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Restrictions on Active Legal Capacity

1. Introduction

In connection with the strengthening and enlargement of the European Union, the development of EU law and its harmonisation with the national law of the member states becomes increasingly important and topical. Harmonised regulation is particularly necessary in areas relevant to communication between persons from different states. Contract law, for which many model laws have been drafted[*1] and which also has a central role in the European Civil Code currently being prepared, has been in the foreground for good reason. In relation to contract law, consumer protection law has been the focus of European Union law, so as to ensure the equal and fair treatment of consumers. Estonia's new civil law was drafted in great consideration of these developments in European law, particularly as regards the General Part of the Civil Code Act[*2] (GPCCA) and the Law of Obligations Act[*3] (LOA), which entered into force on 1 July 2002. The active legal capacity of natural persons is an area to which adequate attention has not yet been paid from the standpoint of harmonisation of the law of the various EU member states. In connection with the principle of free movement of persons, capital, goods, and services in the EU, more attention should be paid to the issues concerning the active legal capacity of natural persons and ways to harmonise the relevant regulation. In particular, this concerns protection of the rights of persons with restricted active legal capacity, but it also relates to protection of the rights of any party who enters into a transaction with such a person. Major development has occurred in Estonia in this area. The GPCCA effective since 1 July 2002 replaced the former GPCCA, which entered into force on 1 September 1994[*4] (referred to below as the former GPCCA), whereas one of the main changes introduced in the new act of Parliament, which is a supplemented version of the former GPCCA, is the amended regulation of the active legal capacity of natural persons.

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[1] See the Principles of International Commercial Contracts (UNIDROIT Principles). Rome, 1994; Principles of European Contract Law. Parts I and II. O. Lando, H. Beale (eds.). Kluwer Law International 2000; Part III. O. Lando, E. Clive, A. Prüm, R. Zimmermann (eds.). Kluwer Law International, 2003.

[2] Tsiviilseadustiku üldosa seadus (General Part of the Civil Code Act). Passed 27 March 2002. – RT I 2002, 35, 216 (in Estonian).

[3] Võlaõigusseadus (Law of Obligations Act). Passed 26 September 2001. – RT I 2001, 81, 487 (in Estonian).

[4] Tsiviilseadustiku üldosa seadus (General Part of the Civil Code Act). Passed 28 June 1994. – RT I 1994, 53, 889 (in Estonian). An English translation is available at: http://www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE_ALL&ptyyp=I&m=000&query=v%F5la%F5igus (1.07.2004).

The purpose of this article is to analyse regulation concerning the restricted active legal capacity of natural persons in Estonia, based on the major legal amendments of 2002; the article also compares the Estonian law in this area with that of other European Union states and makes proposals for harmonisation of the regulation within the European Union. The relevant regulation of any particular state cannot be analysed in greater detail in this article. Therefore, the examples of particular states are discussed only insofar as necessary for general conclusions. The legal systems compared are: the Germanic family of law, the Roman family of law and common law, as well as Scandinavian law. The aim of the authors is to develop discussion in this area, which could contribute to the prospective harmonisation of regulation related to restricted active legal capacity in the European Union.

2. Persons with restricted active legal capacity and persons without active legal capacity

2.1. Bases for definition of active legal capacity

The concept of active legal capacity pertains to the ability to carry out transactions. GPCCA § 8 (1) provides the following definition of active legal capacity: 'Active legal capacity of a natural person is the capacity to enter independently into valid transactions'. As a transaction is an act of will, it is important that a person understand what he or she is doing and what the consequences of the act are. The ability to understand the meaning of one's actions depends on the mental status of the person, his or her intellectual capacity. It is therefore important for a person who enters into a transaction to have reached a certain minimum level of intelligence and mental maturity.[*5] The wilful act of a person who has reached such a level is recognised by the legal order, and the person is regarded as having active legal capacity. Primarily, the establishment of active legal capacity serves the purpose of protecting mentally immature or undeveloped persons. Mental maturity mainly correlates with age. The generally recognised rule in all the legal systems considered in this article is the prescription of a certain age at which the person acquires full active legal capacity. All people acquire active legal capacity by virtue of age, although their individual capacity to conduct transactions is different. There is also a generally recognised exception to this general rule — persons who are mentally inadequate for certain transactions, particularly due to mental illness or mental disability, and who are permanently in such a state, do not have full active legal capacity. There are thus two generally recognised reasons for a person not having full active legal capacity: minority and a permanent mental disorder. Persons with full active legal capacity and persons without full active legal capacity can thus be distinguished in terms of active legal capacity. The latter in turn may be divided into persons without active legal capacity and persons with restricted active legal capacity, depending on the legal system.

