Law on Criminal Procedure – Proceedings for Proceeds of Crime". The participants of the session – MPs and professionals, including the Prosecutor General, representatives of the Supreme Court, representatives of the Ministry of Justice, representatives of the Ministry of the Interior, prosecutors, sworn advocates – each expressed their vision on the possible directions for improvement of the procedure provided for in Chapter 59 of the Criminal Procedure Law. However, due to the limited time allocated for the meeting, the problems identified by the advocate were not fully discussed and debated (*Saeima*, 2021).

Given that the Criminal Procedure Law does not provide for the right to appeal against a decision of a regional court in proceedings for criminal property, even if it is the first and only decision on confiscation of a private person's property in the case, a complaint was lodged with the European Commission on 20 August, 2020 for infringement of European Union law on the ground that the Republic of Latvia has not correctly

implemented Article 8(6) of Directive 2014/42/EU pursuant to Article 288, third paragraph, of the Treaty on the Functioning of the European Union. According to a notification dated 9 September, 2020, the European Commission has registered the complaint.

Article 8(6) of Directive 2014/42/EU requires Member States to ensure that persons subjected to confiscation have an effective opportunity to appeal against such confiscation orders. The Directive analyses the concept of confiscation, which is the definitive deprivation of property ordered by a court in relation to a criminal offence. Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders defines what constitutes a confiscation order. It is a final penalty or measure imposed by a court in connection with a criminal proceeding for an offence or offences, which provides for the definitive confiscation of property. It is clear from this definition that the decision on confiscation of property can only be court-ordered, emphasised Mr Voronko (Voroņko, 2021).

Special confiscation of property is the compulsory forfeiture to the State of property obtained by crime or the object of the commission of a crime, or property related to a crime (Criminal Law, 1999) without compensation. Special confiscation of property under Article 70 of the Criminal Case is not a criminal sanction, but an independent criminal law institute, which in criminal law theory is counted among other criminal law coercive measures. Unlike a criminal penalty, special confiscation of property is not imposed on a person for a specific criminal offence committed by them but is nevertheless related to the criminal offence committed by them and may also be imposed on other persons (both natural and legal persons) in cases provided for by law. The legal doctrine has expressed the opinion, which has been shared by the Criminal Cases Department of the Senate of the Supreme Court in Case No. SKK-234/2012, that confiscation of criminally acquired property, unlike confiscation of property, cannot be recognised as punishment in the classical sense, because confiscation of criminally acquired property results in forfeiture of benefits that are not due to the person at all (Criminal Case No. SKK-234/2012).

The Warsaw Convention states in its preamble that the fight against serious crime, which has become a growing international problem, must be fought at international level using modern and effective methods. One of these methods is to deprive criminals of the proceeds and instrumentalities of crime. The preamble to the Directive also states that the most effective way of combating organised crime is to provide for strict legal consequences for the commission of such crimes and for the effective detection, freezing and confiscation of the instrumentalities of a crime and the proceeds of a crime. The legitimate aim of confiscation of property obtained by crime can thus be defined as the removal of property obtained by criminal means from the legal civil circulation in order to prevent its further circulation and the commission of further criminal offences and to reduce the financial incentive to commit criminal offences.

In the Palermo Convention, the Vienna Convention and the Directive, "confiscation" means seizure of property pursuant to a decision of a court or other competent

authority. Under the Warsaw Convention, "confiscation" means a penalty or measure imposed by a court following proceedings in respect of an offence or offences and resulting in deprivation of property. The substantive rules on special confiscation of property are regulated in Chapter VIII "Special Confiscation of Property" of the Criminal Case, which were incorporated into the Criminal Case by the Law "Amendments to the Criminal Law", which entered into force on 1 August, 2017 (Criminal Case No. SKK-234/2012).

It follows from Article 70 of the Criminal Law that the essence of confiscation of property obtained by crime, the object of the commission of a criminal offence or property connected with a criminal offence is the compulsory forfeiture of the property to the State for no consideration. The decision to declare property as criminally acquired may be taken by an investigator during a pre-trial investigation, by a prosecutor at the conclusion of criminal proceedings, or by a court with a final decision in a criminal case, when considering the merits of the case. The proceedings for criminally acquired property are characterised by the fact that in these proceedings the guilt of a person is not established, but the criminal origin of the property or its connection with a criminal offence is decided (Constitutional Court's judgment, Case No. 2016-13-01, 2017).

From the findings, the author of the study can conclude that there are problems in the development of uniform case law, in understanding of what exactly criminally acquired property is and in which cases it should be confiscated and when it should be returned to the owner. There is a lack of understanding of the meaning of Chapter 59 of the Criminal Procedure Law and its application in practice. In order to bridge the gap between the divergent practices of the Member States and to reduce future claims against the Latvian State for unjustified confiscation of property based on poor understanding of the application of criminal procedural rules, it is necessary to establish a working group of EU Member States to develop guidelines on the precise application of these rules in practice.

Article 73 of the German Criminal Code provides for the confiscation of criminal assets for the benefit of the State. Nevertheless, the confiscation of criminal property for the benefit of the State is limited to what is necessary to compensate the victims. Where the offence has been committed in the interests of other persons and those other persons have benefited financially from the offence in question, the confiscation of the proceeds of crime shall be directed against the property of those other persons. Germany also provides for the possibility to recover from the perpetrator the monetary equivalent of the value of the proceeds of crime if confiscation of the object in question is not possible. According to Article 76 of the German Criminal Code, in cases where it is not possible to prosecute or convict a particular person for a punishable offence, it is also possible to decide separately on the confiscation of the object or its value (German Criminal Code, 1998).

Conclusions

Pursuant to Article 5 of the Law on the Bar of the Republic of Latvia, advocates are persons belonging to the judicial system for conducting cases in any court of the Republic of Latvia and pre-trial investigation institutions of the choice of the parties, the accused and other participants (clients) in the case and on their behalf, as well as in cases prescribed by law on behalf of court presidents, heads of pre-trial investigation institutions and the Latvian Council of Sworn Advocates. Lawyers also provide other legal assistance in accordance with the procedure established by law. If lawyers are persons belonging to the judicial system, it is reasonable for a lawyer to also have the possibility to get acquainted with all the case materials in a given case, and not merely with the randomised case materials at the discretion of the instigator of the proceedings. Such an approach would ensure the right to a fair trial, full and high-quality defence and possibly promote uniform case law.

It should be noted that, pursuant to Articles 6, 10 and 48 of the Law on Advocacy of the Republic of Latvia, an advocate is granted the right to access restricted information necessary for the full and *timely* protection of the legal interests of the client *at any stage of the proceedings*. A legitimate question then arises as to why the lawyer is denied access to all the case files, thereby denying the right to information and to the full and timely protection of the client's legal interests. For example, in Germany, the Netherlands and other EU Member States, a lawyer has every right to inspect the case files, including the secrets of the investigation, in order to ensure that the law of criminal procedure is applied fairly and to ensure a high-quality and complete defence. It is noteworthy that a lawyer who is familiar with the investigation secret is aware that this information and documents cannot be disclosed to the client. It is possible that the introduction of such a system in the laws and regulations of the Republic of Latvia would contribute to the quality of criminal proceedings, ensuring their compliance with the purpose of the law.

1. There is no uniform practice and approach in analysing, assessing and reviewing cases of alleged money laundering and proceeds of crime. There is no uniform evaluation of evidence.
2. Events that are five, ten or twenty years old are judged by the law currently in force, not by the law in force at the time the transaction was concluded.
3. A recurring problem in many cases before the courts is the setting of an examination period, which is often not set at all or is arbitrarily extended.
4. Expediency of seizure of property is important before taking evidence of illegal origin of money.
5. The current procedure (two-tier court) does not comply with Article 8(6) of Directive 2014/42/EU of the European Parliament and the Council of 3 April, 2014.
6. The instigators of the proceedings must communicate with the owners of the property affected. A person cannot fully prepare for a trial if no questions

have been asked by the moving party for two years, and questions are raised at the hearing that have never been mentioned in any procedural document before.

7. Procedures, time limits and thresholds of proof should be laid down for the duration of the retention of documents, taking into account the country in which the transactions took place. The personality of the owner of the property affected, the time period in question, the type of business must be considered, as in many countries accounting documents are kept for 3–5 years, while the proceeding director asks for explanations of transactions and evidence for transactions as far as 9 years back.
8. If the owner of the affected property has to explain the lawful acquisition of the property, he or she needs to understand which transactions are rising suspicions in order to be able to fully defend their affected interests.
9. It is not legal to investigate the case and seek evidence from unofficial sources (various websites). Evidence must be established in accordance with the Criminal Procedure Act.
10. Denying full access to the case file denies the rights of the defence, as it is impossible to defend against what is not known.
11. When analysing confiscation options in other countries, there is no single "formula", due to different judicial systems, laws and values.

In order to have grounds for criminal proceedings, submission of the necessary information and its acceptance as reliable and substantiated must be clearly and comprehensibly defined. Such cases where, due to lack of knowledge, no evidence is reliable and everything is obtained criminally must be eradicated. It is high time to understand cases and be able to assess the facts, which may serve as sufficient grounds for closing a case.

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Covid-19 pandēmijas aktualizētie pārvaldības kārtības noziedzīgie apdraudējumi Latvijā

Criminal Threats to Administrative Order in Latvia Updated by the COVID-19 Pandemic

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Abstract

COVID-19 pandemic in Latvia has activated several types of criminal threats. Their range also included criminal threats to the administration existing in Latvia, which have been explored in detail in this article.

The author has highlighted three topical groups of criminal threat in the field of administrative order: 1) threats, expressed as counter-activities against the person, who participates in elimination or termination of illegal commitment driven towards COVID-19 restrictions; 2) threats expressed as violations of the procedure determined for processing of documents in the field of COVID-19 restrictions; 3) threats expressed as violation of special regulations in the field of COVID-19 restrictions.

Having paid attention to each separate group, the author has studied not only the case law, but also amendments to the Criminal Law planned and implemented by the legislator, analysing the positive and negative aspects of the amendments.

The study revealed that the repressive approach of the state, implemented within the framework of control of the restrictions for spread of the COVID-19, lead to the situation, where not only the need was discussed to recognise the offences not yet deemed as criminally punishable, but where the legislator still considered it necessary to supplement the special part of the Criminal Law with new norms, thus expanding the types of expression of criminal offences.

Keywords: administrative order, criminal threat, resistance, compatible certificate, restrictions and duties, repression.

Ievads

Covid-19 pandēmijas laikā daudzās valstīs, arī Latvijā, tika ieviesti dažādi cilvēktiesību ierobežojumi un iedzīvotājiem noteikti vairāki pienākumi, kas bija orientēti uz infekcijas straujas izplatības apturēšanu. Latvijā, piemēram, bija noteikta komandantstunda (mājsēde), pienākums konkrētās vietās nēsāt sejas aizsargmasku un ievērot distanci, savukārt pēc vakcinācijas uzsākšanas tika izveidoti arī sertifikāti, kurus vajadzēja uzrādīt, apmeklējot noteiktas vietas, kā arī vajadzēja ievērot citus ierobežojumus – tas viss tika aktīvi kontrolēts.

Šīs kontroles apjomu spilgti raksturo 2021. gada 13. janvārī Saeimas Aizsardzības, iekšlietu un korupcijas novēršanas komisijā sniegtā Iekšlietu ministrijas parlamentārās sekretāres Signes Boles informācija par mājsēdes noteikumu un ierobežojumu ievērošanu. Viņa norādīja, ka no 8. līdz 10. janvārim nakts laikā tika pārbaudītas 12 553 personas, uzsākti 1144 administratīvo pārkāpumu procesi, 2599 personām doti preventīvie norādījumi. Turklāt tika sagatavoti 290 ziņojumi administratīvā pārkāpuma procesa uzsākšanai, pārbaudēs uz ielām tika konstatētas 9604 personas, kam bija apliecinājumi (Latvijas Republikas Saeimas Aizsardzības, iekšlietu un korupcijas novēršanas komisija: 2021. gada 13. janvāra sēdes ieraksts no 28. minūtes 20. sekundes). Tikai vienas nedēļas nogales nakts laikā tiesībaizsardzības iestāžu darbinieki, lai atklātu pārkāpumus, apturēja vairākus tūkstošus cilvēku.

Šādas plašas tiesībaizsardzības iestāžu aktivitātes neizbēgami radīja atsevišķu cilvēku neapmierinātību, kas dažkārt pārauga aktīvās prettiesiskās darbībās, arī apdraudot pārvaldības kārtību. Viņu rīcība izpaudās gan kā pretošanās pieprasījumam ievērot ierobežojumus, gan kā mēģinājumi citādi apiet un neievērot kārtību, kas bija ieviesta *Covid-19* izplatības ierobežošanai. Rezultātā šo nodarījumu apkarošanā bija jāsastopas arī ar krimināltiesiskiem jautājumiem, kurus vajadzēja risināt likumdevējam, lemjot par nepieciešamību grozīt Krimināllikuma normas. Jānorāda, ka noziedzīgi nodarījumi, kas apdraud pārvaldības kārtību, ir ietverti Krimināllikuma 22. nodaļā.

Krimināltiesību eksperts Aivars Niedre šos noziedzīgos nodarījumus ir nosacīti iedalījis četrās grupās:

1) pretdarbība varas un citām valsts institūcijām;
2) oficiālo dokumentu virzībai noteiktās kārtības apdraudējumi;
3) apdraudējumi, kas izpaužas speciālu noteikumu pārkāpšanā;
4) citi noziedzīgi nodarījumi pret pārvaldības kārtību (Krimināltiesības. Sevišķā daļa, 2009, 659).

Izmantojot gramatisko, sistēmisko, vēsturisko, kā arī teleoloģisko Krimināllikuma normu interpretācijas metodi un Aivara Niedres izveidoto iedalījumu, šajā rakstā tiek analizēti šādi *Covid-19* pandēmijas aktualizētie pārvaldības kārtības noziedzīgie apdraudējumi:

1) apdraudējumi, kas izpaužas kā pretdarbība personai, kura piedalās pret *Covid-19* ierobežojumiem vērsta prettiesiska nodarījuma novēršanā vai pārtraukšanā;

2) apdraudējumi, kas izpaužas kā dokumentu virzībai noteiktās kārtības *Covid-19* ierobežojumu jomā pārkāpšana;
3) apdraudējumi, kas izpaužas kā *Covid-19* ierobežojumu jomā noteikto speciālu noteikumu pārkāpšana.

Pētījuma gaitā tika meklēta atbilde uz jautājumu, vai šie apdraudējumi kļuva par iemeslu dekriminalizācijai? Atbilde uz šo jautājumu ir meklēta, analizējot tiesu praksi, vadošo pētnieku, tostarp Valentijas Liholajas un Andreja Judina, atziņās, kā arī likumu jaunrades ietvaros izstrādātajos dokumentos, piemēram, likumprojektu anotācijās sniegtajos pamatojumos.

1. Pretdarbība personai, kura piedalās pret *Covid-19* ierobežojumiem vērsta prettiesiska nodarījuma novēršanā vai pārtraukšanā

Krimināllikuma 270. panta nosaukumā ir norādīts, ka šī norma ir par pretošanos varas pārstāvim vai citai valsts amatpersonai. Šā panta dispozīcijā ir paredzēta atbildība par pretošanos ne tikai varas pārstāvim, bet jebkurai personai, ja tā piedalās noziedzīga vai cita prettiesiska nodarījuma novēršanā vai pārtraukšanā, vai "par šo personu piespiešanu izpildīt acīmredzami prettiesiskas darbības". Attiecīgi, ja persona piedalās pret *Covid-19* ierobežojumiem vērsta jebkura prettiesiska nodarījuma, arī administratīvā pārkāpuma, novēršanā vai pārtraukšanā, tad pretdarbība šai personai var tikt kvalificēta kā Krimināllikuma 270. pantā paredzētais noziedzīgais nodarījums. Turklāt jāņem vērā, ka Krimināllikuma 270. pantā kriminalizēta ir tikai pretošanās, kas izdarīta, lietojot vardarbību vai piedraudot ar vardarbību (Krimināllikums, 1998, 270. pants).

Piemēri par pretošanos *Covid-19* dēļ noteiktajiem ierobežojumiem ir atrodami tiesu praksē. Zemgales rajona tiesas 2022. gada 16. marta spriedumā lietā Nr. 11390029821 noziedzīga nodarījuma aprakstā ir norādīts, ka Valsts policijas Zemgales reģiona pārvaldes Kārtības policijas biroja Patruļpolicijas nodaļas Satiksmes uzraudzības rotas jaunākie inspektori pēc izsaukuma ieradās veikalā un piegāja pie personas, kura atradās veikala telpās alkohola ietekmē un bez sejas aizsargmaskas, un šī persona vardarbīgi pretojās (lietā ir šīs personas vardarbīgas pretošanās apraksts) (Zemgales rajona tiesas 2022. gada 16. marta spriedums lietā Nr. 11390029821).

Arī komandantstundas neievērošana dažkārt noveda pie vardarbīgas pretošanās. Zemgales rajona tiesas 2021. gada 19. aprīļa spriedumā lietā Nr. 11200003621, piemēram, ir nodarījuma (vardarbīgās pretošanās) apraksts, kurā izklāstīta arī pretošanās priekšvēsture: "*2021. gada 5. februārī ap plkst. 22.45 Dobeles novada* [vietas nosaukums] *Valsts policijas Zemgales reģiona pārvaldes Dobeles iecirkņa Kārtības policijas nodaļas inspektors, valsts amatpersona, kurš saskaņā ar likuma "Par policiju" 22. pantu uzskatāms par valsts varas pārstāvi, būdams ģērbies policijas formas tērpā, pildīja tam uzliktos pienākumus, veicot patrulēšanu sakarā ar Ministru kabineta rīkojumu Nr. 655 "Par ārkārtējās situācijas izsludināšanu" par to, ka iedzīvotājiem laika posmā no plkst. 22.00 līdz 05.00*

ir aizliegta pārvietošanās un ir pienākums uzturēties savā dzīves vietā. Patrulēšanas laikā inspektors, valsts amatpersona, konstatēja, ka apdzīvotā vietā [vietas nosaukums] *pārvietojas pers. A., tādējādi izdarot likumpārkāpumu*" (Zemgales rajona tiesas 2021. gada 19. aprīļa spriedums lietā Nr. 11200003621). Tālāk seko vardarbīgās pretošanās apraksts.

Šeit minētie tiesu prakses piemēri bija par vardarbīgas pretošanās gadījumiem. Taču krietni lielāks ir nevardarbīgu konfliktu skaits, turklāt to kļuva aizvien vairāk. Šāda atziņa pausta Iekšlietu ministrijas 2021. gada ziņojumā: "*Pēdējā laikā, amatpersonām pildot dienesta pienākumus, veicot valstī noteikto Covid-19 izplatības ierobežojumu kontroli, arvien biežāk nākas saskarties ar gadījumiem, kad pret viņiem publiskā vietā tiek izrādīta necieņa, tiek aizskarts likumsargu gods un cieņa. Piemēram, amatpersonas tiek aizskartas, lietojot rupjus un necenzētus vārdus, tiek saņemti draudi inficēt ar Covid-19. Īpaši minētās darbības izpaudās rīkotajās akcijās pret valstī noteiktajiem epidemioloģiskās drošības pasākumiem un pret Covid-19 vakcināciju.*"

Šāds situācijas raksturojums tika sniegts likumprojekta "Grozījums Krimināllikumā" sākotnējās ietekmes novērtējuma ziņojumā (anotācijā), kas pamatoja nepieciešamību papildināt Krimināllikumu ar 271.[1] pantu "Varas pārstāvja goda un cieņas aizskaršana". Iekšlietu ministrijas piedāvātajā normas redakcijā ir paredzēta krimināltatbildība "*par varas pārstāvja goda un cieņas aizskaršanu, ja tas izpilda tam uzliktos dienesta pienākumus sabiedriskās kārtības, drošības un valsts robežas apsardzības jomā*" (Likumprojekts "Grozījums Krimināllikumā", 2021).

Salīdzinot piedāvāto jauno normu ar Krimināllikuma 270. pantā jau noteikto, var secināt, ka piedāvātā norma paredz aizsargāt tikai varas pārstāvju godu un cieņu, bet citu personu, kuras piedalās noziedzīga vai cita prettiesiska nodarījuma novēršanā vai pārtraukšanā, aizsardzība normā nav paredzēta.

Jāpiemin, ka līdz 2004. gada 1. februārim krimināltatbildība par varas pārstāvja un citas valsts amatpersonas goda un cieņas aizskaršanu bija paredzēta Krimināllikuma 271. pantā, kas arī sašaurināja cietušo klāstu tikai līdz varas pārstāvjiem vai citām valsts amatpersonām. Proti, krimināltatbildība bija paredzēta par neslavas celšanu varas pārstāvim vai citai valsts amatpersonai vai to goda aizskaršanu sakarā ar šīm personām uzlikto pienākumu pildīšanu.

Taču Latvijas Republikas Satversmes tiesa 2003. gada 29. oktobra spriedumā lietā Nr. 2003-05-01 norādīja uz nepieciešamību vēl vairāk sašaurināt cietušo klāstu, norādot, ka: "*[T]iesa nav guvusi apstiprinājumu tam, ka visas krimināltiesībās lietotajam jēdzienam "valsts amatpersona" atbilstošās amatpersonas patiešām veic tādus pienākumus, kas prasītu īpašu valsts aizsardzību. Tādējādi apstrīdētajā tiesību normā noteikts pārāk plašs aizsargājamo amatpersonu loks*" (Latvijas Republikas Satversmes tiesa: 2003. gada 29. oktobra spriedums lietā Nr. 2003-05-01).

Iekšlietu ministrijas piedāvātajā Krimināllikuma 271.[1] panta redakcijā aizsargājamo amatpersonu loks ir sašaurināts. Tajā norādīts uz varas pārstāvi, kurš izpilda tam uzliktos dienesta pienākumus sabiedriskās kārtības, drošības un valsts robežas apsardzības jomā.

Jautājumam, vai jāparedz krimināltatbildība par varas pārstāvja goda aizskaršanu, tika veltīts žurnāla "Jurista Vārds" 2021. gada 23. februāra numurs. Tajā Latvijas Universitātes profesore Valentija Liholaja (Vai sekos kļūdas labojums: viedoklis diskusijā par Krimināllikuma 271. panta atjaunošanu, 2021, 15–20), kā arī Iekšlietu ministrijas pārstāvji Signe Bole un Maksims Miņejevs (Kāpēc jāatjauno Krimināllikuma norma par varas pārstāvja goda un cieņas aizsardzību, 2021, 8–13) analizēja Krimināllikuma 271. panta izslēgšanas vēsturiskos aspektus un pamatoja valsts pārstāvju goda un cieņas krimināltiesiskās aizsardzības nepieciešamību. Savukārt Saeimas deputāts Andrejs Judins (Par priekšlikumu paredzēt krimināltatbildību par varas pārstāvja goda aizskaršanu, 2021, 13–14) apšaubīja analizēto nodarījuma kaitīguma atbilstību noziedzīgam nodarījumam.

Sliecos pievienoties Andreja Judina pozīcijai, jo valsts pārstāvja goda un cieņas aizskaršana nebūtu vērtējama kā kaitīgāks nodarījums par amatpersonas likumīgo prasību nepildīšanu vai amatpersonas darbības traucēšanu, par ko administratīvā atbildība paredzēta Administratīvo sodu likuma par pārkāpumiem pārvaldes, sabiedriskās kārtības un valsts valodas lietošanas jomā 4. pantā.

Rezumējot izklāstīto, jāsecina, ka *Covid-19* izplatības ierobežojumu kontroles ietvaros īstenotā valsts represīvā pieeja noveda pie situācijas, kurā tika apspriesta nepieciešamība atzīt vēl nekriminalizētus nodarījumus par krimināli sodāmiem.

2. Dokumentu virzībai noteiktās kārtības pārkāpšana *Covid-19* ierobežojumu jomā

Covid-19 pandēmija aktualizēja arī pārvaldības kārtības apdraudējumu, kas ne tikai noveda pie jaunu nodarījumu kriminalizācijas apspriešanas, bet arī rezultējās ar jauna noziedzīgu nodarījumu sastāva ieviešanu. Tas ir saistīts ar dokumentu virzībai noteiktās kārtības pārkāpšanu.

2021. gada 21. oktobrī Latvijas Republikas Saeimas deputāti Andrejs Judins, Juris Jurašs, Juris Pūce, Raivis Dzintars un Anda Čakša iesniedza likumprojektu Nr. 1211/Lp13, kurā sākotnēji paredzēja Krimināllikumu papildināt ar 140.[1] pantu "Viltota sadarbspējīga sertifikāta iegādāšanās un izmantošana". Respektīvi, deputāti uzskatīja, ka šis nodarījums apdraud personas veselību, tādēļ to iekļāva Krimināllikuma 13. nodaļā.

Pamatojot Krimināllikuma grozījumu nepieciešamību, likumprojekta anotācijā tika norādīts, ka Krimināllikuma 275. pantā ir paredzēta atbildība par dokumentu viltošanu un viltota dokumenta realizēšanu, un izmantošanu. Apspriežot ar tiesībsargājošajām institūcijām aktuālo situāciju par viltotu sadarbspējīgu sertifikātu realizēšanu un izmantošanu, deputāti konstatēja, ka personu saukšanai pie krimināltatbildības jāpierāda vakcinācijas sadarbspējīga sertifikāta izmantošanas fakts vai vismaz gatavošanās vai mēģinājums to darīt. Nepārprotami skaidrs, ka viltota sadarbspējīga sertifikāta izmantošanas fakta konstatēšana ir apgrūtinoša un tā iegādāšanās notiek nolūkā izmantot viltotu dokumentu. Lai efektīvi izmantotu tiesībaizsardzības institūciju kapacitāti, kā arī novērstu nelikumīgas darbības, kuras var izraisīt smagas sekas (cilvēku inficēšanos

ar smagu slimību), ir nepieciešams paredzēt krimināltbildību par sadarbspējīga sertifikāta iegādāšanos (Likumprojekta "Grozījumi Krimināllikumā" anotācija, Nr. 1211/Lp13, 2021).

Apspriežot šos grozījumus Tieslietu ministrijas pastāvīgajā Krimināllikuma darba grupā, tika sagatavots priekšlikums, kas iesniegts Latvijas Republikas Saeimai. Tajā bija ieteikums ietvert šo noziedzīgo nodarījumu Krimināllikuma 22. nodaļā. Darba grupa secināja, ka darbības, kas saistītas ar viltota sertifikāta iegūšanu un glabāšanu, primāri apdraud Krimināllikuma 22. nodaļā aizsargātās intereses, proti, pārvaldības kārtību, un ir saistītas ar viltotu dokumentu apriti, par ko jau ir paredzēta krimināltbildība Krimināllikuma 275. pantā. Turklāt Krimināllikuma 275.[1] pantā arī ir definēts noziedzīgs nodarījums, kas saistīts ar prettiesisku dokumenta iegūšanu, proti, tajā paredzēta krimināltbildība par personu apliecinoša dokumenta iegūšanu, izmantojot citas personas datus. Ievērojot minēto, krimināltbildība par viltota sertifikāta iegūšanu un glabāšanu ir nosakāma Krimināllikuma 275.[2] pantā (Latvijas Republikas Tieslietu ministrijas vēstule "Par priekšlikumiem likumprojektam "Grozījumi Krimināllikumā" (Nr. 1211/Lp13) pirms otrā lasījuma").

Šo priekšlikumu Latvijas Republikas Saeima atbalstīja un Krimināllikumu papildināja ar 275.[2] pantu, kas stājās spēkā 2021. gada 14. novembrī (Likums "Grozījumi Krimināllikumā", 2021, 1. pants). Minētajā normā paredzēta krimināltbildība par viltota sadarbspējīga vakcinācijas, testēšanas vai pārslimošanas sertifikāta iegūšanu vai glabāšanu.

Piedāvāju modelēt šādu situāciju: uz ārstniecības iestādi vakcinēties atnāk persona un uzrāda cita cilvēka personību apliecinošo dokumentu, rezultātā cits cilvēks saņem sadarbspējīgu vakcinācijas sertifikātu. Analizējot šo situāciju, jānovērtē, vai vakcīnas saņēmēja nodarījums ir noziedzīgs.

Iesākumā vērtējumam jāpakļauj šīs personas izdarītā nodarījuma kvalifikācija pēc Krimināllikuma 274. panta pirmās daļas. Šajā normā paredzēta atbildība par dokumenta, kas piešķir tiesības vai atbrīvo no pienākumiem, nolaupīšanu. Kā zināms, viens no nolaupīšanas veidiem ir krāpšana, kurā ļaunprātīgi tiek izmantota uzticēšanās, vai arī dokuments tiek iegūts ar viltu. Problemātiku šajā kvalifikācijā rada fakts, ka iegūto dokumentu (vakcinācijas sertifikātu) likumdevējs Krimināllikuma 275.[2] pantā nodēvēja par viltotu, nevis nolaupītu. Ņemot vērā minēto, apšaubāma ir šādas prakses ilgtspēja pēc minēto normu grozījumu izdarīšanas.

Cits kvalifikācijas variants varētu būt atbilstīgs Krimināllikuma 275. panta pirmajai daļai, kurā paredzēta krimināltbildība par dokumenta, kas piešķir tiesības vai atbrīvo no pienākumiem, viltošanu. Proti, ņemot vērā, ka personas, kas veica vakcināciju un vēlāk reģistrēja datus sertifikāta saņemšanai, nekonstatēja cita cilvēka personību apliecinošā dokumenta uzrādīšanas faktu, viņu nodarījumā nav konstatējama noziedzīga nodarījuma subjektīvā puse. Savukārt tā persona, kura vakcīnu saņēma, domājams, ir atzīstama par viltošanas izdarītāju saskaņā ar Krimināllikuma 17. pantu, kurā paredzēts, ka par noziedzīga nodarījuma izdarītāju uzskatāma ne tikai tā persona, kas noziedzīgo nodarījumu pati tieši izdarījusi, bet arī persona, kura izdarīšanā izmantojusi citu personu, kura saskaņā

ar Krimināllikuma nosacījumiem nav saucama pie krimināltbildības. Attiecīgi persona, kura saskaņā ar Krimināllikuma nosacījumiem nav saucama pie krimināltbildības, ir persona, kas veica vakcināciju, un persona, kura reģistrēja datus sertifikāta saņemšanai.

Jāatzīst, ka abi kvalifikācijas varianti pastāvēja līdz 2021. gada 14. novembrim, kad spēkā stājās Krimināllikuma 275.^{2} pants. Pēc grozījumiem Krimināllikumā (turpinot vērtēt šeit modelēto nodarījumu) personu var saukt pie krimināltbildības gan kā Krimināllikuma 275.^{2} pantā paredzētā noziedzīga nodarījuma izdarītāju, proti, par viltota sadarbspējīga vakcinācijas sertifikāta iegūšanu, gan kā līdzdalībnieku Krimināllikuma 275.^{2} pantā paredzēta noziedzīga nodarījuma izdarīšanu, proti, kā viltota sadarbspējīga vakcinācijas sertifikāta iegūšanas atbalstītāju, atsaucoties uz Krimināllikuma 20. panta ceturto daļu. Ja par pareizāku tiks atzīts kvalifikācijas variants, kurā persona atzīta par līdzdalībnieku, radīsies jautājums, vai uz līdzdalībniekiem attieksies šāda Krimināllikuma 327.^{3} pantā paredzētā privilēģija: "*Personu, kura ieguvusi, glabājusi vai izmantojusi viltotu sadarbspējīgu vakcinācijas, testēšanas vai pārslimošanas sertifikātu, var atbrīvot no krimināltbildības, ja tā pēc noziedzīgo darbību izdarīšanas labprātīgi paziņo par notikušo un aktīvi veicina noziedzīgā nodarījuma atklāšanu un izmeklēšanu.*"

Jautājumu klāstu vēl varētu papildināt ar noziedzīga nodarījuma dalības kā kvalifikācijas varianta pieminēšanu, tomēr jau šobrīd ir saprotams, ka jauni *Covid-19* pandēmijas aktualizētie pārvaldības kārtības noziedzīgie apdraudējumi liks krimināltiesību normu piemērotājiem kādu brīdi maldīties dažādu Krimināllikuma normu interpretācijā.

Neskatoties uz to, ka likumdevējs Krimināllikumā nav skaidri formulējis cita cilvēka personību apliecinošā dokumenta uzrādīšanu vakcīnas saņemšanas laikā kā noziedzīgu darbību, domājams, ka šo darbību izdarītājus sauks pie krimināltbildības. Ieviestais Krimināllikuma 275.^{2} pants nepārprotami norāda uz likumdevēja gribu kriminalizēt sadarbspējīga vakcinācijas sertifikāta iegūšanu, un modelētajā situācijā galvenā persona, kura piedalās sertifikāta iegūšanā, ir persona, kas uzrāda cita cilvēka personību apliecinošo dokumentu.

Krimināllikuma 275.^{2} pantā likumdevējs paredzēja nevis krimināpārkāpumu, bet noziegumu. Vērtējot veiktās kriminalizācijas saturu, tomēr apšaubāma ir viltota sertifikāta glabāšanas kaitīguma atbilstība nozieguma kaitīgumam. Piemēram, fakts, ka dēls prettiesiski ieguva tēvam viltoto sertifikātu, vēl neliecina, ka tēvs būtu gatavs šo viltoto sertifikātu izmantot. Taču zinot, ka sertifikāts ir viltots, tēvs kļūst par nozieguma izdarītāju.

3. Covid-19 ierobežošanas speciālo noteikumu pārkāpšana

Covid-19 pandēmija aktualizēja arī pārvaldības kārtības apdraudējumu, kas ne tikai noveda pie jaunu nodarījumu kriminalizācijas apspriešanas, bet arī rezultējās ar jaunu noziedzīgu nodarījumu sastāva ieviešanu. Tas ir saistīts ar speciālu noteikumu pārkāpšanu *Covid-19* ierobežojumu jomā. Šie speciālie noteikumi aptver sanitāri higiēniskās un epidemioloģiskās drošības normas.

Uzreiz gan ir jānorāda, ka krimināltbildība par šo noteikumu pārkāpšanu paredzēta Krimināllikuma 140. pantā, kas iekļauts 13. nodaļā, kurā apkopoti noziedzīgi nodarījumi pret personas veselību, un pirmšķietami šo noteikumu pārkāpšana neapdraud pārvaldības kārtību. Tomēr, iepazīstoties ar 1997. gada 11. decembra Epidemioloģiskās drošības likuma normām, redzams, ka tajās noteiktas valsts institūciju, pašvaldību, fizisko un juridisko personu tiesības un pienākumi epidemioloģiskās drošības jomā, reglamentējot dažādus pretepidēmijas, karantīnas un sabiedrības veselības aizsardzības pasākumus, kas pēc savas būtības veido pārvaldības kārtību. Tādēļ var uzskatīt, ka Krimināllikuma 140. pantā paredzētā noziedzīga nodarījuma papildu tiešais objekts ir pārvaldības kārtība higiēniskās un epidemioloģiskās drošības jomā.

Līdz 2020. gada 28. septembrim Krimināllikuma 140. pantā bija paredzēta krimināltbildība par sanitāri higiēniskās un epidemioloģiskās drošības noteikumu pārkāpšanu, ja tā izraisījusi epidēmiju. Par epidēmijas izraisīšanu maksimāli iespējamais sods bija tikai brīvības atņemšanu uz laiku līdz vienam gadam.

Latvijas Republikas 13. Saeimas Juridiskās komisijas Krimināltiesību politikas apakškomisijas priekšsēdētājs Andrejs Judins 2020. gada 14. aprīlī apakškomisijas sēdē uzsāka diskusiju par nepieciešamību grozīt Krimināllikumu saistībā ar *Covid-19* dēļ valstī noteikto ārkārtējo situāciju. Diskusijā Andrejs Judins pievērsa uzmanību Krimināllikuma 140. pantam, norādot, ka pantā paredzēta atbildība par sanitāri higiēniskās un epidemioloģiskās drošības noteikumu pārkāpšanu, un jautājot, vai "un" var tikt lasīts kā "vai"?

Tieslietu ministrijas Krimināltiesību departamenta direktore Indra Gratkovska atbildēja, ka ārkārtas situācijas izsludināšanas sākumposmā šis pants bija diskusijas objekts, bet šobrīd [2020. gada 14. aprīlī] par to nav jēgas diskutēt, jo jau ir izsludināta pandēmija, nevis epidēmija, par kuras izraisīšanu atbildība ir paredzēta. Jebkurā gadījumā "un" ir lasāms šauri, tas ir, "un" nevis "vai", bet viņa piekrita, ka tuvākajos grozījumos dispozīcijā iekļautais saiklis "un" būtu grozāms uz "vai" (Latvijas Republikas 13. Saeimas Juridiskās komisijas Krimināltiesību politikas apakškomisijas 2020. gada 14. aprīļa sēdes protokols Nr. 45).

Rezultātā ar Tieslietu ministrijas 2020. gada 10. jūnija vēstuli Saeimai tika iesniegti priekšlikumi likumprojektam "Grozījumi Krimināllikumā" Nr. 712/Lp13 pirms otrā lasījuma. Priekšlikumos tika piedāvāts saikli "un" aizstāt ar saikli "vai", vēršot uzmanību uz to, ka šis grozījums ir precizējošs, jo Krimināllikuma 140. panta vēsturiskais un teleoloģiskais mērķis ir vērsts uz to, lai personas tiktu sauktas pie krimināltbildības gan gadījumos, kad tiek pārkāpti sanitāri higiēniskie drošības noteikumi, gan epidemioloģiskie drošības noteikumi, proti, kad pārkāpti tiek kaut vai vieni no minētajiem noteikumiem, tā rezultātā izraisot epidēmiju (Latvijas Republikas Tieslietu ministrijas 2020. gada 10. jūnija vēstule Nr. 1-11/1948 "Par priekšlikumiem likumprojektam "Grozījumi Krimināllikumā" (Saeimas reģ. Nr. 712/Lp13) pirms otrā lasījuma"). Tādējādi Tieslietu ministrija atzina, ka ar minētajiem grozījumiem *expressis verbis* tiek nostiprināta Krimināllikuma 140. panta vēsturiskā un teleoloģiskā interpretācija.

Protams, šo jautājumu varētu pakļaut diskusijai, tomēr nevar prognozēt šīs diskusijas attīstību praksē, jo galvenais šķērslis Krimināllikuma 140. panta piemērošanai līdz grozījumiem bija ne jau saiklis "un", bet gan pantā paredzētās sekas. Proti, visai problemātiski ir atsevišķa cilvēka rīcību sasaistīt ar tik plašām sekām kā epidēmija.

Ņemot vērā minēto, ir likumsakarīgi, ka Tieslietu ministrija piedāvāja Krimināllikuma 140. panta dispozīciju papildināt arī ar kvalificējošu pazīmi – citas smagas sekas –, grozījumu pamatojumā norādot, ka Epidemioloģiskās drošības likuma 1. panta 6. punktā noteikts, ka epidēmija ir infekcijas slimības izplatīšanās tādos apmēros, kas pārsniedz konkrētai teritorijai raksturīgu saslimstības līmeni, vai arī slimības parādīšanās un intensīva izplatīšanās teritorijā, kurā iepriekš tā nav reģistrēta. Tas nozīmē, ka epidēmija tiek saistīta ar slimības izplatīšanos apmēriem noteiktā teritorijā. Tādējādi, kā norādīja Tieslietu ministrija, šāda kvalificējošā pazīme atbilst tikai vienam no likuma "Par Krimināllikuma spēkā stāšanās un piemērošanas kārtību" 24. panta pirmajā daļā definētajiem smagu seku veidiem, proti, "radītu citādu smagu kaitējumu ar likumu aizsargātām interesēm", bet neaptver tādus smagu seku veidus kā cilvēka nāve, smagi miesas bojājumi vismaz vienai personai, mazāk smagi miesas bojājumi vairākām personām, lielu mantisku zaudējumu, kas arī var iestāties, pārkāpjot sanitāri higiēniskās vai epidemioloģiskās drošības noteikumus (Latvijas Republikas Tieslietu ministrijas 2020. gada 10. jūnija vēstule Nr. 1-11/1948 "Par priekšlikumiem likumprojektam "Grozījumi Krimināllikumā" (Saeimas reģ. Nr. 712/Lp13) pirms otrā lasījuma").

Ņemot vērā šo pamatojumu, jāatzīst, ka tad, ja Krimināllikuma 140. pantā paredzēto seku klāstā ietilpst arī mantisks zaudējums, šā panta atrašanās Krimināllikuma 13. nodaļā ir apšaubāma. Katrā ziņā, praksē konstatējot sanitāri higiēniskās vai epidemioloģiskās drošības noteikumu pārkāpšanu, kas izraisījusi tikai smagām sekām atbilstošu mantisku zaudējumu, būs problemātiski konstatēt noziedzīga nodarījuma grupas objektu – personas veselību. Šis varētu būt iemesls, kādēļ Krimināllikuma 140. pantā paredzēto noziedzīgo nodarījumu vajadzētu ietvert Krimināllikuma 22. nodaļā, tādējādi pilnvērtīgāk aizsargājot pārvaldības kārtību higiēniskās un epidemioloģiskās drošības jomā.

Vēl jāpiemin, ka Tieslietu ministrija arī ierosināja palielināt Krimināllikuma 140. panta sankcijā paredzēto brīvības atņemšanas sodu no viena gada uz pieciem gadiem. Visi Tieslietu ministrijas priekšlikumi Saeimā tika atbalstīti, un 2020. gada 29. septembrī stājās spēkā grozījumi Krimināllikuma 140. pantā, izsakot dispozīciju šādā redakcijā: "Par sanitāri higiēniskās vai epidemioloģiskās drošības noteikumu pārkāpšanu, ja tā izraisījusi epidēmiju vai citas smagas sekas" (Likums "Grozījumi Krimināllikumā", 2020, 2. pants). Savukārt sankcijā pēc grozījumiem jau tika paredzēta brīvības atņemšana līdz pieciem gadiem vai alternatīvie soda veidi.

Secinājumi

Latvijā, sastopoties ar jauniem izaicinājumiem, kurus radīja *Covid-19* pandēmija, personu savstarpējo attiecību noregulējumā tika attīstīta represīvā pieeja, kura ietvēra ierobežojumus un cilvēkiem uzlika papildu pienākumus. Turklāt represīvā pieeja Latvijā noveda arī pie krimināltiesiskās represijas palielināšanas, lai aizsargātu izveidoto pārvaldības kārtību.

Proti, šis pētījums parādīja, ka *Covid-19* izplatības ierobežojumu kontroles ietvaros īstenotā valsts represīvā pieeja noveda pie situācijas, kurā ne vien tika apspriesta nepieciešamība atzīt vēl nekriminalizētus nodarījumus par krimināls odāmiem, bet kurā likumdevējs tomēr uzskatīja par nepieciešamu Krimināllikuma Sevišķo daļu papildināt ar jaunām normām, tādējādi paplašinot noziedzīgu nodarījumu izpausmes veidus, līdz ar to tas neizbēgami novedīs arī pie noziedzīgu nodarījumu izdarījušo personu skaita palielināšanās.

Tādējādi var atzīt, ka Latvijā prioritāte vai, kā minimums, liela uzmanība ir piešķirta tieši krimināltiesiskai pārvaldības kārtības aizsardzībai. Respektīvi, nevis tiek attīstīts pārvaldības kārtības kontroles mehānisms, īstenojot apdraudējumu novēršanas pasākumus, bet gan tiek palielināta cilvēku sodīšana, atļaujoties piemērot pat visbargāko atbildības veidu – krimināl atbildību –, ja konstatēta pārvaldības kārtības pārkāpšana.

Turklāt, sastopoties ar šķēršļiem krimināltiesiskās represijas piemērošanai, likumdevējs izvēlas sasteigti grozīt Krimināllikumu, izvairoties no plašām un detalizētām zinātniskām diskusijām, paļaujoties tikai uz to speciālistu viedokli, kuriem bija dota iespēja izteikties Tieslietu ministrijas darba grupās vai Saeimas Juridiskajā komisijā, vai tās Krimināltiesību politikas apakškomisijā.

Uzskatu, ka šāda sasteigta likumdošanas prakse nav pieņemama. Īstenojot kriminalizāciju, nepieciešama plaša un visaptveroša diskusija sabiedrībā, ļaujot ne tikai krimināltiesību ekspertiem vērtēt visus pozitīvos un negatīvos likuma grozījumu aspektus.

Lai gan represīvā pieeja pirmšķietami var likties lētāka, mazāk resursu ietilpīga, nekā novēršanas pieeja, tomēr apšaubāmi ir ieguvumi no represīvas pieejas, jo tā rada zaudējumus ne tikai valstij, kas šo represiju īsteno, bet arī personai, pret kuru šāda pieeja tiek vērsta. Taču šis pieņēmums šajā pētījumā nav pārbaudīts.

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Victim's Right to Prove in Criminal Proceedings

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Abstract

This article is about the victim's right to prove in criminal proceedings. It studies the victim's right to prove only in criminal proceedings before the court. However, it does not consider the victim's ability to prove in court.

The aim of the study is to examine the possibilities of victims to prove in criminal proceedings, to identify legal and practical issues for the victim's right to prove in criminal proceedings, as well as to put forward proposals for solving them.

Material and methods used in the preparation of the study include analysis and description of regulatory enactments, court judgments, comparable and logical method. Analysis and description of normative acts and court judgments were used for the creation of the study. The comparative method has been used to compare provisions of regulatory enactments, while the logical method has been used to draw conclusions. Methods of interpretation of legal norms have also been used in the study: grammatical, systemic and teleological method.

Keywords: criminal proceedings, the victim, proof.

Introduction

In the basic law of Latvia, it is stipulated that everyone has the right to know their rights (The Constitution of the Republic of Latvia, 1922, Article 90). This indicates that the right of every victim in criminal proceedings is to know their rights. The right of

such a victim is also specified in the Criminal Procedural Law. It stipulates that as soon as a person has been recognised as a victim, information on the victim's fundamental rights shall be immediately provided to them in writing and, if necessary, explained (Criminal Procedural Law, 2005, Article 97).

According to the Criminal Procedural Law, the victim in criminal proceedings may be a natural or legal person who has suffered harm as a result of a criminal offense, namely moral damage, physical suffering or property damage. A person who has been morally offended as a representative of a certain group or part of society may not be a victim in criminal proceedings. If a person dies, the victim may be one of the relatives of the deceased (Criminal Procedural Law, 2005, Article 95).

In addition, according to the Criminal Law, a harmful offense (act or omission) committed intentionally or negligently, which has been provided for in the Criminal Law and for the commission of which a criminal penalty is threatened, shall be recognised as a criminal offense. An offense (act or omission) which has the characteristics of an offense provided for in this Law, but which is committed in circumstances which exclude criminal liability, shall not be recognised as a criminal offense (Criminal Law, 1998, Article 6).

The above indicates that a person who has been a victim of a criminal offense described in the Criminal Law and meets the requirements specified in the Criminal Procedural Law has the right to know their rights, including the right to prove it.

Different rights of expression are granted to the victim in criminal proceedings. They have both directly defined rights and rights indirectly included in court norms. Criminal Procedural Law sets out the rights of the victim in criminal proceedings before the court. Nevertheless, the list of these rights does not specify the right of the victim to take evidence in criminal proceedings before the court (Criminal Procedural Law, 2005, Article 98).

According to the Criminal Procedural Law, the proof is the act of a person involved in criminal proceedings in the form of substantiating the existence or non-existence of the facts which are the subject of the evidence (Criminal Procedural Law, 2005, Article 123). Such an explanation of evidence in the Criminal Procedural Law indicates the right of the victim to take evidence, as the victim is one of the persons involved in the criminal proceedings. However, the question is whether the victim can take evidence in accordance with the requirements of the Criminal Procedural Law.

The aim of the study is to examine possibilities of the victims to prove in criminal proceedings, to identify legal and practical issues for the victim's right to prove in criminal proceedings, as well as to put forward proposals for solving them.

Material and methods used in the preparation of the study include analysis and description of regulatory enactments, court judgments, comparable and logical method. These materials and methods in the study help to achieve the goal of the research. Analysis and description of normative acts and court judgments have been also used. The comparative method has been used to compare provisions of regulatory enactments, while the logical method has been used to draw conclusions. Methods of interpretation of legal norms have also been used in the study: grammatical, systemic and teleological method.

1 Victim and Rights in Criminal Proceedings before Court

According to the Criminal Procedural Law, the victim in criminal proceedings may be a natural or legal person who has suffered harm as a result of a criminal offense, namely moral damage, physical suffering or property damage. A person who has been morally offended as a representative of a certain group or part of society may not be a victim in criminal proceedings. If a person dies, the victim may be one of the relatives of the deceased (Criminal Procedural Law, 2005, Article 95). Thus, the victim is a person who has an interest in the evidence in criminal proceedings being high.

Over the last decade, activities of European Union institutions have contributed to protection of victims in Latvia, including ensuring effectiveness of victims' rights. The authors agree with the opinion of Professor A. Meikališa that activities of European Union institutions in the field of victim protection have taken place in dual direction. One – for victims in categories of criminal offences, and the other – for all victims of criminal offences, regardless of the type of criminal offence (Meikališa, 2013, *146*). Protection of the victim's rights is, among other things, the granting and securing of rights in criminal proceedings.

The Criminal Procedure Law sets out general principles of the victim's rights. Firstly, the victim can exercise all their rights only in part of the criminal proceedings, which directly relates to the criminal offense with which has been harmed. Secondly, the victim, i.e. a natural person, can exercise their rights themselves or through a representative. Next, the rights of the victim, i.e. legal person, are exercised by their representative. Further, the victim exercises their rights voluntarily and to the extent of their choice. Non-exercise of rights does not hinder the proceedings. Moreover, without the consent of the victim, their image recorded by means of a photograph, video or other technical means during the proceedings may not be published in the media, unless this is necessary for the detection of the criminal offense. Even more, a victim whose adulthood is in doubt has the rights of a minor victim until their age is ascertained. Lastly, a state-provided representative of the victim or a legal aid provider participates in the case from the moment the order is accepted until the end of the criminal proceedings. (Criminal Procedural Law, 2005, Article 97)

These general principles apply to the victim in criminal proceedings in general; they serve as guidelines for realisation of the victim's rights and obligations in criminal proceedings. These principles do not contain any direct reference to the victim's right to take evidence.