2.2. Restrictions on active legal capacity due to age

As mentioned above, the active legal capacity of a person is related to the achievement of a certain physical and mental maturity. An adult person has active legal capacity. There are differences between the various legal systems considered here only as to the age from which a person is considered adult and having active legal capacity. According to GPCCA § 8 (2), this age is 18 years. This seems to be the most common age, as the same has been established in Germany (BGB § 2), France (*Code Civil* art. 388), Italy (*Codice Civile* art. 2), and the Netherlands (BW art. 1:234), as well as Sweden, Finland, and Denmark.[*6] However, there are other age limits; for example, in Austria, adulthood is deemed to start at 19 years of age (ABGB § 21), and it starts at 20 years of age (ZGB art. 14) in Switzerland. However, the general trend has been a lowering of the age limit in countries where it has been over 18 years. For example, the age of majority was lowered from 21 to 18 years of age in England in the course of the family law reform (Family Law Reform Act, 1969). The English Law Commission has recommended lowering it even further, to 16 years, but the proposal was declined on the recommendation of experts.[*7]

Until the end of 1974, a person acquired full active legal capacity in Germany at the age of 21. It has been opined that the limit of 18 is too low for some transactions, such as purchasing expensive but quickly consumed things with a hire purchase obligation of several years or providing surety for a large amount of money.[*8] There is a general minimum limit for adulthood. It is clear that 18-year-olds and older persons

5 K. Zweigert, H. Kötz. Introduction to Comparative Law. 3rd ed. Oxford 1998, p. 348.

6 R. Nielsen. Contract Law in Denmark. The Hague 1997, sec. 343; M. H. Whincup. Contract Law and Practice. The English System and Continental Comparisons. 4th ed. The Hague, London, Boston 2001, p. 110.

7 H. Kötz. European Contract Law. Vol. I. Oxford 1997, p. 98.

8 D. Medicus. Allgemeiner Teil des BGB: ein Lehrbuch. 6. Aufl. Heidelberg: Müller Verlag 1994, § 38, sec. 538.

differ in intellectual capacity. Other grounds for the voidness and cancellation of transactions offer certain protection, but differentiation by age for performance of different kinds of transactions by those older than 18 would not be justified, as the basis in such a case would more appropriately be the criterion of individual development.

Setting of the age of majority is largely a legal policy issue. Based on the limit established in most European countries, it would be reasonable to consider the age of 18 as the beginning of adulthood and acquisition of active legal capacity in the EU states.

While in a majority of the countries considered a minor has restricted active legal capacity until adulthood, minors have no active legal capacity in states belonging to the Germanic family of law. In Germany (BGB § 104 (1)) and Austria (ABGB § 865), a child has no active legal capacity until the age of seven. In Greece (Civil Code § 128), the age is 10. Also, in Estonia, according to § 11 of the former GPCCA, a child did not have active legal capacity until the age of seven; the provisions was amended with effect from 2002, and according to GPCCA § 8 (2), persons who are under 18 years of age have restricted active legal capacity. The amendment was based on the conclusion that drawing a line for an age limit under which a minor has no active legal capacity whatsoever is arbitrary and subjective; neither is there any special practical need for such a limit. Whether a child has no active legal capacity or restricted active legal capacity is irrelevant at a very young age. If a child has a restricted active legal capacity from birth, this does not damage his or her rights; the interests of a child who has no active legal capacity are no better protected. The protection of a minor with restricted active legal capacity should be sufficient also for children under the age of seven — as a rule, such a child may conduct transactions with the consent of his or her lawful representative, while the legal representative may carry out transactions on behalf of the minor. Rather, there is a danger that for example, a 12-year-old boy who is capable of conducting a transaction damages himself more by the transaction than does a six-year-old, who is not capable of carrying out any serious transactions anyway. Similar protection would suffice in both cases. The problem is not so much that children under seven should be protected more but that supplementary active legal capacity should be given by way of exceptions to older minors who are nearly adults. General regulation of transactions of minors with a restricted active legal capacity should be formulated so that there is no need to distinguish minors without active legal capacity from the general class of minors. Unfortunately, Estonia has not applied this principle consistently. As has been mentioned, minors without active legal capacity are not set apart among all minors, yet GPCCA § 12 specifies much narrower possibilities for children under seven to enter into transactions compared to the provisions of §§ 10 and 11 covering other minors. For example, a minor younger than seven has no right to enter into transactions even with the consent of the legal representative and may perform transactions only by means granted by his or her legal representative or a third party with the consent of the legal representative for such purpose or for free use — in essence, the 'pocket money' principle similar to what is outlined in BGB § 110. We hold that GPCCA § 12 is inappropriate and should be repealed. Regulation applicable to other persons with a restricted active legal capacity should be extended also to minors under the age of seven.[*9] We also find that the EU states should discard the notion of persons without active legal capacity and designate all persons under the age of 18 as persons with restricted active legal capacity subject to uniform rules of transaction.