The Criminal Procedural Law also determines the fundamental rights of the victim in criminal proceedings. Firstly, the victim has the right to receive information on the conditions for applying for and receiving compensation, including state compensation, and to apply for compensation for the damage caused. Secondly, the victim has the right to participate in the criminal proceedings in a language they understand, if necessary with

the assistance of an interpreter free of charge. Next, the victim has the right not to testify against themselves and their relatives. Furthermore, the victim has the right to reconcile with the person who has caused them harm, as well as to receive information on implementation of the settlement and its consequences. Additionally, the victim has the right to call a lawyer for legal aid. The victim has the right to apply for measures in the event of danger to the person themselves, their relatives or property. The victim has the right to apply for reimbursement of procedural expenses incurred in the criminal proceedings in cases specified in the Criminal Procedural Law. Even more, the victim has the right to submit a complaint regarding the procedural decision or the actions of the official authorised to perform the criminal proceedings in the cases within the terms and in accordance with the procedures specified in the Criminal Procedure Law. The victim has the right to receive contact information for the specific criminal proceedings, information on available support and medical assistance. The victim also has the right to request information on the progress of the criminal proceedings, on the officials who are or have been conducting the criminal proceedings. Also, the victim has the same rights as the witness during the testimony. In addition, the victim or their guardian has the right to request adoption of a European protection order at all stages of the criminal proceedings and in all its forms if there are grounds for adopting a European protection order under the Criminal Procedural Law. Finally, the victim has the right to receive an explanation of the victim's fundamental rights in writing and, if necessary, immediately (Criminal Procedural Law, 2005, Article 97[1]).

These fundamental rights of the victim also make no express reference to the victim's right to take evidence. Although the set of fundamental rights is wide, it does not include the right of proof.

Considering the emphasis of this study in criminal proceedings before the court, the rights of the victim specified in the Criminal Procedural Law are also to be taken into account.

According to the Criminal Procedural Law, the victim in criminal proceedings before the court has the following rights:

1) to apply for rejection to the official who conducts the criminal proceedings;
2) to submit applications regarding performance of investigations and other activities;
3) to get acquainted with the decision regarding determination of expert examination before the transfer thereof for performance and to submit an application regarding the amendment thereof, if expert examination is performed upon their own application;
4) after completion of criminal proceedings before the court, to receive copies of the materials of the criminal case to be handed over to the court which directly relate to the criminal offense for which they have been harmed, if they have not been extradited earlier, or with the consent of the prosecutor;

5) to apply to the investigating judge for a request to acquaint them with the materials of the special investigative activities which are not attached to the criminal case (source documents);
6) to receive a written translation in the cases provided by law;
7) to request the person conducting the proceedings to inform about the progress of the criminal proceedings in the part regarding the criminal offense with which they have been harmed, if they have suffered from a criminal offense related to violence or against sexual integrity or morality (Criminal Procedural Law, 2005, Article 98).

It is also clear from the content of these specific rights that the victim does not have a certain right to prove themselves. Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA is a major step forward at the European Union level, guaranteeing effective protection of victims' rights. The purpose of the Directive is to ensure that victims of crime receive adequate information, support, protection and are able to participate in criminal proceedings (Directive 2012/29/EU of the European Parliament and of the Council, 2012, Article 1).

In the context of this Directive, significant amendments have been made to the Criminal Procedural Law in order to achieve its objective. Amendments were also made to the rights of the victim, substantially extending the content of the rights of the victim. Through such expansion, there is also a greater involvement of the victim in the criminal proceedings, which is possible by exercising the victim's rights. Although the victim's rights sufficiently allow the victim to participate in the criminal proceedings, a specific right to prove the victim in criminal proceedings before the court is not granted.

2 Proving Proceedings in Criminal Proceedings

According to the Criminal Procedural Law (Article 123), evidence is the activity of a person involved in criminal proceedings, which manifests itself as the substantiation of the existence or non-existence of the facts included in the subject matter of the evidence. It follows that proof is an activity carried out for a specific purpose and carried out by a specific group of persons using specific means, namely evidence. Also, the process of proof has three integral components, namely the circle of persons carrying out the evidence, the specific activities of those persons and the tools to be used. Commenting on the provisions of the Criminal Procedural Law on evidence, Professor K. Strada-Rozenberga has pointed out that the activity of a person who is not involved in the criminal procedure in a certain status is not recognised as evidence, moreover, the above explanation of evidence (Strada-Rozenberga, 2019a, *413*).

Given that the victim is a person involved in the criminal proceedings, their action, which takes the form of substantiating the existence or non-existence of the facts which are the subject of the evidence, should be regarded as evidence.

The Criminal Procedural Law (Article 126) stipulates that all persons involved in criminal proceedings who have been obliged or granted the right to take evidence by the Criminal Procedure Law shall be deemed to be subjects of evidence. Such a legal norm, in the author's opinion, narrows the range of subjects of evidence, as it establishes a restriction that the subjects of evidence are persons involved in criminal proceedings, but also adds that they are persons involved in criminal proceedings who are obliged or granted the right to take evidence by the Criminal Procedural Law.

In interpreting the meaning of the term "right", the right means a statutory advantage which other persons are obliged to respect (European Union Glossary of Terms, 2004). On the one hand, the Criminal Procedural Law allows the victim to take evidence in criminal proceedings as a person involved in the criminal proceedings; on the other hand, the victim does not have a specific right to do so.

An interesting situation arises in relation to the victim's right to apply for an investigation and other actions and the right to acquaint himself with the decision to order an expert examination before it is handed over and to apply for its amendment if the examination is carried out at their own request. This raises the question of whether pointing to evidence is proof. Professor K. Strada-Rozenberga, giving an expert opinion on the adequacy and clarity of the Criminal Procedural Law regarding the standard of proof and the sufficiency of evidence, has indicated that in cases when the legislator has chosen not to use the word "prove" but "to indicate", there is no duty to persuade but merely to state the fact, prompting it to be verified (Strada-Rozenberga, 2020).

Evidence must be used to make evidence as required by the Criminal Procedural Law (Article 123). Evidence in criminal proceedings is any information obtained in accordance with the procedures prescribed by law and confirmed in a certain procedural form regarding the facts which the persons involved in criminal proceedings use to substantiate existence or non-existence of circumstances included in the subject matter of evidence. Only reliable, relevant and admissible facts may be used as evidence by persons involved in criminal proceedings (Criminal Procedural Law, Article 127). Professor K. Strada-Rozenberga, commenting on the content of evidence in criminal proceedings, has pointed out that evidence is the unity of content (information) and its procedural form of confirmation (Strada-Rozenberga, 2019b, *430*).

Regarding the evidence in the decision of the Department of Criminal Cases of the Supreme Court of the Republic of Latvia of 22 August 2018 in case No. 11250014115, SKK-297/2018, it is stated that information on facts obtained in accordance with the procedures prescribed by law and confirmed in a certain procedural form shall be recognised as evidence, and not the assessment of this information provided by a witness. The situation studied in the judgment clearly indicates that if one of the witnesses has a subjective assessment of what has happened, such subjective assessment cannot be considered as

evidence. In addition, regarding the evidence, the decision of the Department of Criminal Cases of the Supreme Court of the Republic of Latvia of 4 October 2018 in case No. 11520035214, SKK-540/2018, stipulates that circumstances included in the subject of proof shall be proved by admissible, relevant, reliable and sufficient evidence obtained, verified and assessed in accordance with the procedures specified in the Criminal Procedural Law. (Decision of the Department of Criminal Cases of the Senate of the Republic of Latvia, 2015)

Reliability of evidence is the degree to which a piece of information is established. Reliability of the factual information used in the taking of evidence shall be assessed by looking at all facts or information obtained in the course of criminal proceedings as a whole and in relation to each other. No evidence has a higher level of confidence than the other (Criminal Procedural Law, Article 128).

Evidence is applicable to specific criminal proceedings if information on the facts directly or indirectly confirms existence or absence of circumstances to be proved in criminal proceedings, as well as reliability or unreliability of other evidence, possibility or impossibility of use (Criminal Procedural Law, Article 129).

Information on facts obtained during criminal proceedings may be used as evidence if they have been obtained and procedurally confirmed in accordance with the procedures specified in the Criminal Procedural Law. Information on facts obtained through violence, threats, blackmail, deception or coercion obtained in the course of proceedings performed by a person who was not entitled to do so under the Criminal Procedural Law, including information obtained by allowing in particular the specified violations that prohibit the use of the specific evidence, as well as in violation of the basic principles of criminal proceedings cannot be deemed admissible. Information on facts obtained through other procedural irregularities shall be deemed to be of limited admissibility and may be used in evidence only if the procedural irregularities are insignificant or can be remedied, could not affect veracity of the information obtained or are corroborated by other news. Accordingly, evidence obtained in a situation of conflict of interest is admissible only if the prosecutor is able to prove that the conflict of interest has not affected the objective conduct of the criminal proceedings (Criminal Procedural Law, Article 130).

It follows that evidence, in order to be evidence in criminal proceedings in general, must contain many specific features. Without this property, proof cannot be evidence in criminal proceedings.

Having examined judgements of the first instance of Kurzeme District Court in 2020 and 2021, it can be concluded that the court in its judgements referred to evidence indicated or submitted by the victim. For example, in the judgement of Kurzeme District Court of 12 November 2020, case archive No. K69-0609-20/26, the testimony of the victim has been indicated as a piece of evidence (Judgement of Kurzeme District Court, 2020).

In the judgement of Kurzeme District Court of 8 October 2020 in case No. 11261093216, the victim has submitted an extract from a psychologist, substantiating

the compensation for moral damage. In its turn, in the judgement of Kurzeme District Court of September 7, 2021 in case No. 11261045320, the victim based the moral damage only on their testimony in criminal proceedings before the court. Examining the judgment, it can be concluded that there are cases when the court claims there to be no evidence to substantiate the moral damage caused to the victim. An example is the judgement of Kurzeme District Court of September 7, 2021 in case No. 11151013521.

With regard to submission of documents as evidence, in the judgement of Kurzeme District Court of 13 October 2021 in criminal case No. 11151031621 presents the situation of the victim's representative submitting the video surveillance camera recordings on a CD matrix as a document.

Examining the above, it is evident that the court also indicates in its judgments that the compensation for pecuniary damage has been proved by the victims or representatives of the victims, but does not indicate exactly as what evidence. Examples include the judgement of Kurzeme District Court of 5 July 2021 in criminal case No. 11261048718 and the judgement of Kurzeme District Court of June 4, 2021, criminal case No. 11261072520.

The above allows to conclude that the court most often evaluates evidence proved by the victim as evidence when deciding on the material or moral compensation of the victim.

According to the Criminal Procedural Law (Article 135), a document may be used as evidence in criminal proceedings if it can be used in evidence only due to substantive information contained therein. The document may contain factual information in written or other form. Documents in the meaning of evidence in criminal proceedings shall also include computerised information carriers, recordings made by technical means recording sound and images, in which the content of the recorded information may be used as evidence. When submitting a document to be attached to a criminal case to substantiate existence or absence of the facts included in the object of proof, the victim may take evidence. The same situation can be seen with regard to physical evidence and electronic evidence. The victim can also take evidence in criminal proceedings for this type of evidence.

According to the Criminal Procedural Law, information on the facts provided by a person in their testimony during interrogation or interrogation regarding circumstances to be proved in the criminal proceedings and the related facts and ancillary facts may be evidence in the criminal proceedings. A testimony is also a report, application or explanation of a criminal offense, specific facts or circumstances addressed to the investigating authority, prosecutor's office or court. If a person had the right to refuse to testify in the cases specified in the Criminal Procedural Law and the person was informed about it, but this testimony was nevertheless provided, such testimony shall be assessed as evidence (Criminal Procedural Law, Article 131). A similar situation exists with regard to the victim's testimony.

The situation is different with regard to expert opinion. According to the Criminal Procedural Law (Article 132), an expert or auditor's opinion on the facts and circumstances provided in writing by an expert or auditor involved in the particular criminal proceedings may be evidence in criminal proceedings. In addition, the Criminal Procedural Law (Article 193) states that an expert examination is an investigative activity performed by one or more experts on behalf of the person conducting the proceedings and the content of which is the examination of objects submitted for examination in order to detect facts and circumstances relevant to criminal proceedings. It is clear from the above that expert examination, for which an expert opinion would be drawn up, is performed by an expert or experts only on behalf of the person conducting the proceedings. However, it must not be forgotten that the victim's rights determine the victim's involvement in determining the examination, but in the form of an application. It follows that the victim may request something in connection with the examination, but the examination in the criminal procedural sense will not be performed on their behalf.

Conclusions

1. The existing legal norms in the Criminal Procedural Law, which reflect general principles of the victim's rights, fundamental rights and rights in criminal proceedings do not include the right to take evidence, but the legislator has given this right in the criminal procedural legal norms on evidence.
2. It follows from the content of legal norms of evidence that the victim, as a person involved in criminal proceedings, has the right to take evidence, but the right to use all evidence specified in the legal norms of criminal procedure. There is a clear difference between the evidence that the victim can use to prove it and the official's evidence.
3. After all, the victim is a person in the criminal process who is very interested in the success of the trial, which is also one of the possibilities to achieve the goal of the criminal process, that is, to achieve a fair settlement. The victim's right to prove its content is not the same as to point to evidence. Referring to evidence reduces the victim's ability to prove it.

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Definition of Tax Planning in the Case Law of the Court of Justice of the EU (ECJ)

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Abstract

The objective of the study is to analyse the current and past case law of the European Court of Justice (ECJ) regarding tax disputes based on the modern legislation of the EU countries and applicable international law to determine the concept and criteria for legal tax planning. This article provides an in-depth study of the well-known Cadbury Schweppes case (2006), including the decision of the ECJ, which laid the foundation for a new concept of examination and interpretation of tax disputes on the merits in general. The introduction of the concept of "wholly artificial arrangements" and their characteristics stipulated and determined the development of the entire field of tax planning for years to come. Other rulings of the ECJ following the case of Cadbury Schweppes have described in greater detail and more specifically the concept of "wholly artificial arrangements" under the influence of the practice of tax planning itself, determining what tax planning is legitimate and how exactly it should be distinguished from tax evasion and tax avoidance.

Several research methods have been used in this study: comparative method, historical method, analytic method, inductive method.

Keywords: European Court of Justice, freedom of establishment, notion of economic substance, tax disputes, tax planning, wholly artificial arrangements, tax evasion.

Introduction

Theoretical significance of the study is that the presented article is the first scientific experience of doctrinal analysis of the category of tax planning within the case law of the ECJ. The practical significance of the results of the study is benefiting business activity and freedom of establishment within the EU. The definition of the concept

and content of the legitimate tax planning as part of financial activity of commercial undertakings in the EU countries, which opens prospects for entrepreneurs in terms of planning their expenses for making mandatory payments within the framework of legitimate legal arrangements. To achieve these objectives, particular court cases from the practice of the ECJ have been used and analysed in the study.

The historical method helped explore the formation of the functions and historic case law of the ECJ in elimination of gaps and interpretation of the provisions of the EU foundation documents in the field of creating the single economic space, freedom of establishment and development of integration processes.

The comparative method is used to examine and investigate tax regulation and practice of tax disputes resolving in EU Member States on the one hand and EU legislation and the ECJ practice on the other. This method allows to determine important role of the ECJ in formation of the framework of lawful tax planning.

The analytic and synthetic method was used to study regulatory enactments and other sources of law to identify the cases which concern tax planning. Through the inductive method, general conclusions from court cases have been drawn.

1 Role of Case Law of the ECJ in Integrated Regulation of Single Market

Case law on tax disputes and legitimacy of tax planning in the Member States of the European Union (hereinafter referred to as the EU) has undergone major change over the past 20 years that require doctrinal elaboration. Legal tax planning is justified from the economic and business point of view and is necessary. Not a single company or private individual is interested or even obliged to pay higher amounts of taxes in the course of their business activities, as stipulated by the law. Simultaneously, complexity lies in adequate perception of legitimacy of tax planning and interpretation of this legality by various legal entities and economic operators.

This perception in the EU varies depending on the specific legal situation, but the interpretation depending on the jurisdiction of a particular EU Member State will have the greatest impact. Although the concept of legitimate tax planning exists, interpretation and practical application of certain theoretical provisions will ultimately depend on the court of the country whose jurisdiction will raise the issue of tax planning.

The case law of the ECJ in tax disputes and related to tax planning is currently among the most elaborate and systematic ones; however, it is also new and not entirely established, as it is subject to the effect of numerous factors (a range of different political perspectives of the EU Member States, taxation policy and tax behaviour of subjects developing it, the transnational nature of tax planning).

For the purpose of maintaining stable functioning of the domestic market in the EU territory, creation of which led to increase of the number of cross-border and transnational transactions carried out by and between EU Member States, necessity arose to

eliminate not only direct barriers on the way of movement of capital, goods, services and persons, but also hindrances indirectly affecting fundamental freedoms of the domestic market. The above indirect barriers were to a large extent related to the tax burden established on the level of every Member State. Therefore, within the transformation process, the Union sets uniform principles of taxation in relation to a restricted number of taxes and duties by means of harmonisation, manifested mainly as adoption of directives and in the form of regulations in just few cases of exception, which are different from the first ones as to their legal force still a large independence in the field of taxation is provided to the EU Member States when it comes to direct taxation.

The ECJ plays a particular role in regulation of the single market by interpreting taxation – it is a supranational institution, independent of the Member States and most frequently protects interests of the Union as a whole, instead of individual countries. It has been assigned quite an extensive exclusive competence and, within the framework of direct jurisdiction, inter alia, hears cases on the claims of the European Commission to the EU Member States and disputes between them. Within the framework of indirect competence, the Court reviews preliminary requests by the jurisdiction authorities of the Member States regarding enforcement and interpretation of EU treaties and acts of its bodies and institutions. The ECJ plays a special role in developing law enforcement practice in tax disputes.

In the course of reviewing the matters within the framework of securing functioning of the single integration space, in the 1980-ies the ECJ started reviewing the issues of compatibility of the international tax treaties (aimed at avoiding double taxation) and their complex relations with the Treaty on establishing the European Union (TEU). In particular, the matter of redistribution of the powers of taxation due to signing of international tax treaties, where the Member States are parties, was the subject of review by the ECJ in cases like Avoir Fiscal (the ruling of the ECJ, dated 28 January 1986, case C-270/83) (Commission of the European Communities v. French Republic, 28.01.1986.) and Gilly (the ruling of the ECJ, dated 12 May 1998, case C-336/96). The issue of conformity of the provisions of international tax treaties with the provisions of the legislation adopted by the EU institutions on the basis of TEU and for its implementation is also among the subjects for review by the ECJ, which has pointed out the unconditional prevalence of the EU legislation: "[…] *the rights provided to subjects of economic activity* […] *by the Directive are unconditional and the Member State cannot subject compliance with them dependent on the international treaty with another Member State*" (Athinaiki Zithopiia AE v. Greek state, 04.10.2001). It is also worth pointing out the set of the rulings of the ECJ consisting of a group of acts governing the matters of free movement of capital (Article 56 of the Treaty on European Union) (Erika Waltraud Ilse Hollmann v. Fazenda Pública, 11.10.2007).

Thus, it can be concluded that the ECJ performs the most important functions of elimination of gaps and interpretation of the provisions of the EU foundation documents in the field of creating the single economic space and development of integration processes.

2 Concept and Characteristics of Tax Planning

Traditionally, types of tax planning include the classic and legitimate tax planning (aimed at ensuring correct and timely payment of taxes, accounting systems and reports), optimisation of tax planning (tax avoidance/tax mitigation), illegitimate tax planning (tax evasion). The focus of this article is legitimate tax planning.

Core principles of tax planning providing its actual efficiency under conditions of difficult economic and legal situation include compliance with legislation (legitimacy), application of knowledge, vision, consistency, individuality, cooperation in adoption of decisions, efficiency, possibility of choice, fast response, clarity, and reliability.

Classic tax optimisation is characterised by compliance with requirements of the legislative base; study of decisions of state authorities of tax inspection, as well as case law regarding tax optimisation, prudence, gradualism, and individuality. The above classic arrangement is also manifested by general efforts in decision making (tax optimisation is developed by a team of experts and includes accountants, lawyers and managers of relevant undertaking); proportionality of the price and quality (tax planning should guarantee actual economic effect); variability (an undertaking should develop several arrangements of tax optimisation and choose the safest and most profitable option); timeliness (timely response to amendments of tax legislation), comprehensiveness and effectiveness (the arrangement should be developed in a logic way, its components should be economically and legally effective).

Methods of the classic arrangement of tax optimisation include use of tax benefits and gaps in domestic legislation, choice of jurisdiction and form of transactions, the accounting policy, use of special tax territories/regimes, holding, choice of the type of company and migration.

Nevertheless, over the last 10–15 years the concept of tax planning has received both business and state interpretation, which, in essence, exclude any tax savings as such. The question remains whether companies have become quasi slaves of the Member States or there is still a compromise between such submission and freedom of establishment in any jurisdiction of the EU and enjoying the respective tax benefits. The key case for defining the position on this issue is the case Cadbury Schweppes (Cadbury Schweppes and Cadbury Schweppes Overseas, 12.09.2006), as in this case the competent opinion of supervisory nature was provided and the tax planning was interpreted by the court.

The Court was inquired of the freedom of establishment of undertakings and benefiting from tax benefits in the European Union. The group Cadbury Schweppes and Cadbury Schweppes Overseas Limited submitted an appeal against the claims by the UK tax service to the special commission of the United Kingdom by stating that legislation of the United Kingdom regarding controlled foreign companies was contrary to the provisions of the Treaty on the Functioning of the European Union (TFEU) regarding free movement of capital. The national court referred the matter for review to the ECJ.

On 12 September 2006, the ECJ adopted ruling on the case Cadbury Schweppes and Cadbury Schweppes Overseas v Commission tax authority. Following the hearing of the case, the ECJ supported the side of the company by establishing that provisions of the EU Member State (in this case, the United Kingdom) cannot be enforced and restrict the rights and freedoms of the company having founded a foreign controlled subsidiary if it follows from all the circumstances of the case that, irrespective of enjoying tax advantages, this company is engaged in actual economic operations in any EU Member State.

Having heard the case on its merits, the ECJ drew the following conclusions regarding the above key questions:

1. According to the settled case-law, although direct taxation falls within their competence, Member States must nonetheless exercise such competence consistently with the Community law.
2. If provisions of the national legislation restrict operation of the principle of freedom of establishment and performance of economic activity, as well as operation of the principle of free movement of capital, actions of companies which may cause doubts by tax authorities are unavoidable consequences of any other restrictions of freedom of establishment and performance of economic activities. In particular, in the argument part of its ruling, the Court of Justice points out that no establishment of general presumption of tax evasion and justification of a measure is possible in another Member State, which compromises exercise of fundamental freedom guaranteed by the Treaty.
3. In its ruling, the ECJ has explained its standpoint regarding freedom of establishment of companies and performance of economic activities. It has stated that establishment of a company in the EU Member State for the purpose of gaining profit in compliance with the legislation providing for tax benefits does not in itself suffice abuse of that freedom and, accordingly, is not a violation. Article 43 of the TFEU provides that freedom of establishment and performance of economic activities allows engaging in economic activities, founding and managing undertakings according to the conditions stipulated by the legislation, including for legal entities founded in the relevant EU Member State.

In compliance with Article 48 of the TFEU, such establishment provides the right to a company to exercise activity through a subsidiary, a branch, or an agency. The Court of Justice pointed out that conditions of the TFEU regarding freedom of establishment and performance of economic activity are aimed at ensuring that non-resident companies would be considered equal to resident companies of the relevant country. These conditions prohibit the EU Member State to prevent legal entities to found companies in another EU Member State registered in compliance with the relevant legislation.

Firstly, the ECJ also concluded that legislation of the United Kingdom, due to different approaches of taxation, causes damage to a resident company, in relation to which the legislation of foreign controlled companies is applied. The above legal provision

makes it difficult to exercise the freedom of establishment and performance of economic activity, as well as prevents establishment of subsidiaries in the EU Member State where such a subsidiary may enjoy more loyal taxation.

Simultaneously, Articles 43 and 48 of the TFEU also provide for restriction of validity of the freedom of establishment and performance of economic activity justified by the "general interest"; however, the ECJ established that necessity to prevent reduction of the state tax revenue was not an element of such "general interest", which would justify restriction of the freedom of establishment and performance of economic activity. Moreover, the ECJ emphasised that a resident company establishing a subsidiary in another EU Member State does not create general presumption of tax evasion and cannot compromise exercise of fundamental freedoms guaranteed under the TFEU.

However, restriction of freedom of establishment and performance of economic activity may be justified if it refers to artificial arrangements through which a company is trying to circumvent legislation of an interested EU Member State. The ECJ maintained the same arguments in other complicated cases; in particular, the case related to the tax on dividends (Commission of the European Communities v Italian Republic, 19.11.2009) and Belgium v Truck Centre SA (Belgian State-SPF Finances v Truck Centre SA, 18.09.2008).

The key concept used by the ECJ in review of the case of Cadbury Schweppes was the goal of any economic activity or transaction of the company. At the same time, the Court noted that such performance of economic activity in the territory of the country which encourages economic and social interaction within EU is legitimate. Freedom of establishment and economic activity presents the basis for continuous involvement of a country and the EU in the economic life of other countries, as well as presents the basis for gaining profit from this activity.

Thus, the ECJ has established in its case law that freedom of establishment and performance of economic activity within the scope of the TFEU provides for performance of economic activity by means of actual and effective establishment for an unrestricted term in any EU Member State for the purpose of performing true (and not fictitious) economic activity.

Secondly, the ECJ concluded on insufficiency of facts for stating that there were artificial agreements between the parties of the case consisting of and aimed at tax evasion. The Court of Justice pointed out that it was necessary to establish objective circumstances: existence of real estate, personnel, and material part of the company. The company has to prove that a foreign controlled company was actually established and engaged in effective economic activity. In other words, the ECJ has determined in its ruling which party has the burden of proof of non-existence of wholly artificial arrangements.