If we define all minors up to the age of 18 as persons with restricted active legal capacity, there is still the problem that it may be in the interests of a minor for certain reasons to have a greater active legal capacity than provided for by the general rule before the age of 18. BGB §§ 112 and 113 thus provide for the possibility to grant full active legal capacity to a person with restricted active legal capacity in a certain area ('business and working capacity'). In order for the minor to obtain full active legal capacity for business transactions, the consent of both the legal representative and the guardianship court are necessary, and only the consent of the legal representative is required for working in a certain job. It should be kept in mind that full active legal capacity is granted only for the transactions prescribed in BGB §§ 112 and 113; minors still have a restricted active legal capacity for all other transactions. The active legal capacity of a minor can be extended in France also (*Code Civil* art. 476–482, 487). The active legal capacity of a minor may be extended with the consent of his or her legal representative, or by virtue of the law if the minor enters into marriage. A minor has to be at least 16 years old for an extension of his or her active legal capacity. A minor with extended active legal capacity may independently enter into transactions in the same way as an adult (*Code Civil* art. 481) but has not right to be a merchant (*Code Civil* art. 487).

According to § 10 (3) of the former GPCCA, a supervisory guardian could grant a minor of at least 15 years of age, with the consent of his or her legal representative, the right to be a trader and the minor thus acquire full active legal capacity to enter into transactions necessary for this work. The new GPCCA does not contain such a rule but provides a much broader possibility for extending the active legal capacity of a minor. According to GPCCA § 9, a court may extend the restricted active legal capacity of a minor of at least 15 years of age if this is in the interests of the minor and the level of development of the minor so permits. In such a case, the court shall determine the transactions into which the minor is independently permitted to

[9] Rules concerning the transactions of persons with restricted active legal capacity are discussed in section 3.1 below.

enter. A court may extend active legal capacity up to granting a minor full active legal capacity. The consent of the legal representative of the minor is required for extending his or her active legal capacity. If refusal to grant consent is clearly contrary to the interests of the minor, the court may extend the active legal capacity of the minor without the consent of the legal representative. We find this general rule to be more flexible and thus preferable to providing for single situations in which restricted active legal capacity may be extended. Deciding on the extension of active legal capacity should not fall within the competence of the legal representative — the legal representative may grant his or her consent for single transactions anyway. The court is more competent to decide on the issue of extension of active legal capacity, as the decision requires an objective and professional assessment of the level of development and the actual interests of the minor. Whether the active legal capacity of a minor could be extended before the age of 15 is disputable. The possibility should be discussed. There is no such possibility in Estonia; the drafters of the Act believed that a minor younger than 15 may enter into single transactions with the consent of the legal representative, but the level of development of persons younger than 15 presumably does not allow for the extension of their active legal capacity.

According to § 9 (2) of the former GPCCA, a minor acquired full active legal capacity if he or she married before the age of 18. According to § 3 (2) of the Estonian Family Law Act[*10] (FLA), a minor between 15 and 18 years of age may marry with the written consent of his or her legal representative. The current GPCCA no longer contains such a provision. The amendment is fully justified. Acquisition of active legal capacity depends on mental maturity, the minimum level of which is presumed to be attained by the age of 18. Mental maturity does not necessarily increase by virtue of marriage and might not be attained prior to marriage, and thus the automatic acquisition of full active legal capacity on marriage is not justified. However, marriage is an event for which it may be said that the extension of the minor's active legal capacity to full active legal capacity is in his or her interests. The reasons for this may in particular lie in the need to be independent, as part of a new family, from one's parents as legal representatives; if one spouse is an adult, it is advisable that the other spouse be equal in this respect. It is up to the court to assess whether the level of development of the minor enables an extension of his or her active legal capacity according to GPCCA § 9 and to what extent. It should be mentioned that also under BGB § 1633, a minor does not acquire full active legal capacity when marrying.

2.3. Restrictions on active legal capacity in connection with a permanent mental disorder

According to § 13 of the former GPCCA, a court could, at the request of an interested person, declare a person to be without active legal capacity if due to mental illness or mental disability the person were persistently unable to understand the meaning of or to direct his or her actions. Such persons were placed under guardianship and transactions carried out in his or her name by the guardian. Transactions of a person without active legal capacity were void, except for transactions which a court allowed him or her to carry out. It is a generally recognised principle in all countries that mentally ill and mentally disabled persons have no active legal capacity. However, two questions have arisen on account of differing regulations: (1) whether a mentally ill or disabled person should have no active legal capacity or restricted active legal capacity and (2) whether such a person should be declared without active legal capacity or with restricted active legal capacity by a court or rather by default, due to his or her objective status. While, according to § 13 of the former GPCCA a court declared a mentally ill or disabled person to be without active legal capacity, the new GPCCA contains major changes in this respect. According to GPCCA § 8 (2), persons who due to mental illness, mental disability, or other mental disorder are permanently unable to understand or direct their actions have restricted active legal capacity. The court thus no longer declares anybody to be without active legal capacity but instead identifies a person as having restricted active legal capacity where necessary. Restricted active legal capacity is thus an objective status. Unlike the Estonian regulations, German law specifies that persons who are in a state of pathological mental disorder that precludes the free formation of will, if such condition is not temporary by nature, have no active legal capacity. The same principle also arises from the Austrian (ABGB § 21) and Swiss law (ZGB § 16). Whether a mentally disturbed person has no active legal capacity or has restricted active legal capacity is largely a legal policy decision on the part of the legislative body. Estonia has proceeded from the principle that it is not democratic to regard or declare anyone as having no active legal capacity whatsoever. Even a person who is mentally disturbed should be granted certain rights that he or she can exercise independently. The person's ability to do so depends on the specific circumstances. One may ask why a mentally ill adult should be restricted more than a minor. The Estonian legislature has proceeded from the idea that both a mentally immature minor and a mentally ill adult have restricted active legal capacity; such a position makes the legal

[10] Perekonnaseadus (Family Law Act). Passed 12 October 1994. – RT I 1994, 75, 1326 (in Estonian). An English translation is available at: http://www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE_ALL&ptyyp=I&m=000&query=perekonnaseadus (1.07.2004).

regulation of the transactions performed by such persons much simpler — it is similar in both cases. The only difference is that the active legal capacity of adults with restricted active legal capacity cannot be extended in the manner done in the case of minors with restricted active legal capacity. It should be noted that Germany has basically abandoned the concept of mentally ill persons having no active legal capacity whatsoever. In 2002, the BGB was supplemented by § 105a, addressing transactions of daily life, aimed at improving the legal position of adult persons without active legal capacity by enabling them to participate in legal transactions to a limited extent.*[11] These are the transactions of daily life that can be conducted with few funds, in which performance by the person without active legal capacity and counterperformance are still required for the validity of the transaction. Transactions of daily life are the transactions required to satisfy the basic needs of a person; it must be possible to carry out such transactions with limited funds, and the financial status of the person is not to be considered.*[12] Transactions that represent a major risk for the person without active legal capacity or his or her property are excluded.*[13]

It may thus be said that persons without active legal capacity under BGB § 104 2) actually have restricted active legal capacity pursuant to BGB § 105a. The next question is why the provisions of BGB §§ 107–111 should not apply to these persons.

The practice of declaring a person to have restricted active legal capacity or no active legal capacity is used neither in Estonia nor Germany anymore. According to BGB § 1896, a guardianship court appoints a guardian for a person who cannot take care of his or her affairs in full or in part, due to mental illness or a physical, mental, or emotional disorder. Section 256 of the Estonian Code of Civil Procedure (CCP)*[14] provides the same; the only difference is that BGB § 1896 allows appointing a guardian also for a person with active legal capacity, which the CCP does not. Declaration of a person to be without active legal capacity is still accepted in, for example, Denmark and Finland.*[15] In Denmark, a court may declare without active legal capacity a person who cannot manage and direct his or her affairs due to mental disability or mental illness, as well as a person who by dissipation threatens the welfare of his or her family, and a person who cannot manage and direct his or her affairs by reason of alcohol abuse or other similar habits.*[16] We prefer regulation that regards a person's active legal capacity or lack thereof to be an objective status rather than the legal consequence of a court judgement. This is mainly justified in terms of better protection of the rights of mentally ill persons. If we consider the restricted active legal capacity or lack of active legal capacity of an adult as an objective status, this status can be relied on in transactions involving such a person, regardless of whether or not a court has made a decision on the person's active legal capacity. Where restriction of active legal capacity or declaration of a person to be without active legal capacity arises from a court judgement, the transactions performed by mentally ill persons would remain in force until the court has made a decision on their active legal capacity. There are people who are mentally ill but concerning whom no petitions have ever been filed with a court. The counterargument is the need to protect the other party to the transaction, as, due to the objective status of the person, the other party cannot be expected to know whether the person with whom he or she is entering into a transaction has active legal capacity or not. This is a valid and serious argument, but in weighing of the different interests, those of a mentally ill person should have priority, as in the opposite case, his or her interests would be protected to a much lesser extent and are much more likely to be harmed than the interests of the other party to the transaction.