It should be stated that this precedent set the beginning of the direction of case law to other cases on tax disputes and served as the grounds for discussion of application of ruling and concepts developed by the ECJ during hearing of the case.

3 Criteria of Determining Legitimacy of Tax Planning. Concepts "Wholly Artificial Arrangements", "Abusive Practice", "Mailbox Companies" and "Substance"

The concepts interpreted and presented in the argumentation part of the rulings of the ECJ: wholly artificial arrangements; abusive practice; objective and subjective criteria/factors; "mailbox companies"; bogus company – are the key ones for the ruling, they form the basis of the methodology of evaluation of legitimacy of tax manoeuvres of the companies by the ECJ.

This wording was first applied by the ECJ in the case C-264/96 Imperial Chemical Industries plc v Kenneth Hall Colmer, which was related to tax provisions of the United Kingdom prohibiting application of tax benefits in relation to loss of a subsidiary of the holding company which is the resident of the United Kingdom. The ECJ of Justice used the same term in the case Lankhorst-Hoborst, 78 X and Y v Riksskatteverket, 79 Lasteyrie du Saillant (Hughes de Lasteyrie du Saillant v Ministère de l'Économie, des Finances et de l'Industrie, 11.03.2004).

However, in the case Cadbury Schweppes, the ECJ addresses the concept "wholly artificial arrangements", and points out that the situation when subsidiaries of the group are founded outside the EU Member State cannot evidence tax evasion per se. However, national legal provisions providing restrictions to exercising freedom of establishment may be justified in the case if they are aimed at fighting wholly artificial arrangements which are used by companies and aimed at circumventing national legislation. The ECJ maintained the same arguments and line of discussion in the case Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue, 13.03.2007.

Another important concept applied by the ECJ in resolving tax disputes is the term "abusive practice". The standpoint of the ECJ concerning its interpretation has developed gradually and in the case Cadbury Schweppes, where the ECJ refers to the concept it has already applied in the cases Emsland-Starke (Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas, 14.12.2000) and Halifax (Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise, 21.02.2006), where the essence of the disputes was not in the issues of direct taxation or exercising of fundamental freedoms. Thus, for several years since the hearing of these cases till adopting the ruling in the case Cadbury Schweppes, the ECJ has defined a particular concept of understanding what should be considered abuse and violation of rights.

Based on the case law of the ECJ, it can be concluded that two criteria need to be considered when determining the abusive practice: 1) objective non-compatibility of the goal of legislation with the results achieved by the company resulting from implementation of specific types of economic activity, and 2) subjective intentions of the company manifested as abusive practice to receive advantages.

Within this context, Starbucks case serves (Starbucks Corp., Starbucks Manufacturing Emea BV, 24.09.2019) as an example where the ECJ considers economic reality of transactions instead of reasonableness of transaction and does not consider the potential objective non-conformity between the law and results achieved by relevant types of economic activity. In this case, the company assured that know-how of roasting coffee was paid for, thus benefiting from favourable tax regime; although, based on considerations of reasonableness, it could be concluded that the transaction was performed for the taxation purpose (transaction was concluded with a related supplier, the prices of the supplied goods in comparison to other companies seemed to be too high for roasted coffee beans). However, the ECJ ruled that the Commission failed to prove the contrary, concluding that the company acted in a legitimate manner.

Moreover, in the analogous Apple case, the behaviour of the subsidiary in Ireland and taxation of the entire European profit only in Ireland, which is the country with the most favourable taxation regime, was viewed as tax evasion, as the EU Commission considered this behaviour to be a violation (the ruling is not freely available) and the Deputy Chair of the ECJ rejected the appeal by Apple as not substantiated by joining the EU Commission's position (Apple Sales International and Others, 17.05.2018).

Regarding the effect of the case law of the ECJ on the national judicial system, according to the opinion of the ECJ, obligation of national courts in finding true intentions and arguments of performed transactions is important. In performing the above analysis, national courts should consider the artificial nature of such transactions and the links between the legal, economic, and personal characteristics between legal entities involved in tax evasion arrangements.

In Cadbury Schweppes case, the ECJ is addressing the terms "mailbox company" and "bogus company". On the one hand, their use can be misleading, as it can create an impression that a legal entity not possessing premises, personnel, equipment (and therefore liable to be described as the "mailbox company") can be subjected to less favourable regulation in a cross-border situation. However, instructions and recommendations of the ECJ do not definitely mean that legal entities without premises, personnel and equipment can be totally disregarded. The size of premises and the number of personnel, and the quantity of equipment cannot be determined without considering the type of business activity the company is performing.

It is undisputed that a medium size holding company or a group of financial companies do not need a large number of personnel. Within the scale of a single country, such legal entities without offices or personnel are clearly not disregarded by tax authorities. On the other hand, in many jurisdictions such companies are subject to taxation of the company income of the minimum level, even if they receive non-taxable dividends.

It cannot be presumed that establishment of such a legal entity is definitely a wholly artificial arrangement. This conclusion is confirmed by the case "Eurofood IFSC" (Eurofood IFSC Ltd, 02.05.2006), where the ECJ pointed out that the mailbox

company is not a company which does not have office and personnel, instead, it is a company "*which does not perform economic activity in the territory of the EU Member State where it is located*".

The fact that the economic choice can be controlled by the holding company established in another EU Member State is not sufficient for disregarding the existence of such a company as a resident of another country. Key words in this regard are the "economic substance", "effective (actual) establishment", "effective economic activity" and "degree of the physical existence of the foreign dependent company".

If arrangements do not correspond to the economic reality, do not conform with the criterion of effective establishment, these can be disregarded. This is not surprising: tax authorities are well organised in finding actual facts and models, and this does not refer only to application of fundamental freedoms.

The concept of substance is extensively common among tax doctrines of many countries and is a key within the process of evaluation of a transaction regarding legitimacy of any tax manoeuvre. Within the context of international tax planning, "substance" means a set of respective features of performing economic activity that create impression of independent performance of business activity, in particular, comprehensive business.

"Substance" comprises everything: criteria of existence of the office, personnel, executive bodies, and bank accounts. The term has been seen increasingly often in cases heard by the ECJ, starting from the Cadbury Schweppes case, it was indirectly confirmed in BEPS (Base erosion and profit shifting. Organisation for Economic Cooperation and Profit Shifting) developed by the Organisation for Economic Cooperation and Development. Assessment of a company according to the criterion of "substance" is based on the following principle: if it is not possible to confirm the "substance" of the company performing activity in the territory of a foreign country, probability of declaring the operation of the company as a tax manoeuvre aimed at tax evasion increases considerably.

Conclusions

It can be concluded that the ECJ plays a major integrating role in shaping the EU single market, and eliminates the gaps of legal regulation on the EU level by its case law, defines the prevalence of the EU law over the law of the EU Member States, by its decisions confirms freedom of establishment within the EU

Although there is a range of issues which prohibit strict definition of tax planning, Cadbury Schweppes case has become the basis for definition of fundamental approach of understanding that there is "legitimate tax planning" and how it can be differentiated from tax evasion. It defines several approaches (concepts) based on which it is possible to judge legitimacy of tax planning with certain accuracy: the concept of use of wholly artificial arrangements, the concept of abusive practice, and the use of the substance has also been becoming increasingly meaningful over the last few years.

In the case Cadbury Schweppes, the ECJ resolved that tax provisions of the United Kingdom should not be applied if, based on objective factors confirmed by the third parties, it is proven that, irrespective of tax motivation, the foreign controlled company was established in the EU Member State and performs their effective economic activity. By this the ECJ has confirmed prevalence of the EU legal provisions over national legislation of the Member States in defining the single market.

The ECJ has also emphasised the importance of performing assessment of the behaviour of the taxable subject by focusing on **goals, objects, and reasons behind the disputed regulation**. The ECJ obliges national courts of the EU Member States to identify the true motivation and meaning of transactions performed by companies.

This is related to the goal set by the subjects of business operations by implementing the principle of freedom of establishment, and the essence is to allow entities from the EU Member States to establish subsidiaries and other "secondary" organisations in other EU Member States for the purpose of performing operations, and, thus, to encourage economic and social integration within the EU.

The ECJ establishes that freedom of establishment also provides participation of natural and legal entities of one EU Member State in the economic life of the other EU Member State on "robust and sustainable basis", and profit is gained in this process. That means that the concept of freedom of establishment within the scope of TFEU entails legally correct establishment for a non-restricted term for the purpose of gaining profit. From the moment when the ECJ applies the principle of freedom of establishment, it performs evaluation of the goal and object of such freedom.

In other parts of the argumentation of the ECJ in Cadbury case, the focus is on the object and reasons for regulation. In professional environment, there is an opinion according to which considering of the object and goal of regulation should be included in the process of interpretation of special provisions. Importance of such factors should not be made dependent on subjective assessments and requirements.

When the issue concerning artificial arrangements is resolved, intentions should not be taken into account separately from other criteria if the arrangement seems artificial or because the actual substance differs from what taxpayers are investing, or because the relevant arrangement is not covered by the regulation under the provision in compliance with interpretation of the object and goal of this provision.

In relation to the above referred for convenience and uniformity of concepts, the concept "wholly artificial arrangements" emerged in the practice of resolution of disputes concerning legitimacy of tax planning and its active use in many rulings of the ECJ began after the Court presented its position in the case Cadbury Schweppes.

Two conditions can be distinguished, worth paying attention to, for qualification of actions of the company as "using wholly artificial arrangements":

1) Does establishment and registration of the controlled foreign company by the resident holding company of another country affect economic reality of the EU Member State? Does the company perform effective economic activity

in the selected country or is such establishment fictitious and the company established in this way is the mailbox company or the bogus company?

2) Does the controlled foreign company physically exist at the place of establishment? Does this company possess premises, personnel, and equipment?

Depending on responses to the above questions, conclusions can be drawn concerning true intentions of company management by establishing subsidiaries in other countries. In the examined case, the ECJ took the side of the company Cadbury Schweppes, thus confirming the new approach to resolution of the dispute on legitimacy of tax planning.

It can be summarised that during identification of existence of abusive practice, two criteria should be satisfied:

1) objective non-compatibility of the goal of the legislation with the results achieved by the company in the result of definition of the types of economic activity, and
2) the subjective intentions of the company manifested as abusive practice to receive benefits.

Presently, there is the established position according to which all the listed markers of illegitimate tax planning are described by just a single characteristic of the company and tax planning named "substance". "Substance" is the concept comprising all key features allowing evaluation of company operation from the point of view of actual economic activity and business independence.

For the purpose of determining the degree of effect of the ruling in the case Cadbury Schweppes, upon the process of taking decisions concerning other disputes the question, the answer to the question regarding the effect of the case Cadbury Schweppes on the national law of the EU Member States is also important.

It is obvious that national law of any EU Member State should conform to the EU law; however, not all provisions of the national law have been primarily established at national level. National legislative bodies in the European Union do not have the discretion to act in relation to adoption of strategic decision, as the EU law accurately stipulates their competence, and in certain areas there is absolutely no space for rulemaking. If the EU law does not provide accurate rules which should be implemented by national legislators, the latter adopt decision independently as long as they conform with the requirements of the EU law. Such requirements may follow from both directives and from the primary EU law, for example, principles and freedoms.

The case Cadbury Schweppes presents a situation when the legal position of the ECJ concerning "wholly artificial arrangements" refers to application of imperative provision of the EU law which should be implemented in national law and does not leave the possibility for the national legislator to issue provisions based on its independent decision.

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Sanctions as Means of Security in Registering Information on Beneficial Owners in the Register of Enterprises

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Abstract

This research examines the place of sanctions as a means of security in the legal framework of the Republic of Latvia. Specifically, relation between the sanctions as a legal impediment and registration of beneficial owners by the Register of Enterprises has been analysed as the central problematic. The aim of this research is to evaluate effectiveness of the provisions of law with respect to sanctions as a legal impediment in registering beneficial owners in Latvia and argue for a necessity to introduce amendments for elaboration thereof. In order to achieve the aim, such research methods as analysis of relevant legal norms on sanctions, legal impediments to registration of beneficial owners and competence of the Register of Enterprises have been applied. To supplement arguments of the research, a number of case studies have been used to illustrate the current practice of the Register of Enterprises in registering information on sanctioned beneficial owners. Eventual findings of the research lead to a conclusion that legal framework on sanctions regarding registration of information on beneficial owners needs serious amendments to improve its effectiveness and accordance with latest international developments. The results of this research underline the necessity to define sanctions as a means of security in the Law on the Enterprise Register of the Republic of Latvia, so as to clarify the competence of the Register of Enterprises.

Keywords: beneficial owners, civil legal restrictions, means of security, public register, Register of Enterprises, sanctions.

Introduction

Lately, international community has been shaken by Russia's unexpected and overwhelming military aggression in Ukraine. Consequently, not only the future possibility of amicable international relations among states but also rule of international law has been deeply questioned. The breach of the very core principle of the non-use of force enshrined in the article 2(4) of the United Nations Charter which states that "*all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations*" (United Nations, 1945) has endangered the very existence of international law. Unsurprisingly, serious steps on different levels have been taken since the beginning of the invasion, with an aim to restore international peace and lawful order.

On the international level, the United Nations General Assembly adopted a resolution No. A/ES-11/L.1 of 1 March 2022, in which it "*demands that the Russian Federation immediately cease its use of force against Ukraine and refrain from any further unlawful threat or use of force against any Member State*" (United Nations, 2022) and "*also demands that the Russian Federation immediately, completely and unconditionally withdraws all of its military forces from the territory of Ukraine within its internationally recognised borders*" (United Nations, 2022). Despite the very strong and condemning language resorted to in the aforementioned resolution, its nature is unfortunately merely declaratory. It means that in order to resort to stronger means in countering Russia's actions in Ukraine, it would be necessary to use force as well which would mean further breach of principles of international law, this time not only by Russia. Given the aforementioned, it is unfeasible to find an adequate and effective response on an international level. After all, even international norms remain rather vague and unexplicit as regards applying consequences to specific situations even nowadays.

The case is different when it comes to the level of regional supranational organisations with a truly international span of influence. Such organisation is the European Union (hereinafter – the EU) which has taken legislative actions to deal with Russia's aggression in Ukraine. Although the EU does not have the capacity to put an immediate end to invasion, it has other effective tools in its arsenal indirectly aimed at diminishing longevity of Russia's aggression. Thus, Article 2(1) of the Council Regulation (EU) No. 269/2014 of 17 March 2014 concerning restrictive measures in respect to actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine stipulates that "*all funds and economic resources belonging to, owned, held or controlled by any natural or legal persons, entities or bodies, or natural or legal persons, entities or bodies associated with them, as listed in Annex I, shall be frozen*" (Regulation (EU) 269/2014). Given that the Annex I is constantly being revised and supplemented, one might consider that funding Russia's activities in Ukraine is becoming more complicated once assets of the key involved persons are frozen.

Relevance and effectiveness of sanctions, however, depend on the ability of individual Member States to ensure their application. This means that national regulatory frameworks should be comprehensive enough to ensure that all state institutions involved in registration of assets of any kind are legally able to prevent the disposal of such assets if they belong to sanctioned persons. The aim of this research is to evaluate effectiveness of such legal framework in the Republic of Latvia as one of the Member States of the EU. In order to successfully conduct the research, overall doctrinal methodology has been used with the principal research method of analysis of relevant legal norms. Additionally, such method as case study has been used to illustrate the arguments stemming from the analysis of law.

Consequently, results of the research demonstrate insufficient clarity of legal norms regarding sanctions in the Republic of Latvia. Hence, certain proposals for amendments thereof are being put forward, so as to clearly define the place of sanctions as a means of security within the normative regulation in Latvia. The practicality of the aforementioned finding would be understanding as to when and in what cases sanctions should be regarded as a legal obstacle to registering information on beneficial owners. Originality of the research lies within the previously described topicality of the subject and the fact that the matter of application of sanctions regarding registration of beneficial owners is not widely studied in Latvia.

1 Beneficial Owners as Subjects of Sanctions

Frequently, assets outside of Russia held by the sanctioned persons find themselves in different legal structures and enterprises. A number of specialised non-governmental organisations have concluded that in order to ensure control of the Russian assets abroad, and for international sanctions to work, it is absolutely imperative to identify the sanctioned persons who are simultaneously beneficial owners in enterprises. Since there is a hazard that assets will be moved to new ownership, most likely even to another country, it is important that the competent institutions block such re-registration of assets. After all, Russian assets abroad are crucial for funding the war in Ukraine (Morris, 2022). Therefore, beneficial owners are to be regarded as subjects of sanctions which deserve special attention and legal treatment.

As stipulated by Section 1, Clause 5 of the Law on Prevention of Money Laundering and Terrorism and Proliferation Financing (hereinafter – AML Law), the beneficial owner is "*a natural person who is the owner of the customer which is a legal person or legal arrangement or who controls the customer, or on whose behalf, for whose benefit or in whose interests business relationship is being established or an individual transaction is being executed*" (Law on the Prevention of Money Laundering and Terrorism and Proliferation Financing, 2008). It goes on to specify that beneficial owner of a legal person is "*a natural person who owns, in the form of direct or indirect shareholding, more than 25 per cent of the capital shares or voting stock of the legal person or who directly or indirectly controls it*"

(Law on the Prevention of Money Laundering and Terrorism and Proliferation Financing, 2008). This means that the assets essentially held by the beneficial owners are capital shares in capital companies. For the purpose of this research, it is relevant to specifically examine the definition of a beneficial owner in legal persons (capital companies) because the control exercised otherwise than that of an ownership of shares would not involve the risk of assets owned by the sanctioned person being transferred and potentially used for funding Russia's aggression.

The Law on International Sanctions and National Sanctions of the Republic of Latvia (hereinafter – the Law on sanctions) prescribes in Section 4, Clause 2 civil legal restrictions as one of the types of international or national sanctions that may be introduced or imposed in Latvia (Law on International Sanctions and National Sanctions of the Republic of Latvia, 2016). Regarding civil restrictions, it is further stated in Section 5, Paragraph two of the Law on Sanctions that "*a subject of sanctions on which civil legal restrictions have been imposed, based on these restrictions, is prohibited from acquiring and alienating tangible and intangible objects to which ownership rights or other property rights must be registered, corroborated, or published in public registers*" (Law on International Sanctions and National Sanctions of the Republic of Latvia, 2016). Consequently, it derives from this implied definition of civil legal restrictions that capital shares also fall within this type of sanctions. Logically, Paragraph three of Section 5 specifies that "*the acquisition and alienation of the ownership rights or other property rights referred to in Paragraph two of this Section is forbidden to be registered or corroborated in public registers*" (Law on International Sanctions and National Sanctions of the Republic of Latvia, 2016).

However, whilst the normative regulation stipulates what is to be regarded as civil legal restrictions and what the actions of the institution holding a public register of the relevant ownership rights are, the competence of these institutions in refusing to register certain amendments in the information is lately neglected. Although sanctions generally serve a noble aim, there are certain cases where legality of refusal of registration of ownership rights regarding sanctioned persons is dubious. When it comes to beneficial owners, the problem of insufficiently precise and effective legal framework is highlighted.

2 Scope of Competence of the Register of Enterprises in Refusing to Register Information on Sanctioned Beneficial Owners

In examining interrelation of sanctions and registration of information on beneficial owners, it is necessary to assess the competence of the Register of Enterprises, i.e. the institution responsible for registering beneficial owners in the Republic of Latvia laid down in the normative acts. In other words, it is important to understand what place sanctions take in the normative regulation covering the operation of the Register of

Enterprises and to what extent the Register of Enterprises is entitled to regard sanctions as an impediment for registration activities. Further, it is useful to view the practice of the Register of Enterprises in resolving the issue of sanctions by analysing the position of the institution and actual cases.

When viewing the Law On the Enterprise Register of the Republic of Latvia, it can be seen that only a single section is devoted to the topic of sanctions. More specifically, Section 4^2, Clause 1 stipulates that the state notary shall take a decision to postpone entering of the commercial company in the commercial register if civil legal restrictions have been applied to one of the members or founders, and refuse entering of the commercial company in the commercial register if civil legal restrictions have been applied to the sole founder (Law On the Enterprise Register of the Republic of Latvia, 1990). It seems logical that normative acts prescribe not to make an entry when a sanctioned person who is inevitably becoming a beneficial owner of the legal entity wants to found a commercial company. Thus, normative regulation prevents registration of new enterprises that would have sanctioned persons as their members or shareholders and ultimately the beneficial owners.

However, the case is not so obvious with respect to already existing companies. Clauses 4 and 5 of Section 4^2 maintain that the state notary shall "*refuse to add a division of the register of shareholders to the registration file of a limited liability company, if an application for adding a division of the register of shareholders to the registration file has been submitted and a civil legal restriction has been imposed on the shareholder thereof, except for the case when the equity capital shares of the shareholder are inherited*" (Law On the Enterprise Register of the Republic of Latvia, 1990), and, respectively, that in a similar case the registration shall be refused if "*the number of equity capital shares of a person on whom a civil legal restriction has been imposed has decreased*" (Law On the Enterprise Register of the Republic of Latvia, 1990). Essentially, this means that registration shall be refused when either a new sanctioned shareholder enters the company or the existing subsequently sanctioned shareholder disposes of their capital shares. Nevertheless, the Law On the Enterprise Register of the Republic of Latvia does not mention a word on what the activities of the Register of Enterprises should be in cases when an application for changes in information on the already registered subsequently sanctioned beneficial owners is received.

As it stems from the previously analysed norms of the Law On the Enterprise Register of the Republic of Latvia, express prohibition of registration when it comes to sanctions applies only to cases which involve changes in the composition of shareholders. However, it should be marked that the notion of a shareholder is not necessarily equivalent to that of a beneficial owner. Thus, the Supreme Court of the Republic of Latvia has concluded that the entry in the register of shareholders does not always mean that the person entered therein also possesses the property right to the capital shares. Those shares may belong to another person who on the basis of some private arrangement may hold them for the benefit of the actual shareholder entered in the register of shareholders.

That specific person is to be regarded the beneficial owner of the commercial company (Supreme Court of the Republic of Latvia, 2018). Moreover, Paragraphs five and six of Section 18^1 of the Commercial Law put forward an obligation to the board of directors of the commercial company to make a relevant entry in the register of shareholders whenever any change regarding the company's shareholders has taken place, and subsequently submit the new division of the register of shareholders to the Register of Enterprises (Commercial Law, 2000). Additionally, Section 18^2, Paragraph one of the AML Law imposes an obligation to provide information on beneficial owners simultaneously with application for changes in the division of the register of shareholders (Law on the Prevention of Money Laundering and Terrorism and Proliferation Financing, 2008). Hence, under the current normative regulation it is unclear what the competence of the Register of Enterprises is in registration of information on beneficial owners who happen to be sanctioned.

All the legal circumstances that need to be verified by the Register of Enterprises before any registration activity is made, are listed in Section 14, Paragraph one of the Law On the Enterprise Register of the Republic of Latvia. According to Clause 6 of the aforementioned norm, the state notary shall verify, whether "*another legal impediment has not been registered in the Enterprise Register*" (Law On the Enterprise Register of the Republic of Latvia, 1990). The notion of a legal impediment involves different means of security that may be applied decisions and orders of competent authorities or officials and that Register of Enterprises is obliged to register on the basis of Clause 3 of Section 4 of the aforementioned Law (Law On the Enterprise Register of the Republic of Latvia, 1990). However, the Law On the Enterprise Register of the Republic of Latvia neither separately categorises sanctions, nor expressly envisages whether sanctions are to be regarded as legal impediments or means of security.

The utmost issue at stake is the following: whether the Register of Enterprises has the right to interpret sanctions as being the means of security which prevent registration of information on beneficial owners who happen to be sanctioned. It should be noted that according to Section 10, Paragraph one of the State Administration Structure Law, "*state administration shall be governed by law and rights. It shall act within the scope of the competence laid down in laws and regulations. State administration may use its powers only in conformity with the meaning and purpose of the authorisation*" (State Administration Structure Law, 2002). Hence, the strict principle of separation of powers does not permit the Register of Enterprises to apply excessively free interpretation to certain legal notions. Nevertheless, to respond to the stated question above, it is necessary to study the practice of the Register of Enterprises in registering information on beneficial owners by examining actually received applications.

3 Practice of the Register of Enterprises in Regarding Sanctions as a Means of Security

As a matter of fact, sanctions is an issue of particular novelty and topicality to all the public registers related to registration of ownership rights in any sense, including the Register of Enterprises. The latter has expressed a position that the Law on sanctions imperatively obliges any responsible institution to verify whether the person regarding which any registration activity is to be made is subject to international or national sanctions. Interestingly, the Register of Enterprises goes on to explain that such verification procedure should also apply to registration of the transfer of capital shares and registration of newly founded companies by authorised persons. Importantly, the Register of Enterprises notes that imposition of sanctions does not affect the duty of all legal persons to register their beneficial owners, i.e., the changes in information on beneficial owners should be registered in any case (Register of Enterprises of the Republic of Latvia, 2022). While such approach is definitely in accordance with the purpose of the AML Law which is *inter alia* aimed at full transparency of legal persons, it can be questioned whether registration of changes in information on beneficial owners within the framework of normative regulation should and in practice always does take place. After all, refusal to the transfer of capital shares inevitably lead to the issue of registration of beneficial owners.