Restriction of a person's active legal capacity on grounds other than permanent mental disorder cannot be regarded as justified. According to § 12 of the former GPCCA, Estonia had a rule similar to that of Denmark that a court could restrict, at the request of an interested person, the active legal capacity of a person who placed his or her family in a difficult economic situation by dissipation or abuse of alcohol or another drug. This provision has now been revoked. Restriction of active legal capacity is an extreme measure, justified only in extreme situations. A permanent mental disorder is an extreme situation where a person cannot understand the meaning of his or her actions; in all other cases, including dissipation and harmful drinking, restriction of active legal capacity is not justified — it is a disproportionately strict restriction of the person's rights. Other legal remedies should be used where necessary.

However, one has to admit that different families of law define the legal status of a mentally ill adult rather differently. The regulation of the Roman family of law and the English law differs from that of the Germanic family of law, described above, and from the Scandinavian system. In France, judicial protection, tutorship, or curatorship may be established with respect to persons with a mental disorder.*[17] Those subject to tutor-

[11] H. Dörner. Bürgerliches Gesetzbuch. Handkommentar. 3. Aufl. 2003, § 105a, Rn 1.

[12] BT – Drucksache 14/9266, p. 43.

[13] O. Palandt, H. Heinrichs. Bürgerliches Gesetzbuch. 62. Aufl. München 2003, § 105a, sec. 5; H. Dörner (Note 11), § 105a Rn 4.

[14] Tsiviilkohtumenetluse seadustik (Code of Civil Procedure). Passed 22 April 1998. – RT I 1998, 43–44, 666 (in Estonian). An English translation is available at: http://www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE_ALL&ptyyp=I&m=000&query=tsiviilkohtumenetluse (1.07.2004).

[15] L. Gustafsson. Business Laws in the Nordic Countries. Legal and Tax Aspects. Stockholm 1998, p. 389; R. Nielsen (Note 6), sec. 343.

[16] R. Nielsen (Note 6), sec. 343.

[17] K. Zweigert, H. Kötz (Note 5), p. 351. The transactions of these persons are discussed below in item 3.2.

ship should be regarded as having no active legal capacity; other persons with a mental disorder may provisionally be called persons with restricted active legal capacity. In English law, mentally ill persons are divided into two categories depending on their mental state. Persons who are not able to manage their affairs and govern their property due to their mental state are certified insane by a court. Such certification requires the identical opinion of two practising physicians. The activities and property of such persons are subject to judicial control under the Mental Health Act of 1983. The other category comprises mentally ill persons not certified as insane.*[18] Persons who have been certified insane may provisionally be said to have no active legal capacity, and those not certified as insane may be said to have restricted active legal capacity.

While in the case of minors it could be concluded that restriction of active legal capacity due to age should be made uniform in the European Union because the differences between the states are not very large or fundamental, it is difficult to draw such a conclusion in the case of mentally ill persons. The differences between countries are too large for bridging of the gap. The main difference lies in whether those with a mental disorder are treated as one group in terms of their active legal capacity (Germanic family of law, Scandinavian countries, Estonia) or divided into various categories (France, England); another major difference is whether mentally ill persons are regarded due to their condition as having restricted active legal capacity (Estonia, also France and England in part) or as having no active legal capacity (Germanic family of law) or whether they should be declared as such by a court (Scandinavian countries, also France and England in part). Other essential divisions relate to whether people with mental disorders have no active legal capacity (Germanic family of law, Scandinavian countries, France and England in part) or whether they have restricted active legal capacity (Estonia, also France and England in part). If we aim at unification of law, these differences should be overcome first.

3. Transactions of persons with restricted active legal capacity and persons without active legal capacity

3.1. Transactions of minors

A principle applies in Estonia according to which the consent of the legal representative is required for a transaction involving a minor with restricted active legal capacity. According to GPCCA § 10, unilateral transactions conducted by a person with restricted active legal capacity without the prior consent of his or her legal representative are void. Pursuant to GPCCA § 11 (1), a multilateral transaction entered into by a person with restricted active legal capacity without the prior consent of his or her legal representative is void unless the legal representative subsequently ratifies the transaction. If the person acquires full active legal capacity after entry into the transaction, he or she may ratify the transaction him- or herself. A person with restricted active legal capacity may independently perform certain transactions, specified in GPCCA § 11 (3), for which the consent of the legal representative is not required. For example, such a person may take part in a transaction from which no direct civil obligations arise for him or her. The person may also enter into a transaction using means granted for that purpose, or for free use, by his or her legal representative or a third party with the consent of the legal representative. The Estonian body of regulation has been greatly influenced by the relevant regulation characteristic of the Germanic family of law; similar provisions are contained in, *e.g.*, BGB §§ 107–108 and 110–111. A transaction conducted by a person with restricted active legal capacity is provisionally void until approved by the legal representative. According to BGB § 107, a minor with restricted active legal capacity may independently enter into transactions that result in only a legal advantage for him or her. Similar provisions are contained in ZGB § 19 and GPCCA § 11 (3) 1). A legal advantage is granted by transactions that do not reduce the person's rights or increase his or her obligations. Minors need not be protected where such transactions are concerned, which is why their full active legal capacity in such situations is recognised.*[19] A legal advantage can be given to a minor only by unilaterally obligatory agreements and only if the person with restricted active legal capacity is not the party who assumes an obligation. Assessment is based on the effect of the relevant expressions of will according to the prevailing opinion and its legal consequences, not the economic advantage a minor may receive from the transaction.*[20] For example, if a minor has purchased something at a favourable price and the money was not his or her pocket money (BGB § 110), he or she still incurs obligations and the transaction is provisionally void. The legal representative should then decide whether the transaction was advantageous for the

[18] P. Richards. Law of Contract. 2nd ed. London 1995, p. 82; K. Zweigert, H. Kötz (Note 5), p. 353.

[19] H. Dörner (Note 11), § 107 sec. 1.

[20] U. Kulke. Probleme der beschränkten Geschäftsfähigkeit. – JuS 2000, L 82; D. Medicus (Note 8), § 39 sec. 560.

minor, and if the legal representative consents, the transaction is ultimately valid. Still, it should be concluded that BGB §§ 107 and 110 (the 'pocket money clause') and GPCCA § 13 (3) do not give enough consideration to the minor's interests and the entire regulation is too centred on the minor's legal representative.

In this respect, Austria's law is more flexible among systems in the Germanic family — according to ABGB § 151 (3), transactions carried out by minors as everyday transactions of little significance are valid.[*21] The law of the Nordic countries also offers more flexibility: the independent transactions of minors are valid if they are usual and of little significance. The level of development of the minor is taken into account, as well as the nature of the transaction and other circumstances, such as what was purchased, where, and under what conditions.[*22] In Denmark, a person who is at least 15 years old is allowed to dispose of the money earned by his or her own work.[*23]

As a rule, the consent of the legal representative is also required for the transactions of minors with restricted active legal capacity in France. According to *Code Civil* art. 389 (3) and 450, the consent of the legal representative is not required for transactions to which the minor is entitled according to law or custom. This includes transactions of daily life not involving serious risks; courts also regard as valid those transactions of minors as are made for preserving and ensuring a proprietary right of small value that the minor already has. A major difference from, *e.g.*, Estonia, Germany, Switzerland, and Austria is that transactions lacking the consent of the legal representative can be voided only by a court. According to *Code Civil* art. 1125, a minor or his or her legal representative may request the voiding of a transaction. It has to be proved that the transaction caused economic loss to the minor (*Code Civil* art. 1305). A transaction of a minor is thus valid unless economically disadvantageous to the minor. The disadvantage of a transaction is indicated by a disproportion between the performance and counterperformance but also by the fact that a transaction that is usually just can be unreasonable given the financial situation of a minor.[*24]

Transactions performed by minors as persons with restricted active legal capacity are usually regarded as void (not binding) also in English law.[*25] However, transactions involving the necessaries of a minor are valid. The concept of necessaries is typical of this area of English law. Necessaries are understood in the present context as goods that are suitable for and needed by a minor at the time of the sale and delivery. Such acquired things must be proved to be necessary for a minor in order for the transaction to be considered valid. For the validity of the transaction, it is also important to keep in mind that the conditions of the transaction must not be excessively strict or burdensome for the minor.[*26] Deciding over necessity is a question of fact, and the substance of the concept depends on the social situation (a station in the life of the minor).[*27] Necessaries also include services such as medical aid, education, counselling, and accommodation.

The doctrine of necessaries may be juxtaposed with the *lésion* theory used in French law. While the French law examines whether a minor has suffered damage (*lésion)* due to the transaction*,* under English law it is important that the goods that a minor purchases be necessaries or that the service agreement be on the whole to the minor's benefit.[*28] The aspects considered are thus essentially similar.

Compared to the rules established for persons with restricted active legal capacity according to the above approach, there is a certain similarity in the Roman law and common law countries as well as Scandinavia, but the provisions of the civil codes of the Germanic family of law stand apart in this area.