The previously described position deserves a thorough analysis. Although the practice on the matter of sanctions is currently rather scarce, from the emerged cases one might see a direction of how sanctions are being interpreted by the Register of Enterprises. Thus, on 25 April 2022 the Chief State Notary of the Register of Enterprises adopted the decision No. 1-5n/100 to uphold the administrative act by which it was decided to refuse registration of losing the status of the beneficial owner and registering a new beneficial owner. The case involved transfer of ownership rights of the sanctioned beneficial owner within the chain of legal persons behind the company which applied for registration of changes to a new owner who was indicated as the new beneficial owner. The Register of Enterprises substantiated its decision by stating that the state institution is bound by the sanctions, fulfilment of which from its part would mean non-registration of the transfer of ownership rights of the person to whom sanctions have been applied (Register of Enterprises of the Republic of Latvia, 2022). Another argument for refusal of registration lied within the provisions of Cabinet Regulation No. 327 adopted on 9 July 2019 "Procedures for the Proposition and Enforcement of International and National Sanctions" which expressly stipulates in Clause 2.2. that the Register of Enterprises is one of the public registers responsible for enforcement of civil legal restrictions (Cabinet Regulation 327, 2019). Thus, it can be concluded that the Register of Enterprises interprets sanctions as a means of security when beneficial owners change on the basis of the transfer of capital shares or ownership rights thereto.

As it can be seen from the case in question, SIA "Riga Fertilizer Terminal", i.e., the company applying for registering the changes in beneficial owners still has the same beneficial owner as initially registered on 21 June 2018 (Register of Enterprises of the Republic of Latvia, 2022). The practice of the Register of Enterprises is further strengthened by the decision of the Chief State Notary No. 1-5n/101 adopted on 27 April 2022. This decision which also upheld the administrative act on refusal to register losing of status of the beneficial owner on the basis of the transfer of ownership rights to the capital shares essentially contains the same argumentation (Register of Enterprises of the Republic of Latvia, 2022). It is also visible from the public register that with respect to SIA "VENTAMONJAKS", the company at stake in the specific case, information registered on its beneficial owner has not changed since 4 September 2018 (Register of Enterprises of the Republic of Latvia, 2022).

Overall, current practice of the Register of Enterprises is insufficient to make comprehensive conclusions as to how sanctions are interpreted in every case. One thing, however, is clear – when it comes to losing of the status of the beneficial owner on the basis of transfer of capital shares or ownership rights thereto – sanctions are unequivocally regarded by the Register of Enterprises as a means of security. Thus, a statement that changes in information on beneficial owners shall always be registered is not absolute. Nevertheless, it can be concluded that by refusing to register information on sanctioned beneficial owners, the Register of Enterprises applies teleological interpretation method to legal norms covering the matter of sanctions. Given that grammatical, systemic and historical interpretation methods in this case are not enough, the Register of Enterprises is following the principle of reasonable application of legal provisions enshrined in Section 11 of the Administrative Procedure Law (Administrative Procedure Law, 2001) and teleologically interprets sanctions in conformity with the purpose of the Law on sanctions. Thus, the Register of Enterprises fills the notion of the legal impediment mentioned in the Law On the Enterprise Register of the Republic of Latvia by including sanctions therein.

Conclusion

As the war in Ukraine is ongoing, it is clear that the issue of sanctions will not lose its topicality in the months to come. The public registers responsible for registering ownership rights will face numerous legal issues when deciding how to fulfil sanctions. The Register of Enterprises on its part will be concerned with freezing of the *status quo* in enterprises where sanctioned persons are involved. In this regard, beneficial owners will remain one of the complicities, albeit not the only one. As the Ministry of Justice of the Republic of Latvia has noted, status of the beneficial owner on the basis of an ownership right is crucial because it reflects control not only over the capital shares but also over the whole property owned by the capital company. Consequently, publicly registered restrictions are necessary to prevent the use of economic resources as an analogue to

monetary resources (Ministry of Justice of the Republic of Latvia, 2022). Nevertheless, it would be wrong to assume that complicity of fulfilment of sanctions regarding registration of beneficial owners is limited to the question of ownership rights.

Although the practice of the Register of Enterprises has made it relatively clear that registration of the changes in beneficial owners is to be refused if such changes involve losing of status of the beneficial owner due to transfer of ownership rights to capital shares, with a high likeliness, a whole range of other legal issues will emerge in no time. More specifically, the status of the beneficial owner does not only derive from a direct or indirect ownership right to capital shares. The list of possible types of control is by no means exhaustive and is nowhere to be found in the normative acts but, as seen in practice, control in a legal person may frequently be exercised on the basis of an authorisation agreement, through a legal arrangement, on the basis of business relationship, or via status in a legal person, for instance, as a member of executive institution (Register of Enterprises of the Republic of Latvia, 2022). Therefore, it is important to understand whether sanctions would apply as a means of security if beneficial owners exercising control in the legal person in any way other than that of an ownership right applied for registration of losing of their status.

It can be concluded from this research that provisions of the normative regulation and practice of the relevant state institution put together are still not enough for decisive determination of whether sanctions are to be considered a means of security or legal impediment doe registration within the meaning of the Law On the Enterprise Register of the Republic of Latvia. It is visible from the practice of the Register of Enterprises that sanctions are indeed interpreted as a means of security when it comes to registration of sanctioned beneficial owners and their ownership rights to shares. However, the fact that the Register of Enterprises refuses to register loss of status of the beneficial owner in cases of ownership rights does not necessarily mean that such practice will apply to losing of status of the beneficial owner with respect to all other types of control.

Consequently, the aim of the research has been reached. It has been substantiated that the legal framework with respect to the competence of the Register of Enterprises in fulfilling the civil legal restrictions imposed on natural persons who happen to be beneficial owners of legal entities is insufficiently elaborated. It does not specify what the place of sanctions in the verification process of documents is and, as a consequence, leaves excessive room for interpretation for the Register of Enterprises. This, on its part, makes the function of the Register of Enterprises gradually move from that of an executive institution to that of a partly judicial institution.

To counter legal challenges posed by latest global developments, it would be necessary to make amendments to the normative regulation. In particular, it would be useful to define sanctions as a means of security within the framework of the Law on the Enterprise Register of the Republic of Latvia and supplement Section 4^2 of the aforementioned Law with a provision which would envisage in which cases the Register of Enterprises

shall refuse to register information on beneficial owners. That way, the competence of the Register of Enterprises on the matter of beneficial owners and their relation to sanctions would be clear and the overall purpose of the normative regulation on sanctions aimed at preventing relevant persons from escaping from sanctions would be fulfilled much more effectively.

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Towards Treaty on Business and Human Rights: Key Areas of Agreement

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Abstract

Current legal framework does not properly address the impact that transnational corporations have on human rights. In response to that in 2014 the UN Human Rights Council established an open-ended intergovernmental working group with a mandate to elaborate an international legally binding instrument to regulate activities of transnational corporations and other business enterprises. Although this decision was strongly contested and initially there was very little consensus on what such a treaty should entail, much effort has been invested to improve the content of the proposed treaty and gather the necessary support for its adoption.

The aim of this article is to analyse the progress made in negotiating the treaty and to find any essential areas of agreement between different stakeholders. To achieve that aim, historical and analytical research methods have been primarily used. The study finds that two crucial areas of agreement exist – on the regulatory targets and regulatory model – that allows for real negotiations to begin.

Keywords: consensus, human rights, transnational corporations, treaty on business and human rights.

Introduction

The impact of business on human rights and corporate human rights violations are well documented (Amnesty International, 2014). Victims face significant challenges when seeking remedy in cases where transnational companies are perpetrators of human rights abuse or are complicit in violations committed by state actors (Birģelis, 2019, *343–349*). It is argued that international law is not currently equipped to properly deal with such challenges (Joseph, 2004). Therefore, an understandable reaction to this situation is to

argue that there should be more specific regulations in place that would bind all businesses under a common set of standards protecting all human rights. Because customary norms cannot be merely created at will (Dumberry, 2016), seeking to establish binding international standards in the field of business and human rights means that an international treaty should be negotiated, regardless of whether the treaty would impose obligations on states or on companies directly. Civil society has long been advocating for such a treaty and there appear to be several good reasons for that (Birģelis, 2021, *97–103*). It can, for instance, help address the issue raised above through clarifying human rights standards applicable to companies, removing obstacles to access to justice in transnational litigation, and promoting initiatives that would enhance corporate accountability for human rights violations. Eventually the work towards a binding treaty on business and human under the auspices of the UN has begun.

In 2014, three years after the Human Rights Council (HRC) unanimously endorsed the UN Guiding Principles on Business and Human Rights (UNGP), the HRC adopted resolution 26/9 by which it decided "to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises" (Human Rights Council, 2014). It should be noted that the mandate of this open-ended intergovernmental working group (OEIGWG) initially started on quite uncertain grounds as the said resolution was far from unanimously welcomed, with 20 states voting in favour, 14 against and 13 abstaining (Human Rights Council, 2014). Powerful home states such as the USA had refused to engage with establishing such treaty from the very start (Delegation of the United States of America, 2014). Similarly, to the previous efforts to regulate transnational corporations by the UN (Muchlinski, 2021, *212–226*), primarily developing countries and civil society members supported the development of the treaty while developed countries and large businesses did not. Nevertheless, the process of developing a binding instrument has significantly moved forward.

The first session of the OEIGWG took place in July 2015. It was not well attended and delegates from the EU and EU member states walked out of the meetings on the second day (Ruggie, 2015; Cassel, 2015). There was very little consensus on what exactly should the instrument entail. To be of practical use, the treaty has to go beyond a simple restatement of obligations that states and businesses already have. Therefore, the first and second sessions of the OEIGWG were dedicated to increasing the participation of states and conducting more concrete deliberations on the content, scope, nature and form of a future international instrument (without yet beginning to draft the treaty text itself) (HRC, 2016; HRC, 2017). During the third session, the OEIGWG discussed elements for a draft legally binding instrument (Elements for the Draft Legally Binding Instrument, 2017) prepared by the Chairperson-Rapporteur of the OEIGWG based on the discussions held during the first two sessions (HRC, 2018). During the fourth

session, the discussions focused on the very first draft which was named as "zero draft" (Legally Binding Instrument, 2018) of the treaty, as well as a zero draft optional protocol (Draft Optional Protocol to the Legally Binding Instrument) to be annexed to the zero draft legally binding instrument. Then during the fifth session, a revised draft (Legally Binding Instrument, 2019) of the legally binding instrument served as the basis for negotiations, while during the sixth session, a second revised draft (Legally Binding Instrument, 2020) of the legally binding instrument was evaluated. Ahead of the seventh session, the Permanent Mission of Ecuador prepared a third revised draft (Legally Binding Instrument, 2021) of the legally binding instrument which is the most up to date version of the treaty so far. Third revised draft maintains the structure, scope and the balance of content and approaches of the previous drafts, improving in drafting and clarifying certain ambiguities (López, 2021). Undoubtedly, these draft versions of the proposed treaty maintain progressive development.

The proposed treaty narrows the regulatory gap through broad extraterritorial jurisdiction, concrete reporting and due diligence obligations and over-arching duty on states to ensure that such obligations are fully justiciable and victims are equipped with remedies and ample access to justice (Bantekas, 2021, *662*). Although further improvements are necessary, inter alia, to provisions regarding the reversal of burden of proof, the extra-territorial obligations of states and human rights due-diligence, two fundamental milestones have been achieved that allows the real negotiations to begin. Those are: agreeing upon the regulatory targets and regulatory model.

1 Regulatory Targets: Scope of Business Enterprises

The first major debate during the opening session of OEIGWG was regarding the scope of business enterprises that the treaty should cover. More specifically, what the "regulatory targets" should be (Deva, 2017, *154*); whether the proposed treaty should follow the approach adopted by the UNGPs and apply to all types of business enterprises, or whether its applicability should be limited only to transnational corporations and other business enterprises with a transnational character in their operational activities.

The start of this debate has its roots in the previously mentioned HRC Resolution 26/9 which called for a treaty to regulate the activities of "transnational corporations and other business enterprises". However, presumably to gain enough votes to pass, a footnote was placed in a preamble paragraph of Resolution 26/9 stating, "*Other business enterprises' denotes all business enterprises that have a transnational character in their operational activities and does not apply to local businesses registered in terms of relevant domestic law*" (HRC, 2014). Such footnote, if taken on its face value, does restrict the scope of the intended treaty. In that way the first real point of tension was created.

Immediately after the adoption of the said resolution, several NGOs reacted to express their concern and called for the perceived restriction established by the footnote to be lifted. In a report released before the first meeting, the International Commission of

Jurists convincingly argued that a footnote in the preamble could not limit the scope of discussions or the outcome of negotiations (International Commission of Jurists, 2015). Similarly, at the very start of the negotiations, the EU had suggested that the scope of the treaty must be more inclusive. However, the EU's proposal and subsequent tedious debate was qualified as obstructionist by some even though most NGOs, several expert panellists, and business representatives agreed that the treaty should cover all business enterprises (Carlos, 2016, *111–116*). Despite initial disagreements at the beginning of the negotiations, a certain consensus has emerged.

With the risk of some pro-treaty states withdrawing from the treaty negotiations, the draft version of the treaty is constructed in a way that it applies to all business enterprises. That appears to be in line with the increasing trend towards adopting instruments that apply to all types of enterprises, rather than merely transnational ones (OECD, 2011). In essence, it can be considered beneficial to the victims as from their standpoint it does not particularly matter whether a transnational or local company abuses their human rights, and corporations often structure their enterprise to act through locally incorporated subsidiaries. Therefore, the current draft treaty does afford some protection to potential victims against all types of corporate behaviour. Another practical advantage of this approach is that it avoids the issue of constructing an agreeable definition of "transnational corporation", a task which could prove very difficult because an entity could be considered "transnational" in view of multiple alternative variables (for instance, location of offices, operations, nationality of shareholders and directors), and neither municipal corporate laws nor international law generally recognise incorporation of a company as a "transnational corporation". Any attempt to limit the treaty's scope only to transnational corporations would potentially result in lawyers advising companies how to bypass the given definitional contours. Therefore, from a normative perspective such approach is seen more preferably.

Although one cannot theoretically exclude the possibility that states could once again renegotiate the scope of the treaty and narrow it down to "transnational corporations", that is highly unlikely considering the incremental extension of the scope of initiatives regulating corporate behaviour over the last four decades and the unanimous endorsement of the UNGPs by the HRC. Unless this treaty is seen as the first of many subsequent treaties in the field, it is safe to assume that there is a solid ground of agreement about the regulatory targets of the proposed treaty.

2 Regulatory Models: Direct vs Indirect Corporate Human Rights Obligations

Besides the agreement regarding the regulatory targets of the treaty, another crucial agreement was about the proper way or model to regulate these targets. David Bilchitz rightly notes that there are two main models for a treaty to regulate corporations in this regard (Bilchitz, 2017, *186*). The first model maintains focus on the obligations of

the state, which is expected to protect individuals against the violation of their rights by third parties such as corporations or to require certain actions of corporations to facilitate realisation of such rights. This model can be called the "indirect model" as it would place an international legal obligation on the state to ensure (though regulations, investigations, etc.) that corporations do not violate the human rights of individuals; however, corporations themselves would lack any obligations stemming directly from international human rights law.

Meanwhile, the "direct model" involves imposing direct obligations upon corporations by international human rights law independently of the obligations of states. Motivation behind the calls for direct obligation arises from the perceived weakness of the existing state-centred system where unwillingness or inability of national state authorities to adopt and enforce national legislation often fail to hold corporations accountable. Such direct obligations, possibly, even enforced by international bodies could sideline the need for state action. Bilchitz has previously argued that direct human rights obligations of companies is already contained in international human rights law and should not be regarded as a radical departure (Bilchitz, 2013; Latorre, 2020). In this respect professor Louis Henkin is often cited, who, in the context of Universal Declaration of Human Rights, famously noted that: "*Every individual and every organ of the society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to all of them*" (Henkin, 1999).

Based on a similar idea, the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms), drafted by the UN Sub-Commission on the Protection and Promotion of Human Rights (2003), made legal obligations for corporations its central theme. Yet in his first interim report in 2006, John Ruggie, the special representative of the Secretary-General on human rights and transnational corporations and other business enterprises (from 2005–2011), concluded that the Norms could not be a restatement of the current international human rights law because, with a few possible exceptions, this law did not bind corporations (Commission on Human Rights, 2006, *60–61*).

J. Ruggie writes: "*While it may be useful to think of corporations as 'organs of society' as in the preambular language of the Universal Declaration, they are specialised organs that perform specialised functions. They are not a microcosm of the entire social body. By their very nature, therefore, corporations do not have a general role in relation to human rights as do States; they have a specialised one.*" (Commission on Human Rights, 2006, *66*)

Irrespective of whether Ruggie's claim is fully accepted or not, the direct model would still require some guidance or mechanism to determine the nature and extent of these obligations. It is the absence of clear proposal of what direct obligations have to be imposed on corporations and what kind of institutions and mechanisms will have the task of implementing and enforcing, what appears to be problematic. For that reason, the direct model lacks the required state support. Moreover, several risks associated with the direct model would have to be mitigated.

There are risks that imposing direct human rights obligation on corporations would lead to situations where states would be justified to decrease their own positive and negative human rights obligations in all those areas where corporations have the faintest presence. Moreover, if transnational corporations were to have the same obligations as states, they could request that they were endowed with powers typically exercised by state; thus, making them even more powerful than they currently are and potentially causing more risk than benefit to society (Bantekas, 2021, *638*).

Recognising direct obligations of corporations without simultaneously setting an effective system of remedies for victims of rights violations, enforcement of those duties and guaranteeing due process may only serve at the end to undermine protection of human rights and favour authoritarian states' rule (Knox, 2008).

Consequently, the treaty discussions appear to be settled for the first model. Although in 2017, the discussion of the OEIGWG reflected in the previously mentioned document on elements for the draft legally binding instrument showed some ideas for allocating direct obligations to businesses, ever since the Zero Draft the proposed treaty establishes obligations for state parties to create a legislative or administrative measure in order to regulate companies, but it does not allocate direct obligations to businesses.

Conclusion

The latest draft treaty is a crucial step forward in establishing a legally binding instrument in the field of business and human rights. It overcomes important objections and establishes areas of agreement. Although initially there was very little agreement on what the intended instrument should look like, a general consensus around two fundamental issues has emerged. Namely, an agreement on regulatory targets and the regulatory model has been reached.

As to regulatory targets, the treaty is expected to apply to all businesses. The victims of corporate human rights abuses are unlikely to distinguish whether the business enterprise that causes them harm has transnational characteristics or not. Also, victims are not likely to excuse abuses they suffer from a local business simply because the entity lacks a transnational element. From the point of view of the victims, the key consideration is not the formal character of the business entity, but instead the victims' practical access to effective remedy and reparation for the harm they have suffered. Many state delegates along with other stakeholders requested this balanced approach during the OEIGWG sessions, and some states, including EU members, had even justified their absence from the debates on account of the limited scope proposed instrument. The current draft takes away this objection and paves the way for a negotiation focused on the substance of the treaty provisions.

As to the regulatory model, treaty is expected to regulate corporations via the indirect model, that is, to impose direct obligations only to states which then in turn would have to further regulate the activities of business in their domestic law. One

of the main arguments in favour of direct obligations for corporations is the perception that states already often fail to discharge their duty to protect human rights under international law, leaving corporate abuses unaddressed. Therefore, imposing obligations directly onto corporations without intermediation of the national state could theoretically solve the issue. However, in the author's opinion, the proponents of this argument also fail to offer an option that will go beyond a mere declaratory instrument without effective implementation. While the notion of direct obligations for corporations may be an appealing concept, it is not yet clear how they will strengthen in practice the protection of individuals' rights without a robust functioning of state-based system for their enforcement.

Although eventually it will all come down to political will (European Coalition for Corporate Justice, 2021) and there are still aspects of the treaty and its provisions that require refinement during the process of negotiation, the draft can now be considered sufficiently clear and comprehensive so as to be the subject of serious negotiations.

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Augstskolas autonomija kā demokrātisks pārvaldības princips Latvijā

Autonomy of University as a Democratic Governance Principle in Latvia

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Abstract

Autonomy of a university is a right to self-determine its existence and operation. Autonomy is not the absolute freedom of action of the institution, but rather the liberty to operate within the national legal framework. Autonomy embraces the democratic principles of a governance model enforced with the purpose to maintain a balance between the self-governing entities. The balance refers to internal and external democracy. Shifting the balance of the current governance model of the Constitutional Assembly, the Senate, the Rector, the Audit Commission and the Academic Arbitration Court affects democracy at large. The article aims to analyse the legal framework of university autonomy and its changes, identify shortcomings of the governance model, and propose solutions to them. Used materials include legal acts, publications and literature. Methods used in the article are descriptive, analysis, synthesis, dogmatic, induction and deduction, and legal interpretation methods as well – grammatical, systemic, historical and teleological methods.

The main results relate to how changing the university governance model in Latvia impacts the university autonomy and compliance with the democratic principle in governance. Leaving the choice to establish the Constitutional Assembly to the university jeopardises the principle of participation of a university staff in the university's activities. Furthermore, leaving the establishment of the Academic Arbitration Court to the university dismantles the democratic balance in the university governance.

Keywords: autonomy, self-governance, constitution assembly, the senate, the rector, the academic arbitration court.

Ievads

Izglītība ir viena no starptautiskajās un nacionālajās tiesību normās iekļautajām cilvēka pamattiesībām, kuras valstij ir jānodrošina (Latvijas Republikas Satversmes komentāri, 2011, *643–645*). Augstākā izglītība tiek iegūta augstskolā, kam var būt atšķirīgs nosaukums, piemēram, augstskola, universitāte, akadēmija u. tml. (turpmāk – augstskola vai universitāte). Neatkarīgi no nosaukuma augstskola ir institūcija, kura personai sniedz iespēju apgūt profesiju, nodarboties ar zinātni un ir darbavieta akadēmiskajam un administratīvajam personālam.

Pēc būtības augstskola ir kā sarežģīts mehānisms, kas īsteno dažāda veida tiesiskās attiecības. Lai nodrošinātu personas tiesības uz izglītību augstākajā pakāpē, augstskolas ir tiesīgas veidot savu pārvaldi, izdot iekšējos normatīvos aktus un kontrolēt to izpildi, noteikt uzņemšanas nosacījumus, studiju maksu, zinātnes virzienus un risināt citus jautājumus. Parasti tās pilda publisku funkciju – veic izglītības pakalpojuma nodrošināšanu, taču augstskolas var piedalīties arī civiltiesiskās attiecībās. Citiem vārdiem sakot, jebkurai valsts augstskolai kā publiskās pārvaldes institūcijai ar likumu ir piešķirta autonomija lemt par tai svarīgiem jautājumiem.

Modernā demokrātija ir samērīga, tā balstās uz varas dalīšanu, reprezentatīvu dažādu viedokļu paušanu un lēmumu veidošanu, kas balstīti tiesībās un konstitūcijā (Īsi par demokrātiju, 2017, *184*). Likumdevējs, nosakot augstskolas autonomiju ārējā normatīvajā aktā, veido valsts un augstskolas tiesiskās attiecības, lai nodrošinātu vairāk vai mazāk unificētu augstskolas pārvaldības modeli, kuram ir jāspēj nodrošināt augstskolas pastāvēšanu un izglītības pakalpojuma sniegšanu. Augstskolu likumā ir noteiktas augstskolas pašpārvaldes institūcijas, kas Latvijā ir tradicionālas, – satversmes sapulce, senāts, rektors, revīzijas komisija un šķīrējtiesa. Tieši varas līdzsvars šajā pārvaldības modelī nodrošina augstskolas autonomiju un demokrātijas principa īstenošanu. Izglītības un zinātnes ministrijas virzītajā augstskolu reformā augstskolu autonomija un pārvaldības modelis bija viens no pamatjautājumiem. Tā aktualitāte ir pamatota Augstskolu likuma 2021. gada 8. jūnijā veiktajos grozījumos, ar kuriem tika mainīts augstskolas pārvaldības modelis, ieviešot padomi kā augstāko augstskolas lēmējinstitūciju un pieļaujot augstskolas izvēli satversmes sapulces un šķīrējtiesas izveidošanā. Līdz ar to likumdevējs ir mainījis varas līdzsvaru, nosakot, ka padomē izpildvaras iecelto ārējo pārstāvju skaits ir lielāks nekā augstskolas ievēlēto pārstāvju skaits, turklāt padomes priekšsēdētājs pirmajā padomes darbības termiņā ir ārējais pārstāvis. Starptautiski atzītie pamatprincipi nepieļauj, ka politiskā vai ekonomiskā vara ietekmē augstskolas autonomiju, bet pašreizējais padomes regulējums to netieši pieļauj, jo ārējos pārstāvjus izvirza Ministru kabinets un Valsts prezidents.

Tiesiskais regulējums pieļauj arī iespēju augstskolām neveidot satversmes sapulci, ar to radot situāciju, ka augstskolas personālam var tikt liegta iespēja piedalīties augstskolas pašpārvaldē. Savukārt, atsakoties no šķīrējtiesas obligātas pastāvēšanas augstskolā, nav izvērtēta šāda lēmuma ilgtermiņa ietekme uz strīdu izšķiršanu augstskolā un

administratīvo tiesu noslodzi. Lemt par augstskolas autonomijas apjomu ir likumdevēja prerogatīva, bet likumdevējam ir jāspēj nodrošināt demokrātijas principa ievērošana augstskolas autonomijā.