As a rule, 'beneficial transactions' are recognised similarly in statutory law countries and legal systems following the Roman tradition. Consideration for the interest and benefit of minors in English law is related to the doctrine of necessaries. The French *lésion* theory is comparable to that. But there is no such principle of considering the minor's benefit and interests in the Germanic family of law. Furthermore, the legal systems of the Germanic family of law designate persons under the age of seven as having no active legal capacity, and no provisions are made for their participation in legal transactions. The abolishment of the legal category of persons having no active legal capacity would help protect minors and provide balance for legal transactions in this context.

The role of legal representative may be regarded as a common feature of different families of law in the regulation of transactions of persons with restricted active legal capacity. In the Germanic family of law, the

[21] H. Kötz (Note 7), p. 101.

[22] J. Pöyhönen. An Introduction to Finnish Law. Helsinki 2001, p. 81.

[23] R. Nielsen (Note 6), sec. 345.

[24] H. Kötz (Note 7), pp. 99–102; K. Zweigert, H. Kötz (Note 5), pp. 349–350.

[25] The active legal capacity of minors is regulated in the English law by the Minors' Contract Act, 1987. See J. C. Smith. The Law of Contract. 2nd ed. London 1993, p. 225.

[26] P. Richards (Note 18), pp. 83–84.

[27] J. S. Smith (Note 25), p. 227.

[28] H. Kötz (Note 7), p. 100.

consent of the legal representative is usually a prerequisite for the validity of transactions conducted by persons with restricted active legal capacity. The position of legal representative is also known in the Roman family of law and in the Scandinavian countries, but the interest and benefit of minors is taken into account to a much greater extent in the Germanic legal tradition in deciding on the validity of a transaction. Legal transactions are protected here for good reason: it is difficult for a party to a contract who has active legal capacity to predict the evaluation by the legal representative of a transaction with a minor; it is much easier to assess whether the transaction is beneficial for and in the interest of the minor. The protection of the minor and of legal transactions is much more balanced here than in the legal order of the Germanic family of law. The concept of a legal representative is foreign to English law. The validity of a transaction performed by a minor is thus independent of the consent of such a person, and the only aspects considered are the interest and benefit of the minor. However, the position of legal representative bears similarity to the role of a trustee that is specific to English law. The legal consequence of transactions entered into by persons with restricted active legal capacity in the Roman family of law and in English law is the disputability of such transactions. Under the French *Code Civil*, a minor or his or her legal representative has to refer to a court in order to void a transaction. In statutory law countries, transactions are disputed extrajudicially and the minor is entitled to disputation. The transaction is thus valid until disputed and hence binding on the party to the transaction having active legal capacity. The provisions of the codes of the Germanic family of law differ in this respect: the legal consequence of the transactions of persons without active legal capacity is their voidness, and transactions performed by persons with restricted active legal capacity are 'provisionally' void. Having entered into a transaction with a minor, the adult party is in a much less safe position. However, he or she may withdraw from the transaction (GPCCA § 11 (6); BGB § 109) at any point until the minor's legal representative has formally withheld approval of it. There is no regulation of withdrawal in systems in the Roman family of law or in statutory law countries. All the legal systems allow a minor who has become an adult to confirm the validity of a transaction.

If we ask about the area and scope in which the regulation of transactions carried out by persons with restricted active legal capacity could be unified in the European Union, the central problem is the transactions that minors could take part in independently. Unification could be based on French and English law, as well as Scandinavian law. It is advisable to set out the general criteria for such transactions, based on their necessity and benefit for the minor, not just limiting regulation to transactions that give a minor a legal advantage and the language concerning pocket money. As regards the validity of transactions that minors must not enter into independently, the regulation could be based on the principle characteristic of Germanic law, which has been adopted also in Estonia, by which multilateral transactions are provisionally invalid until the legal representative approves them. For purposes of legal certainty, the other party to the transaction should have the right to ask the approval of the minor's legal representative, and if approval is not given within a reasonable or specified time, the transaction could be regarded as ultimately void.

3.2. Transactions of persons with a persistent mental disorder

Persons with persistent mental disorders are regarded as having restricted active legal capacity in Estonia, and their transactions are subject to exactly the same rules in GPCCA §§ 10 and 11 as transactions of minors who have restricted active legal capacity. Adults with a restricted active legal capacity may independently carry out the transactions listed in GPCCA § 11 (3) — transactions from which no direct civil obligations arise for the person, as well as transactions conducted by means which his or her legal representative or a third party with the consent of the legal representative had granted to him or her for such purpose or for free use (as described in the 'pocket money clause'). In other cases, the consent of the person representing the individual with restricted active legal capacity is required for a transaction (these transactions are provisionally invalid). We find it a major positive development in Estonian law that the transactions of all persons with restricted active legal capacity are treated in the same way — this makes the regulation much clearer, simpler, and easier to understand.

In the Germanic family of law, the transactions of persons with mental disorders are void (BGB § 105 (1)). In France, persons with mental disorders are protected by a system distinguishing among judicial protection (*Code Civil* art. 491: adults under the Protection of Law), tutorship (*Code Civil* art. 492–507: adults in Guardianship), and curatorship (*Code Civil* art. 508–514: adults in Partial Guardianship). A court may void those transactions of judicially protected people that are economically damaging; in the case of tutorship, the tutored person usually has no active legal capacity and his or her transactions are void, but a court may grant him or her permission to conduct certain transactions. In the case of curatorship, a person may enter into transactions of daily life on his or her own behalf but requires the curator's consent for other transactions.

In English law, the transactions of persons who have been certified as insane are void. Where the person is not certified as insane, the contract will be voidable if the other party is aware of the person's disorder and the mentally disorded person did not understand the transaction in question. Such transactions are thus

disputable. Such a person may approve the transaction later if his or her health condition improves. The transaction then becomes binding on said person.*[29] The doctrine of necessaries as described above is applied to mentally ill persons as well as minors. According to the Sale of Goods Act (1979), when necessaries are sold and delivered to a person who by reason of mental incapacity is incompetent to be party to a contract, he or she must pay a reasonable price for them. This rule is not applied if the seller of the goods was not aware of the mental condition of the person. Rather, in such cases, the actual price of the goods must be paid to the seller.*[30]

Unification of the regulation of transactions conducted by mentally ill persons mainly depends on the extent to which the legal status of such persons can be dealt with uniformly — whether they are treated as a single group having no active legal capacity or as persons with restricted active legal capacity, and whether the active legal capacity should be restricted by a court or instead constitutes an independent status first and foremost. We believe that mentally ill people should be treated by reason of their condition as persons with restricted active legal capacity. Their transactions could be provisionally invalid; this would suit the interests of such persons the best. The validity would depend on the approval of the guardian. This proposal mostly arises from the Germanic system, with the exception that mentally ill persons should, as a rule, have restricted active legal capacity in the same scope as minors. The validity of their transactions should be based on examination of how much the persons benefit and on the doctrine of necessaries in a similar manner to that applied under Roman and English law.

4. Conclusions

Differences in the regulation of different states and families of law as regards restrictions of the active legal capacity of persons are rather great. Yet the Germanic, Roman, and Scandinavian families of law as well as English regulation have many similarities; even approaches that are very different at first glance yield results that are not so different. Potential unification could therefore combine the different systems in a common regulation. All the systems agree that adults with permanent mental disorders and minors cannot have full active legal capacity. Regulation concerning minors is probably an easier area to address than regulation of mentally ill adults is. Adulthood starts at the age of 18 in most countries, which could also serve as the basis for unification. There are two main issues that pose problems: (1) which transactions can be performed by minors independently and (2) how to handle transactions conducted by minors who lack the relevant right. Transactions that may be performed independently should be specified on the basis of English law but also considering the Scandinavian and French law; the decisive elements should be the benefit and needs of a minor. Determination of the validity of transactions carried out by minors without the relevant rights should be based on the Germanic family of law, which treats such transactions as provisionally invalid. It is much more difficult to unify regulation concerning mentally ill adults, as differences in the legal status of these persons between states are greater than they are in the case of minors. Unification could proceed from regarding these persons as having restricted active legal capacity. Their right to enter into transactions could be regulated similarly to that of minors.

The problem remains of whether the states where mentally ill persons may be given one of several legal statuses would accept a single regulation system based on one category. It is feasible for another category to be distinguished besides mentally ill persons with restricted active legal capacity, like in France and England. This sets apart those who do not have restricted active legal capacity but are still protected by the court in that their transactions can be declared void. Transactions performed by mentally ill persons with restricted active legal capacity who are not competent to perform them independently would be provisionally invalid. Transactions of those mentally ill persons whose active legal capacity is not restricted could be valid but still voidable by a court if the transactions are damaging to said person. Mentally ill persons should have restricted active legal capacity by virtue of their objective status without having their active legal capacity declared by a court to be restricted. If necessary, it has to be identified whether a mentally ill person has restricted active legal capacity or not, so as to then decide on a particular transaction involving this person — whether it is provisionally invalid (the person has restricted active legal capacity), disputable and hence voidable by a court if the transaction is damaging to the person (the person has a mental disorder and should be protected but his or her active legal capacity is not restricted), or valid (the person's mental disorder does not indicate a restricted active legal capacity and warrants no additional protection).

[29] R. Stone. Contract Law. 2nd ed. London 1996, p. 10; P. Richards (Note 18), p. 82.

[30] D. W. Greig, J. L. Davis. The Law of Contract. Setton 1987, p. 794.