Šā pētījuma mērķis ir analizēt augstskolas autonomijas tiesisko regulējumu un tā izmaiņas, lai konstatētu pārvaldības modeļa trūkumus un ieteiktu to risinājumu. Veicot pētījumu, tika analizētas tiesību normas, publikācijas un literatūras avoti, bet rezultātu iegūšanai izmantotas šādas metodes: deskriptīvā, analīzes, sintēzes, dogmatiskā, indukcijas un dedukcijas, kā arī tiesību normu interpretācijas metode, proti, gramatiskā, sistēmiskā, vēsturiskā un teleoloģiskā metode.

1. Augstskolas autonomija – formalitāte vai demokrātijas mēraukla

Jēdziens "autonoms" tiek skaidrots kā tāds, kam ir pašpārvaldes tiesības, kam ir autonomija (Svešvārdu vārdnīca, 1951, 38), arī kā "neatkarīgs, patstāvīgs" (Latviešu literārās valodas vārdnīca, 1972). Attiecīgi tiek veidots arī autonomijas jēdziens: no grieķu valodas vārda *autonomia*, ko savukārt veido *autos* (pats) un *nomos* (likums), tātad – pašlikumdošana; atsevišķu apgabalu, sabiedrisku apvienību vai iestāžu tiesība nokārtot valsts robežās savu iekšējo dzīvi pēc pašu radītām tiesību normām. Tiesības tiek piešķirtas ar sevišķu likumu, dodot vispārējas līnijas, kuru robežās sabiedriskas organizācijas vai iestādes var brīvi rīkoties, pašas izdodot un arī piemērojot pakļautām personām saistošas vispārējas normas (Latviešu konversācijas vārdnīca, 1927–1928, 1335. šķirklis). Apkopojot šeit minēto, var teikt, ka autonomija primāri ir attiecināma uz autonoma subjekta ārējās tiesību normās noteiktu tiesību pašam noteikt savu pastāvēšanu, eksistenci un iekšējo organizāciju. Ņemot vērā, ka autonomija var tikt īstenota likuma noteiktajos ietvaros, tā ir jānošķir no subjekta absolūtas rīcības brīvības.

Attiecīgi augstskolas autonomija ir ar likumu noteiktas tiesības lemt par augstskolas pārvaldību, lai nodrošinātu Latvijas Republikas Satversmē noteiktās cilvēktiesības (Latvijas Republikas Satversme, 1922, 8. nodaļa).

Īsu augstskolas autonomijas skaidrojumu ir sniegusi arī Valsts kontrole, secinot, ka augstskola ir autonoma izglītības un zinātnes institūcija ar pašpārvaldes tiesībām un tai ir tiesības patstāvīgi noteikt augstskolas organizatorisko un pārvaldības struktūru, kā arī augstskolas autonomija izpaužas tiesībās mērķtiecīgā un racionālā finanšu un materiālo resursu izmantošanā (Latvijas Republikas Valsts kontrole, 2017, *68*).

Augstskolu likuma 4. panta otrajā daļā ietverti arī papildinājumi, kuros cita starpā paredzēta augstskolas atbildība par demokrātisma principu ievērošanu, mērķtiecīgu un racionālu finanšu un materiālo resursu izmantošanu (Augstskolu likums, 1995, 4. panta otrā daļa). Šī augstskolas atbildība par demokrātisma principa ievērošanu, kas izriet no augstskolas autonomijas, tiek analizēta turpmāk.

Tas, ka augstskolām / universitātēm ir jāpiemīt autonomijai, norādīts 1988. gadā parakstītajā Lielajā universitāšu hartā (*Magna Charta Universitetum*), kā fundamentālo

pamatprincipu akcentējot universitāšu autonomiju, kas var būt organizēta dažādos veidos, lai spētu atbilst apkārtējās pasaules vajadzībām, zinātnei un izglītībai, tai ir jābūt morāli un intelektuāli neatkarīgai no politiskās varas un ekonomiskajiem spēkiem (Lielā universitāšu harta, 1988).

Eiropā šo demokrātijas principu īstenošanu dzīvē caur augstskolu autonomiju novēro un uzrauga Eiropas Augstskolu asociācija (*European University Association*, turpmāk – *EUA*), vērtējot augstskolu autonomijas līmeni Eiropas valstīs un 29 augstākās izglītības sistēmās. Šie vērtējumi parāda attiecības starp universitātēm un valsti, cik brīvi universitātes var pieņemt lēmumus valsts noteiktajā likumu un regulējumu kontekstā, kā atbilstošs tiesiskais ietvars nodrošina brīvu lēmumu pieņemšanu, lai nodrošinātu universitāšu darbības brīvību. Bieži tiesiskais regulējums universitātēm piešķir ierobežotu autonomiju vai rada domstarpības starp universitātēm un valdību. *EUA* norāda, ka augstskolu autonomija ir komplekss koncepts, kas ietver dažādus, bet savstarpēji saistītus elementus. Autonomijas mērījumi tiek veikti četrās dimensijās un ir šādi: 7 organizatoriskās autonomijas indikatori, 11 finanšu autonomijas indikatori, astoņi personāla autonomijas indikatori un 12 akadēmiskās autonomijas indikatori (*EUA*, https://www.university-autonomy.eu/about/).

Šajā publikācijā tiek atainoti tikai organizatoriskās autonomijas rādītāji. Jaunākais *EUA* vērtējums tika publicēts 2017. gadā. Attiecībā uz organizatorisko autonomiju Latvija saņēma 57 %, kas atbilst vidēji zemam rādītājam. Salīdzinot ar iepriekšējo novērtējumu 2010. gadā, situācija kļuvusi sliktāka – toreiz Latvijas rādītājs bija vidēji augsts. Latvijas augstskolu organizatorisko autonomiju galvenokārt samazināja rektora atlaišanas procedūra, kā arī iespējas trūkums augstskolām veidot juridiskas personas un ārējo dalībnieku neiesaistīšana augstskolas pārvaldībā (*EUA*, 2017, *44*). Kārtējais *EUA* vērtējums tiks publicēts pēc 2022. gadā ievāktajiem datiem par Eiropas valstu augstākās izglītības sistēmu. Tajā atkārtoti tiks noteikti organizatoriskās autonomijas indikatori. *EUA* vērtēs 2021. gadā veiktos grozījumus Augstskolu likumā, kuri, diemžēl ne visi, ir vērsti uz augstskolu autonomijas stiprināšanu.

Augstskolas autonomija ir vērtēta arī vairākos Satversmes tiesas spriedumos, konstatējot, ka likumā noteiktā augstskolas autonomija izpaužas tiesībās patstāvīgi noteikt savu organizatorisko un pārvaldības struktūru, bet augstskolu autonomija nav absolūta. Saskaņā ar Augstskolu likuma 4. panta pirmo daļu augstskolas autonomiju raksturo varas un atbildības sadale starp augstskolu un valsts institūcijām. Augstskolu autonomija ir ierobežota ar citu valsts institūciju tiesībām (Satversmes tiesa, 2000).

Gandrīz 20 gadus pēc šeit minētā nolēmuma Satversmes tiesa pamatoja augstskolas autonomijas nepieciešamību, nosakot, ka "*augstskolas uzskatāmas ne tikai par izglītības iestādēm, kurās sagatavo darbam dažādu jomu speciālistus, bet tās ir arī akadēmiskās izglītības un zinātnes centri. Lai tiktu aizsargāta studējošo un akadēmiskā personāla akadēmiskā brīvība, augstskolām nepieciešama autonomija.* [..] *Kā uzsvērts Lielajā universitāšu hartā, lai spētu atbilst apkārtējās pasaules vajadzībām, zinātnei un izglītībai, universitātei ir jābūt morāli un intelektuāli neatkarīgai no politiskās varas. Tāpat*

universitāšu autonomija nodrošina augstākās izglītības un zinātnes sistēmu nepārtrauktu piemērošanos mainīgajām vajadzībām, sabiedrības prasībām un jaunākajiem zinātnes sasniegumiem. Augstākās izglītības iestāžu autonomija ietver augstākās izglītības iestādes tiesības veidot savu institucionālo stratēģiju, nosakot savus mērķus un misiju, kā arī to sasniegšanas un īstenošanas veidus. Ņemot vērā augstākās izglītības nozīmi sabiedrības ilgtspējā un nacionālās zinātnes attīstībā, valstij, ievērojot augstākās izglītības iestāžu autonomiju un akadēmisko brīvību, ir pienākums izveidot tādu augstākās izglītības sistēmu, kas nodrošina šo izglītības iestāžu darbību visas sabiedrības interesēs." (Satversmes tiesa, 2019).

Augstskolas autonomija ir nozīmīgs instruments sabiedrības vērtību tālākā attīstībā un demokrātijas nodrošināšanā augstskolā. Juriste Anda Ozola norāda: "*Politiskā dimensija pieprasa akadēmisko brīvību un institucionālo autonomiju kā nosacījumus augstākās izglītības spējai sniegt pilnvērtīgu ieguldījumu sabiedrībā, kuras daļa tā ir. Tiesiskā dimensija konstituē augstskolu autonomiju kā vērtiblielumu ar satura un formas nosacījumiem. Forma – dažādos veidos organizēta, ar nosacījumu spēt atbilst apkārtējās pasaules vajadzībām. Satura nosacījums – izvēlētās formas ietvarā zinātnei un izglītībai ir jābūt morāli un intelektuāli neatkarīgām no politiskās varas un ekonomiskajiem spēkiem.*" (Ozola, 2021, 24).

Turklāt augstskolas autonomija nevar būt formāli likumā ierakstīts vēsturiski pārmantots postulāts, bet tai jābūt likumdevēja piešķirtam efektīvam augstskolas attīstību un demokrātiju veicinošam līdzeklim.

2. Augstskolas pārvaldības modelis līdz 2021. gada 16. augustam

Augstskolas pārvaldība ir viens no indikatoriem, pēc kuriem nosaka augstskolas organizatorisko autonomiju. Augstskolas pārvaldību reglamentē likumdevējs ar ārējā regulējuma palīdzību. Pašlaik tā ir noteikta ar Augstskolu likuma grozījumiem, kurus Saeima pieņēma 2021. gada 8. jūnijā, un tie stājās spēkā tā paša gada 16. augustā. Lai izprastu, kā Latvijā līdz 2021. gada 16. augustam bija organizēta augstskolas pārvaldība, tiks veikta Augstskolu likuma normu analīze kontekstā ar *EUA* fiksētajiem trūkumiem un Izglītības un zinātnes ministrijas rīcību, lai īstenotu augstskolu pārvaldības reformu.

Augstskolu likumā – tā pirmajā redakcijā 1995. gadā – tika noteikts, ka augstskolu autonomiju raksturo varas un atbildības sadale starp valsts institūcijām un augstskolu vadību, kā arī starp augstskolu vadību un akadēmisko personālu (Augstskolu likums, redakcija no 1995. gada līdz 1997. gadam, 4. panta pirmā daļa). No šīs normas izriet, ka autonomija izpaužas ārējā līmenī, t. i., starp valsts institūcijām un augstskolas vadību, un iekšējā līmenī – starp augstskolas vadību un akadēmisko personālu. Te vērojama tieša korelācija ar *EUA* veikto vērtējumu indikatoriem – augstskolas autonomija valsts noteiktajā tiesiskajā ietvarā.

Augstskolu likums primāri regulē iekšējo pašpārvaldi, skaidri definējot tās subjektus – rektoru, senātu, satversmes sapulci, revīzijas komisiju un šķīrējtiesu (Augstskolu likums, 1995, 12. pants), paredzot to kompetenci un atbildību, vienlaikus arī paredzot augstskolas tiesības savā satversmē noteikt citus jautājumus, kas nav pretrunā ar likumu (Augstskolu likums, 1995, 14. pants). Jautājums par ārējo pašpārvaldi ir sarežģītāks, jo Augstskolu likuma normu piemērotājiem pašiem likumā jāmeklē valsts institūciju kompetence. Pārsvarā tā ir saistīta ar Izglītības un zinātnes ministriju, bet likumā arī noteikta Aizsardzības ministrijas un Tieslietu ministrijas kompetence atsevišķos jautājumos.

Demokrātiju raksturo līdzsvars starp lēmējvaru, izpildvaru un kontrolējošo varu. Augstskolu likuma pamata redakcijā bija iekļauts mehānisms, kas nodrošināja demokrātijas pamatprincipus, veidojot augstskolas pārvaldības modeli. Paralēli 12. pantā iekļautajām pārstāvības un vadības institūcijām tika noteikts padomnieku konventa institūts, kas palicis nemainīgs līdz šim laikam. Padomnieku konvents ir konsultatīvs instruments senātam un rektoram augstskolas attīstības un stratēģijas jautājumos. Pozitīvi vērtējams, ka padomnieku konventa izveidi var pieprasīt augstskolas senāts un arī izglītības un zinātnes ministrs (Augstskolu likums, 1995, 16. pants), tādējādi nodrošinot augstskolas un valsts vienlīdzīgas tiesības augstskolas autonomijas īstenošanā.

2000. gadā Augstskolu likuma grozījumos tika paplašināts augstskolas autonomijas regulējums: "[..] *augstskolas ir autonomas augstākās izglītības un zinātnes institūcijas ar pašpārvaldes tiesībām. Augstskolu autonomiju raksturo akadēmiskā brīvība un varas un atbildības sadale starp valsts institūcijām un augstskolu, starp augstskolas dibinātāju un tās lēmējinstitūcijām*." (Grozījumi Augstskolu likumā, 2000, 4. panta pirmā daļa).

Izmaiņas saistītas ar skaidru autonomijas iezīmēšanu, proti, noteikts, ka tā ir augstākās izglītības un zinātnes institūcija, kurai piemīt pašpārvaldes tiesības, kā arī ir dots precizējums, kādā apjomā izpaužas autonomija. Tā ir akadēmiskā brīvība, saglabājot varas un atbildības sadales regulējumu, kurš savukārt ietverts Augstskolu likuma pamata redakcijā. Šī norma šādā redakcijā palikusi nemainīga arī pašlaik.

2000. gadā tika papildināts Augstskolu likuma 12. pants (Augstskolas pārstāvības un vadības institūcijas un lēmējinstitūcijas), nosakot kompetences sadalījumu starp valsti un augstskolu, kas pirms tam likumā nebija noteikts: augstskolā augstākā vadības institūcija un lēmējinstitūcija stratēģiskajos, finanšu un saimnieciskajos jautājumos ir tās dibinātājs, bet augstākā pārstāvības un vadības institūcija un lēmējinstitūcija akadēmiskajos un zinātniskajos jautājumos – augstskolas satversmes sapulce (Grozījumi Augstskolu likumā, 2000, 12. panta otrā daļa).

Augstskolu likumā satversmes sapulcei paredzētas plašas pilnvaras, piemēram, pieņemt un grozīt satversmi, ievēlēt un atcelt rektoru, ievēlēt senātu, revīzijas komisiju un šķīrējtiesu (Augstskolu likums, 1995, 14. panta pirmā daļa), tādējādi šāds regulējums nodrošina gan augstskolas autonomiju, gan demokrātijā pieņemto līdzsvaru varas sadalījumā. Jāakcentē likumā noteiktais, ka dibinātājam, respektīvi, valstij, valsts dibinātā augstskolā piekrīt tiesības lemt par stratēģiju, finanšu un saimnieciskiem jautājumiem.

Šajā pašā Augstskolu likuma pantā paredzētas augstskolas tiesības satversmē noteikt arī citus jautājumus (Augstskolu likums, 1995, 14. panta otrā daļa). Augstskolu satversmēs tās izpaudās kā pašpārvaldes institūciju atsevišķu lēmumu apstrīdēšanas iespēja citās pašpārvaldes institūcijās, piemēram, senāta vai šķīrējtiesas atsevišķus lēmumus var apstrīdēt satversmes sapulcē (sk. Par Rīgas Stradiņa universitātes Satversmi, 2002), rektora atliekošā veto tiesības senāta lēmumiem (sk. Par Rīgas Stradiņa universitātes Satversmi, 2002; Par Rīgas Tehniskās universitātes Satversmi, 2014) vai arī satversmes sapulces un senāta lēmumu apstrīdēšana šķīrējtiesā (sk. Par Daugavpils Universitātes Satversmi, 2001). Šādi izpaudās augstskolas autonomijas tiesības likumā noteiktajā ietvarā īstenot savu pašpārvaldi, nosakot augstskolas darbības un iekšējo procesu risināšanas kārtību.

No formālā viedokļa Augstskolu likums nodrošināja augstskolu autonomiju un demokrātijas īstenošanu tajās. Tomēr Valsts kontrole 2017. gadā, veicot revīziju, secināja (turpmāk – Ziņojums), ka Izglītības un zinātnes ministrija gan risina nozarē identificētās problēmas, tomēr "*vairāk nekā 10 gadus augstākās izglītības sistēmā tiek konstatētas vienas un tās pašas problēmas, par ko liecina to atkārtošanās attīstības plānošanas dokumentos* [..]" (Latvijas Republikas Valsts kontrole, 2017, *17*). Tāpat tika konstatēts, ka Izglītības un zinātnes ministrija nav pildījusi vairākus tai noteiktos uzdevumus, piemēram, Ziņojuma 25. lpp. teikts, ka ir trūkumi koordinētas izglītības politikas īstenošanā, valsts finanšu resursu racionālā izlietošanā, bet 61. lpp. – akadēmiskā personāla ataudzes plānošanā, un joprojām pastāv administratīvo struktūru sadrumstalotība (Latvijas Republikas Valsts kontrole, 2017, *68*).

Jāsecina, ka valsts dibinātajās augstskolās Izglītības un zinātnes ministrija nav īstenojusi Augstskolu likumā noteikto kompetenci.

Laika ziņā Valsts kontroles Ziņojums sakrīt ar *EUA* augstskolu autonomijas izvērtējumu, arī tajā fiksētie trūkumi ir gandrīz vienādi. Izglītības un zinātnes ministrija, pieturoties pie Satversmes tiesas paustās atziņas, ka "*paredzētais tiesiskais regulējums, kur tas nepieciešams, jāpamato ar izskaidrojošiem pētījumiem*" (Satversmes tiesa, 2019, 18.1 punkts) jau 2013. gadā Pasaules Bankas ekspertiem pasūtīja pētījumu, kas turpinājās arī 2017. gadā.

Pasaules Bankas 2017. gada pētījums "Latvijas augstākās izglītības iestāžu iekšējā finansēšana un pārvaldība" (turpmāk – pētījums vai ieteikumi) ir turpinājums 2013. gada pētījumam, kurā ietvertās rekomendācijas par augstākās izglītības finansējuma modeļa ieviešanu bija uzsāktas, un 2017. gada rekomendācijas tika tendētas uz finansējuma pārvaldības modeļa un cilvēkresursu attīstību (Izglītības un zinātnes ministrija, 2020).

Šajā pētījumā tika norādīts, ka augstskolas iekšējās pārvaldības pasākumos trūkst stratēģisko un vadības uzdevumu nodalījuma. Būtiska iezīme ir iekšējo pārvaldības struktūrvienību un iesaistīto personu lielais skaits, bet pārvaldības būtiskai iezīmei ir jābūt efektivitātei un ar stratēģiju saistītu lēmumu pieņemšanai, trūkst līdzsvara starp koleģiālo institūciju atbildību un augstākās izglītības līderu un vadītāju personīgo atbildību. Ārējo ieinteresēto pušu iesaiste Latvijas augstākās izglītības iestāžu pārvaldībā notiek dažādos

veidos, bet tā notiek bez formālām lēmumu pieņemšanas tiesībām un pienākumiem, tāpēc būtu vērts apsvērt formālāku un sistemātiskāku veidu, kā tās integrēt pārvaldības procesos (Izglītības un zinātnes ministrija, 2020). Pētījumā sniegtās atziņas daļēji sakrīt ar *EUA* vērtējumu par ārējo institūciju piesaistes trūkumu un stratēģisko un vadības uzdevumu nodalījumu.

Izglītības un zinātnes ministrija kā institūcija, kas ir atbildīga par augstākās izglītības un zinātnes jautājumiem valstī (Izglītības un zinātnes ministrijas nolikums, 2003), balstoties uz šiem pētījumiem, iniciēja augstskolu pārvaldības reformu (Izglītības un zinātnes ministrija, 2018).

No pētījumā konstatētajām nepilnībām izriet vairākas rekomendācijas / ieteikumi, no kuriem uz šajā rakstā aplūkojamo tematu attiecas divi: panākt pārvaldības struktūru un procesu atbilstību prasībām par vadības pieeju, kas koncentrēta uz autonomiju un orientēta uz sniegumu, un pārstrukturēt iestāžu apakšvienības, papildinot jaunās vadības pieejas. Iekšējās pārvaldības pasākumi pamatā veido jebkuras augstākās izglītības iestādes iekšējās koordinācijas un stratēģiskās attīstības spēju, kurā iekšējā pārvaldība ir vērsta uz funkciju un pilnvaru sadalījumu, struktūrām un procesiem, kas nosaka iestāžu stratēģiju un politiku. Šie pasākumi atšķir iekšējo pārvaldību no vadības, kas attiecas uz institucionālo mērķu īstenošanas procesiem ikdienā atbilstoši stratēģijai un politikas ietvaram, ko izveido iekšējās pārvaldības procesā (Izglītības un zinātnes ministrija, 2020).

2019. gada augustā, izskatot jautājumu par atteikumu apstiprināt Latvijas Universitātes rektoru, valdība nolēma, ka nepieciešams "*Izglītības un zinātnes ministrijai sadarbībā ar Kultūras ministriju, Veselības ministriju un Zemkopības ministriju sagatavot un izglītības un zinātnes ministram līdz 2019. gada 17. decembrim noteiktā kārtībā iesniegt izskatīšanai Ministru kabinetā konceptuālo ziņojumu par augstskolu un valsts zinātnisko institūtu iekšējās pārvaldības modeļa maiņu, veidojot pārredzamu, atbildīgu, uz augstākās izglītības un pētniecības izcilību vērstu un starptautiskai praksei atbilstošu pārvaldības struktūru*" (Par Latvijas Universitātes rektoru, 2019). Šā valdības protokollēmuma pamatojums nav atspoguļots Izglītības un zinātnes ministrijas virzītajā 2020. gada 4. marta konceptuālā ziņojuma anotācijā, un tas liek secināt, ka Izglītības un zinātnes ministrijas ierosinājums par augstskolu iekšējās pārvaldības modeļa maiņu ir politiski motivēts.

2019. gada septembrī Valsts prezidents Egils Levits, uzklausot Rektoru padomi par topošo augstākās izglītības reformas koncepciju, norādīja, ka augstskolu autonomija Izglītības un zinātnes ministrijas veidotās augstākās izglītības reformas koncepcijā ir ļoti svarīga, jo tai ir jāveicina augstākās izglītības iestāžu kvalitāte un konkurētspēja (Valsts prezidents ..., 2019).

2020. gada 4. martā Ministru kabinets apstiprināja konceptuālo ziņojumu "Par augstskolu iekšējās pārvaldības modeļa maiņu" (turpmāk – Koncepcija), kurā norādīts, ka augstskolu, Valsts kontroles, atbildīgo ministriju, Latvijas Studentu apvienības, sociālo un sadarbības partneru un starptautisko ekspertu analīze un secinājumi norāda uz augstskolu potenciāla sistēmisku neizmantošanu. Lai to novērstu, ir nepieciešami kompleksi

strukturāli risinājumi, kas fokusējas uz trim pīlāriem: pārvaldību, finansējumu un cilvēkresursiem (Par konceptuālo ziņojumu "Par augstskolu iekšējās pārvaldības modeļa maiņu", 2020, 4). Koncepcija bija pamatā Augstskolu likuma 2021. gada grozījumiem, ar kuriem tika mainīts līdzšinējais augstskolu pārvaldības modelis.

3. Augstskolu pārvaldības modeļa maiņa

Izglītības un zinātnes ministrija norāda: "*Pēdējos gados Latvijas augstskolās izglītības sektorā ir veikti vairāki sistēmiski pētījumi* [..], *kas apliecina, ka līdzšinējās augstākās izglītības iestādes pārvaldības modelis nav spējis nodrošināt pietiekami efektīvu institūciju pārvaldību, kas ir īpaši nozīmīgi ierobežota finansējuma apstākļos*" (Par konceptuālo ziņojumu ..., 2020, *8*).

Tātad galvenais iemesls, kāpēc augstskolas nesasniedz tām izvirzītos mērķus, ir līdzšinējais pārvaldības modelis. Lai izvērtētu augstskolu jauno pārvaldības modeli, kura pamatā ir Koncepcijā ietvertās atziņas, jāanalizē atsevišķi ārējo un starptautisko ekspertu konstatētie trūkumi un sniegtās rekomendācijas, likumdošanas akti, skatot tos caur pašreizējo augstskolu pārvaldības institūciju prizmu.

Attiecībā uz pārvaldības modeļa problēmu, kas izriet arī no *EUA*, Valsts kontroles un Pasaules Bankas ekspertu izvērtējuma, jānorāda, ka augstskolu pārvaldības modelis nenodrošina stratēģisko virzienu pieņemšanu un šo stratēģiju īstenošanu ar vadības starpniecību. Tas cieši saistīts ar ārējo ieinteresēto pušu saprātīgu iesaistīšanu, lai attiecīgās struktūrvienības veidotu pienācīgu iestāžu daļu, kas darbojas to labākajās interesēs, nevis veido stāvokļa un politikas ziņā jaunu pārvaldības līmeni, kas mazina iestāžu autonomiju (Pētījums par augstākās izglītības pārvaldību sadarbībā ar Pasaules Banku: Latvijas augstākās izglītības iestāžu iekšējā finansēšana un pārvaldība: Ziņojums par faktisko stāvokli: 2017. gada 13. februāris, *47*). Tiek izvirzīts uzdevums izstrādāt skaidri noteiktas funkcijas, pienākumus un tiesības saistībā ar ārējo ieinteresēto pušu iesaisti iekšējā pārvaldībā (Pētījums par augstākās izglītības pārvaldību sadarbībā ar Pasaules Banku: Latvijas augstākās izglītības iestāžu iekšējā finansēšana un pārvaldība: Ieteikumi: 2017. gada aprīlis, 24, G12 priekšlikums). Tajā pašā laikā eksperti kā vienu no ilgtermiņa uzdevumiem nosaka, ka jāpanāk pārvaldības struktūru un procesu atbilstība prasībām par vadības pieeju, kas koncentrēta uz autonomiju un orientēta uz sasniegumiem (Pētījums par augstākās izglītības pārvaldību sadarbībā ar Pasaules Banku: Latvijas augstākās izglītības iestāžu iekšējā finansēšana un pārvaldība: Ziņojums par faktisko stāvokli: 2017. gada 13. februāris, *53*). Eksperti arī iesaka likumā vai noteikumos noteikt, ka ārējās ieinteresētās puses būtu jāiesaista institucionālajā stratēģijā, bet veids, kā to īstenot, ir jāizvēlas katrai augstskolai pašai.

Augstskolu padomju ieviešana. Izglītības un zinātnes ministrija piedāvāja augstskolās izveidot padomes kā stratēģisko lēmējinstitūciju, "*kas spēs efektīvi garantēt augstskolu autonomiju, atvērtību un caurspīdīgumu*". Tāpat tā norādīja, ka jāpārdala līdzšinējo

pārvaldības institūciju kompetence, t. i., "*senātam ir jānodrošina akadēmisko brīvību, zinātnes un izglītības ekselence*", vajag "*vienkāršot pārvaldības modeli, atsakoties no satversmes sapulces (funkcijas pārdalot starp padomi un senātu) un atsakoties no šķīrējtiesas (kompetences jautājumi izskatāmi administratīvā procesa kārtībā vai senāta apstiprinātu universitātes iekšējo noteikumu kārtībā)*" (Par konceptuālo ziņojumu ..., 2020, *11*). Pēc būtības šie priekšlikumi rosina ieviest izmaiņas visā līdzšinējā augstskolas pašpārvaldes modelī.

Izglītības un zinātnes ministrija organizēja diskusiju ciklu "Drosme mainīties" par Koncepcijā piedāvātajām izmaiņām, to skaitā, arī par augstskolu pārvaldības modeli (detalizētāk sk. Par konceptuālo ziņojumu ..., 2020, 2. pielikumu), kas atbilst starptautisko ekspertu rekomendācijām par diskusiju nepieciešamību.

Koncepcija bija Grozījumu Augstskolu likumā (turpmāk – Grozījumi) izstrādes pamatā un attiecībā uz augstskolu pārvaldības modeļa maiņu paredzēja ieviest padomi, atteikties no satversmes sapulces, šīs funkcijas sadalot starp padomi un senātu, mainīt rektora pilnvaru apjomu un atteikties no šķīrējtiesas institūta (Grozījumi Augstskolu likumā: likumprojekts, 2021). Anotācijā nav ietverti paskaidrojumi par šo normu teleoloģisko izpratni, acīmredzot Grozījumu izstrādātāji balstās uz Koncepcijā ietvertajām atziņām, tāpēc turpmāk tiks analizētas augstskolas pārvaldības institūcijas un to pamatotība.

Koncepcijā ir norādīts, ka augstskolas nav izmantojušas tām piešķirtās tiesības, ko sniedz ārējo ieinteresēto pušu iesaistīšana, jo ārējo ieinteresēto pušu īpatsvars ir zems un to iesaistīšana ir neformāla un virspusēja (Par konceptuālo ziņojumu ..., 2020, 2.3. apakšpunkts). Tiek rosināts ieviest jaunu institūtu iekšējai pārvaldībai – padomi (Par konceptuālo ziņojumu ..., 2020, 10). Vērtējot padomi, Anda Ozola norāda: "*Pārvaldības jaunā modeļa novitāte – padomes institūta ieviešana – augstskolu vadībā pati par sevi nav nekas jauns ne pasaules, ne Eiropas praksē, bet padomes izveides kārtība, pilnvaras, varas un atbildības sadalījums konkrētajā pārvaldības modelī – ir tās pozīcijas, kas pēc būtības rada atbilstību vai neatbilstību visu ieinteresēto pušu sabalansētas iesaistes un varas dalīšanas līdzsvara principiem.*" (Ozola, 2021, 21)

Padomes kā jauna tiesību institūta ieviešanu var vērtēt pozitīvi, ņemot vērā *EUA* un citu ekspertu norādītos trūkumus, ieteikumu stiprināt ārējo ieinteresēto pušu darbību, bet Koncepcijā nav ņemta vērā rekomendācijas otrā daļa, ka "ieinteresētās puses būtu jāiesaista institucionālajā stratēģijā, bet veids, kā to īstenot, ir jāizlemj katrai augstskolai" (Pētījums par augstākās izglītības pārvaldību sadarbībā ar Pasaules Banku: Latvijas augstākās izglītības iestāžu iekšējā finansēšana un pārvaldība: Ieteikumi: 2017. gada aprīlis, 30). Būtībā Augstskolu likums jau noteica ārējo ieinteresēto pušu līdzdalību augstskolas stratēģiskos jautājumos – Padomnieku konventu. Kā jau iepriekš norādīts, tad, ņemot vērā, ka šo institūciju varēja rosināt veidot gan pati augstskola, gan izglītības un zinātnes ministrs, šādi arī varēja stiprināt jau esošo Padomnieku konventu, piešķirot tam jaunu kompetenci un nosakot tās locekļu atlases kārtību, kas saglabā esošo līdzsvaru starp augstskolu un valsti.

Grozījumi papildina likumu ar 14.[1] pantu (Valsts augstskolas padome), kurā noteikts padomes statuss un iezīmētas galvenās darbības jomas: "*Valsts augstskolas padome ir koleģiāla valsts augstskolas augstākā lēmējinstitūcija, kas ir atbildīga par valsts augstskolas ilgtspējīgu attīstību, stratēģisko un finanšu uzraudzību, kā arī nodrošina valsts augstskolas darbību atbilstoši tās attīstības stratēģijā noteiktajiem mērķiem. Valsts augstskolas padome aizsargā valsts augstskolas autonomiju* [..]" (Grozījumi Augstskolu likumā, 2021, 14[1]. panta pirmā un otrā daļa). Šis regulējums īsteno Koncepcijā ietverto ideju, ka padomes kompetence būs dalīta satversmes sapulces un senāta kompetence (Par konceptuālo ziņojumu ..., 2020, 14). Padomes ieviešanas galvenais nolūks ir nodalīt stratēģiskās un finanšu funkcijas no akadēmiskajām un zinātniskajām funkcijām (sk. Grozījumi Augstskolu likumā, 2021, 14.[2] panta pirmajā daļā iekļautos deviņus punktus, kuros ietverta padomes kompetence).

Padomes ieviešana ir politiska izšķiršanās par to, kādu augstskolas autonomijas pārvaldības modeli turpmāk Latvijā izveidot, bet pārdomas raisa padomes sastāva noteikšana. Grozījumos paredzēts augstskolu padomes veidošanā ievērot principu, ka iekšējie padomes pārstāvji ir mazākumā, bet ārējie – vairākumā visos jaunieviestajos augstskolu tipos (Grozījumi Augstskolu likumā, 2021, 14.[1] pants).

Lai pamatotu šādu kārtību, Koncepcijas 3. tabulā ir dots salīdzinājums ar vairākām ārvalstu augstskolām. Šis modelis jau tika kritizēts *Jurista Vārda* publikācijā: "*Apstrīdama un neatbilstoša realitātei ir arī nepieciešamība pēc ārējo locekļu vairākuma padomes sastāvā, kas saistībā ar līdzsvara meklējumiem starp akadēmisko aprindu pārstāvjiem un profesionāliem menedžeriem augstskolas vadībā tiek pamatota ar kaimiņvalstu un reģiona augstākās izglītības institūciju pārvaldības tendenču analīzi.* [..] *salīdzinājumā ir iekļautas 11 augstskolas* [..]. *Salīdzinošajā tabulā minētie gadījumi, kuros ārējie padomes locekļi ir vairākumā, nav savstarpēji salīdzināmi bez to faktoru salīdzinošas analīzes, kas ir tā pamatā*." (Ozola, 2021, 21). Proti, padomes ārējo pārstāvju lielāks īpatsvars ir tajās universitātēs, kurām ir 100 % valsts finansējums. Augstskolas finansējums kā kritērijs ārējo padomes pārstāvju īpatsvaram nevar tikt attiecināts uz Latviju, bet citu kritēriju šādam ārējo padomes pārstāvju sadalījumam nav.

Turklāt paredzēts, ka padomes priekšsēdētājs pirmajā termiņā ir ārējais pārstāvis: "*Valsts augstskolas padomes locekļi no sava vidus ievēlē padomes priekšsēdētāju. Par valsts augstskolas padomes priekšsēdētāju pirmreizēji ievēlē Valsts prezidenta vai Ministru kabineta virzītu padomes locekli*" (Grozījumi Augstskolu likumā, 2021, 14.[1] panta piecpadsmitā daļa). Demokrātiskā un tiesiskā valstī diskutabla ir šīs normas juridiskā konstrukcija, proti, pirmajā teikumā noteikta vispārīga norma, ka padomes priekšsēdētāju padomes locekļi ievēl "*no sava vidus*", bet otrais teikums precizē šo vispārīgo normu attiecībā uz pirmreizējo situāciju, nosakot, ka par padomes priekšsēdētāju ievēlē Valsts prezidenta vai Ministru kabineta virzītu padomes pārstāvi. Tātad padomes pārstāvji tiek dalīti divās kategorijās – augstskolas izvirzīti kandidāti, kuri nepiedalās pirmreizējās padomes priekšsēdētāja vēlēšanās kā kandidāti, un ārēji virzītie pārstāvji, no kuru vidus ir obligāti jāievēlē padomes priekšsēdētājs.

Sākotnēji likumprojektā bija ietverta norma, ka priekšsēdētājs vienmēr tiek ievēlēts no ārējiem pārstāvjiem (Grozījumi Augstskolu likumā: likumprojekts, 2021, 14.[1] panta trešās daļas redakcija), bet Saeima 3. lasījumā nobalsoja par ārējo pārstāvi kā priekšsēdētāju tikai pirmajam padomes darbības termiņam. Jebkurā gadījumā šādu kārtību nevar uzskatīt par vienlīdzīgu, tā ir tendencioza, jo ārējai ietekmei piešķir priekšrocību augstskolas pārvaldībā. Tā izjauc pašnoteikšanās līdzsvaru starp valsts un augstskolas noteikto autonomiju, kas vēl joprojām ir formāli saglabāta Augstskolu likuma 4. pantā.

Senāta kompetences maiņa. Senāts ir augstskolas pārvaldības institūcija, kuras kompetence ir būtiski mainīta. Senāts tradicionāli ir bijis augstskolas personāla koleģiāla vadības institūcija un lēmējinstitūcija, kas apstiprina kārtību un noteikumus, kuri regulē visas augstskolas darbības sfēras – izskata un apstiprina studiju programmas, dibina un likvidē struktūrvienības u. tml. (Augstskolu likums, 1995, 15. panta pirmā daļa redakcijā līdz 2021. gada 15. augustam).

Senātam regulāri jālemj par augstskolas būtiskiem un ikdienas darba nodrošināšanas jautājumiem. Senātu parasti ievēlēja satversmes sapulce, bet pašlaik šis jautājums praksē var radīt problēmas, jo Grozījumos noteikts, ka augstskola satversmes sapulci var neveidot. Līdz ar to nav skaidrs, kas ievēlēs senātu, ja Augstskolu likumā paredzēts šāds regulējums: "*Institūcija, kas ievēlējusi senāta locekli* [..]" (Grozījumi Augstskolu likumā, 2021, 15. panta sestā daļa). Var mēģināt minēt vai arī interpretēt šo normu, izmantojot likumprojektā ietverto rosinājumu 15. panta piektajai daļai: "*Ja augstskolas iekšējās pārvaldības modelis neparedz satversmes sapulces darbību, senātu ievēlē augstskolas satversmē noteiktā institūcija*" (Grozījumi Augstskolu likumā: likumprojekts, 2021, 12. punkts).

Ņemot vērā 10. pantā noteikto augstskolas satversmes izstrādes un apstiprināšanas kārtību, šo jautājumu izlemšana atstāta senāta un padomes ziņā (galavārds piederēs padomei, apstiprinot satversmi), kas varēs noteikt, vai augstskolā tiek veidota satversmes sapulce un kura institūcija ievēlēs senātu, ja satversmes sapulces nebūs. Nav racionāla izskaidrojuma tam, kāpēc likumprojekta autori rosināja atteikties no satversmes sapulces un satversmē noteikt citu institūciju, kura būs atbildīga par senāta ievēlēšanu, un kā tas uzlabos augstskolas pārvaldību. Šie Grozījumi drīzāk ir vērtējami kā reforma reformas pēc.

Atbilstīgi Grozījumiem senāts ir koleģiāla augstskolas augstākā akadēmiskā lēmējinstitūcija, kuras kompetencē ir izglītība, pētniecība, radošās darbības izcilība, attīstība un atbilstība starptautiski atzītiem kvalitātes standartiem. Senāts regulē augstskolas akadēmiskās, radošās un zinātniskās darbības jomas (Grozījumi Augstskolu likumā, 2021, 15. panta pirmā daļa). Par šādu grozījumu kvalitāti varēs spriest tikai ilgtermiņā, kad būs iespējams izvērtēt starptautisko ekspertu rosināto stratēģiskās, finanšu un saimnieciskās funkcijas nošķiršanu no akadēmiskās un pētniecības funkcijas.

Satversmes sapulces funkcijas. Jaunizveidotais padomes institūts paredz faktiski pārņemt satversmes sapulces funkcijas (to skaitā visas būtiskās, ja augstskolā netiks

izveidota satversmes sapulce), tāpēc ir jāizvērtē arī šī institūcija augstskolu pārvaldības reformā. Satversmes sapulce kopš Augstskolu likuma spēkā stāšanās ir bijusi noteikta kā augstskolas pilnvarota augstākā koleģiālā pārstāvības un vadības institūcija un lēmējinstitūcija, kuru aizklātā balsojumā ievēlē viss augstskolas personāls – studējošie, akadēmiskais personāls un vispārējais personāls (Augstskolu likums, 1995, 13. pants). Šāds modelis ir tiešs demokrātijas principa nodrošinājums augstskolā. Viss augstskolas personāls deleģē savas tiesības pārstāvjiem lemt augstskolai būtiskus jautājumus. Satversmes sapulce ir veids, kā nodrošināt personāla piesaisti un lojalitāti augstskolai.

Grozījumos noteikts, ka satversmes sapulci var paredzēt augstskolas satversmē, tomēr tā no augstākās koleģiālās pārstāvības un vadības institūcijas un lēmējinstitūcijas ir pārtapusi par augstskolas akadēmiskā, vispārējā personāla un studējošo pārstāvības institūciju. Mainīta ir arī satversmes sapulces kompetence, piemēram, tā nevar atcelt rektoru, bet tikai rosināt atcelšanu; tā apstiprina augstskolas satversmi un tās grozījumus (Grozījumi Augstskolu likumā, 2021).

Nenosakot satversmes sapulci kā obligātu pārvaldības institūciju, būtisks trūkums parādās rektora ievēlēšanas procesā. Līdz 2021. gada 15. augustam rektoru ievēlēja satversmes sapulcē jeb rektors tika ievēlēts ar visas augstskolas personāla pilnvarotu pārstāvju lēmumu (Augstskolu likums, 1995, 17. panta otrā daļa), bet pēc Grozījumu stāšanās spēkā rektoru ievēlē padome, ja nav izveidota satversmes sapulce (Grozījumi Augstskolu likumā, 2021, 17. panta otrā daļa). Ja augstskolā nav izveidota satversmes sapulce, padome rektora kandidātu izraugās konkursa rezultātā. Likums paredz padomei pašai rīkot rektora vēlēšanas, kurās nepieciešams vismaz divu trešdaļu padomes locekļu pozitīvs balsojums par rektora kandidatūru (Grozījumi Augstskolu likumā, 2021, 17. panta piektā daļa). Tādējādi var veidoties situācija, ka padome gan virza rektora kandidātu vai kandidātus, gan pati ievēlē rektoru. Satversmes sapulce īstenotu augstskolas personāla lēmumu par citas institūcijas – padomes – virzītajiem rektora kandidātiem vai kandidātu (Grozījumi Augstskolu likumā, 2021, 17. panta ceturtā daļa). Atšķirībā no padomes virzīta un ievēlēta rektora šāda kārtība ļautu ne tikai nodalīt augstskolas pārvaldības institūciju lēmumus, bet arī iesaistītu augstskolas personālu augstskolai būtiska jautājuma izlemšanā.

Augstskolu likumā pašlaik nav nepārprotami noteikts, kurš pēc reformas apstiprinās šķīrējtiesas nolikumu, jo no likuma ir izņemta satversmes sapulces attiecīgā kompetence, kas nav deleģēta citai institūcijai. Ja par senāta un padomes nolikumiem ir atruna Augstskolu likuma 15. panta trešajā daļā un 14.[1] panta trešajā daļā, ka to nolikumus apstiprina attiecīgi pats senāts un padome, tad par šķīrējtiesas nolikumu ir juridiska nenoteiktība. Pēc analoģijas ar normām par senāta un padomes nolikumu apstiprināšanas kārtību arī šķīrējtiesas nolikumu varētu apstiprināt pati šķīrējtiesa. Nenoliedzami, nav atbalstāma prakse, ka nepastāv skaidri noteikta pašpārvaldes institūciju savstarpējā kontrole. Šāds regulējums ir vērtējams nevis kā demokrātijas izpausme augstskolu autonomijas ietvaros, bet kā augstskolas pārvaldības institūciju lēmumu pieņemšanas necaurspīdīgums, jo nepastāv pārējo pārvaldības institūciju kontrole.

Rektora atlases un ievēlēšanas kārtība. Rektors tradicionāli ir augstskolas augstākā amatpersona, kas īsteno augstskolas vispārējo administratīvo vadību un bez īpaša pilnvarojuma pārstāv augstskolu (Augstskolu likums, 1995, 17. panta pirmā daļa). Pašlaik gramatiski nav mainīta Augstskolu likuma 17. panta pirmā daļa, bet rektora kompetence ir konkretizēta likuma 17.[1] pantā. Tāpat ir noteikta jauna rektora atlases un ievēlēšanas kārtība (detalizētāk sk. Augstskolu likuma 17. pantā). Arī šos grozījumus varēs izvērtēt tikai ilgtermiņā, ņemot vērā, ka pirmās rektora vēlēšanas saskaņā ar jaunajiem noteikumiem būs jāorganizē no 2022. gada 31. maija (Augstskolu likums: pārejas noteikumi, 1995, 68. punkts) un rektora atrašanās amatā laika maksimums būs divi termiņi jeb 10 gadi.

Būt vai nebūt šķīrējtiesai. Ar šķīrējtiesu ir saistīts vēl viens reformas jauninājums. Koncepcijā bija ietverts rosinājums atteikties no šķīrējtiesas (Par konceptuālo ziņojumu ..., 2020, 11). Tomēr Koncepcija nesniedz skaidrojumu, kāpēc būtu jāatsakās no šķīrējtiesas, tās kompetenci novirzot uz administratīvajām tiesām vai augstskolās jaunieviešamu kārtību, kā izskatāmi iekšējie strīdi. Nevar saskatīt racionālu mērķi jaunas kārtības veidošanai, ja šķīrējtiesa līdzšinējā modelī bija kā augstskolas iekšējs mehānisms strīdu izskatīšanai, kā to ir atzinusi Augstākā tiesa ar departamentu priekšsēdētāju sēdes lēmumu (Latvijas Republikas Augstākā tiesa..., 2017, 8. punkts).

Tāpat ne Koncepcijā, ne Grozījumu likumprojekta anotācijā, ieviešot šādu normu, nav vērtēti vairāki apstākļi, piemēram, administratīvo tiesu noslodze, personas pieeja taisnīgai tiesai (indivīdu gatavība savas tiesības aizstāvēt uzreiz tiesā, nevis iestādē) un demokrātiskā līdzsvara nodrošināšana augstskolā tās autonomijas ietvaros, šķīrējtiesai kontrolējot pārējo augstskolas pārvaldības institūciju lēmumus. Šāds priekšlikums vērtējams kā reforma pašas reformas dēļ, neizvērtējot zaudējumus un ieguvumus ilgtermiņā.

Saeimas apstiprinātajos Grozījumos, kuri pašlaik ir spēkā, šķīrējtiesas jautājums ir atrisināts, ļaujot augstskolām pašām izvērtēt, vai šķīrējtiesa kā augstskolas pārvaldības institūts tai nepieciešama. Augstskolu likuma 12. pantā ietverts šāds regulējums: "*Valsts dibinātas augstskolas – atvasinātas publiskas personas – pārvaldības orgāni ir augstskolas padome, senāts un rektors, kā arī satversmes sapulce un akadēmiskā šķīrējtiesa, ja augstskolas satversmē tādas paredzētas*" (Grozījumi Augstskolu likumā, 2021, 12. panta pirmā daļa).

Esošais risinājums ir kā kompromiss starp grozījumu pirmo redakciju un trešajā lasījumā pieņemto, kas prasīja ilgstošas likumdošanas diskusijas Saeimas komisijā. Pagaidām nav iespējams atbildēt uz jautājumu, vai valsts dibinātām augstskolām nebūtu lietderīgs vienots regulējums, kas ilgtermiņā nodrošinātu augstskolas personāla tiesību aizsardzību un demokrātisku pārvaldības institūciju līdzdalību augstskolas jautājumu izlemšanā.

Revīzijas komisijas – bez reformām. Vienīgā pašpārvaldes institūcija, kas netiek ietverta reformā, ir revīzijas komisija, jo šis tiesību institūts tiek izslēgts no augstskolas pārvaldības institūciju uzskaitījuma Augstskolu likuma 12. panta pirmās daļas, atstājot augstskolas tiesības tādu veidot, kā tas noteikts Augstskolu likuma 18. panta otrās daļas tvērumā.

Ir grūti prognozēt, vai veiktie Grozījumi Augstskolu likumā, kas mainīja augstskolas pārvaldības modeli, sasniegs mērķi, proti, spēs nodrošināt pietiekami efektīvu institūciju pārvaldību, kas ir īpaši nozīmīgi ierobežota finansējuma apstākļos (Par konceptuālo ziņojumu "..., 2020, 8), lai virzītos uz augstākās izglītības iestāžu kvalitāti un konkurētspēju (Valsts prezidents ..., 2019).

Savā viedokļrakstā Transporta un sakaru institūta rektors Juris Kanels ir norādījis: "[..] *Ir grūti iedomāties, ka ar šādu, būtībā birokrātiska rakstura, lēmumu izdosies ietekmēt izglītības kvalitāti Latvijā*" (Kanels, 2021). Bet jau tagad ir izdarāms secinājums, ka augstskolu autonomijas ietvaros ir atkāpes no demokrātijas principa.

Uz pirmajām problēmām norāda jau 2021. gada 11. novembra Grozījumi Augstskolu likumā (pārejas noteikumu 62. punkts), ar kuriem pagarināts padomes ārējo pārstāvju atlases termiņš no 2021. gada 31. decembra līdz 2022. gada 31. janvārim. Grūti piekrist grozījumu likumprojektā norādītajam: "*Likumprojekts radīs pozitīvu ietekmi uz sabiedrības un tautsaimniecības attīstību, jo atbilstoši labās pārvaldības principiem valsts augstskolās uzsāks darbu kompetentas augstskolu padomes, kas būs spējīgas nest atbildību par valsts augstskolas ilgtspējīgu attīstību, stratēģisko un finanšu uzraudzību, kā arī nodrošinās valsts augstskolas darbību atbilstoši tās attīstības stratēģijā noteiktajiem mērķiem*" (Grozījumi Augstskolu likumā: likumprojekts: anotācija, 2021). Valsts nespēja pašas noteiktajā termiņā izvirzīt padomju pārstāvjus neliecina par "labas pārvaldības principiem".

Secinājumi

1. Augstskolu autonomija nodrošina demokrātijas principa ieviešanu augstskolu darbībā. Tiesiski noteiktais augstskolas autonomijas apjoms ir veids, kā praktiski tiks nodrošināts demokrātijas princips augstskolā.
2. Starptautisko ekspertu norādījumi, ka augstskolu pārvaldībā ārējo ieinteresēto pušu iesaiste augstskolas pārvaldībā ir formāla un nepietiekama, kļūst par vienu no svarīgākajiem jautājumiem Izglītības un zinātnes ministrijas virzītajai augstskolu pārvaldības reformai. Reformas ietvaros tiek veikti pētījumi un rīkotas diskusijas, tomēr ne Grozījumu Augstskolu likuma projektā, ne to anotācijā netiek ietverta rekomendācija par ārējo padomes pārstāvju iesaistes veidu, ko būtu jāatstāj augstskolas ziņā.
3. Ieviešot padomi, Augstskolu likums paredz augstskolām izvēles iespēju par satversmes sapulces un šķīrējtiesas veidošanu. Šāds regulējums atklāj vairākus

trūkumus: ja netiek ievēlēta satversmes sapulce, likumā nav precīzi noteikts, kura institūcija ievēl senātu, zūd augstskolas personāla iesaiste augstskolas pārvaldībā ar deleģētu pārstāvju starpniecību, demokrātiski diskutabla kļūst rektora ievēlēšana. Šķirējtiesas neesamība augstskolā var radīt situāciju, ka augstskolas ietvaros netiek izvērtēti augstskolas pārvaldības institūciju lēmumi un tiek nevajadzīgi noslogota valsts tiesu sistēma.
Būtu jāveic grozījumi Augstskolu likumā un jānosaka, ka satversmes sapulce un šķirējtiesa ir obligāta augstskolas pārvaldības sastāvdaļa.

4. Pašreizējā Augstskolu likuma redakcijā nav noteikts, kura pārvaldības institūcija apstiprina šķirējtiesas nolikumu. Nav izprotams, vai šķirējtiesa – pēc analoģijas ar padomi un senātu – pati apstiprina savu nolikumu vai apstiprināšana ir kādas citas augstskolas pārvaldības institūcijas kompetencē. Padome, senāts un šķirējtiesa ir augstskolas pārvaldības institūcijas, tāpēc nav pieļaujams, ka vienai no šīm institūcijām nav skaidri noteikta nolikuma apstiprināšanas kārtība. Būtu jāveic grozījumi Augstskolu likumā un precīzi jānorāda nolikuma apstiprināšanas kārtība.
5. Padomes sastāva izveide ir daļēji demokrātiska, jo Augstskolu likumā paredzēts, ka ārējo pārstāvju skaits padomē ir lielāks nekā augstskolas pārstāvju skaits. Padomes sastāva izveides kārtība paredz veidot jauktu padomes pārstāvju atlases modeli – daļa tiek ievēlēti (augstskolas pārstāvji), daļa iecelti (Ministru kabineta un Valsts prezidenta virzītie pārstāvji).
6. Apšaubāmi, vai norma par pirmreizējās padomes priekšsēdētāja izvēlēšanu no ārējo pārstāvju vidus ir demokrātiska. Šāda kārtība nepieļauj augstskolu pārstāvju kandidēšanu padomes priekšsēdētāja amatam pirmajā padomes darbības termiņā. Lai to novērstu, no Augstskolu likuma 14.1 panta piecpadsmitās daļas būtu jāizsvītro otrais teikums.
7. Tuvākajos gados gaidāms nākamais *EUA* augstskolu autonomijas izvērtējums. Iespējams, tas parādīs, ka Latvija ir novērsusi 2017. gadā publicētajā izvērtējumā fiksētos trūkumus, tomēr tiesiskais regulējums augstskolu pārvaldībā nenodrošina augstskolas autonomiju, jo pārvaldības modelis nav pilnībā demokrātisks.

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Defence of Rule-Deductivism

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Abstract

Many legal theorists subscribe to the claim that the legal syllogism has a role in justification of legal decisions. A challenge to this thesis is put forward in Luis Duarte d'Almeida's essay "On the Legal Syllogism". This article aims to examine Luis Duarte d'Almeida's arguments against rule-deductivism in order to refine the theoretical understanding of the role that the legal syllogism has in the justification of legal decisions. In this article, three main research methods have been used: the descriptive, the deductive, and the analytical method. The examination of Luis Duarte d'Almeida's arguments against rule-deductivism results in several conclusions. Firstly, the general argument against rule-deductivism fails because of some faulty assumptions about the scope of the major premise in respect to the scope of the statutory rule entailed by its ratio legis, i.e. that this adherence must be perfect when the judge is expanding the scope of the statutory rule by referring to the general purpose of the rule. Secondly, the critique of the first notion of rule-deductivism is effective, but only insofar as one also adheres to several contentious assumptions that are held by some rule-deductivists, but are not essential to rule-deductivism.

Keywords: legal syllogism, rule-deductivism, teleological correction.

Introduction

Deductivism or, as Luís Duarte d'Almeida calls it, rule-deductivism is a view that some parts of justification of a legal decision can be reconstructed by using legal syllogism (Duarte, 2019). Because of the prevalence of rule-deductivism (Alexy, 1989; MacCormick, 2005; Larenz & Canaris, 1995; Neimanis, 2004; Plotnieks, 2009) and in order not to get complacent, it is important to engage with critics who challenge the dominant view. This somewhat polemic is helpful and necessary to advance the understanding of the role (if any) that the legal syllogism has in justification of legal decisions.

This article aims to examine Luis Duarte d'Almeida's arguments against rule-deductivism in order to refine theoretical understanding of the role that legal syllogism has in justification of legal decisions.

In this article, three main research methods have been used: the descriptive, the deductive, and the analytical method. The descriptive and deductive methods are used to reconstruct Duarte's arguments against rule-deductivism, i.e., to elucidate and explicate the assumptions that are at the core of the critique. The analytical method is used to understand which theoretical assumptions are and are not essential to rule-deductivism.

1 Reconstruction of Luís Duarte d'Almeida's Arguments against Rule-Deductivism

In the first four chapters of the essay "*On the Legal Syllogism*", Luis Duarte d'Almeida tries to elucidate and argue against two notions of rule-deductivism. In the fifth chapter, he offers a positive contribution to the theory of legal justification – an alternative to rule-deductivism (Duarte, 2019). The first chapter of this study aims to briefly summarise the main points of Duarte's arguments against rule-deductivism.

1.1 First Notion of Rule-Deductivism

The first notion of rule-deductivism is the view that the legal syllogism is a model of the justification of law-applying judicial decisions. In this model, the premises of the legal syllogism entail that the judge **ought** to apply certain legal consequences. Although proponents of this notion of rule-deductivism claim that this is what the legal syllogism does, Duarte disagrees *inter alia* because of the examples offered by rule-deductivists (Duarte, 2019). The following is one such example.

> *"Rule:* Any person who calls another person a liar has a duty to pay $50 to that other person.
>
> *Fact:* Barnewall (a person) called Adolphus (another person) a liar.
>
> *Ruling:* Thus, Barnewall has a duty to pay $50 to Adolphus." (Gardner, 2007; *67*)

Duarte notes that this conclusion does not justify that a judge **ought** to perform an action, i.e., apply legal consequences. For conclusion to do what rule-deductivists claim it does, it should say that "*the judge ought to rule that Barnewall has a duty to pay $50 to Adolphus*" (Duarte, 2019, 350). Furthermore, it follows from Duarte's arguments (Duarte, 2019) that the major premise of the legal syllogism must be different for the correct conclusion to follow from the premises, e.g.:

> *Rule:* Court ought to rule that any person who calls another person a liar has a duty to pay $50 to that other person.

Duarte argues that the modified rule cannot be a reconstruction of the relevant statutory rule because rule-deductivists claim that the major premise is the section of the statute. In addition, the modified rule is not equivalent to, nor entailed by, the original formulation of the major premise; and the statute does not plausibly express the modified rule. (Duarte, 2019) Although Duarte does not mention this, such objections to the first notion of rule-deductivism are salient insofar as the legal system contains norms that are not already in the form of the modified major premise.

One can summarise Duarte's objections to the first notion of rule-deductivism in the following way. The notion that the legal syllogism is a model of the justification of law-applying judicial decisions is unattainable if:

1) the major premise is a section of the statute;
2) there are instances when legal consequences of the statutory rule are formulated in such a way that they do not demand action from the judge (i.e., "judge ought to rule that");
3) the aforementioned statutory rules cannot be taken to demand such action.

1.2 Second Notion of Rule-Deductivism

Duarte initially describes the second notion of rule-deductivism as "*the view that the legal syllogism suitably models justification of particular legal claims – particular propositions of law – when these are put forward on the basis that a certain legal rule applies to the relevant particular case*" (Duarte, 2019, *350*). It would be a mistake to summarise this view by saying that the legal syllogism models a justification of an individual norm (Kelsen, 1949; Navarro & Rodriguez, 2014) (i.e., an instantiation of certain legal consequences). Duarte further highlights that the legal claim is based on an existing legal rule (Duarte, 2019). The reason for this clarification becomes apparent when considering Duarte's criticism of the second notion of rule-deductivism.

Duarte's critique of the second notion of rule-deductivism consists of two parts: an argument that the legal syllogism is inadequate and three rebuttals to potential counterarguments. Duarte argues that the legal syllogism is inadequate by showing that there exist cases where the court's argumentation cannot be reconstructed by using the legal syllogism. In one such case, the court used the general purpose (*ratio legis*) of an existing statutory rule to apply it to a case that did not fully fall under the antecedent (i.e., the operative facts) of the statutory rule (Duarte, 2019). It seems that Duarte emphasised that it was an existing statutory rule because the court *prima facie* did not argue that the statutory rule in question must be altered so that the scope of the rule would be more in line with its *ratio legis*.

The first counterargument to Duarte's criticism is concerned with the scope of rule-deductivism; one may say that such cases as described above are not in the class of cases that the legal syllogism is meant to model. Duarte disagrees because it is a case in which an existing law is applied to a particular case. Furthermore, the fact that courts

and lawyers frequently construct such arguments is strong pre-theoretical evidence for the legitimacy of such arguments (Duarte, 2019).

The second objection consists of an assertion that the court used a different major premise that is not identical to the rule expressed by the text of the provision. Duarte dismisses this argument because he thinks that "*the court did not justify its law-applying decision on the basis of any rule at all*" (Duarte, 2019, *356*). Furthermore, Duarte argues that rule-deductivists should not expect judges to articulate new universal rules (operative facts of the major premise) that explicate all the conditions which any case must meet for the provision to be applicable (Duarte, 2019).

The third objection consists of an assertion that the court implicitly used a different minor premise. Duarte dismisses this objection by reminding that the court did not try to show that the facts of the case were an instantiation of the operative facts of some rule (Duarte, 2019).

Duarte's objections to the second notion of rule-deductivism can be summarised in the following way. The second notion of rule-deductivism is unattainable because there exist legitimate cases where it seems (pre-theoretically) that:

1) an existing legal rule is applied only by reference to its general purpose;
2) no attempt is made to create a new legal rule that can be used as the major premise;
3) no attempt is made to subsume the facts of the cases under the antecedent of some rule.

2 Critique of Luís Duarte d'Almeida's Arguments against Rule-Deductivism

The first thing to note, Duarte's arguments are linked in the sense that the arguments against the second notion of rule-deductivism can be used to attack the first notion of rule-deductivism. This is because the argument against the former aims to show that there are cases that no form of legal syllogism can model. Therefore, if one wants to show that the first notion of rule-deductivism is tenable, one must refute both arguments. Because of this, it is prudent to start the examination of Duarte's argument by first addressing the more general critique, i.e., the arguments against the second notion of rule-deductivism.

2.1 Critique of Arguments against the Second Notion of Rule-Deductivism

Before addressing the main points of Duarte's argument, two assumptions must be dealt with. First, Duarte insists that, according to rule-deductivists, when the facts of the case cannot be subsumed under the operative facts of the statutory provision, a judge must construct a watertight description of the operative facts that any case must meet for the provision to be applicable (Duarte, 2019). Although it is a fair burden to place on

the legislator who is tasked with creating a provision, it may be that it is an unreasonable burden to place on a judge when he is confronted with a gap in the law. In spite of Duarte's insistence on the contrary, rule-deductivism does not commit one to such a position. Consider the following example.

> *The general purpose (ratio legis) of the provision*: to protect the fish population of lake Dzintars.
>
> *The antecedent of the statutory rule*: "If a person uses a fishing rod or a fishing net to catch fish in the lake Dzintars, then...".
>
> *Facts of the case*: A.A. used type F-1 cast iron hand grenades (SCH-00) to kill fish in lake Dzintars and then gathered them.

Using hand grenades to kill fish in lake Dzintars is clearly against the general purpose of the provision but the facts of the case only partially fall under the operative facts of the statutory rule. The question remains what options the judge has. In this case, there are three broad ways to approach the expansion of the antecedent of the statutory rule using teleological correction:

1) get rid of some operative facts that form a **conjunction** with other parts of the antecedent (similar to the statutory analogy (Kalniņš, 2003));
2) add operative facts that form a **disjunction** with other parts of the antecedent (similar to the teleological extension (Larenz & Canaris, 1995));
3) **replace** operative facts with ones that have a larger scope (Musts, 2022).

If a judge thinks that, given the *ratio legis* of the provision, there is no point in specifying a tool or method for catching fish, then the first option can be used to create the following antecedent:

(I) "If a person catches fish in lake Dzintars, then..."

An example of a modification using the third option, i.e., replacing one of the operative facts with a different one:

(II) "If a person uses a fishing rod or any other method to catch fish in lake Dzintars, then…"

Although both (I) and (II) encompass the facts of the case, these two solutions have the risk of over-inclusiveness.

If one wants to avoid this risk completely or take the view that there are cases in which the judge does not commit himself to what the relevant characteristics of a case are that can be universalised to other relevantly similar cases (Duarte, 2019; Duarte & Michelon, 2017), then the second option offers an appropriate solution because of its versatility. The versatility comes from the fact that the disjunct that the judge can add to the rest of the antecedent can be formulated in many different levels of abstraction in respect to the facts of the case.

The first level of abstraction: (III) "If a person uses a fishing rod, a fishing net **or a type F-1 cast iron hand grenades (SCH-00)** to catch fish in lake Dzintars, then…".

The first level of abstraction provides for the following:

1) creates a new universalizable rule that is more in line with the *ratio legis* of the provision;
2) if the judge gives sufficient reasons that, given the *ratio legis,* the provision is applicable to the case, then the first level of abstraction does not commit the judge to what the relevant characteristics of the case are;
3) reduces the chance of over-inclusiveness to the minimum.

In this example, one can create the first level of abstraction by omitting only the constants (i.e., the person who used the hand grenades) and the facts of the case that are already subsumed under the original parts of the antecedent of the statutory rule. This is the lowest level of abstraction possible. Furthermore, the first level of abstraction is unavoidable, if one wants to maintain that the decision is universalizable to relevantly similar cases.

In higher-level abstractions of the facts of the case, the judge can omit some or all irrelevant aspects of the case in respect to the general purpose of the provision, e.g., the type or material of the hand grenade. One can even abstract the term "hand grenades" to "explosive devices". This shows that the scope of the major premise implicitly or explicitly created by the judge can be in different levels of adherence to the general purpose of the statutory rule. Rule-deductivists are not committed to the view that this adherence must be perfect.

When explaining what the integral and orthodox elements of rule-deductivism are, Duarte points out two essential things that concern the major premise, i.e., that it is a general legal rule and that it is hypothetical in form (Duarte, 2019). The aforementioned perfect adherence to the general purpose of the statutory rule is not one of these integral and orthodox elements. Therefore, the first assumption of what rule-deductivism demands, i.e., that when the facts of the case cannot be subsumed under the operative facts of the statutory provision a judge must construct *a watertight description of the operative facts that any case must meet* for the provision to be applicable, is not true.

Secondly, Duarte insists that when the courts "***do*** *offer general statements of what they take the applicable law or "rule" to be, such statements are not properly construed as universal conditionals on which such courts rely as premises*" (Duarte, 2019, *357*). Duarte supports this view by pointing out that courts tend to say that such rules are "*made by* ***other*** *courts in previous decisions*" (Duarte, 2019, *357*). The problem with Duarte's second assumption is that such disclaimers are not material to whether the rule made by the judge is a proper universal conditional. Such disclaimers concern the origin of a rule, not its validity as a judge-made law (Sniedzīte, 2010).

In order to refute Duarte's main argument against the second notion of rule-deductivism, one must show that the examples he provided are not properly characterised as cases were:

1) an existing legal rule is applied only by reference to its general purpose;
2) no attempt is made to create a new legal rule that can be used as the major premise;
3) no attempt is made to subsume the facts of the cases under the antecedent of some rule.

Duarte offers two cases that allegedly are of the same sort and cannot be modelled by the legal syllogism, i.e., *Smith v Hughes* (1960) and *R v Luffe* (1807) (Duarte, 2019). The problem with the first example is that even *prima facie* it does not fulfil any of the three aforementioned requirements. This is because the court asserts: "*that on the true construction of section 1(1), taking into consideration the mischief at which the Act of 1959 was aimed, it mattered not where a prostitute stood (whether on a balcony, or in a room behind a closed, or half-open window), if her solicitation was projected to and addressed to somebody walking in the street, she was guilty of an offence against section 1 (1)*" (*Smith v Hughes,* 1960).

It is clear that the court gave a new construction ("*the true construction*") of the statutory rule and applied it. Therefore, the court did not apply an existing legal rule only by reference to its general purpose; there **was** an attempt to create a new legal rule that was used as the major premise; the court **did** subsume the facts of the case under the new antecedent. If anything, this is a good example of a case in which the court explicitly creates a new rule and uses it as the major premise in a legal syllogism.

Duarte's main example comes from the oldest of the two cases – *R v Luffe.* The role of the legal syllogism in *R v Luffe* is less obvious for two reasons. Firstly, the Justices of the Peace of the parish already issued an order of filiation to H. Luffe (i.e., applied the legal consequences of the statutory rule in question) and then H. Luffe appealed the order in *R v Luffe.* Secondly, the judges in *R v Luffe* primarily focused on addressing the three objections that were made to the order of filiation by the defendant (*R v Luffe,* 1807). It only seems that the justification in *R v Luffe* cannot be modelled by using the legal syllogism because the judge's arguments were aimed at defending an existing legal syllogism that was used to issue an order of filiation to H. Luffe.

Duarte reconstructs the statutory rule and the facts of *R v Luffe* in the following way:

> *"(1) For every x and every y: if x is a single woman delivered of a bastard child chargeable to a parish, and y is a man charged on oath with being the father of the child, then the Justices of the Peace of the parish have jurisdiction to make an order of filiation judging y to be the father of the child.* [..]
>
> (2) *Mary Taylor is a married woman delivered of a bastard child chargeable to a parish, and the defendant is a man charged on oath with being the father of the child*" (Duarte, 2019, *352*).

The second objection of the defendant was about the fact that Mary Taylor was not a **single** woman. The judge dismissed this objection by referring to the general purpose of the statutory rule (Duarte, 2019). By doing so the judge expanded the scope of the statutory rule. This new rule can be used as the major premise of the legal syllogism. It seems that the statutory rule was modified by omitting the operative fact "single" from the antecedent, or the facts of the case not covered by other parts of the antecedent were added as a disjunct, i.e., the judge modified the rule by adding a first level of abstraction of the facts of the case. Although the judge did not restate the new rule,

nor explicitly subsumed the facts of the case under the operative facts, it is clear that it was not necessary to explicitly do so. It is possible that for brevity's sake the judge did not repeat the whole statutory rule with the one amendment demanded by its general purpose. Furthermore, none of the two aforementioned ways of expanding the scope of the statutory rule necessitates further considerations concerning subsumption of the facts of the case under the new antecedent. In the first case, there are no new operative facts that the judge must consider. In the second case, the new operative facts are identical to the corresponding facts of the case.

Such a reconstruction of the court's arguments cannot be simply dismissed because Duarte acknowledges that rule-deductivists do not think that the court must strictly follow the form of the legal syllogism, i.e., it is sufficient that the court's justification can be represented as an instance of the legal syllogism (Duarte, 2019; Leiter, 2010).

To summarise, in *R v Luffe* a new legal rule was made by reference to the general purpose of the statutory rule. The new legal rule can be made in a way that abides by Duarte's interpretation of the case, i.e., that the judge did not commit himself to what were the relevant characteristics of the case which can be universalized to other relevantly similar cases. There was no need to explicitly argue that the new legal rule was applicable to the facts of the case because of two reasons. Firstly, it is unnecessary when the new legal rule is created by omitting an operative fact, or trivial when the new operative facts are identical to the corresponding facts of the case. Secondly, the defendant did not manage to successfully argue that other operative facts of the original statutory rule were not obtained (*R v Luffe*, 1807). Therefore, the legal syllogism can be used to model some parts of the justification in *R v Luffe*.

2.2 Critique of Arguments against the First Notion of Rule-Deductivism

The problem with Duarte's criticism of the first notion of rule-deductivism is that it is contingent upon several uncommon assumptions, i.e., the notion that the legal syllogism is a model of the justification of law-applying judicial decisions is unattainable if:

1) the major premise is a section of the statute;
2) there are instances when legal consequences of the statutory rule are formulated in such a way that they do not demand action from the judge (i.e., "judge ought to rule that");
3) and the aforementioned statutory rules cannot be taken to demand such action.

It seems that Duarte's argument against the first notion of rule-deductivism is effective at showing that, given the three assumptions that are not essential to the first notion of rule-deductivism, it is unattainable. The strength of such an argument is contingent upon the acceptability of the assumptions among rule-deductivists.

If Duarte maintains that these three assumptions are essential to rule-deductivism, then there are fewer legal theorists who would subscribe to rule-deductivism than Duarte leads us to believe. For instance, Duarte claims that Neil MacCormick and Robert Alexy

are prominent authors who have defended rule-deductivism (Duarte, 2019). It seems that Alexy would not endorse the third assumption, because he stressed that there can be several different formalisations of a statutory rule, e.g., "*one might perhaps understand it as a reaction-guiding norm addressed to the court and stipulate that it is the court as addressee of the norm*" (Alexy, 1989, *224*). This means that Alexy allows for the possibility that a statutory rule can be taken to demand that the judge **ought** to rule in a certain way. Furthermore, it is reasonable to assert that Alexy's view of the major premise is different from the one expressed in the first assumption because for him the first premise "*is a norm, either expressed in a statute or arrived at by the judiciary*" (Alexy, 2003, *434*). "Expressed in a statute" is meaningfully different from "is a section of the statute". The former is compatible with the view that there are different ways of reconstructing the major premise, the latter is not.

Furthermore, it can be argued that MacCormick does not endorse the first notion of rule-deductivism and, because of that, it does not matter if he subscribes to any of the three assumptions. Duarte recognises that, when MacCormick is more careful, he explains that in order to complete the justification of the law-applying decision the legal syllogism must have an additional implicit premise, i.e., that the judge should apply the law when it is relevant and applicable (Duarte, 2019; MacCormick, 1978). Therefore, MacCormick's view of the legal syllogism (without the additional premise) is more in line with the second notion of rule-deductivism.

One can argue that it is important that the added premise is implicit, because of the purpose of justification. As such it would be an argument against the first notion of rule-deductivism and any other model of justification that aims to explicitly justify that the judge ought to apply a statutory rule (provision). When justifying a decision, a judge must adhere to two important functions of justification, i.e.:

1) to **inform** how and why the judge arrived at a specific solution and;
2) to **convince** the parties to the case and the general public of the correctness of the solution (Bārdiņš, 2016; Baader, 1989).

If justification is meant to inform and convince the parties to the case, the aim of the second notion of rule-deductivism is more in line with these functions because the conclusion is directed at said parties. In contrast, the conclusion of the first notion of rule-deductivism is directed at the judge, i.e., that the judge has an obligation to apply the instantiated legal consequences.

To summarise, Duarte's argument against the first notion of rule-deductivism is effective given some more or less exotic assumptions that are not essential to rule-deductivism. R. Alexy's description of the relevant parts of the internal justification shows that one can maintain that the legal syllogism is a model of the justification of law-applying judicial decisions and reject most of the assumptions that are essential for Duarte's critique to work. Although Duarte's arguments fail to show that the first notion of rule-deductivism is unattainable in all circumstances, the conclusion may be reached by considering that justification is mainly addressed to the parties to the case, not the judge.

Conclusion

A thorough reconstruction and examination of Duarte's arguments against rule-deductivism lead to several conclusions.

Firstly, Duarte's general critique of the legal syllogism as inadequate in properly representing even some parts of a justification of a law-applying decision where the judge expands the scope of a statutory rule, depends on a faulty assumption, i.e., that the scope of the major premise must always be in perfect adherence to the general purpose of the statutory rule. Absent to this assumption (that is not essential to rule-deductivism), legal syllogism is compatible with Duarte's assertion that there are cases where the judge expands the scope of the statutory rule but does not commit himself to what the relevant characteristics of the case are that can be universalized to other relevantly similar cases.

Secondly, Duarte's criticism of the first notion of rule-deductivism is effective, but only insofar as one also adheres to several contentious assumptions that are held by some rule-deductivists but are not essential to rule-deductivism. A more apt critique of the first notion of rule-deductivism may be levied by appealing to the purposes of justification.

Finally, an awareness that there exist such sets of assumptions that are not compatible with rule-deductivism is useful for further refinement of theoretical understanding of the legal syllogism.

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Autoru alfabētiskais rādītājs / Alphabetic List of Authors

Baumanis, Jānis 8, 12, **111**
Birģelis, Mārtiņš 9, 13, **156**
Bite, Kitija 9, 13, **165**
Bukēviča, Diāna 9, 13, **145**

Filipenko, Nataliia 6, 8, 10, 12, **15**, **83**

Hahn, Erik 7, 11, **39**

Justickis, Viktoras 7, 11, **28**

Klāviņa, Gerda 8, 13, **122**
Kucina, Irēna 7, 11, **51**
Ķinis, Uldis 7, 12, **61**

Musts, Jānis 9, 14, **183**

Neimane, Liene 8, 12, **96**

Sinkevičs, Ņikita 7, 12, **61**
Spitsyna, Hanna 6, 8, 10, 12, **15**, **83**

Timule, Elza 6, 10, **15**

Zanders, Ansis 8, 13, **122**
Zelmenis, Jānis 9, 13, **132**
Žukovs, Artūrs 6, 10, **15**